W.M., Plaintiff-Appellant, v. D.G., Defendant-Respondent.	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No.: A-3097-19 CIVIL ACTION ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY, PASSAIC COUNTY, CHANCERY DIVISION – FAMILY PART Docket No. Below: FD-16-674-20 Sat Below: Hon. LaToyia Jenkins, J.S.C.

BRIEF OF AMICI CURIAE PARTNERS FOR WOMEN AND JUSTICE, RACHEL COALITION, RUTGERS DOMESTIC VIOLENCE CLINIC, SETON HALL UNIVERSITY LAW CENTER FOR SOCIAL JUSTICE, AND VOLUNTEER LAWYERS FOR JUSTICE

Adam N. Saravay
Michelle Movahed
McCARTER & ENGLISH, LLP
Four Gateway Center
100 Mulberry Street
Newark, NJ 07102
T: (973) 636-2023
F: (973) 297-3749
Attorneys for Amici Curiae Partners for Women and Justice, Rachel Coalition, Rutgers Domestic Violence Clinic, Seton Hall University Law Center for Social Justice, and Volunteer Lawyers for Justice

On The Brief
Adam N. Saravay (NJ Attorney ID #034921990)
Michelle Movahed (NJ Attorney ID #225652017)
Scott M. Weingart (NJ Attorney ID #096672014)
Benjamin D. Heller (NJ Attorney ID #244912017)

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PRELIMINARY STATEMENT

At issue in this case is an order changing the custody of a 17-year-old child from the putative psychological parent with whom he had been living to his biological mother. The trial court entered this order after hearing minimal testimony, refusing to consider documentary evidence, and otherwise declining to engage in factfinding because, the trial court explained, the case was "over goal" – i.e., past the 90-day "goal" period for deciding such cases. The process by which the trial court reached this result fell far short of what the decision's gravity required. Amici Curiae take no position on what the appropriate outcome would have been but offer their views, based on their experience with cases on the Non-Dissolution -– or "FD" -- docket, as to what procedures would have been appropriate in this case and in future cases like it.

The trial court's rushed custody determination illustrates several significant shortcomings in the court rules and directives governing FD cases, particularly with respect to contested custody cases involving pro se parties. In particular, cases on the FD docket are, by default, summary proceedings. Most cases on the FD docket –– which includes child custody, visitation, and support in non-divorce cases -- are capable of fair and efficient resolution by summary procedures within a 90-day period. But in contested child custody matters, expedited

summary procedures are almost always inadequate to protect the rights and interests at stake. Indeed, this Court has repeatedly held that, given the paramount importance of custody determinations to parents and children alike, child custody disputes should be resolved only after a plenary hearing. Yet, as this case illustrates, child custody disputes on the FD docket are adjudicated all too often with no proceedings beyond the FD docket's default summary procedures.

Amici are non-profit organizations that provide free legal and other services to low-income individuals involved in, inter alia, certain family law matters, and engage in advocacy to address systemic problems faced by low-income individuals contending with family law matters that implicate deep-rooted constitutional rights. Based on their experience in these matters, Amici believe that this case presents an opportunity for this Court to address the access-to-justice issues that are common in custody disputes on the FD docket, and Amici offer in this brief a number of suggestions to that end.

First, this case illustrates the way in which the information disparity between represented and unrepresented parties can result in a rushed determination made on the basis of an insufficient record. The judiciary should make available to pro se litigants information about the "complex" track designation, plenary hearings, and other procedures for

resolving contested custody matters, as well as applicable legal standards and the facts and evidence that courts will consider in applying these standards. In addition, education about the legal standards and procedures in custody matters should be incorporated into the recently-created Non-Dissolution Education Program.

Second, trial courts should apply a "case-sensitive" approach to managing child custody matters. R.K. v. D.L., 434 N.J. Super. 113 (App. Div. 2014). This "case-sensitive" approach should not depend on whether a party is represented by counsel or whether a party requests complex designation, but rather on an assessment of the nature and needs of the case, and courts should make findings about whether additional procedures are appropriate or not. The interests at stake in custody disputes are even greater than those in grandparent visitation matters, and the legal and factual issues that arise can be just as complex. Moreover, default summary treatment has proven in multiple cases to be efficient only in denying parties to custody disputes the right, affirmed in the Rules of Court and this Court's own precedent, to a plenary hearing.

Finally, this Court should once again make clear the importance of considering the views of the child at the center of a custody dispute. Specifically, trial courts in FD custody disputes should be required to make an express finding on the

record as to whether an attorney or guardian ad litem should be appointed for the child and, failing that, should consider the need for an in camera examination of the child in accordance with R. 5:8-6. In addition, this Court should make clear that the fact that a custody dispute is on the FD docket is no reason to short-circuit appropriate procedures for ensuring that a child's views are adequately considered.

STATEMENTS OF INTEREST

Partners for Women and Justice is a non-profit, pro bono legal services organization that provides free legal services to low-income individuals, including victims of domestic violence and sexual assault, in certain family law matters, primarily in Essex, Union, Middlesex, Hudson, and Passaic Counties. Partners' services include representation at final domestic violence restraining order hearings and related issues of child support, safe visitation, and child custody, as well as advice and counsel to self-represented victims.

Partners' overall mission is to empower low-income individuals, including victims and survivors of domestic violence, to build safe and secure futures for themselves and their children by providing equal access to justice. In furtherance of this mission, Partners engages in advocacy to address systemic problems faced by low-income individuals contending with family law matters implicating deep-rooted

constitutional rights, such as child custody issues, within the legal system.

Rachel Coalition, a division of Jewish Family Service of MetroWest New Jersey, provides a variety of services to assist victims of domestic violence and those living in high conflict households. Rachel Coalition provides direct legal assistance in obtaining restraining orders and in other related matters, as well as counseling and referrals to other services like shelters and social work. Rachel Coalition also meets with legislators, court staff, and the community to advocate for legal reforms that would benefit victims of domestic violence. Rachel Coalition's participation in this matter is part of its broad advocacy on behalf of domestic violence victims.

The Domestic Violence Clinic at Rutgers Law is a law school clinical program that provides free legal services to survivors of domestic violence and sexual assault throughout New Jersey. As an agency that advocates for survivors of domestic violence and sexual assault and provides direct representation to this population as well as services designed to support pro se litigants, the Domestic Violence Clinic has a substantial interest in ensuring that legal process provided to all family court litigants is fair, accessible and adequate. The Domestic Violence Clinic's client population, survivors of domestic and

sexual violence, frequently navigates the FV and FD family court dockets without the benefit of representation.

The Seton Hall Law School Center for Social Justice ("CSJ") undertakes direct legal services, impact cases, and advocacy work on behalf of low-income clients and community organizations. The Family Law Clinic provides wide-ranging legal assistance to victims of domestic violence and sexual assault, and their families, including representation in hearings to seek final restraining orders, custody disputes, and divorce proceedings. CSJ joins this brief in recognition of the critical need for New Jersey courts to modify current procedures and practices in order to protect the best interests of children and ensure justice for domestic violence survivors litigating custody matters on the non-dissolution docket.

Volunteer Lawyers for Justice ("VLJ") is a comprehensive legal services organization based in Newark, NJ. VLJ's mission is to improve the lives of economically disadvantaged and at-risk adults, children, and families in New Jersey by empowering them with the tools, advice, and pro bono representation to obtain fair and equal treatment in the legal system. VLJ provides a full array of free legal services to low-income and vulnerable client populations throughout New Jersey and coordinates ten distinct pro bono programs, including divorce and other family law assistance for pro se litigants. VLJ sees

first-hand the barriers faced by individuals forced to represent themselves in family proceedings, such as language barriers, cultural differences, power imbalances, literacy issues, and other aspects of poverty that cause low-income families to live in crisis.

BACKGROUND

A. Non-Dissolution Matters -- The "FD" Docket.

The case below was handled on the non-dissolution, or "FD," docket, which:

> provides relief to parents who were never married and are seeking custody, parenting time, paternity, child support, or medical support. . . . Additionally, the Non-Dissolution docket also includes matters where non-parent relatives are seeking custody, child support, or visitation regarding minor children.
>
> [See N.J. COURTS, ADMIN. OFFICE OF THE COURTS, DIRECTIVE 20-19 (2019), https://njcourts.gov/notices/2019/n190910b.pdf]

The vast majority of FD docket litigants are unrepresented. See N.J. COURTS, ADMIN. OFFICE OF THE COURTS, DIRECTIVE 08-11 (2011) (superseded by Directive 20-19) ("Self-represented litigants comprise the majority of those filing in the Non-Dissolution docket."). Unfortunately, without counsel, many FD litigants, including those with limited English proficiency or limited education, are at serious risk of deprivation of their constitutionally-protected rights. This is all the more true

for children whose custody the family court system determines and whose best interests it is obligated to protect.

All matters on the FD docket are "initially processed as summary actions, with additional discovery at the discretion of the judge." Directive 20-19; See also R. 5:5-7(c) ("[N]on-dissolution actions are presumed to be summary and non-complex"); R. 5:4-4 ("[S]ummary actions shall include all non-dissolution initial complaints."). Summary actions "are expedited proceedings governed by Rule 4:67-1," R.K. v. D.L., 434 N.J. Super. 113, 133 (App. Div. 2014), which are "designed 'to accomplish the salutary purpose of swiftly and effectively disposing of matters,'" Grabowsky v. Twp. of Montclair, 221 N.J. 536, 549 (2015) (quoting Pressler & Verniero, Current N.J. Court Rules, cmt. 1 on R. 4:67–1).

Family court judges have discretion, in summary proceedings, to engage in case-specific management and to expand the proceedings as warranted by the facts and circumstances of a particular case. See R. 5:4-4(a) ("The court in its discretion, or upon application of either party, may expand discovery, enter an appropriate case management order, or conduct a plenary hearing on any matter."); see also Directive 20-19 (permitting "additional discovery" in summary proceedings at the court's discretion). This discretion, however, is rarely exercised unless a party asks for it. And the Administrative Office of

the Court's practice of deeming an FD case "backlogged" if it remains on the court's docket for more than 90 days creates a significant pressure on judges to expedite proceedings, regardless of the needs of the particular case.

Current court rules disincentivize the exercise of discretion to either designate matters as "complex" or to take other steps, like holding plenary hearings, that would expand procedures in an FD docket matter. The rules permit the assignment of FD matters to a complex track, but complex designation is "reserved for only **exceptional cases** that cannot be heard in a summary manner," and must be "based only on a specific finding that discovery, expert evaluations, extended trial time or another material complexity requires such an assignment." R. 5:5-7(c) (emphasis added). Once a case is assigned to the complex track, the court must hold a case management conference and issue a case management order to, inter alia, fix a schedule for discovery, narrow the issues in dispute, appoint experts, "or address[] any other relief the court may deem appropriate." Id. While the court has the discretion to sua sponte designate an FD matter as "complex," id., in practice, that discretion is rarely exercised.

Parties may request a "complex" designation, but current procedures do not meaningfully notify pro se litigants of the opportunity to make such a request. The 14-page FD case packet

provided to pro se litigants does not mention the availability of complex designation at all -- much less identify what additional procedures are available on the complex track or explain when complex designation is appropriate. See N.J. Courts, Form CN-11492, How to File a Non-Divorce Application for Custody, Child/Spousal Support or Parenting Time (Visitation) – Non-dissolution "FD" Case (2019), https://www.njcourts.gov/selfhelp/catalog.html.

The complaint/counterclaim form included in this packet -- which is mandatory for pro se litigants, see R. 5:4-2(i) -- provides no place for the litigant to request complex designation. See Form CN-11492. By contrast, the analogous form provided to attorneys includes, on the first page, a checkbox reading "I am requesting this case be designated as complex (R. 5:4-2(j))." See N.J. Courts, Form CN-11917, FD Attorney Complaint Form (2019), https://www.njcourts.gov/forms/11917_fd_atty_complaint_form.pdf.

A request for "complex" designation may also be made "in writing to the court prior to the first hearing," R. 5:4-2(j), or on oral application at the first hearing, R. 5:5-7(c). In practice, however, neither of these additional mechanisms for requesting designation as complex is meaningfully available to pro se litigants because of the absence of any discussion of such designation in the materials available to them. After the initial hearing, the rules allow "complex" designation only at

the discretion of the trial court; even considering the possibility of such a designation is within the ambit of that discretion.

B. Disputed Custody Cases, Such as This One, Frequently Involve Issues Inappropriate for Summary Treatment.

Unlike typical FD cases, custody cases frequently involve disputed substantive and evidentiary issues that are not appropriate for summary treatment. For example, this case presented complex factual disputes, including: disputes over the authenticity of documents, (1T23-1–1T32-5); allegations of an inappropriate romantic relationship between one party and the child, (1T19-3-1T19-6); a prior domestic violence restraining order against the biological father, (1T9-8–1T9-17); and prior involvement of DCP&P, (1T7-17–1T7-18). In addition, the biological mother had documentary evidence in Spanish, but lacked representation or the means to pay for translation of that evidence. (1T14-10–1T14-12; 2T53-2-2T53-8). The record indicates that she was a victim of domestic violence, is of limited means, and is raising a profoundly disabled child, the sibling of the seventeen-year-old whose custody is at issue.

LEGAL ARGUMENT

I. Legal Standard: Constitutional Due Process Protections.

The right to due process of law means, among other things, that a "citizen facing a loss at the hands of the State must be given a real chance to present his or her side of the case

before a government decision becomes final." Rivera v. Bd. of Review, 127 N.J. 578, 583 (1992). Due process is guaranteed by both the Constitution of the United States and the New Jersey Constitution, and it is well-settled that the former is a floor for the latter. See U.S. Const. amend. XIV; Jamgochian v. N.J. State Parole Bd., 196 N.J. 222, 239 (2008).

Due process is flexible, and the procedures necessary to safeguard rights are determined by the specifics of a given situation. See Mathews v. Eldridge, 424 U.S. 319 (1976); S.C. v. N.J. Dep't of Child. and Fams., 242 N.J. 201, 231 (2020); State v. Robinson, 229 N.J. 44, 75 (2017); Jamgochian, 196 N.J. at 240. As a general matter, however, "the state must provide 'notice and an opportunity for ***hearing appropriate to the nature of the case***.'" Rivera, 127 N.J. at 583 (emphasis added) (quoting Mullane v. Cent. Hanover B. & T. Co., 339 U.S. 306, 313 (1950)). To evaluate the constitutional sufficiency of notice and the opportunity to be heard afforded to individuals, courts balance:

> [f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

> [S.C., 242 N.J. at 231 (brackets in original) (quoting Mathews, 424 N.J. at 335).]

Here, as discussed below, consideration of all three factors makes plain that due process demands more than summary process in cases like this one, where custody is disputed and a change is contemplated.

II. The Nature of Rights and Interests At Stake in Child Custody Disputes Require More Than Summary Process.

Child custody disputes implicate "perhaps the oldest of the fundamental liberty interests recognized by this Court." N.J. Div. of Child Prot. & Permanency v. A.B., 231 N.J. 354, 365 (2017) (quoting Troxel v. Granville, 530 U.S. 57, 65 (2000)). Indeed, the New Jersey Supreme Court has recognized that "[t]he interests of parents in this [parent-child] relationship have thus been deemed fundamental and are constitutionally protected." N.J. Div. of Youth & Fam. Servs. v. A.W., 103 N.J. 591, 599 (1986) (citing Stanley v. Illinois, 405 U.S. 645, 651 (1972)). The "procedural requirements . . . [in] cases dealing with parental rights" are accordingly "more demanding . . . than in ordinary civil actions." Div. of Youth & Fam. Servs. v. M.Y.J.P., 360 N.J. Super. 426, 467 (App. Div. 2003) (citing cases).

Importantly, the "private interest" of parents implicated in custody disputes is tempered by the State's "parens patriae responsibility to protect children whose vulnerable lives or

psychological well-being may have been harmed or may be seriously endangered by a neglectful or abusive parent." N.J. Div. of Youth & Fam. Servs. v. F.M., 211 N.J. 420, 447 (2012). This responsibility to safeguard children, even against their parents, "is oft cited as the fundamental principle guiding our courts in promoting a child's welfare and best interests." Fawzy v. Fawzy, 199 N.J. 456, 474 n.3 (2009).

Thus, at a minimum, a plenary hearing is a necessary procedure for adjudicating custody disputes. Indeed, Rule 5:8-6 expressly requires a plenary hearing where "the custody of children is a genuine and substantial issue." And this Court has repeatedly held that "[a] thorough plenary hearing is necessary in contested custody matters where the parents make materially conflicting representations of fact." J.G. v. J.H., 457 N.J. Super. 365, 372 (App. Div. 2019) (citing K.A.F. v. D.L.M., 347 N.J. Super. 123, 137-38 (App. Div. 2014)). This applies with equal force in the context of a change in custody: this Court has held that "[a]bsent exigent circumstances, changes in custody," even if only temporary, "should not be ordered without a full plenary hearing." Faucett v. Vasquez, 411 N.J. Super. 108, 118 (App. Div. 2009).[1]

[1] Notably, child custody disputes that arise in the context of a divorce, and which are thus litigated on the Dissolution (or "FM") docket, are not treated as summary proceedings.

With summary process as the default, and without meaningful notice of the opportunity to request a plenary hearing or a complex designation, pro se litigants in child custody disputes on the FD docket face a serious risk of erroneous deprivation of rights. Indeed, here, the trial court made a drastic change in custody without a plenary hearing or any other additional process to obtain and review evidence, like the report from the New Jersey Department of Child Protection and Permanency that the court had initially deemed necessary but was not completed by the time the court wished to render its decision. (2T64-13-2T64-24; 3T23-24-3T24-15). The trial court's error was not an isolated one, but reflects an all-too-common institutional aversion toward discovery, hearings, and other procedural safeguards in FD matters. Indeed, just two years ago, this Court remanded an FD custody dispute where the trial judge offered the same reason for denying a plenary hearing that the court below invoked to refuse to authorize appointment of counsel for the minor child: "It's an FD matter." J.G., 457 N.J. Super. at 371; cf. (4T24-19 ("[T]his is an FD case.")).

Language access issues also contribute to the risk of error in child custody cases on the FD docket. Litigants with limited English proficiency are dependent on interpreters to understand the judge and to understand and give testimony in any court proceeding. But parties in possession of foreign-language

evidence are frequently forced to bear the cost of translation, which oftentimes they cannot afford, and thus cannot produce. Here, the Defendant's efforts to introduce text messages in Spanish were rejected even after the Defendant explained that she attempted to have the messages translated but that it was too expensive. (2T53-2-2T53-8).

Compounding the risk of error in FD custody disputes, particularly those involving pro se parties, is that, once an erroneous decision is made, it is incredibly difficult to correct. For an unrepresented litigant, obtaining appellate review requires a substantial investment of time, effort, and money. A pro se appellant in a custody dispute will generally be required to obtain at least one, and potentially multiple transcripts.[2] After clearing that hurdle, the appellant must draft a brief that conforms with Court Rules and potentially prepare an appendix as well, a task itself made more difficult by the informal and often imprecise manner in which trial courts take evidence in these cases. Indeed, in this case, even after the Plaintiff engaged counsel, who made numerous requests to obtain the documents and evidence submitted to the trial court, a complete record could not be assembled.

III. Additional Procedural Protections in Child Custody Disputes on the FD Docket Would Serve the Government's

[2] Because costs such as the cost of transcripts are not waived as filing fees are, this requirement alone can be a complete barrier to low-income litigants' ability to obtain review of a decision.

Parens Patriae Interests and Protect Litigants' Rights, With No Significant Additional Burdens to Trial Courts.

Amici urge this Court to address the inadequacies of FD docket summary procedures in two ways. First, the information available to pro se litigants should be modified to ensure that meaningful notice is afforded concerning complex track designation and other procedural protections, such as expanded discovery and plenary hearings. Second, the Court should follow the example it set in R.K. and eliminate the presumption of summary proceedings in disputed custody cases on the FD docket. As in R.K., the Court should make clear that courts must address case management at the outset of the litigation and at any later stage at which issues requiring complex treatment may arise, on the record, and on a case-by-case basis.

B. The Courts Should Provide Pro Se Litigants Relevant Information on FD Docket Procedures and Afford Them the Same Opportunity that Represented Parties Have to Request Complex Designation.

The judiciary should provide pro se litigants information in multiple languages about the procedural and substantive aspects of custody determinations on the FD docket. See generally N.J. COURTS, ADMIN. OFFICE OF THE COURTS, DIRECTIVE 01-17 (2017), https://njcourts.gov/attorneys/assets/directives/dir_01_17.pdf. This information should include specific reference to the availability of the "complex" designation under Rule 5:4-2(j)

and delineate: (a) how "complex" designation is different than the summary proceedings that presumptively ensue in FD docket cases, including the procedures used in cases on the "complex" track; (b) why "complex" designation may be more appropriate –- and potentially imperative -– in particular cases; and (c) when and how a pro se litigant must submit a request for "complex" designation (including whether such request need be in writing or can be asserted at a hearing). Additionally, the information should include the statutory "best interest" factors that courts apply to custody determinations.

The Court's recently-created Non-Dissolution Education Program (FD EP) is one possible forum for disseminating this information. See N.J. COURTS, ADMIN. OFFICE OF THE COURTS, DIRECTIVE 02-20 (2020), https://njcourts.gov/attorneys/assets/directives/dir_02_20.pdf. Court staff and ombudsmen could also be instructed and trained to provide basic guidance on these points at or near the time of filing.

Second, the verified complaint/counterclaim form used by pro se litigants on the FD docket should be amended to include a check box by which a pro se litigant could request that the Court designate a case as "complex," with a mechanism to provide reasons why complex treatment may be warranted, whether in the form of a list of likely reasons to be checked off, a narrative free response, or both. This modification would be analogous to

the "Attorney Supplement to Complaint" Form, and would notify pro se litigants of, and provide them the opportunity to request, complex treatment or otherwise expanded proceedings.

Implementing these measures will undoubtedly help to reduce the risk of error by ensuring that, moving forward, pro se litigants better understand the law governing FD custody disputes as well as their procedural rights. Moreover, expanding pro se litigants' access to relevant information represents a cost-effective and worthy use of the judiciary's resources. Creating educational materials and updating the inadequate FD complaint form will, for an up-front, one-time expenditure, have enduring benefits for pro se litigants involved in FD cases. And while giving pro se litigants the same opportunity as represented parties to request complex treatment may cause more pro se litigants to make such a request, this will not necessarily result in more cases receiving "complex" status than is warranted; rather, this will merely require judges to consider those requests and make determinations on the record after taking into account the appropriate considerations.

C. This Court Should Eliminate the Presumption in Favor of Summary Treatment in FD Custody Disputes and Instead Require Case-Specific Management.

One additional simple reform would ensure that litigants' opportunity to be heard in a child custody dispute on the FD

docket is a meaningful one. Specifically, this Court should hold that trial courts must affirmatively exercise discretion to identify and implement appropriate case management procedures on a case-by-case basis rather than presumptively designating such cases for summary treatment. See generally R.K., 434 N.J. Super. at 127-33 (doing just that in grandparent visitation cases).

As discussed above, the FD docket's presumption of summary process is at odds with the requirement of a "full" or "thorough" plenary hearing in custody cases presenting a genuine and substantial issue. R. 5:8-6; J.G., 457 N.J. Super. at 372; K.A.F., 347 N.J. Super. at 137-38; Faucett, 411 N.J. Super. at 118. As in the grandparent visitation proceedings at issue in R.K., the factually complex and potentially evidence-intensive showing that parties must make in a child custody dispute simply cannot be undertaken summarily "in a manner likely to produce a sustainable adjudicative outcome." 434 N.J. Super. at 129, 136-37. In place of "default" summary treatment, this Court prescribed a "case-sensitive" approach to managing grandparent visitation cases:

> [N]otwithstanding its FD docket designation as a non-dissolution case, when a litigant brings an action seeking grandparent visitation under N.J.S.A. 9:2–7.1, either using the standardized complaint form approved under Directive 08–11 or through an attorney-prepared pleading, the vicinage Family Part Division Manager shall designate the matter as a contested case after joinder

> of issue and refer the case for individualized case management by a Family Part judge selected by the vicinage Presiding Judge of Family. The judge shall review the pleadings and determine whether active case management is needed.
>
> [Id. at 137-38.]

Exactly this type of individualized case management is the most logical and cost-effective way to address the problems created by the default summary treatment of contested custody matters on the FD docket. Importantly, this Court should emphasize trial courts' responsibility to raise the issue of case management at the first hearing in any FD custody matter, specifically including consideration of whether complex tracking is warranted, whether or not a party requests that a case be placed on the complex track, and place findings explicitly on the record. This Court should also emphasize trial courts' responsibility to raise and consider these issues at any later stage at which an issue develops warranting non-summary treatment and place findings explicitly on the record. See R.K., 434 N.J. Super. at 138 (imposing on the court a duty in grandparent visitation cases to "review the pleadings and determine whether active case management is needed"). If the court rejects a request for complex treatment, it should state its reasons for doing so on the record, just as R. 5-5.7(c) requires it to do when designating a case for complex treatment.

Had the court below taken these steps, and considered the need for additional procedures, it may well have recognized the need to develop a thorough record and that a plenary hearing, if not complex designation, would be required. Finally, the administrative costs of individualized case management will be limited to a relatively small subset of cases on the FD docket, namely, disputed custody matters, and will pale in comparison to the benefits to parties, children, and the public in avoiding custody determinations decided based on an incomplete record generated by abbreviated and inadequate procedures.

IV. The Court Should Ensure that Children's Opinions are Heard and Considered in Child Custody Cases on the FD Docket.

Individualized case management in this context must include consideration of the opinions of a child "of sufficient age and capacity to reason so as to form an intelligent decision." C.H.G. v. G.C.R., No. A-3822-14T3, 2017 WL 244107, at *3 (N.J. Super. Ct. App. Div. Jan. 20, 2017) (quoting N.J.S.A. 9:2-4(c)). New Jersey law places great weight on consideration of children's views regarding custody and visitation. See, e.g., R. 5:8-6 (authorizing in camera interviews with children in custody disputes); R. 5:8A (authorizing appointment of counsel for a child); R. 5:8B (authorizing appointment of a guardian ad litem).

Nevertheless, the trial court in this case erroneously rejected a request that then-nearly-seventeen-year-old A.G.[3] "be appointed an actual attorney," which A.G. had requested because "he very much wants to have his own voice and his own position advocated for" and because "his interests are going [to] diverge from [Plaintiff W.M.'s] interests." (T4 21:6-7; 22:11-13;18-19). Indeed, another attorney had filed a "notice of appearance and indicated that she [was] poised and ready" to represent A.G. (T4 21:12-13). The trial court, however, referred repeatedly to the matter's "FD" docket designation several times to justify denial of this request.

> This Court doesn't find that it's necessary for [A.G.] to be represented by counsel **in this FD matter** for today's hearing or any hearing going forward. . . . We've already indicated he's very intelligent. He's well-spoken. I've had the opportunity to observe him. He is part of this litigation. He is

[3] Amici acknowledge that after A.G. turns eighteen in April 2021, some of the factual issues on appeal may become moot. However, both this Court and the New Jersey Supreme Court have long held that "the New Jersey Constitution does not restrict the exercise of judicial power to actual cases and controversies," State v. Davila, 443 N.J. Super. 577, 589 (App. Div. 2016) (quoting State v. McCabe, 201 N.J. 34, 44 (2010)), and therefore, that "[o]ccasionally, the courts will consider the merits of an issue notwithstanding its mootness where significant issues of public import appear," id. (emphasis added) (citing Joye v. Hunterdon Cent. Reg'l High Sch. Bd. of Educ., 176 N.J. 568, 583 (2003)). See also McCabe, 201 N.J. at 44 (outlining that when an "issue before the Court is a matter of significant public importance, [the Court] could justify deciding [the] appeal even if it were technically moot"); Joye, 176 N.J. at 583 (outlining that even though the underlying complaint was "render[ed] moot," the Court nonetheless elected to resolve the issues raised on appeal "given its public significance and the likelihood that controversies similar to this one will present themselves in the future" (internal citations omitted)). Amici respectfully submit that here, similarly, the Appellate Division should resolve the issues raised given their extreme public importance to the myriad indigent litigants who appear pro se on the FD docket.

> the child at issue, yes. **But, again, this is an FD case.** I've spoken with him. I'm not going to appoint counsel for [A.G.] at this point.
>
> [(T4 24:1-4;15-20) (emphases added).]

In denying A.G.'s request to be appointed counsel because "this is an FD case," the trial court disregarded this Court's admonition in J.G. that "[t]houghtful consideration of the importance to any child of custody and parenting time decisions . . . dictates the necessity of looking past the docket designation to the nature of the dispute." 457 N.J. Super. at 374.

To prevent future errors of this type, trial courts should be instructed as follows: (a) in all contested FD custody cases, the trial court should make a finding on the record as to the need for appointing separate counsel or a guardian ad litem for the child[ren] at issue; (b) if the court determines that there is no need for counsel or a guardian ad litem to be appointed, the court should strongly consider conducting an in-camera interview with the children in accordance with R. 5:8-6; and (c) as J.G. made clear, a matter's designation as an "FD case" should never be used to deny an application for additional procedures intended to ensure that a child's views are adequately considered and that a child's interests are adequately protected.

CONCLUSION

For the foregoing reasons, the above-referenced Amici respectfully request that this Court issue a ruling incorporating Amici's preceding recommendations.

McCARTER & ENGLISH, LLP
Four Gateway Center
100 Mulberry Street
Newark, NJ 07102
T: (973) 636-2023
F: (973) 297-3749
Attorneys for Amici Curiae Partners for Women and Justice, Rachel Coalition, Rutgers Domestic Violence Clinic, Seton Hall University Law Center for Social Justice, and Volunteer Lawyers for Justice

By:
/s/ Adam N. Saravay
Adam N. Saravay

/s/ Michelle Movahed
Michelle Movahed
Members of the Firm

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