

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3425-20

RICHARD FREEDMAN, II,

Plaintiff-Appellant/
Cross-Respondent,

v.

COLLEEN FREEDMAN,

Defendant-Respondent/
Cross-Appellant.

APPROVED FOR PUBLICATION

December 5, 2023

APPELLATE DIVISION

Argued December 13, 2022 – Decided January 5, 2023

Before Judges Summers, Geiger and Fisher.

On appeal from the Superior Court of New Jersey,
Chancery Division, Family Part, Camden County,
Docket No. FM-04-0314-09.

Dawn Kaplan argued the cause for appellant
(Weinberg, Kaplan & Smith, PA, attorneys; Dawn
Kaplan, of counsel and on the briefs; Jill Dell'Aquilo,
on the briefs).

Amy C. Goldstein argued the cause for respondent
(Goldstein & Mignogna, PA, attorneys; Amy C.
Goldstein and Melissa L. Mignogna, on the briefs).

The opinion of the court was delivered by

GEIGER, J.A.D.

This sad case involves the disposition of the cremation remains and personal effects of the parties' son, who died unexpectedly and suddenly at age twenty, while attending college in Colorado. The mother unilaterally decided to have the body cremated without informing the father that their son had died, preventing him from participating in that decision and attending the memorial service. The mother has sole possession of the cremation remains and the son's remaining personal effects and refuses to divide them with the father. The parties filed contested proceedings in the Family Part to resolve the dispute and to terminate child support and medical insurance coverage. Following limited oral argument, the court decided those applications without conducting a plenary hearing.

Plaintiff Richard Freedman appeals from two Family Part orders entered on consecutive days regarding the disposition of his adult son's cremation remains and personal property. Among other things, the first order scheduled the case for a plenary hearing. The second order held those decisions should be controlled by their son's mother, defendant Colleen Freedman, now known

as Colleen Thrower, because she had the closer relationship with their son. Colleen¹ cross-appeals from certain aspects of the first order.

Richard had ample opportunity to litigate Colleen's alleged alienation of their son's affection and interference with his parenting time and communication with his late son in the Family Part during the years leading up to his son's eighteenth birthday. He chose not to do so, and instead waited until the dispute over the cremation remains and personal effects erupted more than two years after their son turned eighteen to first raise those issues. We deem those issues waived and, in turn, conclude that a plenary hearing regarding the parties conduct during the last five years of their son's life is not required as the evidence overwhelming demonstrated that Colleen had a closer relationship with their son. We therefore hold that Colleen shall have control over the cremation remains and affirm in part and reverse and remand in part. We also provide guidance on the proper procedure to be utilized in future similar disputes.

The parties married in December 2001, about six months after the birth of their only child, Richard James Hendrix Freedman (Hendrix). After they separated, custody and parenting time changed over time. When Hendrix was

¹ The parties and their son share the same surname. We refer to them by their first names and middle name, respectively. We mean no disrespect.

six, the parties agreed to joint legal custody, with Hendrix spending four overnights per week with Richard and three overnights per week with Colleen. The marriage was terminated by a divorce granted by a Pennsylvania court in January 2007. A property settlement agreement was incorporated into the divorce decree and the custody agreement later filed with the court in March 2007. Thereafter, both parties moved to Haddonfield.

In August 2010, Colleen filed an emergent application for full custody of Hendrix, which the court denied "without passing on the merits." A few months later, she filed a motion to modify custody and other relief. The court issued an October 22, 2010 order that: (1) designated Colleen parent of primary residence (PPR) and Richard parent of alternative residence (PAR); (2) granted Richard's request for court-ordered reunification therapy for Hendrix, the parties, and Richard's wife; (3) directed the therapist to determine the parenting time schedule, except the parties were to follow the court's holiday visitation schedule; (4) ordered Hendrix to undergo an evaluation; (5) required Richard to provide medical insurance coverage for Hendrix. Colleen withdrew her request for child support pending a new parenting time schedule.

Five years later, the parties disputed whether Colleen cooperated with the reunification therapy. Colleen filed a motion for child support and other relief. A July 2, 2015 order required Richard to pay child support, awarded

Colleen counsel fees, and directed Hendrix to participate in reunification therapy.

A May 24, 2019 order terminated Richard's child support and medical insurance coverage obligations effective May 25, 2019, Hendrix's nineteenth birthday. In September 2019, Colleen filed a motion to reinstate child support, which was resolved by a consent order that reinstated child support, required Richard to cover Hendrix under his medical insurance policy, and required Colleen to provide Richard with proof of Hendrix's enrollment and credits for so long as Hendrix remained a full-time college student.

After initially attending Camden County College, Hendrix transferred to Colorado Mountain College for the Spring 2021 semester. On February 10, 2021, Hendrix was found dead. The death certificate stated the manner of death was accidental. It inaccurately listed the name of Hendrix's father and the maiden name of Hendrix's mother.

Colleen did not advise Richard of Hendrix's death. Richard first learned of Hendrix's death from a third party on February 17, 2021. As a result, Richard was unable to participate in the memorial service held for Hendrix in Pennsylvania or the decision to cremate Hendrix's remains. Instead, Colleen unilaterally made those decisions. Through counsel, Richard requested one-half of the cremation ashes, copies of all photographs of Hendrix, and one-half

of Hendrix's personal belongings, to keep in Hendrix's memory. Colleen refused.

On March 31, 2021, the court granted an order to show cause (OTSC) with temporary restraints that restrained Colleen or anyone acting on her behalf from discarding or destroying Hendrix's ashes, personal property, photographs, and cell phone data.

The parties filed cross-motions that were heard the following month. Richard sought an order compelling Colleen to provide him with a copy of Hendrix's birth and death certificates and to cooperate in correcting the death certificate. He also requested that one-half of the cremation ashes be transferred to the crematory to confirm they were Hendrix's ashes and a sanction if Colleen discarded the ashes. Richard also requested access to photographs of Hendrix so they could be copied and one-half of Hendrix's belongings. He further sought an order granting him subpoena power to obtain Hendrix's college records and information from the crematory and funeral home. Finally, Richard sought to terminate child support as of the date of death, reimbursement of any child support overpayment, information concerning Hendrix's healthcare bills, and an award of counsel fees.

In her cross-motion, Colleen sought to dissolve all restraints, sole control over Hendrix's remains, cell phone, photographs, and personal property, and an award of counsel fees.

The court issued an oral decision on April 30, 2021. Before an order reflecting the court's decision was entered, Colleen moved for reconsideration, or in the alternative, for summary judgment.

The court's oral decision was embodied in a June 21, 2021 order that: (1) determined Richard's request for a copy of Hendrix's birth certificate and original death certificate was moot; (2) directed Colleen to cooperate in correcting Hendrix's death certificate to properly list Richard as his father and Colleen as his mother; (3) reserved the issue of transfer of one-half of the cremation ashes to the crematory "until trial"; (4) denied sanctions without prejudice; (5) directed Colleen to provide Hendrix's photographs to Richard, to be copied by him and returned within fourteen days; (6) denied Richard's request to receive one-half of Hendrix's personal belongings without prejudice; (7) granted the requested subpoena power to Richard; (8) restrained Colleen from tampering with Hendrix's cell phone; (9) directed the parties to "cooperate to make the cell phone [ready] for data extraction"; (10) directed Colleen to provide Richard with information and documentation relating to Hendrix's healthcare from January 1, 2020 through the date of death; (11) held

Colleen solely responsible for any outstanding uncovered medical expenses incurred for Hendrix; (12) terminated child support effective February 10, 2021, and directed reimbursement of any overpayment; (13) denied termination of the restraints; (14) denied Colleen's request to grant her sole control over Hendrix's remains, cell phone, photographs, and other property; and (15) denied without prejudice Colleen's request for counsel fees.

The next day, the court unexpectedly issued an amended order that substantially modified the terms of the June 21, 2021 order without further notice or hearing. The amended order stated the court had "reconsidered its decision." The amended order provided: (1) Colleen "shall retain possession of Hendrix's ashes based on her representation that she plans to distribute them in various locations that she knows her son either visited or wanted to visit"; (2) Colleen shall "distribute the ashes and advise [Richard] . . . of each location by latitude and longitude, so that he may create a memorial for himself"; (3) Richard was "free to visit any/all of the locations at his leisure"; (4) the issue of Hendrix's belongings was moot based on Colleen's representation that none of his belongings are still available; (5) permitted Richard to review copies of the requested police reports in the presence of his attorney, after which the copies were to be destroyed; (6) each party was

responsible for their own counsel fees; and (7) the reconsideration/summary judgment motions returnable July 9, 2021 were "rendered moot."

The trial court stayed the June 21, and June 22, 2021 orders pending appeal. We denied Richard's application to file an emergent motion.

Colleen's Version of the Disputed Material Facts

Hendrix was diagnosed at a young age with Asperger's syndrome and an anxiety disorder. Despite these conditions, Richard "bullied and lashed out at Hendrix," making him feel "inadequate, uncomfortable, unsafe and scared." Hendrix did not stay overnight at Richard's residence after the fourth grade.

On the last day of school in June 2010, Richard and Hendrix had an argument, during which Richard screamed at Hendrix that he was "completely out of control," "totally messed up," and that there was "something wrong" with him. Richard then told Colleen that she could keep Hendrix for the entire summer and, "if Hendrix doesn't have any problems when he's with you, then why don't you just deal with him." Richard had no parenting time that summer. In August 2010, Colleen filed an application to suspend Richard's parenting time and require him to participate in reunification therapy.

The therapist terminated the reunification therapy in November 2011, because Hendrix refused to meet with Richard and exhibited "a great deal of anxiety [and] resistance." The therapist noted Hendrix does well with his

mother and opined that the problems between Hendrix and Richard stemmed from "a poor match between [Hendrix's] needs [and Richard's] parenting style." The therapist suggested reunification therapy be tried again in one year. Richard did not return to reunification therapy.

Thereafter, neither Richard nor his family made any attempts to have a relationship with Hendrix. For the five years following the failed reunification therapy, Richard had no parenting time or relationship with Hendrix.

When Colleen sought child support from Richard in 2015, he requested a paternity test. The request distressed Hendrix, who viewed it as an act of rejection. The parties were once again ordered to attend reunification therapy, this time with a different therapist. Despite being ordered to arrange the therapy, Richard never contacted the therapist and did not provide necessary information to Colleen to schedule it.

For a brief period in 2016, Hendrix unsuccessfully tried to have a relationship with Richard. During the five years preceding his death, Hendrix did not see or hear from Richard and received no birthday or Christmas cards or gifts from him. Richard did not acknowledge Hendrix's graduation from high school, did not reach out to Hendrix about college, and did not know he transferred to Colorado Mountain College.

Richard's Version of the Disputed Material Facts

Colleen seemed increasingly "unstable and deceitful" over time. She withheld Hendrix from Richard and told Hendrix lies about Richard.

In 2010, the parties verbally agreed that Colleen would keep Hendrix in her care for three weeks because he was exhibiting behavioral issues and needed a short break from the friends he was hanging out with.

Prior to 2010, Richard was Hendrix's primary caretaker and had an excellent father-son relationship with him. Beginning around June 2010, Colleen would not allow Richard to see or speak to Hendrix. Shortly thereafter, Colleen unsuccessfully applied for full custody. She did not permit Hendrix to participate in the court-ordered reunification therapy or to undergo a psychiatric evaluation. Richard blames Colleen's lack of cooperation for reunification therapy not being completed and the failure to establish a parenting time schedule.

When Richard stopped by Colleen's residence to talk to Hendrix, no one would answer the door or other conduct thwarted the attempted communication. When Richard attempted to speak to Hendrix at school, Colleen would pull Hendrix away and not let him speak to Richard. Colleen's conduct resulted in Richard not having any communication with Hendrix from 2010 to 2015. Richard backed off in the hope Hendrix would eventually realize what was happening. This led to Richard experiencing depression,

interrupted sleep, and nightmares. During this same period, Hendrix was suffering, struggling in school, and in danger of failing classes.

For most of 2016, Richard and his family enjoyed parenting time with Hendrix, which Hendrix enjoyed. Hendrix seemed happy and developed a relationship with his stepsiblings. He spent Christmas at Richard's house that year. Unfortunately, Hendrix experienced trouble with a student at school relating to Colleen's living arrangement. Hendrix was arrested when he faked a break-in to scare the student who was bothering him. Richard attempted to help in any way he could, including communicating directly with Hendrix. Colleen cut Richard out of Hendrix's life and continued to alienate Hendrix's affections.²

Richard did not know whether Hendrix was attending college. It was only after Colleen filed a motion to reinstitute child support that he learned Hendrix was enrolled at Camden County College. Colleen remained uncooperative and did not comply with the October 4, 2019 consent order.

When Richard learned that Hendrix had died in Colorado seven days earlier, he did not know Hendrix was attending college there. The coroner advised Richard that Hendrix appeared to have died from an accidental

² Despite Colleen's alleged conduct, Richard filed no subsequent motions regarding custody or parenting time or to enforce litigant's rights.

overdose and that his body was transported to Pennsylvania to be cremated. When Richard located the funeral home, he was advised that a memorial service had already been held. The funeral home representative indicated he was told Richard's parental rights had been terminated. When Richard attempted to obtain a copy of the death certificate, he was advised by vital records that he was not listed as a parent.

On appeal, Richard argues:

I. A PLENARY HEARING SHOULD BE HELD WHERE THERE IS A GENUINE AND SUBSTANTIAL FACTUAL DISPUTE TO RESOLVE THAT FACTUAL DISPUTE AND THUS, A PLENARY HEARING SHOULD HAVE BEEN HELD AS INITIALLY DETERMINED AND ORDERED ON APRIL 30, 2021 AND JUNE 21, 2021.

POINT II

II. AN ABUSE OR MISTAKE OF DISCRETION WAS EXERCISED BY THE TRIAL COURT BY DENYING [RICHARD'S] RIGHT TO A PLENARY HEARING AS A LEGAL CUSTODIAN TO DETERMINE THE APPROPRIATE DISTRIBUTION OF THE UNEMANCIPATED CHILD'S ASHES.

In her cross-appeal, Colleen argues:

I. THE NEW JERSEY CEMETERY ACT, N.J.S.A. 45:27-1 ET. SEQ., AND CASELAW DEVELOPED UNDER THAT STATUTE GOVERN WHICH PARTY SHOULD HAVE CONTROL OVER THE DISPOSITION OF HENDRIX'S REMAINS.

II. PLENARY HEARINGS ARE REQUIRED ONLY IN CASES IN WHICH THERE ARE GENUINE ISSUES OF MATERIAL FACTS.

III. THE STANDARD OF REVIEW IN THIS CASE SHOULD BE DE NOVO, THE STANDARD THAT ALLOWS FOR THE LEAST AMOUNT OF DEFERENCE TO THE TRIAL COURT.

IV. IN THE EVENT THAT THIS MATTER IS REMANDED, IT SHOULD BE REMANDED TO A DIFFERENT TRIAL JUDGE IN LIGHT OF THE FACT THAT THE TRIAL COURT JUDGE GAVE GREAT WEIGHT TO INAPROPRIATE FACTORS AND BECAUSE OF A LEGITIMATE CONCERN THAT THE TRIAL JUDGE WILL BE COMMITTED TO ITS INITIAL FINDINGS.

We initially note that the proceedings involved in this appeal should have been filed and heard in the Probate Part, not the Family Part. Excepting for the application to terminate child support and medical insurance coverage, the Family Part lacked jurisdiction to hear the applications filed after Hendrix's death.

The disposition of Hendrix's cremation remains is governed by the New Jersey Cemetery Act, 2003 (Cemetery Act), N.J.S.A. 45:27-1 to -41, and its interpretive case law. N.J.S.A. 45:27-22 "addresses who may control the funeral and disposition of a decedent's remains." Gately v. Hamilton Mem'l Home, Inc., 442 N.J. Super. 542, 554 (App. Div. 2015). It provides:

If [a] decedent has not appointed a person to control the funeral and disposition of the remains . . . the right

to control the funeral and disposition of the human remains shall be in the following order of priority class, unless other directions have been given by a court of competent jurisdiction:

- (1) The surviving spouse of the decedent or the surviving civil union or domestic partner.
- (2) A majority of the surviving adult children of the decedent.
- (3) The surviving parent or parents of the decedent.
- (4) A majority of the brothers and sisters of the decedent.
- (5) Other next of kin of the decedent according to the degree of consanguinity.
- (6) If there are no known living relatives, a cemetery may rely on the written authorization of any other person acting on behalf of the decedent.

[N.J.S.A. 45:27-22(a).]

Therefore, if a "decedent has not left a will appointing a person to control disposition and has no surviving spouse or adult children, the statute provides that the right to control the funeral and disposition of the remains passes to "[t]he surviving parent or parents of the decedent.'" Gately, 442 N.J. Super. at 554 (quoting N.J.S.A. 45:27-22(a)(3)).

In Gately, "we conclude[ed] that the more sensible reading of the phrase [the surviving parent or parents] is that where there are two surviving parents, a single parent alone does not have the unilateral right to control disposition."

Id. at 556. Therefore, "if both parents are surviving, then the decision-making authority presumptively is to be jointly exercised." Id. at 557. "Had the Legislature intended to give either surviving parent the singular right to control disposition, it could have so stated" Ibid.

Here, Hendrix was unmarried, died without children, without a will, and without any written directive regarding his funeral or the disposition of his remains. In re Estate of Travers, 457 N.J. Super. 477 (Ch. Div. 2017), involved similar facts. There, the decedent died at age twenty-two, "was unmarried and died without issue, without a will, and without any written directive regarding his funeral or disposition of remains." Id. at 481. The decedent's parents, who were divorced, "differ[ed] on how their son's remains should be disposed, and each [sought] control over the remains pursuant to N.J.S.A. 45:27-22." Ibid. The decedent's father wanted his son's remains buried, while the decedents' mother wanted her son's remains cremated. Ibid.

The court recognized that under these circumstances, N.J.S.A. 45:27-22 "confer[red] the right to control the funeral arrangements and disposition of the remains to the surviving parents of the deceased," Travers, 457 N.J. Super. at 482 (citing Gately, 442 N.J. Super. at 554), and "in the event of a dispute," the court has authority under the statute to resolve disputes between next-of-kin, id. at 482-83 (citing Marino v. Marino, 200 N.J. 315, 322 (2009)). The

court noted the Cemetery Act and New Jersey case law provided no guidance "on how to resolve a dispute that arises between" parents. Id. at 483; accord Gately, 442 N.J. Super. at 554.

In Travers, the court held that where a decedent dies intestate, the court "should carefully consider which next-of-kin of equal standing under the [s]tatute will likely control the funeral [and] disposition of remains in a manner that most closely reflects the wishes, desires and expectations of the decedent." 457 N.J. Super. at 484. "Additionally, relationships between the decedent and next-of-kin of equal standing may be highly relevant." Ibid. "Therefore, the court should consider the closeness of the relationships between next-of-kin of equal standing and the decedent to inform its decision on the appointment of control under the [s]tatute." Id. at 485. "[T]he religious and/or cultural background of the decedent should also be considered." Ibid. "[T]he court may consider, if known, which next-of-kin of equal standing will ultimately be designated as the administrator of the estate, as that person will be obligated to act in the best interests of the estate to protect the estate's assets and ensure payment for funeral [and] disposition expenses." Id. at 486 (citing N.J.S.A. 3B:10-23; Fitzgerald v. Linnus, 336 N.J. Super. 458, 468 (App. Div. 2001)). The court formulated a four-prong test incorporation those

factors for determining who should control the funeral arrangements and disposition of remains. Id. at 486-87.

Applying that test, Colleen contends that because she had a closer relationship with Hendrix during the years leading up to his death, and the other factors are inapplicable, further analysis and a plenary hearing are unnecessary, and she should be granted sole control over the disposition of Hendrix's remains. We agree.

We adopt and apply a modified version of the test formulated in Travers. Where parents of a deceased child dispute the funeral arrangements or disposition of remains, the court shall consider the following factors in selecting the person in control under N.J.S.A. 45:27-22:

- (1) Which parent is more likely to abide by the decedent's expressed preferences, if any;
- (2) Which parent had a closer relationship with the decedent and is in a better position to deduce the decedent's preferences and expectations upon death;
- (3) Which parent is more likely to adhere to the religious beliefs and cultural practices of the decedent, to the extent that such beliefs and practices pertain to funeral arrangements or the disposal of remains and reflect the decedent's preferences; and
- (4) Which parent will likely be designated administrator of the estate and act in the best interests of the estate relating to the funeral arrangements and disposition of the decedent's remains.

The trial court must undertake a qualitative analysis of each factor, assign appropriate weight, and balance the factors.

Applying this modified test, we note that certain facts are undisputed. As to factor one, Hendrix left no will and did not express any preferences regarding funeral arrangements or disposition of his remains.

As to factor two, Hendrix lived exclusively with Colleen since at least 2015, until he left for college. Although the parties shared joint legal custody, Colleen was designated parent of primary residence. Despite the parties residing in the same municipality, Richard exercised no parenting time after 2016. By any measure, Colleen had the closer relationship with Hendrix at the time of his death and was in a better position to ascertain Hendrix's to deduce the decedent's preferences and expectations, even though the parties contested the reasons why that occurred.

As to factor three, there appears to be no evidence that Hendrix practiced any religion or that religious beliefs are a factor in the disposition of his remains. Nor do the parties express any personal religious beliefs as a factor to be considered.

As to factor four, Hendrix's assets appear to consist mainly of personal effects having minimal economic value. Because an estate has not been filed with the Surrogate's Office, an administrator has not been appointed.

Factor two is clearly controlling in this case. Although the parties presented diametrically opposed versions of their conduct, Richard's evolving relationship with Hendrix, and the reasons for the erosion of his relationship with Hendrix, Richard had ample opportunity to seek relief in the Family Part from Colleen's alleged conduct when his parenting time and ability to communicate with Hendrix was curtailed or prevented from 2016 until Hendrix's eighteenth birthday. He chose not to do so.

While a plenary hearing is generally required when there are genuine issues of material fact about custody and parenting time, they must be litigated in the Family Part before the child reaches eighteen, not for the first time in applications filed more than two years after the child's death, when he was twenty years old. Although Richard was conversant with motion practice in the Family Part as reflected by the considerable post-divorce procedural history, in this instance he sat on his rights. We decline to remand this matter to the Family Part or to direct new filings in the Probate Part to litigate those stale issues, which we deem waived. Accordingly, a plenary hearing is not required.

Because the record clearly establishes that Colleen had the closer relationship during the years leading up to Hendrix's death and to discern his preferences, we hold that Colleen shall be granted control over Hendrix's

cremation remains. Any remaining issues regarding Hendrix's personal effects shall be pursued in the Probate Part.

We affirm the following aspects of the trial court's rulings: (1) the termination of child support and medical insurance obligation; (2) the subpoena power granted to Richard (which was properly brought in the Family Part); (3) the denial of sanctions; (4) the requirement that Colleen provide Richard with information and documentation relating to Hendrix's healthcare from January 1, 2020 through the date of death; (5) the requirement that Colleen advise Richard of each public location where the cremation remains are deposited so that he may create a memorial for himself; (6) that restrained Colleen from tampering with Hendrix's cell phone; (7) that directed the parties to "cooperate to make the cell phone [ready] for data extraction"; and (8) denied an award of counsel fees. Any other aspects of restraints entered against Colleen are terminated. We reverse the aspects of the trial court's orders that are contrary to our rulings. On remand, the trial court shall enter an order reflecting our ruling.

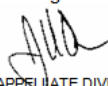
Finally, because the judge expressed comments regarding credibility, see J.L. v. J.F., 317 N.J. Super. 418, 438 (App. Div. 1999), and may have a commitment to her prior findings, see P.T. v. M.S., 325 N.J. Super. 193, 220-21 (App. Div. 1999), any subsequent proceedings regarding concerning

Hendrix's cremation remains and estate shall be conducted by a different judge.

We provide the following guidance for future cases involving similar disputes in intestate estates. The proceedings contesting the funeral arrangements or disposition of remains should be brought by complaint in the Probate Part, rather than by application in the Family Part. The probate judge should consider appointing a pendente lite administrator who shall investigate the facts and attempt to resolve the issues. If a resolution is not reached, the probate court shall apply the test we have adopted and determine which parent or next of kin of equal standing shall control the funeral arrangements and disposition of remains, which should not involve protracted hearings relating to the history of the parties over multiple years leading up to the death. All unresolved aspects of the decedent's estate, including disposition of the decedent's assets and personal effects, should likewise be brought, and decided in the Probate Part.

Affirmed in part, reversed and remanded in part. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION