



The Florida Bar Family Law Section
COMMENTATOR

Volume XXVIII, No. 4

Amy Hamlin, Esq. and Sarah Sullivan, Esq., Co-Editors

Summer 2015

www.familylawfla.org



Section calendar

Look for information on the Family Law Section's website: www.familylawfla.org.

2015

SAVE THE DATE!

September 24-27, 2015

2015 Fall Meetings

Vinoy Renaissance St. Petersburg Resort & Golf Club

October 31-November 4, 2015

Out of State Retreat

Hyatt Regency Washington Capitol Hill

Details and registration at www.familylawfla.org



COVER PHOTO

Cover photo taken by Julia Wyda at the Boca Raton Resort and Club

INSIDE THIS ISSUE:

Chair's Message..... 3

Comments from the Co-Chairs of the Publication Committee..... 4

Guest Editor's Corner..... 5

Back to Basics: In Order to Succeed, You Must Fail..... 6

E-Mail Correspondence With Clients: Better Practices By Avoiding Traps and Pitfalls..... 7

Goodwill or a Good Guess 9

Third Parties in a Dissolution Action..... 11

Electronic Evidence..... 13

Family Law Section Executive Council Meeting (Photos) 14

"Cleaning Up" Social Media Before or During Litigation 17

Prevailing Party Provisions in Family Law Agreements:

Mo' Money, Mo' Problems? Not Necessarily..... 19

Brochure: Out of State Retreat..... 22



The Commentator is prepared and published by the Family Law Section of The Florida Bar.

Norberto Katz, Orlando – *Chair*

Maria C. Gonzalez, Weston – *Chair-Elect*

Laura Davis Smith, Coral Gables – *Treasurer*

Nicole L. Goetz, Naples – *Secretary*

Elisha D. Roy, West Palm Beach – *Immediate Past Chair*

Amy Hamlin, Winter Park – *Co-Editor*

Sarah Sullivan, Jacksonville – *Co-Editor*

Ronald H. Kauffman, Miami – *Chair of Commentator*

Beth Anne Trombetta, Tallahassee – *Administrator*

Donna Richardson, Tallahassee – *Design & Layout*

Statements of opinion or comments appearing herein are those of the authors and contributors and not of The Florida Bar or the Family Law Section.

Articles and cover photos to be considered for publication may be submitted to Sarah Kay, Vice Chair of the Commentator, at Sarah@mbc-lawoffice.com. MS Word format is preferred for documents, and jpg images for photos.



Chair's Message

Thanks for the memories!

As I write this, my final message as Chair of the Family Law Section, I am filled with mixed emotions. While sad that my time as Chair went by so quickly and that we were not able to fulfill all our goals, I am extremely proud of what we have accomplished together as a Section.

My personal thanks to all our committees and their leadership for all their hard work this year. You are the heart and soul of the Section and without you we would not be as successful as we are.

A special mention to all the chairs of our Retreats this year. As always, Doug Greenbaum, our Leadership Retreat Chair, meticulously planned all our activities. Our Fall Retreat Chair, Thomas Duggar, did a wonderful job in putting together a retreat that was a special beginning to the holiday season. And not to be outdone, Dr. Debbie Day and Jorge Cestero organized an amazing retreat in "La Isla del Encanto"



Norberto Katz
Section Chair

(the enchanted island), San Juan, Puerto Rico.

While our proposed alimony bill did not pass, I am sure that all the hard work of the ad hoc alimony committee will bear fruit in the future. My heartfelt thanks to Chair Thomas Sasser for going above and beyond the call of duty and to Magistrate Diane Kirigin for her commitment and dedication to this effort. I would also like to convey my appreciation to Representative Rich Workman for working so collaboratively with the Section on this effort and would hope that he will continue to do so in the future.

And no mention of thanks would be complete without

mentioning the Executive Committee whose advice and assistance was invaluable. Thank you Maria, Laura, Nicole and Elisha!

It has been an honor and a privilege to have served as your Chair this year, and I thank you for having given me this opportunity.



The Florida Bar
**FAMILY LAW
SECTION**

F A M S E G

Visit **FAMSEG** and see what's new!

www.familylawfla.org



Comments from the Co-Chairs of the Publication Committee



This edition of the *Commentator* is the last installment during Norberto Katz's year as Chair of the Family Law Section. We are so proud of the publications put together by everyone involved in this committee. The *Commentator* is mailed to every member of the Family Law Section, more than 3500 people, as well as made available on the Section's website. Everyone part of this committee feels a great deal of responsibility to promote the Chair's theme while educating the readers to better help Florida's families. We think we helped not just new lawyers but those of us who are more experienced with the various Back to Basics articles. We thank all of the Guest Editors this year who volunteered countless hours: Ron Kauffman, Sonja Jean, Loreal Arscott, Amy Cosentino, Cristina Fernandez-Parjus, and Jerry Rumph. They did an outstanding job. We also thank

our Florida Bar liaison, Beth Anne Trombetta and layout designer, Donna Richardson. Both of these women have extraordinary patience.

Sarah Sullivan and I are also at the end of our term as Co-Chairs of the Publications Committee. From a committee standpoint, Sarah and I are dinosaurs in that we started as editors or authors of articles and committee members and then worked our way into leadership. We've enjoyed every minute of our involvement and have been able to work with some very talented people. For that, we are forever grateful. Julia Wyda is taking over as the new Chair of this committee, and we have no doubt she will make this publication, as well as the others put on by this committee, better than ever.

Thank you for sending us your comments, and we encourage you to please continue to do so. We need your articles, pictures, and announcements to make the *Commentator* a fantastic resource. Please feel free to contact Julia at julia.wyda@brinkleymorgan.com.

See what's new...

Visit the Family Law Section Website!

www.familylawfla.org



President Theodore Roosevelt said, "Nothing in the world is worth having or worth doing unless it means effort." As a member of the Family Law Section of the Florida Bar, I can say that the *Commentator* is worth having. Likewise, serving as the Guest Editor for the Summer edition has been worth doing.

I had the pleasure of working closely with Amy Hamlin, co-chair of the Publications committee for the Family Law Section. She supported and guided me in obtaining and building content for this edition. I know that she did additional work behind the scenes, as did others in the Publications committee, the Family Law Section, and the Bar, about whom and which I am unaware. Thank you, Amy and everyone else, for all of your support.

I also had the pleasure of working with some other amazing people: the authors. The authors, individually and collectively, have promoted two important current themes in the Family Law Section and throughout the Bar: (1) Back to Basics, and (2) Technology. Thank you Eddie, Hunter, John, Tom, Marci, and Reuben for your articles and your contribution to this edition



GUEST

Editor's Corner

Jerry L. Rumph, Jr., Tallahassee

of the *Commentator*, to our practices, and to our lives.

While serving as the Guest Editor of this edition was an effortful endeavor, there was much support and collegiality. I had the benefit of asking fellow practitioners and other professionals to share their knowledge with you, the reader. We discussed and developed topics. I was honored to read these articles in their initial state. Amy, the authors, people unknown to me, and I collaborated to refine the articles into their final form. Through the effort, I became a better practitioner, and hopefully, a

better colleague. I gained more than I gave.

I agreed to serve as Guest Editor for the same reason that I agree to serve my profession and my community in other ways, which is the belief that we are all impelled to contribute to make our "world" a better place. Therefore, I urge you to write for the *Commentator* and to serve as Guest Editor of an edition. By so exerting yourself, you will make our "world" a better place, and I imagine that you will gain more than you will give.

Thank you in advance for your contribution. It is worth doing.

**SAVE
THE
DATE!**

Out of State Retreat

October 31 - November 4, 2015

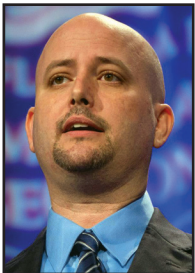
Hyatt Regency Washington on Capitol Hill
Washington, DC

See brochure on page 22



Back to Basics: In Order to Succeed, You Must Fail

By Eddie Stephens, Esquire, West Palm Beach



E. STEPHENS

I am a parent of two teenage boys. I am not a perfect parent, but I try very hard. I like to think that I lead by example, provide boundaries, and allow safe opportunities for my children

to fail. Some parents refuse to allow their children to experience failure by intervening with teachers, coaches, and even employers. Experiencing failure is a necessary part of development. All children need to be able to deal with failure and learn to be a good loser in order to be good winners.

Basic law of physics: “you have to fail in order to succeed.” If our children are not equipped to handle failure... then they are unlikely to ever succeed. Parents should appreciate this basic concept.

So even though it is hard, in many situations where I could easily “save the day,” I hold back and leave it to my kids to either succeed or fail. If they succeed, they did it on their own and are building the confidence to fly without a net. If they fail, I hope they learn the lesson that experience has to teach them and are better able to handle bigger failures in the real world.

So when my 12 year old asked me for \$5.00 to test his rifle skills at the fair, I saw it as a teaching moment.

My 12 year old is a good shot. He has handled and shot rifles, shotguns, and pistols. He has logged hours of classroom study and range time at

several Boy Scout camps he has attended. Many of my friends who are enthusiastic about shooting have taken him to the range and been quite impressed with his abilities. He is literally an award-winning marksman.

So when he saw the “rifle” game at the fair, it was a chance to impress his relatives and win a big prize. All he had to do was hit 2 out of 3 cups from a rifle that shot a cork from ten feet.

I know the deal. Any “game” at a carnival is rigged in favor of the house no matter what. The easier the game looks, the less likely you are to win. I learned this after many unsuccessful attempts to impress the ladies in my youth. But my 12 year old obviously did not know this to be true.

I gave him the \$5.00, and he confidently approached the booth and waited his turn. His first shot missed. The 12 year old was horrified and asked the carnival worker if he could use a different gun. He took a second shot and missed again. The 12 year old looked at me in disbelief as the target was large and only 10 feet away.

He asked to use a third rifle. The carnival worker could tell my son was on to him and suggested that he “aim higher.” At this point, I saw the light bulb go off and my son gave him the funniest evil eye I have ever seen, acknowledging he had been had. My son aimed very high and was able to hit the third shot and win a very small prize.

For \$5.00, my son finally learned lessons I had been trying to teach him for years: carnival games are rigged and life is not fair.

The practice of family law is very similar to this principle. If you are paying attention, you will see the things that work, and the things that don't. Sometimes, things are not very fair and there is absolutely nothing you can do about it. You will fail, and if you cannot handle that failure, you will probably not have a high quality of life if you continue in this practice.

However, if you can handle defeat, even when it is not fair, you will thrive in this stressful line of work we have chosen and hopefully sleep well at night.

The 12-year-old had it easy. I sure wish that when we experience failures and learn a “lesson” in our practices, it only cost \$5.00.

Eddie Stephens is a partner in Ward Damon located in West Palm Beach, FL. Mr. Stephens was admitted to the Florida Bar in 1997 and is Board Certified in Family and Marital Law. After starting his career as an attorney for the Palm Beach County Property Appraiser's Office, Stephens has developed a successful family law practice focused on highly disputed divorces. Through hundreds of hearings and dozens of trials, Stephens has honed his practice by making straightforward arguments that bring opposing sides closer together in order to find a successful resolution. Most importantly to Stephens, he litigates in a manner that minimizes the impact of divorce on children

E-Mail Correspondence With Clients: Better Practices By Avoiding Traps and Pitfalls

By Jerry L. Rumph, Jr., Esquire, Tallahassee



J. RUMPH

I do not intend this article to include all-encompassing best practices for e-mail communications with clients. Instead, I intend for this article to inspire us to think more deeply about e-mail communications with clients and to continue the development of best practices with this type of communication.

I was inspired to write this article by a recent e-mail exchange with an opposing counsel. Our clients reached an agreement regarding the main issues in their dissolution, but my client wanted to engage in discovery to analyze the nature of the agreement and decide on structure. I obtained a number of documents from my client, but the opposing party had documents not in my client's possession. I sent opposing counsel an e-mail stating that we understood that the parties had an agreement and that we were not trying to interfere with that agreement, but we needed some documents to complete our due diligence regarding the agreement. I offered to provide a number of documents and requested that the opposing party provide certain documents in exchange.

Based on opposing counsel's response, I re-read my initial e-mail because I thought I misstated my request or to the extent that tone can be captured in an e-mail, had conveyed a hostile tone. What struck me more was that opposing counsel's client was copied on the e-mail at the

client's state agency e-mail address. Seeing this, I had two concerns. First, I was worried that the aggression in opposing counsel's e-mail would affect his client. Second, I was worried that the parties' divorce would be exposed to third parties, invading both clients' privacy.

I reassured opposing counsel that we were not trying to undo the agreement reached by the parties or unnecessarily litigate the case, and I requested that we not copy the parties on e-mails at their work e-mail addresses.

I have a number of clients who are state employees, and I imagine that many marital and family law attorneys throughout Florida have state or public agency employees as clients. When I ask my state-employee clients for a secure e-mail address, they frequently offer their state e-mail address first. I immediately point out to them that we should not use their state e-mail address due to public records laws and related issues.

Section 119.011(12) of the Florida Statutes defines "public records" as "all documents... data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency." However, Florida courts have held that private or personal e-mails are not public records.¹ Therefore, e-mail correspondence about a state employee's dissolution of marriage or other private and personal litigation is not likely a public record, but the analysis should not end here.

State agencies generally designate a certain person or persons to receive and respond to public records requests. In my experience with public records requests, the person handling the request is someone located in an agency's human resources department or general counsel's office. If a public records request is made for all e-mail correspondence regarding an agency employee, the agency's designated public records request personnel will review all e-mail correspondence related to that agency employee. Sometimes, the agency's public records personnel must work with the agency's information technology personnel to obtain the e-mails requested.

If an agency employee is the subject of a public records request regarding his or her e-mails and is involved in divorce and has used his or her agency e-mail for correspondence related to that divorce, then the person or persons working on the public records request will see all of those e-mails, regardless of whether those e-mails are ultimately designated and disclosed as public records. Such a situation could have a significant impact on attorney-client privilege and work-product doctrine if the subject employee's e-mails are between the employee and his or her attorney because those e-mails and their content will have been seen by third persons. Generally, the attorney-client privilege and work-product doctrine protections are waived when the otherwise confidential information is transmitted to third persons who are

continued, next page



E-Mail Correspondence With Clients

from preceding page

not necessary in the rendition of the legal services or are not necessary to transmit communication between the attorney and the client.²

While a public records request may not reveal personal e-mails between an agency employee and his or her family law attorney, a subpoena to the agency certainly may reveal those e-mails. Similarly, if a privately-employed person involved in litigation is using an employer-provided e-mail address or a common computer to communicate with his or her attorney regarding the litigation, then any e-mails between the employee and his or her attorney may be exposed through a subpoena, a request for production, or a request for inspection of the computer, especially if it is determined that the employee did not have a reasonable expectation of privacy or confidentiality in using the common computer or employer-provided e-mail address.

Finally, attorneys should keep in mind the impact of copying clients

on e-mail correspondence between them and opposing counsel, especially in family law cases. If the e-mails are aggressive or litigation-driven, it could inflame the emotions of the client copied on the e-mail. The client may transfer any acrimonious tone between the attorneys onto the opposing spouse, making settlement more difficult. Not that I want to encourage attorneys to withhold information from their clients, but it may be best to summarize correspondence between attorneys or to send it separately with an explanation to the client. More importantly, I think attorneys who copy their clients on e-mail correspondence with opposing counsel risk waiving protections between communications with their clients and possibly inadvertently copying opposing counsel on e-mails between them and their clients. For these reasons, it is my practice not to copy clients on my e-mails with opposing counsel.

Jerry L. Rumph, Jr., is an attorney at the Law Office of Linda A. Bailey, P.A., where he practices exclusively marital and family law. Jerry practices marital and family law because

he is able to make a meaningful difference in the lives of persons experiencing difficult situations. Previously, Jerry was a shareholder at a Tallahassee firm where in addition to marital and family law, Jerry practiced in the areas of business law, commercial litigation, and real property law. Jerry was admitted to the Florida Bar in 2010 after graduating from Florida State University with a Juris Doctor and a Master of Business Administration. Jerry received a Bachelor of Arts from the University of South Florida.

Endnotes

1. See *Times Publ'g Co. v. City of Clearwater*, 830 So. 2d 844, 847 (Fla. 2d DCA 2002); see also *Media Gen. Operation, Inc. v. Feeney*, 849 So. 2d 3, 5-6 (Fla. 1st DCA 2003).

2. See §90.502, Fla. Stat. (2014); see also *Witte v. Witte*, 126 So. 3d 1076 (Fla. 4th DCA 2012); *Visual Scene, Inc. v. Pilkington Bros.*, 508 So. 2d 437 (Fla. 3d DCA 1987) (relating to the work-product doctrine).

3. For an example of a discussion of a person's reasonable expectation of privacy in using an employer or third-party provided e-mail communication system, see *Pensacola Firefighters' Relief Pension Fund Bd. of Trs. v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 2011 U.S. Dist. LEXIS 88468, 2011 WL 3512180 (N.D. Fla. July 7, 2011).

ANNOUNCEMENTS

Congratulations to Tenesia Connelly Hall!



During the Florida Bar Annual Convention Judicial Luncheon, she received the 2015 Attorney of the Year Award from the Florida Law Related Education Association, Inc. for outstanding service and commitment to educating the public about the American Legal System and fostering respect and confidence in the courts and the legal profession.



Goodwill or a Good Guess?

By Thomas Gillmore, CPA, CFE, CVA, Winter Park



T. GILLMORE

Whether in a collaborative setting or in a contested divorce proceeding, counsel may need to evaluate the fair market value of a business interest for the purpose of equitable distribu-

tion. One or both spouses may hold an interest in the subject business, which may be that of a medical office, family dentist, non-medical niche-specialty, or other business such as a cabinet shop, or HVAC (heating, ventilation or air conditioning) enterprise.

Under the Florida Supreme Court's instruction in *Thompson v. Thompson*, the business valuation analyst was to seek out and evaluate the various goodwill attributes of a subject business and determine (or opine on) whether each attribute is in the nature of personal or enterprise goodwill:

"We therefore answer the certified question with a qualified affirmative: If a law practice has monetary value over and above its tangible assets and cases in progress which is separate and distinct from the presence and reputation of the individual attorney, then a court should consider the goodwill accumulated during the marriage as a marital asset. *The determination of the existence and value of goodwill is a question of fact and should be made on a case-by-case basis with the assistance of expert testimony.*"¹ (emphasis added).

In *Schmidt v. Schmidt*, the Fourth District Court of Appeal reversed the trial court's valuation of the subject business and remanded for the trial court to ascertain the personal goodwill remaining in the marital portion

of the business which can be determined by analyzing what the value of the business would be if the business owner did not sign a covenant not to compete ("CNC").²

The trial court in *Schmidt*, when pressing the valuation expert to quantify the business value with and without a CNC, would have benefited by the expert's reference to

Thompson v. Commissioner, T.C. Memo 1996-468 (1996) where the Tax Court lists eleven factors to determine the economic reality of a CNC including the following: Grantor's business expertise; Grantor's intent to compete; Grantor's economic resources; Potential damage to the grantee; Grantor's network; Duration and geographic scope of the CNC (limited to seven years in Florida); Enforceability by state law; Age and health of grantor; Payment terms; Payment duration; and, Fairness of negotiations. Having considered these factors, the analyst could opine on the likelihood and degree of moral turpitude of the seller and weight of countervailing actions from the buyer.

The analyst's failures in *Schmidt* are evidenced when the court assigns extraordinarily undifferentiated significance to a CNC as if the personal goodwill of a plastic surgeon is similar or even identical to the personal goodwill of an insurance broker or plumber, by stating: "Because the \$2,520,562 value requires execution of a non-compete agreement, it is clear that such valuation still includes a personal goodwill component."

The *Schmidt* court appears frustrated by the lack of guidance offered by the expert witness; then rightly remands the case.

It is critical to distinguish between: (1) the requirement or existence of a

CNC; and, (2) the quantification of personal goodwill.

In *Held v. Held*, the Fourth District Court of Appeal found that, "for purposes of separating enterprise goodwill from professional goodwill, there was no distinction between a non-compete agreement and a non-piracy agreement."³ Similarly there is no distinction between a CNC between the seller and buyer of: a physician's practice; an insurance broker's book of business; a plumber's geographic operating area; or a Kentucky Fried Chicken location. A plumber with over one-hundred employees who signs a CNC cannot to himself then be allocated 100% of the enterprise value (as personal goodwill).

Regardless of the type of enterprise, the strength of a no-compete assures the buyer that he or she will acquire and hold unimpeded access to the enterprise cash flows being purchased in good faith. The CNC, although critical to the buyer's future success, does not in any way accurately portray the full spectrum of personal goodwill monetary value which varies greatly between a plastic surgeon and the skilled plumber as shown in this example, e.g.: I will actually "wear" the plastic surgeon's goodwill on my face or body part; however, I will not wear the goodwill of a plumber on my face or body. Thus, in my opinion, the plumber's personal goodwill attributes, when considered altogether, rise to a value considerably less than the attributes associated with a plastic surgeon's personal goodwill attributes.

1. Counsel should be aware that a valuation analyst could mistakenly focus on the existence of a CNC as if that is the sole determinant of whether personal or enterprise goodwill exists; or the analyst may

continued, next page

**Goodwill or a Good Guess?***from preceding page*

fail to even consider the CNC as part of the valuation.

2. Counsel should be aware too that even experienced valuation analysts frequently and mistakenly focus on the personalized name of a subject entity as if that is the sole determinant of whether personal or enterprise goodwill exists.

The errant analyst may go further with these mistaken thought processes by stripping away all enterprise value from cash flows; then assign a “fair market value” to the business consisting of some cumulative variant of cash, other assets, plus accounts receivable minus debts. Some analysts will also mistakenly toss in a 10% to 20% liquidity / marketability discount against the cumulative resultant value, thus “quantifying” a supposed difficulty in liquidating cash which of course is a spurious notion. All or any part of this misguided process will expose the errant analyst to tough cross-examination on the stand or at deposition.

Counsel may want to ask their business valuation analyst if he or she is aware of the AICPA reference material titled *The Advisor’s Guide to Healthcare – Consulting with Professional Practices*; authored by renowned healthcare valuation analyst Robert James Cimasi, MGA, ASA, AVA, CM&AA...where Cimasi states: [the appraiser shall] identify, distinguish, disaggregate, and allocate the relevant portion of existing goodwill to either professional or personal goodwill. Mr. Cimasi goes on to say “professional or personal goodwill results from the charisma, education, knowledge, skill, board certification, and reputation of a specific physician practitioner.”

Counsel may also want their expert to be familiar with the work of David Wood CPA, ABV, CVA who developed the multi-attribute utility

model which “recently received ratification” by the court in *Lieberman v Lieberman*, Case No. FD-2008-956 (Tulsa, Okla.), Judge Funderburk presiding. The expert witness in *Lieberman* relied on the Illinois case *In re Marriage of Alexander*, (2006 Ill. App. Lexis 836) to defend against a Daubert-like challenge.

Many of the goodwill attributes identified by both Cimasi and Wood are listed here:

- (1) ability, skills and judgement;
- (2) age & health of the owner;
- (3) closeness of contact with clients or patients;
- (4) comparative personal success in the subject industry;
- (5) marketing and branding associated with the individual;
- (6) marketing and branding associated with the subject entity;
- (7) personal in-bound referrals;
- (8) personal reputation;
- (9) personal staff;
- (10) work habits;
- (11) ancillary services;
- (12) assets in use;
- (13) business name;
- (14) business reputation;
- (15) repeating revenue streams;
- (16) systems and organizational structure;
- (17) workforce in place;
- (18) location of business;
- (19) barriers to entry.

In summary, counsel and the expert valuation analyst should be familiar with at least the previously mentioned differentiators of personal goodwill and enterprise goodwill when evaluating a medical practice, a dental practice, or a niche-market non-medical specialty firm as well as any other business that exhibits identifiable traits of personal and enterprise goodwill.

Thomas Gillmore is a self-employed forensic accountant serving the Central Florida legal community and individuals from his office in Winter Park, Florida since January, 2009. You can reach Tom at www.FloridaDivorceCPA.com

Endnotes

- 1 *Thompson v. Thompson*, 576 So. 2d 267, 270 (Fla. 1991)
- 2 *Schmidt v. Schmidt*, 120 So. 3d 31, 33-34 (Fla. 4th DCA 2013)
- 3 *Held v Held*, 912 So. 2d 637 (Fla 4th DCA 2005)



LEGAL
EXPERTISE
in

Q D R O
Drafting
&
Litigation™



Reduce your
MALPRACTICE
Liability by referring
your clients directly
to our law firm.

CONTACT:

Raymond S. Dietrich,
Chartered

Miami, Florida

305.731.2220
www.galleongroup.net



Third Parties in a Dissolution Action

By Reuben A. Doupé, Esquire, Naples



R. DOUPÉ

If only our client's lives were as simple as the text book facts we learned. They would keep all their assets titled appropriately; they would not deal in assets from their family through informal hand-shake agreements; and they would openly communicate with their spouses regarding the status and ownership interests of their assets. However, as we have come to learn, real-life tends to be sloppy, informal, and sometimes lazy. As a result of some of these traits, it occasionally becomes necessary to join a third party to a divorce action.¹ When the situations arise, it is necessary for the Family Law Practitioner to know when and how to properly join a third party to the action.

Why Third Parties May be Required

A common reason to join a third party to a cause of action is the third party owns or holds a marital asset which your client would like to receive as part of equitable distribution. There are a number of assets that might belong to or be held by a third party, assets belonging to a business entity such as real estate, excess capital (i.e. cash), motor vehicles, life insurance policies, or other capital assets; assets held by a trust; or assets held by other individuals, like a home that remained titled in one spouse's parent's name.

In other situations, a spouse may wish to affect the behavior of another through an injunction. A third party, other than a spouse, may have custodial or time-sharing rights to the parties' child.

Additionally, one of the parties may have a separate cause of action against a third party, which is sufficiently factually or legally related to the dissolution such that it is permissible to join the cause and the third-party defendant to the dissolution action.

In all of these instances, it will be necessary to join the third party to the dissolution action for your client to avail himself or herself of all remedies. Florida appellate case law is replete with reversals for not joining a third party to a dissolution action. For instance, the Second District Court of Appeal stated, "[t]he corporation was not a party to the dissolution action nor was there any evidence or finding that the corporation was a sham or alter ego of the husband. Consequently, the trial court had no authority to order transfer of assets owned by the corporation."² In an effort not to belabor the point, if, at the end of the case, your client wishes to receive a payment of money from or an asset that is owned by someone other than a spouse, then the owner must be joined as a party. This principle is true even if the owner of the property is a company that is 100% owned by the parties.³ Failure to join the third party will be reversible error as a matter of law.

If you need any more convincing of the necessity of joinder, please read the opinion of *Mathes v. Mathes*.⁴ In this case, the Second District Court of Appeals pulled no punches in describing how counsel for both parties failed to join the parties' business, then proceeded to try the case and each asked for relief from the business. The trial court granted a multitude of relief, including setting salaries for the parties from the company, ordering disbursements from the company assets, and ordering the corporation

to be sold, "all without jurisdiction over the corporation and without notice to creditors who might be affected."⁵

When Third Parties Should Be Joined

Obviously, the best time to join a third party is at the outset of the action. To do this, the lawyer must have careful and detailed discussions with his or her client about all assets belonging to or being held by third parties, to determine whether the client is going to make a claim.

Many times, however, the necessity to join a third party will not be obvious until discovery begins, and it will be necessary to amend pleadings to add the third party. The general rules and authority concerning the amendment of pleadings will apply.⁶

How to Join Third Parties

It takes more than simply adding someone to the caption for them to be properly joined.⁷ There must be a proper pleading filed, which alleges facts related to the third party and seeks relief from the third party. In addition, the pleading must be served on the third party with a valid summons. Again, this is true for all third parties, even business entities that are wholly-owned by one or both parties. Joinder will fail if the third party is not properly served.⁸

The most important step in the joinder process is stating a valid cause of action against the third party. The pleading must contain sufficient factual allegations to survive the inevitable motion to dismiss. In doing so, you can simply link your client's equitable interest in property which belongs to a third party into the equitable distribution claim, or

continued, next page



Third Parties in a Dissolution Action

from preceding page

you can set forth separate causes of action against the third party, with or without joining the other spouse into those actions.⁹ Some of the causes of action you may consider: Equitable Claims to ownership (i.e. husband's parents are still on the deed to the marital home); Constructive Trust; Fraudulent Transfers to a Third Party (wife transfers all assets to her boyfriend); Conversion (theft of shares); Wage Violations (failure to pay spouse for work performed); Breach of Shareholder Agreement/Employment Contract; Injunctive Relief; Receivership; and other corporate actions available under Chapter 607 or other appropriate chapter, such as an action for an accounting.

While you may get creative in finding the appropriate cause of action, keep in mind that it is not necessary to bring forth every cause of action your client may have against the third party.

The Third Party Is Joined; Now What?

Once you have successfully served and joined the third party, the third party may need to be represented by counsel. Counsel for the spouses may want to carefully consider whether there are any conflicts before taking on representation of both a spouse-party and a third party. If the third party is a business entity that is owned by both parties, then

independent counsel will be required. This action is an added expense and must be considered before joining the business.

The third party is now a party to the action, just like the spouses, so the third party is entitled to the same rights of the other parties, such as the right to conduct discovery, request a jury trial on the cause of action as it relates to them (if the cause can be separated from the dissolution of marriage action) and all other due process rights.

However, since the third party is not technically a "party" to the dissolution of the marriage, it will not be liable to the other parties for attorney's fees under the authority of §61.16.¹⁰ There may, however, be other authority for the third party to either recover or be held responsible for attorney's fees.

Another tangential issue is determining the tax ramifications of any award from the third party to your client. There are too many variables to cover all of the possibilities in this article, so please have your client consult a tax professional when he or she recovers any award. For example, even if a corporation is ordered to distribute an asset to your client as and for equitable distribution, the IRS tax code only excludes funds transferred from individuals to their spouse or former spouse.¹¹ Thus, any such distribution may have a tax ramification for both the business and the spouse. Additionally, any award of damages may have tax ramifications to your client, so make sure your client sees a tax professional.

In conclusion, the decision of whether

or not to join a third party may be the most important issue in the entire dissolution of marriage action. If the parties hold all significant assets in a trust, or in an LLC, then the only way to break up the assets is to join the trust or LLC as parties. The most frequent mistake made by attorneys, as evidenced by the case law, is forgetting that businesses are separate entities, and if a business owns an asset, then the parties do not own the same asset. While some clients may forget this distinction, their attorneys cannot. Remembering that businesses are separate entities and joining them at the right time is vital to providing your clients with the best representation and getting them the property or payments they deserve.

Reuben A. Doupe, Esq., is an attorney at Klaus Doupe PA in Naples. Reuben is Board Certified in Marital and Family law and is a Fellow in the American Academy of Matrimonial Lawyers. Reuben wishes to thank Stuart R. Manoff, Esq., and Casey M. Reiter, Esq., both of Stuart R. Manoff and Associates, PA, for their assistance and contribution to the legal research done for the preparation of this Article.

Endnotes

1 And sometimes it this necessity is also caused by very detailed and organized clients who have properly titled all assets.

2 *Good v. Good*, 458 So.2d 839 (Fla. 2d DCA 1984).

3 *See Good*, 458 So.2d 839.

4 91 So.3d 207 (Fla. 2d DCA 2012)

5 *Mathes*, 91 So.3d at 208.

6 *Goldberg v. Goldberg*, 309 So.2d 599 (Fla. 3d DCA 1975) (Amendment to join the husband's parents should be allowed because not only was the request to amend timely, but the wife's right to establish her interest in the property could be prejudiced if not presented in the action for dissolution of marriage).

7 *Mathes*, 91 So.3d at 208.

8 Be mindful of long-arm jurisdiction for foreign third parties; and joining all necessary third parties.

9 *See Rosenberg v. North American Biologicals, Inc.*, 413 So.2d 435 (Fla. 3d DCA 1982).

10 *See Clinton v. Carver*, 675 So.2d 642 (Fla. 1st DCA 1996).

11 Internal Revenue Code §1041(a); see also Frumkes of Divorce Taxation Sec. 2.1.1.1 (help with cite for this).





Electronic Evidence

By John Sawicki, Esquire, Tallahassee



J. SAWICKI

Computers, cell phones, and other electronic devices are becoming more important in our daily lives. A recent study from the Pew Research Center's Internet and American Life Project found that 91 percent of the adult population owned some sort of mobile phone and that 61 percent owned smart phones. Indeed, the scope of available electronic evidence is growing. According to the Consumer Electronics Association (the producers of the annual Consumer Electronics Show), the average U.S. household now has more than 24 electronic devices. As we come to rely more heavily on our electronic devices, the trail of evidence that we leave behind grows.

Electronic evidence isn't really a new concept in the realm of criminal law. In the late 80's, Lt. Colonel Oliver North was indicted for lying to Congress about the Iran-Contra affair after senate investigators recovered hundreds of emails North thought he had deleted. Though North's convictions were ultimately overturned on other grounds, they present a great example of the early potential impact of electronic evidence.

When considering digital evidence in a family law case, the first thing that often comes to mind is catching the cheating spouse. Because Florida is a no-fault state, proof of infidelity may often have little impact. However, there are other uses for electronic evidence in family law cases.

The evidence contained in a family's electronic devices may be directly relevant to showing a history of violence or proving contact in violation of a domestic violence injunction.

Business valuations for asset distributions may be entirely dependent on information that is created, transferred, or stored on electronic devices. Digital photos and videos or social media evidence may prove valuable in establishing powerful images of behavior and activity in family law cases.

Forensic analysis of the data a computer user leaves behind can produce a wide variety of information about the user's activity. Most people are aware that a user's browser history can reveal websites visited or that deleted files can generally be recovered until overwritten by the computer's operating system, sometimes months or even years after deletion.

The registry and event logs of Windows based computers track even more extensive information about a user's activity. Lists of installed applications, URLs typed into the address bars of web browsers, logon/logoff dates and times are just a few examples of the activity Windows tracks. Windows even tracks USB flash drives that have been connected by manufacturer and serial number.

Much of the collection of electronic evidence revolves around our communication. Most computer users are well aware that emails have become a common source of evidence in virtually all areas of law. As a result, many users save their more damning communications for other avenues, such as text message (SMS and iMessage) and voice communications. Text messages and voicemails are two often overlooked sources of potential evidence.

After realizing that text messages or voicemails may be helpful to a case, attorneys face the issue of how to go about collecting this evidence. Self-collection may prove problematic because screen captures of text mes-

sages strung together can be awkward to use. In addition, the self-collection by the attorney, a paralegal, or party to a case may cause issues with authentication. Even if you're comfortable putting your assistant on the stand, they may not make the best witness.

A computer forensics expert can extract text messages using specialized tools and deliver them in a table or spreadsheet that is easy to understand, search, and sort. Additional text metadata is available, such as whether or not the text has been read may also be available. In addition, a forensic expert may be able to recover text messages that have been deleted by the user but haven't yet been overwritten by the device.

Even after deleted text messages have been overwritten on a device, it may be possible to recover them from backup files. iPhone backups via both iTunes and iCloud capture snapshots of user data as it resides on the phone. It is possible to retrieve backups from iTunes or iCloud to recover messages that were located on the phone as of the date of the backup.

Voicemails are another great source of evidence that are often overlooked by lawyers. Callers are often willing to speak more freely in a voice message because they don't get to actually read their words before hitting send. Like text messages, voicemails may also be recovered after being deleted by a phone user. For example, iPhones automatically dump deleted voicemails into a separate container until manually deleted a second time by the user. It's not uncommon to find several hundred deleted voicemails residing on a user's iPhone.

Metadata contained within the files of an electronic device can provide additional information about when

continued, page 16



Family Law Section Executive Council Meeting

June 2015
Boca Raton Resort & Club
Boca Raton, FL





**Electronic Evidence***continued from page 16*

and how a file was created. Most user created files contain date and time stamps for the file's modification, creation, and access that are stored by the operating system. However, many applications such as Microsoft Word may also tag a file with a separate creation date and time. Comparing the two time stamps can help determine if the file has been altered.

Cell phone applications can tag files with additional metadata. For example, photos taken with smart phones usually contain EXIF metadata that is automatically tracked within the file itself. EXIF data can include exposure information as well as camera manufacturer and model. Perhaps more importantly, photos taken with the iPhone include GPS location coordinates and altitude of where the photo was taken by default.

Even more evidence may be located on a user's social media account. Users regularly take to social media to publish information that may unknowingly impact litigation. As a

result, Facebook, Twitter, Instagram and similar sites all provide excellent sources of evidence.

Florida courts have recently gone so far as to compel production of social media photos in a personal injury case because they were reasonably calculated to lead to the discovery of admissible evidence regarding the quality of the plaintiff's life before and after injury.¹

Traditionally, attorneys and their staff have captured social media through screen captures or printouts. Facebook even provides a method for a user to download their entire profile. If you have a willing witness who can authenticate the social media posts, these could be viable options.

Computer forensics experts can utilize special software to capture not just an image of a social media post, but the metadata, links, and other data that runs with the posting. For example, Facebook provides approximately 20 different metadata fields with each post including date and time of the post, location, device posted from, and user account making the post. That metadata can be used by an expert to assist with the authentication, and ultimate admis-

sion of the social media posting.

Our daily lives continue to become more dependent on our electronic devices. As a result the opportunity to collect electronic evidence about our activities and behavior has increased dramatically. Being aware of the digital trail we leave behind will enable you to identify potential evidence that would have previously been ignored. That evidence may just save your case.

John D. Sawicki is a forensic computer scientist and attorney in Tallahassee. John is the founder and President of Forensic Data Corp., a firm providing computer and cell phone forensics services throughout the southeastern United States. John received his Juris Doctor from Florida State University and his Master of Science in Digital Forensics from the University of Central Florida. John is admitted to the state bars of Florida and Oregon. He can be reached at john@forensicdatacorp.com.

Endnotes

- 1 *Nucci v. Target Corp.*, 2015 Fla. App. LEXIS 153 (Fla. Dist. Ct. App. 4th Dist. Jan. 7, 2015)



Family Law Section

Save These Dates!

2015-2016

September 24-27, 2015

2015 Fall Meetings
Vinoy Renaissance St. Petersburg
Resort & Golf Club
St. Petersburg, Florida

Oct. 31-November 4, 2015

Out of State Retreat
Hyatt Regency Washington
Capitol Hill
Washington D.C.

January 28, 2016

Midyear Committee Meetings
(Thursday)
Hilton Bonnet Creek
Orlando, Florida

January 29-30, 2016

2016 Marital & Family Law
Review Course
Hilton Bonnet Creek
Orlando, Florida

January 30, 2016

Executive Council Meeting
(Saturday)
Hilton Bonnet Creek
Orlando, Florida



“Cleaning Up” Social Media Before or During Litigation

By Marci Finkelstein, Esquire and Howard Rudolph, Esquire, West Palm Beach

In this digital age where social media is playing an ever increasing role in litigation, attorneys are turning to Facebook, Twitter, Instagram, Message Boards, and blog sites in order to obtain evidence for litigation. There is a treasure trove of information available on the web as people constantly update their followers about their daily lives, share personal comments, messages, photographs, and relationship status. This information is especially fruitful for the family attorney looking to locate hidden assets, unreported income, or gather information in a time sharing dispute. All too often, attorneys are instructing their staff and even their own clients to gather evidence regarding the opposition's social media available to the public. There are also companies such as onlinebloodhounds.com that are dedicated to the investigation of social media in order to provide litigation support.

Given the exponential increase in the use of evidence collected from social media in recent years, it is becoming increasingly common for the family law attorney to inquire either at the time they are retained or more frequently in the midst of litigation, about his or her client's postings on social media in order to determine if the posts will negatively impact their litigation position. The question becomes, can the attorney “clean up” a client's online presence or does this constitute spoliation of evidence? The uncertainty of the answer to that question has left attorneys in an ethical quandary.

In July of 2013, the Virginia State Bar suspended an attorney's license for five years after it was discovered that the attorney had instructed his client, in the midst of his representa-

tion in a wrongful death action, to sign sworn answers to interrogatories stating that his client, the surviving Husband, did not have a Facebook account.¹ After receiving the interrogatories from opposing counsel, the attorney had instructed his paralegal to contact the client and instruct him to remove certain photographs from his Facebook page, including a photograph of the client drinking, surrounded by women and wearing a t-shirt that read “I [heart] hot moms.” The client thereafter deactivated his Facebook account. The attorney and his client were also sanctioned by the court for his actions in the wrongful death matter totaling \$772,000 (\$542,000 against the attorney and \$180,000 against the client).²

In an adversary proceeding in a Texas bankruptcy action, a Federal Judge held that the Defendant's changing of his Facebook settings to private following an incident that gave rise to an underlying personal injury suit, supported the Court's adverse inference regarding Defendant's intent to injure the Plaintiff, thereby making the judgement debt non-dischargeable in bankruptcy.³ In a New York action, after finding that the Plaintiff's postings on her Facebook and Myspace accounts were inconsistent with her claimed injuries, the Court granted the Defendant's request for access to the Plaintiff's private and deleted social media pages.⁴

The question of an attorney's ethical obligations in advising a client to “clean up” their social media prior to the commencement of litigation was recently posed by a Florida Bar member. Proposed Advisory Opinion 14-1 was issued of January 23, 2015. In rendering its opinion, the Committee

refers to Rule 4-3.4(a) of the Rules of Professional Conduct, which states:

“A lawyer must not (a) unlawfully obstruct another party's access to evidence or otherwise unlawfully alter, destroy, conceal a document or other material that the lawyer knows or reasonably should know is relevant to a pending or a reasonably foreseeable proceeding; nor counsel or assist another person to do any such act;”

Rule 4-3.4(a) applies to evidentiary material generally, which includes computerized material.

The question is not whether the client's social media is directly or not directly related to the proceeding, but whether the information is relevant to the proceeding. The Committee refers to a recent Second District Court of Appeal case ruling, which stated “normal discovery principals apply to social media and that information sought to be discovered from social media must be “(1) relevant to the case's subject matter, and (2) admissible in court or reasonably calculated to lead to evidence that is admissible in court.”⁵ The committee has stated that pre-litigation, a lawyer may advise a client to change the privacy settings on the client's social media pages to the highest level of privacy setting so that they are not accessible by the public.

The committee has also advised that pre-litigation, an attorney may counsel a client to remove information from the client's social media page, regardless of its relevance to the potential proceeding, provided (1) the removal does not “violate any substantive law regarding the preservation and/or spoliation of evidence” and (2) the lawyer must then take

continued, next page

**Cleaning Up Social Media***from preceding page*

affirmative steps to preserve an appropriate record of the social media information or data if the attorney knows or should reasonably know that the information may be relevant to the reasonably foreseeable proceeding. Whether information on a social media page may be relevant to the anticipated litigation must be determined on a case-by-case basis.

This opinion makes it clear that while an attorney may advise a client on managing their privacy settings, the issue of "cleaning up" social media postings is still an ethical minefield. Attorneys must now understand how to counsel clients on the consequences of their postings, as well as the ramifications of "cleaning up" their social media accounts. Given the bountiful information readily available to the public, attorneys need to provide their clients with guidance about their online presence at the outset

of litigation. Furthermore, attorneys need to remain current in the law regarding preservation and spoliation of evidence and gain competence regarding preservation of clients' social media information or data or engage information technology professionals to assist with preserving clients' social media information or data.



M. FINKELSTEIN

Marci E. Finkelstein, is an attorney at Rudolph & Associates, LLP, where she practices exclusively in the area of marital and family law. Previously, Marci was an associate at the Law Offices of Gary I. Cohen, P.C. and a partner at the Law Offices of Cohen & Finkelstein in Stamford, Connecticut, where she also practiced in the area of marital and

family law. Marci was admitted to the Florida Bar in 2015. Marci has been a member of the Connecticut Bar since 1998, the New York Bar since 2002 and the Tennessee Bar since 2008. Marci received her Juris Doctor from Touro College, Jacob D. Fuchsberg Law Center and a Bachelor of Arts from the University of Florida.



H. RUDOLPH

Howard M. Rudolph is the managing partner at Rudolph & Associates LLP, practicing exclusively in the area of marital and family law with additional focus on more complex matters such as post/pre martial agreements, child support & custody, domestic relations, professional sports/family law issues and relocation. Mr. Rudolph received his Juris Doctor from Hofstra University where he was Research Editor, Law Review and received his undergraduate from Rutgers University. Mr. Rudolph has been admitted to the New York Bar since 1988 and the Florida Bar since 1990 where he is Board Certified in Family & Marital Law.

Endnotes

- 1 *In the Matter of Matthew B. Murray*, 2013 WL 5630414, VSB Docket Nos. 11-070-088405 and 11-070-088422. (Virginia State Bar Disciplinary Board July 17, 2013).
- 2 *Allied Concrete Co. v. Lester*, 736 S.E.2d 699 (Va. 2013).
- 3 *In re Justin Allen Platt, Debtor*, 2012 WL 5337197, Bankruptcy No. 11-12367-CAG (Tx. 2012).
- 4 *Romano v. Steelcase, Inc.* 907 N.Y.S. 2d 650 (NY 2010).
- 5 *Root v. Balfour Beatty Construction, Inc.*, 132 So.3d 867, 869-870 (Fla.2nd DCA, 2014).

Christopher Rumbold, Esq.

proudly announces the establishment of the

LAW OFFICES OF CHRISTOPHER W. RUMBOLD**Marital & Family Law**

Supreme Court Certified Family Law Mediator

Palm Beach | Broward | Miami-Dade

2301 Wilton Drive-Suite 3C | Wilton Manors | Florida | 33305

954.914.7866 | www.cwrlaw.net

C W R



Prevailing Party Provisions in Family Law Agreements: Mo' Money, Mo' Problems? Not Necessarily

By Hunter Hendrix, Esquire, Tallahassee



H. HENDRIX

It is important to holistically analyze the particular facts of a family law case and attempt to predict the potential, future pitfalls/set-backs that may arise when negotiating and drafting nuptial and paternity agreements (collectively referenced as “family law agreement(s)”). Every provision within a family law agreement must be scrutinized and evaluated based upon the specific facts and personalities involved in each case. An example of such a provision is the prevailing party attorney’s fees provision (“prevailing party provision”), which provides for an award of attorney’s fees and costs in favor of the prevailing party in the event of a future enforcement action.

Prevailing party provisions are generally considered “boilerplate” language and, as a result, they are commonly overlooked by attorneys while negotiating and drafting family law agreements. The exact language of prevailing party provisions varies widely, but the inclusion is standard, even though its use should be carefully considered in light of Sections 61.16 and 742.045, Florida Statutes. The purpose of this article is to highlight this important provision by examining: (1) how to construct an effective prevailing party provision depending upon which party you represent and the specific facts of the case, (2) when prevailing party provisions should be included within

family law agreements, and (3) the potential effects of such provisions.

Florida Law Without a Prevailing Party Provision

It is well settled that “attorney’s fees cannot be awarded unless authorized by statute or agreement of the parties.”¹ Absent a provision within an agreement, Section 61.16, Florida Statutes, determines whether a party is entitled to attorney’s fees in proceedings related to dissolution of marriage.² Section 61.16, Florida Statutes, states in part:

(1) The court may from time to time, after considering the financial resources of both parties, order a party to pay a reasonable amount for attorney’s fees, suit money, and the cost to the other party of maintaining or defending any proceeding under this chapter, including enforcement and modification proceedings and appeals....

Section 742.045, Florida Statutes, mirrors Section 61.16, for paternity cases.³ The purpose of these Sections are to ensure that both parties have a “similar ability to obtain competent legal counsel.”⁴ Therefore, judges are required to consider the financial resources available to each party and determine whether the party seeking fees has an actual need for attorney’s fees and whether the other party has an actual ability to pay an attorney fee award.⁵ It should be noted that a party does not have to be completely unable to pay their attorney’s fees as a prerequisite for the trial court to enter an order requiring the other

party to contribute toward or fully pay the other’s fees.⁶

Interpreting Family Law Agreements

Interpretations of family law agreements are governed by contract law.⁷ A party’s entitlement to fees and costs in the event of an enforcement action will depend upon the language of the prevailing party provision, if one is included. As a general rule, Chapters 61 and 742 do not control when the parties have voluntarily entered into a family law agreement and such agreement contains a prevailing party provision.⁸ The purpose of family law agreements is to lessen the court’s discretion when deciding issues addressed within the agreement.⁹ Each provision “must be strictly construed”¹⁰ and a court may not ignore or alter provisions within the agreement.¹¹ Further, a court may not save a party from his or her own bad bargain by rewriting an agreement voluntarily entered into by parties.¹²

Drafting a Prevailing Party Provision

Attorneys should be careful when drafting or reviewing prevailing party provisions because these terms must be strictly construed.¹³ Fees and costs must be specifically provided for in order to establish a contractual right to the relief and remove the issue from the purview of Section 61.16 or Section 742.045.¹⁴ For example, if a party wishes to be permitted to seek fees and costs for litigating the

continued, next page



Mo' Money, Mo' Problems? Not Necessarily

from preceding page

amount of attorney's fees, not simply the question of entitlement, the party should ensure that the prevailing party provision explicitly provides for such an award.¹⁵ Further, in order to guarantee that appellate fees will be awarded to a prevailing party, and perhaps diminish the likelihood that the issue will be litigated, a party should clearly state that appellate fees and costs are to be awarded to the prevailing party.

A common mistake attorneys make when drafting prevailing party provisions is including the word "default." Courts have interpreted "defaulting party" provisions that contain language such as:

"Should either party fail to abide by the terms of this Agreement, the defaulting party will indemnify the other for all reasonable expenses and costs including attorney's fees incurred in the enforcement of this Agreement"

to not be a prevailing party provision at all.¹⁶ Instead, such language will be interpreted by courts as tying a party's obligation to pay attorney's fees to a "default" in that party's obligations under the agreement.¹⁷ On its face, this distinction does not appear to be crucial. However, because prevailing party provisions contained within family law agreements are bilateral, depending upon the facts of a particular case, tying a party's obligation to a "default" can render a prevailing party without a contractual right to seek attorney's fees and costs.¹⁸ For example, in a case where a party brings an action to enforce a provision within a family law agreement and loses, the prevailing party who successfully defended against the enforcement action would not be entitled to fees and costs as a prevailing party because the party who brought the action did not "default."¹⁹ A party will not be deemed to have defaulted merely because the other

party prevailed in defending against an enforcement action.²⁰

Another mistake attorneys make is not explicitly using the words "attorney's fees."²¹ A prevailing party provision that only provides for "expenses" or "costs" may not be interpreted as providing a prevailing party his or her attorney's fees.²² Terms like "costs" and "expenses" are not "generally construed to include attorney's fees absent an express contractual provision that defines expenses to include fees."²³

Representing the Impecunious Party

When representing an impecunious party, an attorney should be cautious when agreeing to include a prevailing party provision within a family law agreement because it may not be in the impecunious party's best interest. The impecunious party may be entitled to at least a portion of his or her legal fees from the other party under existing Florida law, regardless of which party prevails in an enforcement proceeding.²⁴ Pursuant to Chapter 61 and Chapter 742, Florida Statutes, and relevant case law, if the opposing party has an ability to pay attorney's fees and costs and the impecunious party has a need for attorney's fees and costs, the impecunious party may be entitled to an attorney fee award. If the previous facts are present, an impecunious party may be better off proceeding under Chapter 61 or Chapter 742.²⁵ If a prevailing party provision is to be added within a family law agreement, the attorney should advise his or her client of the ramifications of such provision, i.e. if there is a prevailing party provision within an agreement, either Section 61.16 or Section 742.045 "cannot be used as a basis for an award of attorney's fees"²⁶ and the court must strictly adhere to the prevailing party provision.²⁷ A

court may not balance the equities²⁸ among the parties and it is irrelevant whether the action was brought in good-faith.²⁹

When representing an impecunious party, the family law practitioner should consider (1) whether it is foreseeable that the client will become the "moneyed" party in the future, (2) whether there is a possibility that the client will violate the agreement, or (3) whether the client is likely to unnecessarily litigate against the other party. If a client may become the moneyed party at a later date, then the family law practitioner should consider using the below analysis and opt to either include or allow a prevailing party provision to be inserted into a family law agreement. However, if there is a possibility, for whatever reason, that the client will violate the agreement in the future or unnecessarily litigate against the other party, the attorney may want to prevent or avoid having a prevailing party provision within the family law agreement. It may be that the client will ultimately have to pay attorney's fees for violating a provision of the agreement; however, it may be best not to have the provision within the agreement, forcing the other party to seek relief pursuant to existing Florida law.

Representing the "Moneyed" Party

An attorney representing a moneyed party may want to include a prevailing party provision within that party's family law agreement in order to avoid the need and ability to pay analysis contained within Sections 61.16 and 742.045, Florida Statutes. In a case where a significant financial disparity exists between the parties, and there is no prevailing party provision in the family law agreement, the moneyed party will have exposure to being required to pay the fees of the



other party, regardless of the merits of the enforcement action, in Chapter 61 or Chapter 742 proceedings.

If enforcement litigation occurs related to a family law agreement containing a prevailing party provision and the moneyed party prevails, the moneyed party is entitled to seek fees and costs from the non-prevailing party.³⁰ However, the moneyed party may have an issue collecting the fee award if the other party does not have the financial resources available to pay an attorney fee award. In that case, the moneyed party's only remedy may be to seek a money judgment from the other party. Receiving a money judgment against the other party may be better than nothing and the threat of a judgment may dissuade the impecunious party from filing unfounded or nuisance enforcement actions against the moneyed party.

When representing a moneyed party, it is best to include a prevailing party provision whenever possible. Without such a provision, the moneyed party will almost never be able to recoup fees incurred in an enforcement action, regardless of which party violated the agreement or which party prevailed in the enforcement action. In fact, the moneyed party could be charged with the opposing party's fees, even if the opposing party is the bad actor, dissuading the moneyed party from enforcing rights properly negotiated and contained within the family law agreement.

Closing

It is understandable that, when drafting family law agreements, at-

torneys tend to focus on provisions which they anticipate will immediately affect their clients' lives, such as time-sharing/parenting plans, equitable distribution, alimony, child support, etc. As family law practitioners are well aware, negotiations, whether in formal mediation or through informal avenues, can be exhausting, tedious, and overwhelming, especially for younger, less experienced practitioners. Therefore, after all the substantive issues are agreed upon, it is easy to forget to closely examine the general, "boilerplate" language. However, failing to adequately consider all the practical and legal ramifications of prevailing party provisions can prove to be very costly to your client if an issue ever arises regarding the enforcement of a family law agreement.

Hunter J. Hendrix began working as a law clerk in The Law Office of Linda A. Bailey, P.A., while in law school at Florida State University. He immediately began dedicating himself to a career in marital and family law. After graduation from law school and becoming a member of the Florida Bar in 2013, Mr. Hendrix joined the firm as an associate, where he continues to grow his practice exclusively in the area of marital and family law. Mr. Hendrix is also active in the Tallahassee Bar Association, Access Tallahassee, and Thunderdome Tallahassee.

Endnotes

- 1 Scott v. Scott, 303 So. 2d 683, 684 (Fla. 4th DCA 1974).
- 2 Rosen v. Rosen, 696 So. 2d 697, 699 (Fla. 1997); section 742.045 of the Florida Statutes is a mirror to section 61.16 for paternity cases.

Rosen v. Rosen applies to section 742.045 as well – Guerin v. DiRoma, 819 So. 2d 968, 971 (Fla. 4th DCA 2002).

- 3 Guerin, 819 So. 2d 968, at 971.
- 4 Id. at 698; Canakaris v. Canakaris, 382 So. 2d 1197 (Fla. 1980).
- 5 Id. at 697; *id.*
- 6 Id.; *id.*
- 7 Taylor v. Taylor, 1 So. 3d 348, 350 (Fla. 1st DCA 2009); Zakian v. Zakian, 837 So. 2d 549, 550 (Fla. 4th DCA 2003).
- 8 Turchin v. Turchin, 16 So. 3d 1042, 1044 (Fla. 4th DCA 2009).
- 9 Id.
- 10 Miller, 107 So. 3d 430 at 432-433; Wendel v. Wendel, 852 So. 2d 277 at 282.
- 11 Churchville v. GACS Inc., 973 So. 2d 1212, 1216 (Fla. 1st DCA 2008); See also Delissio v. Delissio, 821 So. 2d 350, 353 (Fla. 1st DCA 2002).
- 12 Id.; See also Delissio, 821 So. 2d 350 at 353.
- 13 Williams, 892 So. 2d 1154 at 1155; Wendel, 852 So. 2d 277 at 282.
- 14 Miller, 107 So. 3d 430 at 432; Wendel, 852 So. 2d 277 at 282.
- 15 Wight v. Wight, 880 So. 2d 692 (Fla. 2d DCA 2004).
- 16 Zakian, 837 So. 2d 549 at 552.
- 17 Sacket v. Sacket, 115 So. 3d 1069 (Fla. 4th DCA 2013).
- 18 Id.
- 19 Id.
- 20 Id. at 171.
- 21 Wendel, 852 So. 2d at 282.
- 22 Id.
- 23 Id.
- 24 Id. at 698; *id.*; See also Fla. Stat. § 61.16.
- 25 Id.; *id.*; See also Fla. Stat. § 61.16.
- 26 Ulbrich v. Coolidge, 935 So. 2d 607, 608 (Fla. 4th DCA 2006).
- 27 Williams v. Williams, 892 So. 2d 1154, 1155 (Fla. 3d DCA 2005).
- 28 Brickell Bay Club Condo. Asso., Inc. v. Forte, 397 So. 2d 959, 962 (Fla. 3d DCA 1981).
- 29 McCormick v. Molenkamp, 449 So. 2d 384, 386 (Fla. 1st DCA 1984).
- 30 Miller v. Miller, 107 So. 3d 430, 432 (Fla. 4th DCA 2012); Wendel v. Wendel, 852 So. 2d 277, 282 (Fla. 2d DCA 2003).

Cover Photos Needed!!!

YOU COULD HAVE YOUR PHOTO PUBLISHED!

If you would like to submit a large format photo for consideration, please email it to Sarah Kay, Vice Chair of the Commentator, at Sarah@mbc-lawoffice.com.



The Family Law Section
**Out of State
Retreat**

October 31 - November 4, 2015

Hyatt Regency Washington on Capitol Hill
400 New Jersey Avenue NW
Washington, DC 20001





**Included in Registration*

All Supreme Court applicants and guest participating in the Swearing-In Ceremony must register for the retreat

Saturday, October 31, 2015

- 6:00 p.m. - 7:00 p.m.
Registration and Welcome Reception*
Capitol B

Sunday, November 1, 2015

- 8:30 a.m. - 9:30 a.m.
Breakfast*
Thornton Lounge, 11th Floor
- 9:30 a.m. - 11:30 a.m.
CLE (1501085N)*
United States Supreme Court Practice and Developments
Major General William K. Suter,
U.S. Army (Ret.)
Thornton Lounge AB, 11th Floor
- 11:30 a.m. - 12:30 p.m.
Executive Council Meeting
Thornton Lounge AB, 11th Floor
- LUNCH AND AFTERNOON ON YOUR OWN**
(See website link for suggested "dine arounds" and activities while in DC)
- 7:15 p.m.



Major General William K. Suter
Clerk of the Supreme Court of the United States (1991-2013)

Monuments by Moonlight Night Tour*
Meet in lobby at 7:15 p.m. Eat dinner prior to tour.

Enjoy champagne and delicious desserts in this all-encompassing night tour of Washington. Guests will pass such sights as the **White House**, the **U.S. Capitol Building**, the **Old Post Office Building**, the **Washington Monument**, **Smithsonian Museums**, and **World War II Memorial**, **Tidal Basin** and **Jefferson Memorial**. The tour will circle the inspiring **Iwo Jima Memorial** and then make a stop at the **Lincoln Memorial** to explore the tribute to President Abraham Lincoln and enjoy the stunning views down the National Mall and Potomac River. A short walk from the Lincoln Monument is the **Vietnam** and **Korean War Memorials** – both moving tributes to our country men who served in these conflicts and stunning to see cast in an amber glow at night.

CLE CREDITS

CLER PROGRAM	CERTIFICATION PROGRAM
(Max. Credit: 2.5 hour)	(Max. Credit: 2.5 hours)
General: 2.5 hours	Marital and Family Law: 2.5 hours

Monday, November 2, 2015

- 7:00 a.m. - 12:00 p.m.
United States Supreme Court Private Breakfast and Swearing-In Ceremony (scheduled applicants and guest only)
7:00 a.m. – Meet in the Lobby
8:00 a.m. – Private Breakfast
9:00 a.m. – Swearing-In Ceremony
10:00 a.m. – Oral Arguments
**Refer to dress code and items allowed as listed on FLS website

- Morning **ON YOUR OWN** for registrants not attending Supreme Court on Monday. Breakfast vouchers for hotel restaurant provided at registration.*

- 12:00 p.m. - 4:00 p.m.
Group Lunch and Private Tour of U.S. Capitol (all registrants)*
Everyone to meet at Capitol Building entrance prior to going through security.
Sponsored by Congressman Ted Deutch

- EVENING AND DINNER ON YOUR OWN**

Admission to the United States Supreme Court

Please refer to the documents available on the FLS website (www.familylawfla.org) regarding the application process for Admission to the United States Supreme Court. Space is extremely limited.

All completed applications must be received by Julia A. Wyda, Esq. by August 12, 2015

Tuesday, November 3, 2015

- 7:00 a.m. - 12:00 p.m.
United States Supreme Court Private Breakfast and Swearing-In Ceremony (scheduled applicants and guest only)
7:00 a.m. – Meet in the Lobby
8:00 a.m. – Private Breakfast
9:00 a.m. – Swearing-In Ceremony
10:00 a.m. – Oral Arguments
**Refer to dress code and items allowed as listed on FLS website

- Morning **ON YOUR OWN** for registrants not attending Supreme Court on Tuesday. Breakfast vouchers for hotel restaurant provided at registration.*

- LUNCH AND AFTERNOON ON YOUR OWN**

- GROUP RECEPTION AND DINNER at The Occidental Grill & Seaford Restaurant***
5:45 a.m. – Meet in the Lobby
6:00 p.m.-7:00 p.m. – Group Farewell Cocktail Reception
7:00 p.m.-9:30 p.m. – Dinner at The Occidental Grill & Seafood Restaurant*
Transportation Provided

Wednesday, November 4, 2015

- Depart



Registration Form

Out of State Retreat

October 31 - November 4, 2015 • Hyatt Regency Washington on Capitol Hill • Washington, DC

TO REGISTER BY MAIL, SEND THIS FORM TO: The Florida Bar, Order Entry Department, 651 E. Jefferson Street, Tallahassee, FL 32399-2300 with a check in the appropriate amount payable to The Florida Bar or credit card information filled in below. If you have questions, call 850/561-5831.

Name _____ Florida Bar # _____

Address _____

City/State/Zip _____ Phone # _____

E-mail _____

Guest Name: _____

ET: Course No. 1501085N

REFUND POLICY: A \$25 service fee applies to all requests for refunds. Requests **must be in writing and postmarked** on or before September 30, 2015.

REGISTRATION <i>All Supreme Court applicants and guest participating in the Swearing-In Ceremony must register for the retreat.</i>	ITEM #	QUANTITY	COST	TOTAL COST
<input type="checkbox"/> Section Member	8100140	_____	\$450	\$_____
<input type="checkbox"/> Guest of Section Member # Adults _____ # Children (age 13 and above) _____ /ages _____	8100141	_____	\$380	\$_____
<input type="checkbox"/> Non-Section Member	8100142	_____	\$495	\$_____
<input type="checkbox"/> Sponsor	8100143	_____	\$380	\$_____
<input type="checkbox"/> Monument Tour (included in registration but must indicate attendance for reservation purposes) _____ # Attending _____ Children 12 and under and not registered as a guest	8100144	_____	\$30	\$_____
			TOTAL ENCLOSED \$_____	

METHOD OF PAYMENT (CHECK ONE): Check enclosed made payable to The Florida Bar Credit Card (Fax to 850/561-9413) MASTERCARD VISA DISCOVER AMEX Exp. Date: ____/____ (MO./YR.)

Signature: _____

Name on Card: _____

Billing Address with Zip Code: _____

Card No. _____



Please check here if you have a disability that may require special attention or services. To ensure availability of appropriate accommodations, attach a general description of your needs. We will contact you for further coordination.



Are you getting the most from your Member Benefits?



Visit www.floridabar.org/memberbenefits for a complete list of member benefits



The Florida Bar Practice Resource Institute

PRI

Promoting Excellence in the Profession

CAREER CENTER

Searching for a job or looking to fill a position?

With easy to use search tools, The Florida Bar Career Center is the #1 source for job seekers to find opportunities to help advance their careers. Employers will also find that the Career

Center provides the resources needed to make recruitment more efficient and successful.

Visit
The Florida Bar
Career Center
today!



job seeker

employer

Advance Your Career

It's fast, easy and free! Register today and explore the opportunities that will take your career to the next level.

Post Your Resume Anonymously

Simply post your resume or create an anonymous career profile and employers will contact you directly with new opportunities.

Search Through Premier Job Postings

Search the many jobs in your field that are not widely available on other career sites.

Receive Job Alerts

Create job alerts based on various criteria and new opportunities will be emailed directly to you.

Hire Qualified Job Seekers

Reach qualified candidates who have the experience and expertise to fill your positions.

Save Time and Money

Single out candidates who specialize in your field and advertise positions to them at a fraction of what it costs on other job boards.

Post Multiple Positions

From one posting package to unlimited access, there are many options available to assist you in your recruitment.

Receive Resume Alerts

Create resume alerts based on various criteria and you will be notified of qualified candidates directly via email.

For more information, visit us online at www.floridabar.org/PRI



Advertise in the *Commentator* or *FAMSEG!*

Advertise in the *Commentator* or *FAMSEG* only

1/3 page (2 1/4 x 9 3/8 in) \$275.00
1/2 page (7 1/4 x 4 5/8 in) \$350.00
2/3 page (4 3/4 x 9 3/8 in) \$550.00
Full page (7 1/4 x 9 3/8 in) \$680.00
Back Cover (7 1/4 x 7 1/4 in) \$1050.00

FAMSEG
One Size \$200.00

Your advertisement may be submitted electronically as a .jpg, .tif or pdf file, at 300 ppi or larger. Black & white camera-ready copy is also acceptable. Payment is by check only and must accompany the proposed ad and signed agreement below. Payment will be accepted on a per-issue basis only.

The Family Law *Commentator* will accept all advertising that is in keeping with the publication's standards of ethics, legality and propriety, so long as such advertising is not derogatory, demeaning or contrary to The Florida Bar rules and procedure; Standing Board Policy 13.10 (e). The editor reserves the right to place the submitted ad in an issue as space permits during the layout stage.

For further information, contact Beth Anne Trombetta, Section Administrator, 850/561-5650 or etrombetta@flabar.org Company

Name: _____

Address: _____

Contact: _____

Phone No (____)____-____ Email: _____

Payment Enclosed: \$ _____ (payable to: The Florida Bar)
 Item # 8100091

I hereby agree to comply with all of above procedures and policies as set forth by the Family Law Section of The Florida Bar .

Contact Signature

Date

Send to: Beth Anne Trombetta, Administrator, The Florida Bar, 651 E. Jefferson St., Tallahassee, FL 32399-2300

The Florida Bar
651 East Jefferson Street
Tallahassee, FL 32399-2300

FIRST CLASS
U.S. POSTAGE
PAID
TALLAHASSEE, FL
Permit No. 43

