Message From the Chair

On behalf of the Family Law Section of The Florida Bar, I hope you enjoy our latest edition of The Commentator.

One of my earliest mentors, Brenda Abrams, Esq., a former Chair of the Family Law Section, taught me something that has stayed with me throughout the two decades since: “It is a wise man (or woman, of course) who knows his ignorance.” How does that apply to our practice of family law? Invariably, issues arise in our daily practices that are outside the normal confines of Chapters 61, 39, 741 or 742 and the smattering of other provisions in the law that we labor in so intensively on a day to day basis. Whether they are real property issues, landlord-tenant issues, constructive trusts or equitable liens, securities or stock option issues, immigration issues, or simply general civil litigation, the list goes on and on. That is when it certainly helps to have some background and understanding of these other areas of law that impact what we do and how we counsel our clients in the family law arena. However, we must not assume we have the same depth of understanding in these collateral matters as we do in our stock and trade: family law.

With this in mind, I am pleased to present the latest Commentator. In the pages that follow you will find valuable insights, tips and pointers on how to manage the occasional issue that genuinely falls outside the broad breadth of domestic relations law. Like preparing for a thought provoking law school exam, it is our hope that these essays help you to identify issues and know when you need a better understanding or, perhaps, the advice of an attorney more seasoned in that practice area. I want to thank the authors of these articles as well as the contributors to earlier issues of the Commentator this year for sharing their time and acumen.

This issue of the Commentator is going to print right after the Section’s Annual Meeting in conjunction with The Florida Bar Annual Convention at the Boca Raton Resort & Club on June 23 through 26, 2010. Our Section Luncheon marked the “changing of the guard” for Section officers and my opportunity as outgoing Chair to personally thank all of the hard working men and women who have devoted their time and energies to the work of the Section over the past year. Since many of you were not able to join us in Boca, I am exercising my “Chair’s Prerogative” to extend my appreciation in the short space available to me to those who have helped to make this year a tremendous success.

By now you all know that on the last day of this past legislative session, House Bill 907 passed both houses and was signed by the Governor on June 3, 2010. The passage of the Bill marked the culmination of hundreds of hours of work of many caring and generous members of the Section, our highly skilled and effective lobbyists, and compassionate legislators who have a true appreciation for the Section’s goals. I wish to congratulate our Legislative Co-Chairs Elisha Roy and Patricia Alexander and Co-Vice Chairs Thomas Duggar and Maria Gonzalez for carrying this legislation into the “end zone.” I cannot say enough about our lobbyists Nelson Diaz, Edgar Castro and their entire team at Becker & Poliakoff, P.A. They have served the Section for three years and it is a relationship that I personally hope continues for many years to come. I also want to thank Senator Storms and Representatives Frishe and Flores for working

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from preceding page

with us on these important and, I dare say, historic pieces of legislation for families in Florida. Last but certainly not least, a very special thank you goes to my good friend and colleague Tom Sasser for his hard work above and beyond the call of duty, behind the scenes and mostly thankless efforts to make this legislation a reality.

As I have said countless times throughout the year, in addition of our legislative undertakings it is the Section’s work educating our constituents that promises to achieve our greatest calling: to help families reduce conflict and facilitate cooperation between parents in championing the best interests of children throughout our State. We do this through the many CLE programs that we present throughout the year and through publications like this one, the articles that appear in The Florida Bar Journal on behalf of the Section, and our recently revitalized electronic newsletters. Our CLE and Publications Committees are blessed with thoughtful leaders and industrious “worker bees” without whom the Section would be rendered practically meaningless. Tremendous credit goes to CLE Co-Chairs Doug Greenbaum and Eddie Stephens, Publications Committee Co-Chairs Luis Insignares, Ingrid Keller and Laura Davis Smith, and the other committee officers who have moved up the ranks and are now poised to take over the reins of these important committees. I would be remiss were I not to also thank our Certification Review Committee Chairs, Melinda Gamot, Carin Porras, Caryn Green and Ingrid Keller for their exhausting efforts making this past year’s Family Law Review Course better than ever.

The limited space here does not permit me to thank all of those who have contributed meaningfully to the year’s successes as well as those who have laid the groundwork this year for the invariable successes of the years to come. I do, however, wish to thank General Magistrate Norberto Katz for his continued leadership, Amy Hickman for her expertise and valued counsel to the Section in working with the Standing Committee on the Legal Needs of Children this year, Lawrence Datz for his continued effort in helping the Section shape the administration of Parenting Coordination throughout the state, Cynthia Greene for her continued service as a premier lecturer as well as her work serving on the Section’s Amicus Committee, Jack Moring for resuscitating FAMSEG, Charles Fox Miller for organizing our unforgettable Spring Retreat in Manhattan, Kim Nutter for all of her hard work on the Guardian Ad Litem training manual, Susan Savard and Michael Gilden for spearheading the Section’s efforts to improve the quality of the mandatory Parenting Class throughout the State, Allyson Hughes and her faculty for their herculean efforts in organizing and presenting the Section’s Trial Advocacy Workshop, and Dr. Deborah Day for her service as “special counselor” to the Chair. I would also like to thank the American Academy of Matrimonial Lawyers for sponsoring this year’s Family Law Review Course and their administrator, Susan Stafford, for her adept assistance with our premier seminar. Special thanks also go to Terry Hill, Director of the Florida Bar Programs Division, for his gracious assistance throughout the year, and to Summer Hall, our Section Administrator for her reliable assistance with even the smallest details in overseeing the Section’s many undertakings.

Throughout the year I relied heavily on the other officers of the Section, Chair-Elect Diane Kirigin, who I know will do the Section proud as Chair; Treasurer, now Chair-Elect David Manz; and Secretary, now Treasurer Carin Porras. I cannot thank them enough. Finally, heartfelt thanks to Jeffrey Weissman, my long-time law partner, also a member of the Section’s Executive Council, for his unyielding support both within the Section and personally and professionally outside of our work in the Section. The only acknowledgment I will allow myself is the good fortune of working with so many kind and generous people and friends. The real credit goes to all of you. Thank you.

— Peter L. Gladstone, Chair
Editor’s Corner
By Luis E. Insignares, Fort Myers

We are pleased to present an information-packed double edition of the Commentator addressing two timely and relevant topics: “Commercial Issues in Family Law” and “Non-Traditional Families.” Thanks to Robin Vines, in Fort Lauderdale, Associate Editor of the Commercial Edition, and to Abigail Beebe in West Palm Beach, Associate Editor of the Alternative Families Edition. As always, we couldn’t have brought you this issue without Summer Hall and Lynn Brady at The Florida Bar.

I hope that you will find the articles on both topics helpful and informative in your everyday practices. Here is a brief overview of what’s inside:

On the “Commercial Issues” side, Ceci Culpepper Berman writes about “The Proper Use of Commercial Mechanisms in Family Law Matters.” In her article, Ms. Berman considers the concepts of Lis Pendens, Constructive Trusts and Ensuring the Security of a Judgment, sometimes referred to as “securing an asset.” Carolyn Delizia Swift of Fort Myers addresses the question of when to join a corporation in a divorce case in her article, “Divorce and the Family Business – To Join, or Not to Join?”

Also included is an article I wrote explaining the issue of “Sequestration and Receivers in Florida Divorces,” a topic that many practitioners have asked us to cover. In addition, Michelle North-Berg brings us a very interesting and relevant piece dealing with foreclosures: “What the Family Law Attorney Should Know about Foreclosures in Florida.” Finally, Associate Editor Robin Vines shared with us her article: “Are Your Emails Waiving the Attorney Client Privilege?” which deals with questions that arise on the widely used practice of emailing, a crucial topic in today’s technological world.

Then follows a collection of articles on the topic of “Non-Traditional Families” which addresses the unique issues and considerations that family law practitioners may face as they advise same-sex couples and opposite-sex cohabitants. Please note that while this publication does not take a position in favor of or opposed to same sex marriages, civil unions, or cohabitation relationships, we do recognize that such relationships exist and that many of us have clients or potential clients with varying definitions of “family.” As family attorneys, we are faced with the fact that participants in such relationships have a need for information and legal services relating to the formation and dissolution of their relationships, as well as the legal rights and responsibilities each party may or may not have with respect to the income, property, children or person of the other.

Finally, if you are interested in working in the Family Law Section, we urge you to consider registering for and attending the 2010-2011 Family Law Section Leadership Retreat and Legislative Update which will take place from July 29 - August 1, 2010 at the beautiful Hammock Beach Resort, in Palm Coast, Florida. You will learn about the Section’s structure and its work, and have the opportunity to participate in team building activities and long range planning.

As of the next issue, Laura Davis Smith of Miami will be assuming the Commentator’s editorial duties dealing with Children’s Issues. I want to take this opportunity to thank Laura for all of her assistance during my term as Editor and wish her much success.

Thanks to the Commentator Co-Editors, Laura Davis Smith and Ingrid Keller.
The Family Law Section’s 2010 LEADERSHIP CONFERENCE is scheduled to occur Thursday, July 29th, 2010 - Sunday, August 1st, 2010 at the beautiful Hammock Beach Resort in Palm Coast, Florida. If the Section’s pending legislation becomes law, we will also be conducting a LEGISLATIVE UPDATE during the Conference. **All Executive Council Members and Committee Officers should attend this Leadership Conference!** Any Section members who are interested in ultimately serving on the Executive Council are welcome to attend as well.

*Complete brochure available on the Family Law Section website:  www.familylawfla.org.*
The Proper Use of Commercial Mechanisms in Family Law Matters

By Ceci Culpepper Berman, Esq.

On occasion, a family law practitioner encounters legal devices more commonly employed in commercial litigation. This article is a brief introduction to a couple of those devices, including how and when they should be used in family law.

Lis Pendens

One statutory mechanism that appears from time to time is lis pendens. A lis pendens is filed under section 48.23, Florida Statutes. It is “the jurisdiction, power, or control which courts acquire over property involved in a pending suit.” Med. Facilities Dev. v. Little Arch Creek Props., Inc., 675 So. 2d 915, 917 (Fla. 1996). If the primary purpose of a lawsuit is to recover money damages, and the action does not directly affect the title to or the right of possession of real property, filing a notice of lis pendens is unauthorized. DeGuzman v. Balsini, 930 So. 2d 752, 755 (Fla. 5th DCA 2006). Often, when filing certain types of lawsuits, a party simultaneously files a notice of lis pendens because the action is based on a duly recorded instrument concerning the real property described in the lis pendens. See § 48.23, Fla. Stat. (2009). A common example of this situation would be a mortgage foreclosure action.

When the action is not based on a recorded instrument affecting title to property, the court may, and almost always will, require a bond to be posted by the party who filed the notice of lis pendens. See DeGuzman, 930 So. 2d at 754. This is because a lis pendens clouds title to property, causing potential damage to the property owner. See id.; Haven Ctr., Inc. v. Meruelo, 995 So. 2d 1166, 1167 (Fla. 3d DCA 2998). Essentially, a notice of lis pendens does not go hand-in-hand with filing a lawsuit unless that lawsuit is directly connected to the right or title to the property itself. There is an exception when the litigation is not connected to the property, but the filer of the lis pendens holds a lien against the property as a result of a recorded judgment (the lis pendens is then appropriate because it is founded on a recorded instrument). See DeGuzman, 930 So. 2d at 755.

Generally speaking, most family law litigation does not meet this test. See, e.g., id. at 754-55 (finding lis pendens improper where wife filed notice of lis pendens in conjunction with contempt/enforcement action to recover child support and other financial relief); Sheehan v. Reinhardt, 988 So. 2d 1289, 1290-91 (Fla. 2d DCA 2008) (ordering discharge of lis pendens where filed with complaint based on marital settlement agreement, which did not support a direct claim against the property because claim was for money damages, not one affecting title to or the right of possession of the real property). For instance, if a wife is battling with her husband about child support, it is reckless for her attorney to file a notice of lis pendens relating to the husband’s property. That piece of property is not properly connected to the litigation. Moreover, there is no recorded judgment yet, and a lis pendens cannot be filed by the wife in anticipation of an award against the husband.

Constructive Trust

A second device subject to misuse is a constructive trust. The elements for constructive trust are: (1) a promise; (2) transfer of the property and reliance thereon; (3) a confidential relationship; and (4) unjust enrichment. Bergmann v. Slater, 922 So. 2d 1110, 1112 (Fla. 4th DCA 2006).


Constructive trust is an equitable remedy. It restores property to a rightful owner and prevents unjust enrichment. Carollo v. Carollo (“Carollo I”), 972 So. 2d 930, 931 (Fla. 3d DCA 2007). Most commonly, a constructive trust claim is successfully proven when a party has an equitable claim to a piece of property, but not the deed or title to that property. E.g., Varnes v. Dawkins, 624 So. 2d 349, 350-51 (Fla. 1st DCA 1993) (finding constructive trust claim properly stated where plaintiff asserted that she conveyed property to defendant with oral agreement that defendant would reconvey property to plaintiff, and defendant later refused to reconvey).

In the family law arena, constructive trust claims have their place, but only when properly used. A proper use can be found in dissolution proceedings as a deferred distribution method when, during the structuring of the equitable distribution, certain marital property is difficult to value. Among others, items that might be marital property but are difficult to value can include stock appreciation rights and unvested stock options acquired during the marriage. See Hollister v. Hollister, 965 So. 2d 341, 345 (Fla. 2d DCA 2007); Jensen v. Jensen, 824 So. 2d 315, 320-21 (Fla. 1st DCA 2002); see also Carollo II, 972 So. 2d at 931 (affirming imposition of constructive trust on portion of proceeds from husband’s Elected Officer’s Retirement Trust (“EORT”) where, as discussed in Carollo v. Carollo (“Carollo I”), 920 So. 2d 16, 20 continued, next page
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(Fla. 3d DCA 2005), City Code prohibited QDRO from being used to force direct payment of EORT to effect equitable distribution.

A constructive trust claim is not a proper vehicle for determining whether an asset is marital or non-marital. See, e.g., Riley v. Edwards-Riley, 963 So. 2d 829 (Fla. 3d DCA 2007). On the other hand, when the husband and wife dispute the right to property itself that has already been deemed marital, but the property is not jointly titled, a constructive trust claim might have its place for use by the spouse who does not have title. Compare id. at 831 n.1 (clarifying that claim for constructive trust in marital home not proper method to assert husband’s claim that home titled in his name was nonmarital property, and instructing trial court on remand to treat [husband’s] constructive trust claim “as a special equity claim to have the property declared non-marital”) and Knecht v. Knecht, 629 So. 2d 885-86 (Fla. 3d DCA 1994) (determining that where wife’s home was nonmarital, having been purchased before marriage, husband was not entitled to constructive trust, and instead, his premarital contributions should be accounted for in structuring equitable distribution) with Genter v. Genter, 270 So. 2d 388, 389 (Fla. 3d DCA 1972) (finding imposition of constructive trust in marital home proper where husband and wife planned to title home in both their names, but title was put in husband’s name only).

Ensuring Security of a Judgment

Finally, it can be difficult at times to ensure that a party’s judgment is secured, which some refer to as “securitizing assets.” Regardless of nomenclature, simply put, the question revolves around how to ensure collection on an award. The key to ensuring that an individual can one day execute on the amount awarded is to comply with section 55.10, Florida Statutes. Section 55.10 governs the particulars of recording judgments, which in turn allows for a lien on the judgment debtor’s real property. See § 55.10, Fla. Stat. (2009).

To ensure that a judgment is secured in this manner, the first step is to record a certified copy of the judgment with the Clerk’s office. The judgment creditor’s address should be either in the judgment itself or in a separate affidavit recorded simultaneously with the judgment. See § 55.10(1), Fla. Stat; see also Robinson v. Sterling Door & Window Co., 698 So. 2d 570, 571 (Fla. 1st DCA 1997) (rejecting real estate lien where judgment did not contain judgment creditor’s address). This step creates a lien on any real property in any county where a certified copy of that judgment is recorded. See § 55.10, Fla. Stat.

One should keep in mind that while a judgment is good for twenty years, the lien created by section 55.10 is good only for ten years if recorded after July 1, 1994 (if recorded between July 1, 1987 and June 30, 1994, it is good for only seven years). See id. The lien can be extended, though,
by re-recording the judgment. See § 55.10(2), Fla. Stat. When extending the lien in this manner, if the judgment creditor's current address is not in the judgment, then a new, separate affidavit with that information must be simultaneously recorded. Id.

Additionally, one can secure a lien on personal property by way of section 55.202, Florida Statutes. To obtain a judgment lien on personal property, one files a judgment lien certificate including the information described in section 55.203, Florida Statutes, with the Department of State after the judgment has become final. See § 55.202, Fla. Stat. (2009). The types of property on which a personal property judgment lien may be obtained are found in section 56.061, Florida Statutes. See §§ 55.202 & 56.061, Fla. Stat. Among other things, that personal property includes goods and chattels, equities of redemption in property, and stock. § 56.061, Fla. Stat. (2009). These liens on personal property, as with liens on real property, lapse within five years unless there is a second judgment lien filed. See § 55.204, Fla. Stat. (2009). Liens securing child support payment are excepted from this automatic lapse, though, and survive for twenty years. See id.

While liens on personal and real property are not required and do not affect a judgment's validity, they are necessary to properly secure a party's interests. Recording the judgment and properly obtaining the liens described above ensure a party who later tries to execute on his or her judgment is not behind other creditors who might have secured a claim in the interim. See § 55.205(1), Fla. Stat. (2009).

Conclusion

Having a least a general understanding of how these tools operate is necessary to best serve family law clients. It allows an attorney to assist the client when necessary, as in the case of ensuring the client will be able to at some point collect on his or her judgment. It also allows an attorney to avoid the frivolous filings of lis pendens and constructive trust claims, for example, except for when the law truly provides for it. While this brief article has only touched on these topics with a very broad and quick stroke, it is intended to point in the right direction a practitioner who is faced with one of these issues.

Ceci Culpeopper Berman is a shareholder in the Appellate Practice Group at Fowler White Boggs P.A. She is Board Certified by The Florida Bar in Appellate Practice, and she handles all aspects of federal and state appeals. She is AV peer review rated by Martindale-Hubbell, and she was named one of Florida Trend Magazine’s Up-and-Coming Legal Elite in 2007, 2008, and 2009. She was also named one of Florida Superlawyers’ Rising Stars in 2009. She is currently a member of The Florida Bar’s Appellate Court Rules Committee, and she sits on the Executive Council of the Florida Bar’s Appellate Practice Section where she chairs the Section’s CLE Committee. Ms. Berman is also a past chair of the Hillsborough County Bar Association’s Appellate Practice Section. Ms. Berman received her B.A., with honors, from the University of Florida, and her J.D. from The Georgetown University Law Center.
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Divorce and the Family Business — To Join, Or Not To Join?

By Carolyn Delizia Swift, Esq. Fort Myers

Married couples have been deriving a significant amount of the marital estate from family businesses since the existence of both marriage and business! With the advent of the legal fiction that a business could constitute a separate legal entity, the question has arisen to what extent, if any, a business can or should be joined as a party to a dissolution-of-marriage action.

To a certain extent, the question of joining a family-owned or other small business as a party in a divorce suit is merely a subset of the broader question of whether any third party, other than the spouses themselves, should be joined. Since the two spouses are clearly the primarily important parties in any dissolution-of-marriage case, see, Chaachou v. Chaachou, 118 So.2d 73 (Fla. 3d DCA 1960) (corporations joined as parties could not plead wife's adultery as defense to claims against corporations), Florida courts have limited the circumstances under which any third party may be joined in a dissolution-of-marriage action.

The general rule applicable to such joinder is that when the legal and property rights of third parties are sought to be actually adjudicated in a divorce action, such third parties must be joined as parties. See, e.g., Picchi v. Picchi, 100 So.2d 627 (Fla. 1958) (where court, in divorce action, determines spouses' property rights, it is proper to bring in any third-party claimants to property in which spouses claim interest); Matajek v. Skouronska, 927 So.2d 981, 985 (Fla. 5th DCA 2006) (trial court lacked jurisdiction to adjudicate property rights regarding apartment complex in dissolution proceedings; apartment complex was titled in names of ex-husband and his son, but ex-wife neglected to join son as party to dissolution; “On remand, the court may consider the establishment of an equitable lien only if the Former Husband's son is noticed and joined.”); Barabas v. Barabas, 923 So.2d 588 (Fla. 5th DCA 2006) (finding that trial court lacked jurisdiction to adjudicate property rights of husband's mother, who was non-party, when deciding whether parcel of real property was marital property and thus subject to equitable distribution); Lallouz v. Lallouz, 695 So.2d 466, 468 (Fla. 3d DCA 1997) (reversing, in dissolution-of-marriage action, trial court's denial of wife's claims for equitable relief against husband's mother as to real property titled in husband's mother's name, including claims for resulting and constructive trust as to real property located in Broward County, holding that although property was located in Broward County, trial court had in personam jurisdiction to determine equitable rights of parties, including determination as to which of parties in case, including husband's mother, was entitled to property); Ray v. Ray, 624 So.2d 1146, 1148 (Fla. 1st DCA 1993) (reversing equitable lien trial court imposed on certain nonmarital property former husband owned with his brother and mother for purposes of securing $70,000 debt; “The rule is clear that the trial court [in a divorce proceeding] does not have jurisdiction to adjudicate property rights of non-parties.”) (bracketed material in original).

When the third party whose joiner is being considered is a small or family-owned business, there may be some question to what extent such business really is a “third” party. Even when the business is set up as a corporation, as opposed to a sole proprietorship or partnership, it is common for small or family-owned businesses to ignore the formalities of corporate existence. See, e.g., Lamoureux v. Lamoureux, 157 Fla. 300, 303, 25 So.2d 859, 860 (1946) (“corporation was a mere matter of convenience for . . . transaction of . . . dry cleaning business”). In such cases, the payee spouse may seek to join this corporate entity by asserting that it is the alter-ego of the payor spouse. The law is clear that a spouse's corporation cannot be joined in marital litigation unless the other spouse has an independent claim against the corporation or claims specific relief against it. Rosenberg v. North American Biologicals, Inc., 413 So.2d 435 (Fla. 3d DCA 1982). Mere allegations that the corporation is the alter-ego of the spouse are not enough to join the corporation:

Appellant next argues that the trial court erred when it awarded appellee funds from the sale of a building he owned with the two other stockholders of Sandstrom & Hodge, Inc. Appellant contends the award is improper because (1) the building was not a marital asset and its value did not appreciate during the marriage; and (2) appellee had never filed a claim against the corporation and the corporation was never a party to the dissolution proceedings. Appellee only asserted that the corporation and appellant were one and the same. We hold that this allegation, without more, is insufficient to affirm this award.

Sandstrom v. Sandstrom, 617 So.2d 327, 328 (Fla. 4th DCA 1993) (footnote omitted).

In Ashhourian v. Ashhourian, 483 So.2d 486, 487 (Fla. 1st DCA 1986), the court held that the wife's petition failed to state a cause of action against the husband's corporations, and therefore the wife could not properly join such corporations:

The wife's counterpetition does not allege a special equity in any corporate property but merely alleges a claim against the continued, page 11
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Divorce and the Family Business
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husband’s stock ownership in the corporations. ... The cases relied upon by the wife for joinder are distinguishable. In Rosenberg v. North American Biologicals, Inc., 413 So.2d 435 (Fla. 3d DCA 1982), the wife alleged in her complaint that the corporate defendant had illegally watered down the wife’s stock ownership in the defendant corporation in favor of the husband. If these allegations were true, the wife was entitled to relief against the corporation. Contrarily, the wife’s counterpetition in this case states no cause of action against the corporations, nor does it seek specific relief against them. ... Here, the trial judge correctly determined that the wife’s general allegations of a special equity in the husband’s business enterprises do not justify joinder of the corporations.

(Footnote omitted). See also, Good v. Good, 458 So.2d 839 (Fla. 2d DCA 1984) (where no evidence was presented that justified piercing of corporate veil, corporation could not be party to marital litigation), rev’d on other grounds, 481 So.2d 34 (Fla. 1985); see also, De Armas v. De Armas, 471 So.2d 184 (Fla. 3d DCA 1985) (error to award wife interest in duplex owned solely by husband’s father); Feldman v. Feldman, 390 So.2d 1231 (Fla. 3d DCA 1980) (court may order husband to transfer stock, but cannot order corporation to transfer assets to wife unless corporation is made a party to litigation); Couture v. Couture, 307 So.2d 194 (Fla. 3d DCA 1975) (same); Noe v. Noe, 431 So.2d 657 (Fla. 2d DCA 1983) (divorce court could not award automobile, titled in corporation, to wife, without joinder of corporation); Keller v. Keller, 521 So.2d 273 (Fla. 5th DCA 1988) (same); Thoni Transport Co. v. Thoni, 155 So.2d 838 (Fla. 3d DCA 1963) (seven corporations joined as parties by wife should have been dismissed where only relief sought as to them was injunction to keep husband from selling their assets); St. Anne Airways, Inc. v. Webb, 142 So.2d 142 (Fla. 3d DCA 1962) (corporation should have been allowed to intervene as party where wife sought to have corporation’s rental income paid to her attorney).

The proceeding case law raises additional sub-issues. Since Ashourian, supra, a leading case regarding business joinder, is posited in terms of the payee spouse seeking a “special equity” in the payor’s “business enterprises,” a potential question is posed by the recent amendment to the equitable-distribution statute that abolished special equity. See, § 61.075(11), Fla. STAT. (2009). That question is whether the statute’s amendment has any effect on the rule announced in Ashourian.

Ashourian itself has not been cited since special equity was abolished effective July 1, 2008. Thus, it is debatable whether the abolishment of special equity will have any effect on the joinder rules announced in cases like Ashourian, and if it does have some effect, what that effect will be. While some commentators have made the point that “the statutory amendment abrogating special equity is not just a semantics change,” Nicole L. Goetz & David L. Manz, A Brave New Frontier: The Equitable Distribution 2008 Legislative Changes, 82 FLA. BAR J. 58 (Dec. 2008), it appears that the statutory change has not affected the rules on joining business entities in divorce actions. See, e.g., American Univ. of the Caribbean v. Tien, 26 So.3d 56 (Fla. 3d DCA 2010) (wife who brought dissolution-of-marriage action was not entitled to ex parte temporary injunction preventing three foreign companies owned in whole or in part by husband from accessing certain funds contained in Florida bank accounts; no immediate or irreparable injury would have resulted without entry of injunction, as funds were then under control of federal court-appointed receiver, no basis was asserted for piercing corporate veil or joining companies in dissolution action, and there was no showing that husband had taken any step toward dissipation of companies’ assets).

A further issue raised by Sandstrom, supra, in which the payee spouse “only asserted that the corporation and [payor spouse] were one and the same,” 617 So.2d at 328, is what additional allegations might be necessary to properly allege an “alter ego” basis for joinder of a corporation. The leading case on “piercing the corporate veil” is Dania Jai-Alai Palace, Inc. v. Sykes, 450 So.2d 1114 (Fla. 1984). Under Dania Jai-Alai, the corporate veil can only be pierced on allegations and proof of “improper conduct,” 450 So.2d at 1116, 1117, 1121, such as the corporation having been “organized or employed to mislead creditors or to work a fraud upon them.” Id. at 1120, citing, Adver- tects, Inc. v. Sawyer Industries, Inc., 84 So.2d 21, 23 (Fla. 1955).

In Hoecker v. Hoecker, 426 So.2d 1191 (Fla. 4th DCA 1983), a case distinguished in Sandstrom, the wife sued the husband and his corporation, essentially alleging a 50% special equity in the corporation. The trial court dismissed the corporation as a party, but the Fourth DCA reversed. The court noted the following factors as being sufficient for the wife to keep the corporation in the suit: The parties owned the real estate jointly on which the corporation (a restaurant) did business and the continued, next page
corporation was financed in part by loans generated from mortgages on that property; “[t]he parties’ course of conduct demonstrates a blending of marital and business partnerships”; both parties had access to corporate checkbooks and paid both corporate and personal expenses from them; the husband paid for trips to Nassau and Las Vegas from corporate funds; the wife’s car was purchased and maintained by the corporation; and husband admitted, “I am the company.” 426 So.2d at 1192.

The Hoecker court went on to state that because of the “intertwining nature of [wife’s] claims against [husband] and the corporation,” the corporation was properly joined, and it was error to dismiss it as a party. 426 So.2d at 1192 (bracketed material added for clarity). See also, Johnson v. Johnson, 454 So.2d 797 (Fla. 4th DCA 1984) (wife worked as bookkeeper in husband’s family corporation for ten years without salary and therefore claimed special equity; wife’s motion to join corporation should have been granted). See also, Picchi v. Picchi, supra (joinder of two corporations proper where wife alleged corporations were mere alter egos of her husband, who had allegedly entered into scheme to defraud wife of her interests in jointly owned real estate by conveying property to corporations).

Although the Sandstrom court, in holding a payee spouse’s mere “alter ego” allegations insufficient to pierce the corporate veil so as to make joiner proper, did not cite to Dania Jai-Alai, cases favoring joiner based on veil-piercing, like Hoecker and Picchi (which pre-date Dania Jai-Alai), should be relied upon only in conjunction with the requirements of Dania Jai-Alai. Case law indicates that the Dania Jai-Alai requirements will be applied to divorce cases in which a spouse seeks to join a corporation on a veil-piercing basis. See, American Univ. of the Caribbean v. Tien, supra 26 So.3d at 59 (citing Dania Jai-Alai).

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Sequestration and Receivers In Florida Divorces

By Luis E. Insignares, Esq., Fort Myers

Many, and possibly most, family-law practitioners may tend to think of receivership as a commercial remedy for troubled companies, not as a possible remedy available in a dissolution-of-marriage or post-dissolution proceeding. Similarly, sequestration is a term usually associated with juries or with “invoking the rule” regarding keeping witnesses outside the courtroom until they testify. See, e.g., Kendall v. Kendall, 677 So.2d 48 (Fla. 4th DCA 1996) (trial court did not err in allowing wife’s expert to testify despite attendance at pre-trial deposition). While perhaps little known and less used, both receivership and sequestration may provide counsel for payee spouses with additional enforcement weapons in family-law litigation, and conversely cause unexpected headaches for attorneys representing payor spouses.

It probably does not help matters that “sequestration” in itself includes at least three different, albeit related, enforcement concepts. Two of these sequestration concepts are limited, by statute or rule, to very specific factual scenarios, while the third concept is a much more amorphous and generally applicable concept.

As to the two more manageable sequestration concepts, the statutory version is found in Section 68.03, Florida Statutes (2009). This statute originated before the Civil War, and it has not had any substantive amendment for over 40 years. By its terms, the statute applies only in the specific scenario where one defendant is outside Florida, but another in-state defendant holds property of the absentee defendant, or owes money to the absentee defendant:

(1) If any action is commenced in chancery against any defendant residing out of this state and any other defendant within the state has in his or her hands effects of, or is otherwise indebted to, the absent defendant and the absentee does not appear in the action and give security to the satisfaction of the court for performing the judgment and on affidavit that the absentee is out of the state, or that on inquiry at the absentee’s usual place of abode he or she cannot be found to be served with process, the court may restrain the defendant in this state from paying or conveying or secreting the debts owing by him or her to, or the effects in his or her hands of, the absentee or restrain the absentee from conveying or secreting or removing the property in litigation, or may sequestrate the property which may be necessary to secure plaintiff if he or she prevails, and may order such debts to be paid and effects to be delivered to plaintiff on his or her giving bond with surety for the return thereof.

(2) The court shall require the plaintiff to give bond with surety to be approved by the clerk, to abide the future orders made for restoring the estate or effects to the absent defendant on his or her appearance in the action. If the plaintiff does not furnish the bond, the effects shall remain under the direction of the court or in the hands of a receiver or otherwise for so long a time and shall be disposed of in such manner as the court deems fit.

(Emphasis supplied).

Since divorce and support suits are indeed “in chancery,” see, § 61.011, Fla. Stat. (2009), the above statute is at least theoretically available in a divorce suit involving an absentee spouse. However, despite the statute’s long history, only a handful of reported cases are annotated to the statute, which leaves actually applying the statute to a divorce case somewhat problematic. Although one of the few cases annotated to the statute does involve a divorce scenario, it does very little to elucidate the use of the sequestration statute in a divorce action. In fact, the statute is not even mentioned in this opinion, nor does the opinion ever state that the payor spouse was absent from Florida. The discussion of sequestration in the case is limited to the following single paragraph:

We also find no reversible error demonstrated in Case No. 78-1147 except as to that provision of the May 15, 1978 order granting the wife’s petition for sequestration of the husband’s property. We are unable to determine from the record presented whether it was necessary to sequester all of appellant’s property in order to enforce the April 24, 1978 order of temporary relief. Accordingly, on remand the trial court should determine whether sequestration is still necessary and if the court finds it is imperative in order to enforce its orders then the court is requested to make a finding of the approximate value of the property sequestered and to retain under the order of sequestration only so much thereof as the court finds necessary to secure the enforcement of its orders.

Seneca v. Seneca, 382 So.2d 371, 373 (Fla. 4th DCA 1980).

Given that the sequestration statute does not seem to envision the sort of “necessity” analysis referenced above, and that the opinion mentions neither the statute nor the appellant’s absence from the state, it is quite pos-

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It is possible that Seneca did not actually involve the sequestration statute, but rather dealt with more generalized equitable principles regarding sequestration (to be discussed herein later). Perhaps an over-anxious annotator merely saw the “magic word” “sequestration,” and placed Seneca into the annotations to the statute in error!

There is also a method of sequestration prescribed by rule, rather than statute. Rule 12.570, Florida Family Law Rules of Procedure, specifically makes Rule 1.570, Florida Rules of Civil Procedure, applicable to family-law proceedings. The latter rule is entitled “Enforcement of Final Judgments,” and contains the following provision:

(c) Performance of an Act. If judgment is for the performance of a specific act or contract:

(1) the judgment shall specify the time within which the act shall be performed. If the act is not performed within the time specified, the party seeking enforcement of the judgment shall make an affidavit that the judgment has not been complied with within the prescribed time and the clerk shall issue a writ of attachment against the delinquent party. The delinquent party shall not be released from the writ of attachment until that party has complied with the judgment and paid all costs accruing because of the failure to perform the act. If the delinquent party cannot be found, the party seeking enforcement of the judgment shall file an affidavit to this effect and the court shall issue a writ of sequestration against the delinquent party’s property. The writ of sequestration shall not be dissolved until the delinquent party complies with the judgment;

(2) the court may hold the disobedient party in contempt; or

(3) the court may appoint some person, not a party to the action, to perform the act insofar as practicable. The performance of the act by the person appointed shall have the same effect as if performed by the party against whom the judgment was entered.

Fla. R. Civ. P. 1.570(c) (emphasis supplied).

Under the above rule, if a spouse (or ex-spouse) refuses to comply with a court order requiring a specific act to be done, and evades arrest on a writ of bodily attachment, the opposing party can file an affidavit and effectively hold the miscreant party’s property for “ransom,” i.e., compliance with the judgment. Even if an ex-spouse is evading arrest, it is frequently true that a client may know where he or she is actually located, and thus where most of his or her property may be found. Denying a recalcitrant party’s access to any of that property would certainly get his or her attention.

As with statutory sequestration, however, it is somewhat unclear exactly how to apply or enforce Rule 1.570(c) in the real world. Only three reported cases are annotated to the sequestration headnote of Rule 1.570. Although one of those three cases, Randall v. Randall, 158 Fla. 502, 29 So.2d 238 (1947), does arise in a post-divorce scenario, the case was decided before the adoption of the modern Rules of Civil Procedure and thus does not actually involve application of Rule 1.570(c). Interestingly, the case involves an out-of-state former spouse scenario arguably more appropriately arising under Section 68.03 or its predecessors, once again demonstrating the rather hazy parameters of sequestration in Florida. See also, Jenkins v. Jenkins, 326 So.2d 253 (Fla. 4th DCA 1976) (citing Rule 1.570(c) but finding it inapplicable, as court had already held that property to be sequestered had been gifted by ex-spouse to ex-spouse). Finally, the appellate court indicated that a Florida divorce court has inherent equitable powers to sequester property of a former spouse for the purpose of effectuating the payment of sums that have been reduced to judgment:

Paragraph 5 of the order of 1 November 1971 in effect sequestered the defendant’s interest in the motel property to pay attorney’s fees and costs arising out of the original divorce action. The trial court had the power as a court of equity to grant this relief inasmuch as the net effect was to enforce an award which had lawfully theretofore been made. See Burkhart v. Circuit Court of Eleventh Judicial Circuit, 1941, 146 Fla. 457, 1 So.2d 872. See also Garland v. Garland, Fla.App.1960, 118 So.2d 52.

276 So.2d at 88 (emphasis supplied). Although the appellate court vacated the sale of the motel “if in fact [the sale] has been held,” because it included amounts the former husband was found not to have validly owed, id., the appellate court nevertheless stated that the trial court might “in its discretion provide for another sale, after reasonable notice, to foreclose the lien [for fees and costs awarded] created by Paragraph 5 of the order of 1 November 1971.” Id. (bracketed material supplied).

Although Serge was decided after the adoption of the modern Florida Rules of Civil Procedure, it still remains good law. See also Bennett v. Bennett, 469 So.2d 1138 (Fla. 4th DCA 1985). In Bennett, a former spouse refused to pay the ex-husband’s attorney’s fees and costs awarded by the trial court in the form of a final judgment. Bennett was cited to the appellate court and held that the former spouse’s non-payment constituted an act in contempt of court. See id. at 1139. Bennett is further discussed in the Sunshine State’s section on Sequestration & Receivers—Stay tuned for that discussion on next page.
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Rules of Civil Procedure, both cases cited therein predate the adoption of the rules. Does the equitable remedy of sequestration, resulting in a judicial sale [as opposed to merely holding property under Rule 1.570(c) or Section 68.03], survive the adoption of the rules of civil procedure, as a result of the holding in Serge? Serge does not expressly so hold, and the practical question exists whether such a remedy would provide any advantage over regular execution on a judgment. Along similar lines, consider that Rule 1.570 also includes a “money judgment” provision that makes no mention of sequestration, instead stating that “[f]inal process to enforce a judgment solely for the payment of money shall be by execution, writ of garnishment, or other appropriate process or proceedings.” Fla. R. Civ. P. 1.570(a). It could be argued that the failure to mention sequestration impliedly extinguishes any right to use it in order to enforce a money judgment, but the counter-argument exists that sequestration constitutes “other appropriate process or proceedings.”

Simply put, Florida law does not answer this conundrum. Practitioners thus can be assured of the efficacy of a sequestration remedy only within the specific parameters of Rule 1.570(c) and Section 68.03.

This leaves the use of the other remedy mentioned at the outset of this article — receivership. The usual way a court exercises control over assets that are the subject of litigation is via the appointment of a receiver, who is an officer or agent of the appointing court, and acts for and under the supervision of the court. See, Lehman v. Trust Co. of America, 57 Fla. 473, 49 So. 502 (1909). However, as with sequestration, there is not much Florida case law on the ancillary remedy of receivership being used in conjunction with a suit for divorce. For example, although the “Family Law” article in Florida Jurisprudence Second notes the general availability of receivership to a court of equity, the author cites only one reported Florida divorce case concerning receivership in a divorce context. See, Ugarte v. Ugarte, 533 So.2d 250 (Fla. 3d DCA 1989) (upholding receiver’s appointment where husband himself had requested same, and appointment was necessary to protect husband’s spouse and children). There are also examples pre-dating the adoption of the modern rules of civil procedure. See, e.g., Randall v. Randall, 158 Fla. 502, 29 So.2d 238 (1947) (upholding receivership without posting bond); Clawson v. Clawson, 54 So.2d 161 (Fla. 1951) (reversing order setting up “perpetual” receivership; receivership is not an end in itself, but a means to an end). A similar encyclopedic treatment is found in the Florida Jurisprudence Second article “Receivers,” in which seven sections are devoted to various “particular circumstances” in which receivers might be appointed. Six of those sections deal with various specific non-divorce circumstances, but the final “catch-all” section also fails to mention divorce.

That said, Rule 12.620, Florida Family Law Rules of Procedure, does specifically make Rule 1.620, Florida Rules of Civil Procedure, applicable to family-law actions. The more generally applicable receivership rule states:

(a) Notice. The provisions of rule 1.610 as to notice shall apply to applications for the appointment of receivers.

(b) Report. Every receiver shall file in the clerk’s office a true and complete inventory under oath of the property coming under the receiver’s control or possession under the receiver’s appointment within 20 days after appointment. Every 3 months unless the court otherwise orders, the receiver shall file in the same office an inventory and account under oath of any additional property or effects which the receiver has discovered or which shall have come to the receiver’s hands since appointment, and of the amount remaining in the hands of or invested by the receiver, and of the manner in which the same is secured or invested, stating the balance due from or to the receiver at the time of rendering the last account and the receipts and expenditures since that time. When a receiver neglects to file the inventory and account, the court shall enter an order requiring the receiver to file such inventory and account and to pay out of the receiver’s own funds the expenses of the order and the proceedings thereon within not more than 20 days after being served with a copy of such order.

(c) Bond. The court may grant leave to put the bond of the receiver in suit against the sureties without notice to the sureties of the application for such leave.

The receivership procedural rule lays out what the receiver is to do once appointed, but gives virtually no guidance concerning the requirements for having the receiver appointed in the first instance. The case law limits the remedy to somewhat narrow circumstances.

The law is well established that a receiver should be appointed for a corporation only where the exigencies demand it and no other form of protection to the applicants appears. Papazian v. Kulhanjian, 78 So.2d 85 (Fla. 1955); McAllister Hotel v. Schatzberg, 40 So.2d 201 (Fla. 1949). In the McAllister case, the court, in reversing an order appointing a receiver, expressed this principle thusly:

We find that the real question to be determined is: Was it necessary for the Chancellor to exercise his power of appointment of a Receiver in order to protect the rights of respondents as they are alleged and as ultimately they may be established? So we may well inquire whether the invocation of any equitable processes short of receivership would have accorded adequate protection to the respondents. It is observed that there is absence of allegation, or showing, of insolvency on the part of any one or more of the petitioners. This Court has repeatedly asserted that the power of appointment of a Receiver is a delicate one and should be exercised only in those cases where the exigencies demand it and no other protection to the applicants can be devised by the Court. Tampa Water Works Co. v. Woods, 97 Fla. 493, 121 So. 789; Mirror Lake Co.

Under the foregoing principles, a party seeking to have a receiver appointed in a divorce case should allege that she or he will likely prevail on the merits, that the relief requested is absolutely necessary for the protection of the requesting party’s rights, and that she or he has a clear legal right to the property in controversy.

As a practical matter, the probable reason for the dearth of Florida receivership law in a divorce context is that the divorce statutes expressly provide a similar remedy. There are several Florida cases that hold that “status quo” injunctions in marital cases are acceptable, based upon Section 61.11, Florida Statutes, relating to attempts to dissipate assets. For example, in Sandstrom v. Sandstrom, 565 So.2d 914 (Fla. 4th DCA 1990), the Fourth DCA held that Section 61.11 was a sufficient basis for an injunction regardless of whether a spouse attempts to dissipate assets before or after judgment. Nevertheless, Rule 1.610, Florida Rules of Civil Procedure, must still be complied with. Gooding v. Gooding, 602 So.2d 615 (Fla. 4th DCA 1992). Thus, a probability of dissipation must be shown. See e.g., Leonard v. Leonard, 678 So.2d 497 (Fla. 5th DCA 1996) (court did not abuse its discretion in finding that there was danger of dissipation of marital funds or in entering injunction to preserve status quo where in years preceding separation, wife had revoked trust that had controlled moneys for preceding six years, emptied parties’ joint safe deposit box of all documents relating to lottery winnings and trust documents, denied husband access to those documents, and denied that husband had claim to future proceeds).

In Sandstrom, supra, the wife alleged that the husband had conveyed an interest in marital assets to his girlfriend, and that he had sold marital assets or was about to sell them. These allegations were held sufficient to comply with Rule 1.610(c), as the wife also alleged irreparable harm to her right to seek equitable distribution. However, the husband was held to be entitled to a hearing in order to determine which of his assets should

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be subjected to the injunction, although it was noted that the court could require other remedies to secure the award.

In Gooding v. Gooding, supra, the wife alleged that cash was disappearing from her husband's family business, i.e., husband was writing corporate checks to himself that did not appear in his personal accounts. The wife also alleged that husband had previously transferred corporate funds to his own accounts and had excluded her (a shareholder) from participating in corporate affairs. The precise status of the stock had not yet been determined. In holding that an injunction should have issued, the court cited Section 61.11, Florida Statutes, and stated:

In the instant case, appellant asserts that she has been irreparably harmed by appellee's previous improper transfers of their company's funds to his own personal account, and she argues that she will be further harmed unless an injunction is issued. Appellant testified that she reviewed some of the corporation's financial records, and she found approximately $22,800 worth of checks that appellee already has written to himself. Those funds were not put into the parties' joint personal account, nor does appellant know what happened to that money.

Under the circumstances present in this case, we hold that it was an abuse of discretion not to grant a temporary injunction to maintain the status quo pending a determination by the court as to the extent of the entitlement of appellant to a share of the corporate and miscellaneous assets of the parties. Therefore, we reverse.

602 So.2d at 616. See also, P.T.S. Trading Corp. v. Habie, 673 So.2d 498 (Fla. 4th DCA 1996); Leonard v. Leonard, 678 So.2d 497 (Fla. 5th DCA 1996).

As the foregoing illustrates, both sequestration and receivership are traditional equitable remedies that may be resorted to in divorce litigation, as both are expressly referenced in the Florida Family Law Rules of Procedure. While these remedies may be limited to somewhat narrow factual circumstances, or, as in the case of receivership, be considered an equitable “last resort,” difficult cases call for creative lawyering, so these remedies should not be overlooked.

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What the Family Law Attorney Should Know About Foreclosures in Florida

By Michelle North-Berg Esq., Palm Beach Gardens, Florida

The state of the economy has hit every profession and area of the law, and, as you well know, family law attorneys are not immune. Florida in particular has been one of the hardest hit states, with a combination of the subprime mortgage implosion and skyrocketing unemployment, pending foreclosure cases hit nearly half a million by the end of 2009. As a family’s residence is often the only or most significant asset in any dissolution, the loss in value and equity of the parties’ home adds additional stress to an already volatile situation.

On December 28, 2009, Chief Justice Peggy A. Quince issued Administrative Order No. AOSC09-54 in response to a report from the Task Force on Residential Mortgage Foreclosure Cases. The Order effectively adopted the Task Force’s recommendation of a state-wide managed mediation program, citing lack of communication between borrowers and lenders as “the most significant issue impeding early resolution of foreclosure cases, and concluded that effective case management and mediation techniques are the best methods the courts can employ to ensure that such communications occur early enough in the case to avoid wasted time and resources for the courts and the parties.”

The Supreme Court has provided a model administrative order applying to all residential mortgage foreclosure actions filed against homestead property involving loans that originated under the Federal Truth in Lending Act, Regulation Z. Exceptions to mandatory foreclosure mediation will be granted where the borrower “opts out” after being contacted by the mediation manager, has not completed the pre-mediation requirements of HUD-certified housing counseling and submission of required financial documentation, the lender and borrower reach an agreement to forego mediation where pre-suit mediation was previously unsuccessful, or the homeowner cannot be located. Managed mediation must occur no earlier than 60 days nor later than 120 days from filing of the foreclosure action. Costs of the program (not to exceed $750) are to be paid by the lenders, but are recoverable in the final judgment of foreclosure. Although counsel for both parties and the borrower must be present at mediation, due to the high volume of these cases, lender’s representatives are permitted to appear at mediation by telephone or another electronic method. Justice Quince’s Order incorporates “best practices” case management forms which provide an outline to the streamlined foreclosure process. Specifically, Form “A” is a certification from the lender naming its representative to appear at the mediation with authority to settle. Forms 5A, 5B, and 5C contain Financial Disclosure requirements specific to a Loan Modification, Short Sale, and Deed in Lieu of Foreclosure, respectively. Additionally, Form 6 contains the Notice of Borrower’s Request for Plaintiff’s Disclosure for Mediation, which, when utilized in the action, requires the lender to produce: (i) documentary evidence that the plaintiff is the owner and holder in due course of the note and mortgage sued upon; (ii) a history showing the application of all payments by the borrower during the life of the loan; (iii) a statement of the plaintiff’s position on the present net present value of the mortgage loan; and (iv) the most current appraisal of the property available to the plaintiff.

What does all this mean to the family law practitioner and how can you best advise your client?

First of all, know your options. While the managed mediation programs apply only to foreclosure actions filed on residential, homesteaded properties under federal truth in lending regulations after the date of the administrative orders, knowledge of the process and available disclosures can aid in any mortgage delinquency situation. If your client wants to keep the family home, there are many options available under the Making Homes Affordable Plan (“MHA”), such as the Home Affordable Refinance Program (“HARP”) and Home Affordable Modification Program (“HAMP”). HARP is generally available to homeowners who are current on their mortgage, have a one-to-four unit home, with a loan owned or guaranteed by Fannie Mae or Freddie Mac, and the amount owed on the first lien mortgage does not exceed 125% of the value of the home.

HAMP requirements include: an unpaid principal balance on a one-unit residence that is equal to or less than $729,750, on a first lien mortgage originated on or before January 1, 2009, with a monthly mortgage payment (including taxes, insurance, and association dues) greater than 31% of your monthly gross (pre-tax) income, and this mortgage payment must be unaffordable for the homeowner due to a financial hardship that can be documented. Additionally, the Treasury recently announced plans to expand MHA to include the modification of second mortgage liens. Under the 2nd Lien Modification Program (2MP), expected to be fully implemented in the first quarter of 2010, if a borrower’s servicer is a program participant, the second lien will automatically be eligible for a modification when the first lien is modified under HAMP. Although most of these

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programs require documentable income, a new forbearance program for unemployed homeowners should be out by July, 2010.

Other foreclosure avoidance options are available through the Home Affordable Foreclosure Alternatives (HFA) Program, which became effective April 2010, and include the short sale and deed-in-lieu of foreclosure. When a home is upside down, or the client is looking to make a fresh start, getting rid of the home is often the best solution. In a short sale, the homeowner sells the property for less than the full amount due on the mortgage. The servicer typically must pre-qualify the terms, which usually include listing the home for a period of time and an arm’s length transaction. With the deed-in-lieu of foreclosure, the homeowner must provide marketable title, free and clear of other mortgages, liens, or other encumbrances, which is then voluntarily transferred to the servicer in full satisfaction of the total amount due. Sometimes as an incentive to the borrower to move quickly and save the lender the costs of foreclosures, a “cash for keys” program, is available and may be amenable to your client. To avoid the potential for a deficiency judgment, in short sales, deeds-in-lieu, or any type of stipulated foreclosure, it’s always safe to get a written release of liability from the lender.

Secondly, be prepared, get creative and stay organized. Restrictions inherent in the government’s programs, and limited nationwide success thus far, should not be a cause for discouragement. There are also a variety of options currently available and more coming due all the time from individual lenders. Urge your client to communicate directly with their loan servicer early and often. It’s also imperative that the borrow-ers keep detailed records of who they spoke with, the department and extension, and on what date and time regarding their requests and submissions. Keep copies of everything, as form applications, hardship letters, bank statements, tax returns, and W-2s may be requested multiple times. Lenders’ loss mitigation departments are understaffed and overworked, but they are getting better, and persistence breeds attention and success.

Due to the court’s backlog, depending on the jurisdiction, as well as the lender, foreclosure actions can take anywhere from six months to several years. Oftentimes, this delay will work to a borrower’s advantage as they are able to “save up” on housing costs and have a nest egg when the time comes to move.

Use the financial affidavits you have from your client and his or her spouse to provide the lender with all required documentation of income and assets. And, the dissolution action, encompassing the increased expense of two households, serves as a documentable hardship. Other sources of income, such as from renters, a supportive relationship, or loans from friends or family, while not necessarily relevant to the dissolution action or documented in the financial affidavits, may also be accepted to show available income.

And, lastly, know when to call in an expert. If you don’t feel comfortable representing or advising your client with regards to pre-suit negotiations or foreclosure defense, there are plenty of reputable firms and individual attorneys knowledgeable and/or currently specializing in this field. Beware of scams! Avoid companies that charge an upfront fee, promise results, advice individuals to avoid contact with their lenders or not to pay their mortgage.

Additionally, although a forgiven mortgage balance on a primary residence is not to be considered taxable income by the Internal Revenue Service through 2012, borrowers who walk away from investment properties remain at risk for tax liability and other restrictions apply. For example, the debt must have been used to buy or improve the residence. As always, when in doubt, and especially with regards to a short sale or deed in lieu of foreclosure, refer to your accountant or tax specialist.

Knowing the foreclosure process and the programs available, will bring value to your practice and enable you to better assist and advise your clients.

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Endnotes:
1 The Task Force on Residential Mortgage Foreclosure Cases was established pursuant to AOSC09-8 (March 27, 2009) to recommend “policies, strategies, and methods for easing the backlog of pending residential mortgage foreclosure cases”. The 15-member Task Force met over a period of 20 weeks, during which time it conducted research to determine the effect of the foreclosure crises on lenders, services, borrowers, attorneys and judges. A copy of the Task Force’s Final Report and Recommendations, as well as the Supreme Court’s Orders can be found on its website, http://www.floridasupremecourt.org.
2 AOSC09-54, page 2.
3 At the time of submission of this article, only Chief Judges in 10 of the 20 circuits have executed their independent administrative orders. These can be viewed at: http://www.floridasupremecourt.org/pub_info/foreclosure.shtml.
4 See http://makinghomeaffordable.gov.
5 Unpaid minimum balances increase with the number of units, such as: $934,200 for 2 units; $1,129,250 for 3 units; and $1,403,400 for 4 units.
Are Your Emails Waiving the Attorney Client Privilege?

By Robyn L. Vines, Esq., Fort Lauderdale, Florida

With regard to the e-mails [her lawyer] sent to her, there is no question that her address -- ‘[email address omitted]@IHFA.org’ -- clearly put [her lawyer] on notice that he was using her work e-mail address. Employer monitoring of work based e-mails is so ubiquitous that [the lawyer] should have been aware that the [employer] would be monitoring, accessing and retrieving e-mails sent to that address. Given that, the Court finds that [the lawyer’s] e-mails sent to [the employee’s] work e-mail are likewise unprotected by any privilege.”


For most, email has become a routine method of communication both personally and professionally. People use email to monitor bank accounts, phone usage, send photos and correspond countless times a day. Indeed, most of you received notice of this newsletter via email. It is not surprising that the courts are catching on. The Federal trial and Bankruptcy courts now use electronic filing, the Federal Rules of Procedure address electronic discovery, and the various Rules Committees of the Florida Bar are presently considering amendments to the Rules of Procedure which would make email service of pleadings and papers by attorneys mandatory.

The prevalence of electronic communications naturally segues to trial (pun intended) and the proverbial tribulations. At least three courts addressed claims of waiver of the attorney client privilege through use of email in 2009. Some of the holdings may surprise you. Although this author is unaware of a Florida ruling at this time, certainly the cases from 2009 may be persuasive. Inasmuch as one of the 2009 decisions found that the attorney waived the attorney client privilege by sending email to a client’s work email address, all practitioners should be aware of these cases and consider whether one should amend current office practices.

The principle underlying each of the 2009 cases is an allegation that the client waived his attorney client privilege by failing to protect the confidentiality of his communications because the client's email was accessible by the employer either actually or by virtue of employer policy. Some courts are applying the following which appears to be the emerging test to determine whether the attorney client privilege was waived:

1. Is there a company policy banning personal use of e-mails?
2. Does the company monitor the use of its e-mail?
3. Does the company have access to all e-mails?
4. Did the company notify the employee about these policies?


The most notable case of 2009 was Alamar Ranch, L.L.C. v. County of Boise, Case No. CV-09-004-S-BLW (D.Idaho November 2, 2009). Before reviewing the holding, consider this:

Imagine you represent a client who is not involved in litigation. The client writes to you via email from an employer provided email address. You respond to the email address used by your client to send the original message. Someone now subpoena your client’s employer’s records and, specifically, the communications between you and your client. According to Alamar, your client waived his attorney client privilege because the employer reserved the right to review, audit, intercept and disclose all messages created, sent or received over its email system.

It is unreasonable for any employee in this technological age -- and particularly an employee receiving the notice [this employee] received -- to believe that her e-mails, sent directly from her company's e-mail address over its computers, would not be stored by the company and made available for retrieval.

Alamar at page 10. Worse, under the Alamar holding, you also waived your client’s attorney client privilege by responding to the employer provided email address.

With regard to the e-mails [her lawyer] sent to her, there is no question that her address -- ‘[email address omitted]@IHFA.org’ -- clearly put [her lawyer] on notice that he was using her work e-mail address. Employer monitoring of work based e-mails is so ubiquitous that [the lawyer] should have been aware that the [employer] would be monitoring, accessing and retrieving e-mails sent to that address. Given that, the Court finds that [the lawyer’s] e-mails sent to [the employee’s] work e-mail are likewise unprotected by any privilege.

Alamar at page 10. Interestingly, although the lawyer “should have
known” the employer was monitoring the emails, the court declined to impute this constructive knowledge to non-employees communicating with the client and attorney via the employer provided email address since “laypersons are simply not on ‘high-alert’ for such things as attorneys must be.” Alamar at page 11.

While reviewing past cases addressing this issue, the Alamar court cited to multiple other cases wherein courts have held that the privilege is waived or there was no reasonable expectation of privacy when a monitoring policy exists and is known by the employee to exist because the “employer retained the key” to the employee’s files. Alamar at 8-9 (citations omitted). The Alamar court apparently rejected the employee’s denial of knowledge of her employer’s monitoring policy. Also of interest were the cases discussed in the Alamar ruling in which an employer “went too far” when accessing an employee’s emails sent via employer computer when the employee worked remotely so the employer could not regularly conduct the monitoring the employer policy stated, and when the employee sent the email from a web-based email account that was password protected from the employer. See Alamar at 8-9 (citing Curto v. Medical World, 2006 WL 1318387 (E.D.N.Y., May 15, 2006); Stengart v. Loving Care Agency, Inc., Docket No. A-3506-08T1 (N.J.App.Ct. June 26, 2009), review granted New Jersey Supreme Court December 11, 2009); Compare Convertino v. U.S. Dept of Justice, Civ. Action 04-0236 (D.D.C. December 10, 2009) (employee did not waive his attorney client privilege by sending electronic mail to attorney from employer issued email address because employer did not ban personal email).

In contrast to Alamar, the more recent case of Stengart v. Loving Care Agency, Inc., (N.J.App. June 26, 2009) review granted (New Jersey Supreme Court) December 11, 2009, held that the employee did not waive her attorney client privilege by sending email to her attorney from an employer provided computer using a web based private email address that was password protected. This court revealed many troubling issues associated with email and the attorney client privilege including 1) whether the seemingly inviolate principles underlying the attorney-client privilege outweigh the employer’s interest in monitoring employee emails to ensure employees are attending to company business; 2) whether the ineffectiveness of the monitoring policy negates an otherwise waiver of the privilege (when monitoring cannot occur remotely); 3) whether waiver of the privilege occurs when only “occasional” personal use of email is permitted; 4) whether use of a web based email address, over employer provided equipment, waives the privilege; and 5) whether the existence of a password protected email account, where the password is unknown to the employer, prevents waiver of the privilege. The Stengart court did not answer each of these questions, thus they are left to another court on another day.

Many attorneys communicate with our clients by email. Are our clients waiving their attorney client privilege when they email us? Will we be waiving theirs by responding to them by email? Will Florida adopt a ruling similar to Alamar or Stengart? These answers are yet unknown, however a few ‘best practices’ may be advisable. First, advise your client in your initial meeting not to communicate with you or your office from an employer provided email address or employer provided computer. Next, ask your client to establish a private email address to use when communicating with your office. Third, direct all substantive correspondence to the private email address. Fourth, if you must communicate with your client via employer email, consider limiting the content to “check personal email” and sending the actual correspondence to the personal email address.

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The Legal Implications of Adult Cohabitation

By Michelle A. Ralat, Esq., Tampa, Fla.

The changing nature of the family unit in our society has significant implications on marital and domestic relations law. As the number of divorced couples and non-married couples cohabitating rises, courts are faced with factual scenarios in which the existing legal precedent provides little guidance for an appropriate disposition. The purpose of this article is to analyze and evaluate the legal implications of adult cohabitation on marital and family law.

There are presently criminal statutes in effect in Florida regarding adult cohabitation, which could seemingly impact any non-traditional family. For example, Section 798.02, Florida Statutes, provides in pertinent part:

**Lewd and lascivious behavior.**
- If any man and woman, not being married to each other, *lewdly and lasciviously associate and cohabit together*, or if any man or woman, married or unmarried, engages in open and gross lewdness and lascivious behavior, they shall be guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

Additionally, Section 798.01, Florida Statutes provides, in pertinent part:

**Living in open adultery.**
- Whoever lives in an open state of adultery shall be guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083. Where either of the parties living in an open state of adultery is married, both parties so living shall be deemed to be guilty of the offense provided for in this section.

Although the likelihood of enforcement of these statutes and prosecution thereunder is slim because of constitutional protections, among other reasons, the existence of these statutes and the lack of prosecution demonstrate the significant changes that have occurred in the family unit in our society.

Any discussion of non-traditional families inevitably leads to the issue of same sex marriages. Same sex marriages are illegal in Florida, by both statute and by amendment to the Florida Constitution. §741.212, Florida Statutes (2009); Art. I, §27, Fla. Const. (2009). Recently, the debate over the constitutionality of a statute prohibiting same sex couples from adopting children has raged in the legal community, as demonstrated by multiple editorials in the *Florida Bar News* over the past several months. Although this topic is beyond the scope of this article, it is worth noting that at least two counties in Florida have enacted domestic partnership acts ("DPA") to extend certain benefits typically enjoyed by married couples to domestic partners. Notably, the Fourth DCA has expressly held that the Broward County DPA did not conflict with Section 798.02, Florida Statutes, because the DPA's extension of benefits to domestic partners did not depend on sexual relationship between members of domestic partnership. See *Lowe v. Broward County*, 766 So. 2d 1199 (Fla. 4th DCA 2000). This area of law is certain to evolve as family units continue to change in Florida.

**Cohabitation and Alimony**

The topic of cohabitation is most germane to alimony claims in the context of domestic relations proceedings. Although it is well-established that alimony is only awarded in dissolution of marriage proceedings, Section 61.14(1)(a)(1) provides, in pertinent part:

The court may reduce or terminate an award of alimony upon specific written findings by the court that since the granting of a divorce and the award of alimony a supportive relationship has existed between the obligee and a person with whom the obligee resides. On the issue of whether alimony should be reduced or terminated under this paragraph, the burden is on the obligor to prove by a preponderance of the evidence that a supportive relationship exists.

In order to fully evaluate a post-judgment alimony modification or termination proceeding, the first step is to determine whether a supportive relationship exists. Florida Statute Section 61.14(1)(b)(2) establishes a number of factors for the court's consideration, including, but not limited to, the following factors:

(i) The extent to which the obligee and the other person have held themselves out as a married couple;
(ii) The period of time that the obligee has resided with the other person in a permanent place of abode;
(iii) The extent to which the obligee or the other person have pooled their assets or income or otherwise exhibited financial interdependence;
(iv) The extent to which the obligee or the other person has supported the other, in whole or in part;
(v) The extent to which the obligee or the other person has performed valuable services for the other;
(vi) The extent to which the obligee or the other person has performed valuable services for the other's company or employer;

continued, next page
Adult Cohabitation

from preceding page

(vii) Whether the obligee and the other person have worked together to create or enhance anything of value; &
(viii) Whether the obligee and the other person have jointly contributed to the purchase of any real or personal property.

Clearly the existence of a supportive relationship is a question of fact, which will vary in each case. Although cohabitation is one of the factors for the court’s consideration in determining whether a supportive relationship exists, it is not dispositive, nor is it the only factor for the court to consider.

Once the court has determined whether a supportive relationship exists, does alimony automatically terminate? Presently, a conflict exists between the district courts of appeal on this issue. The Fourth DCA held that alimony does automatically terminate upon a finding of the existence of a supportive relationship pursuant to Section 61.14. French v. French, 4 So.3d 5 (Fla. 4th DCA 2009). However, the Second DCA held that alimony did not automatically terminate upon such a finding, certifying conflict with the Fourth DCA. Baumann v. Baumann, 22 So. 3d 719 (Fla. 2d DCA 2009). To date, the Florida Supreme Court has not resolved the conflict. In light of the present state of the law, it is prudent to advise alimony recipients involved in relationships and contemplating cohabitation arrangements to be mindful of the factors set forth in Section 61.14(1)(b)(2), and to organize their affairs accordingly.

Cohabitation as it Relates to Other Financial Issues

Adult cohabitation should not affect the equitable distribution of marital assets and liabilities, because Section 61.075 only applies in dissolution of marriage proceedings. Of course, to the extent that a party can show that adult cohabitation somehow impacted the value of marital assets, a party may be able to use the “catchall” provision of the equitable distribution statute to claim an unequal distribution of marital assets. See § 61.075(1)(j), Fla. Stat. (2009). Additionally, a party may claim that cohabitation caused the dissipation of marital assets, pursuant to Florida Statute Section 61.075(1)(j); however, specific factors must be satisfied in order to acquire an unequal distribution. See Roth v. Roth, 973 So. 2d 580 (Fla. 2d DCA 2008); see also Romano v. Romang, 632 So. 2d 207 (Fla. 5th DCA 1994). Adult cohabitants who need to distribute jointly owned or titled assets must file a partition action pursuant to Chapter 64, Florida Statutes or seek equitable relief.

As it relates to attorneys’ fees, a demand for an award of attorneys’ fees costs in domestic relations matters requires the court to evaluate the financial resources of both parties pursuant to Section 61.16, Florida Statutes. However, it is fairly well established that this does not include the income or financial resources of a cohabitant. The trial court must base its determination upon the individual financial resources of the parties, not the financial assistance provided by family or friends, and the voluntary contributions of a live-in companion cannot be substituted for the legal obligation of a former spouse. Mott v. Mott, 800 So2d 331, 334 (Fla. 2d DCA 2001).

 Likewise, the trial court cannot impute an ability to pay support based
upon the income of a former spouse's cohabitant. Arouza v. Arouza, 670 So2d 69, 70 (Fla. 3d DCA 1995).

Cohabitation and Children’s Issues

One of the most emotional and difficult aspects of any dissolution of marriage proceeding is a party's involvement with a new partner and the introduction of that partner to the parties' children. The standard for determining whether adult cohabitation has any impact on children is identical to the standard involving all children’s issues in domestic relations matters — whether the cohabitation is detrimental to the health, safety, welfare and well being of the child. See Smothers v. Smothers, 281 So. 2d 359 (Fla. 1973). In Smothers, the Florida Supreme Court held that an isolated act of adultery, or even frequent ones, may have no bearing whatsoever on the welfare and upbringing of the children; however, the trial court may modify custody where the welfare and upbringing of the children are adversely affected by cohabitation “without having conformed to society’s legal and moral rules.”

So how does one determine “society’s legal and moral rules” in this ever-evolving society? More importantly, is it fair or just for a trial judge to impose his or her “legal and moral rules” on a family with their own set of “legal and moral rules”? A review of the case law is not particularly helpful in answering these questions. The First DCA ruled that when evaluating the effect of cohabitation on the minor children, “the courts have not reached the level of impotency in protecting and preserving the institutions of marriage and the family that they are powerless to prevent impressionable young children from being thrust into the middle of a cohabitation living arrangement . . . which would tend to foster the development of a distorted view by such children of acceptable norms of family life in our society.” Commander v. Commander, 493 So. 2d 530 (Fla. 1st DCA 1986); see also Hackley v. Hackley, 380 So. 2d 446 (Fla. 5th DCA 1979) (ruling that the issue of “whether a live-in arrangement in and of itself has an impact on this child’s welfare as distinct from it simply failing to satisfy the moral code of the trial judge.”).

As society’s “legal and moral rules” continue to change, this issue is certain to evolve, and courts will be faced with emotional and complex factual scenarios with little guidance from the law. This will likely result in heavy reliance upon psychologists and other professionals to assist the court in reaching decisions regarding best interests of the children.

Conclusion

In sum, adult cohabitation has significant legal implications on an award of alimony. However, adult cohabitation should not have any impact on other financial matters related to domestic relations proceedings. Adult cohabitation may have an impact on time-sharing; however, there is little guidance in the law in this regard, and expert testimony is almost certainly required.

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Taxation of Same-Sex Marriage and Live-Ins

By Melvyn B. Frumkes, Esq. Miami Florida

(Re-Printed with Permission of the ABA Section of Family Law)

According to the Internal Revenue Service (IRS), same-sex couples, whether married or not, where permitted or not, will not be allowed to file joint tax returns.

Such couples will be treated as “live-ins,” whether in a heterosexual or same-sex relationship.

The IRS position is based on the Defense of Marriage Act (DOMA), P.L. 104-199, which defines “marriage” for purposes of administering federal law – including federal tax laws – as the “legal union between one man and one woman as husband and wife.” It further defines “spouse” as a “person of the opposite sex who is husband or wife.”

The IRS position states:

Because of the statute, only married individuals under this definition could elect to file a joint tax return. Even though a state may recognize a union of two people of the same sex as a legal marriage for the purposes within that state’s authority, that recognition has no effect for purposes of federal law. A taxpayer in such a relationship may not claim the status of a married person on the federal income tax return.

The law is clear on this issue, and we point out the federal definition of marriage when explaining “filing status” in IRS Publication 17, “Your Federal Income Tax,” and 501, “Exemptions, Standard Deduction, and Filing Information.” In both publications, we introduce the subject of marital status with this paragraph:

“In general, your filing status depends on whether you are considered unmarried or married. A marriage means only a legal union between a man and a woman as husband and wife.”

Dependency Exemption

The dependency exemption for 2009 is $3,650. The amount is adjusted annually to reflect the inflation rate. Furthermore, after December 31, 2009, no phaseout will be available.

Yes, if the required conditions are met, a taxpayer can take the deduction for the live-in, not as a dependent but as a “qualifying relative.” IRC section 152(a).

Under IRC section 152 (d)(1), a qualifying relative is an individual: (a) who bears a qualifying relationship to the taxpayer; (b) whose gross income for the year is less than the IRC section 151(d) exemption amount: (c) who receives over one-half of his or her support from the taxpayer for the taxable year; and (d) who is not qualifying child of the taxpayer of any other taxpayer for the taxable year.

IRC section 152 (d)(2)(A)-(H) lists eight types of qualifying relationships, seven of which involve various familial relationships. The eighth type of qualifying relationship applies to an individual, other than the taxpayer’s spouse, who has the same principal place of abode as the taxpayer and is a member of the taxpayer’s household for the taxable year. IRC section 152(d)(2)(H).

For an individual to be considered a member of a taxpayer’s household, the taxpayer must maintain the household, and both the taxpayer and the individual must occupy the household for the entire taxable year. IRC section 1.152-1 (b), Income Tax Regs. A taxpayer maintains a household when he or she furnished more than one-half of the expenses for the household.

The taxpayer in Leonard v. Commissioner, T.C. Summ. Op. 2008-141, was unmarried, yet she claimed her roommate and her roommate’s two grandchildren, of whom the grandmother had custody, as dependents, not as qualifying children but as qualifying relatives. The taxpayer contributed 79% of the household expenses, the grandmother 21%. The grandmother was not required to file a federal income tax return and did not file one. The grandmother lived in the taxpayer’s household for 11 years.

Payments or Transfers of Property

In considering payments of support for a “live-in,” or the transfer of funds or property to that person, the intention of the donor is critical to the tax treatment. Under Commissioner v. Duberstein, 363 U.S. 278, 285 (1960), the court called the donor’s intent the “critical consideration” in distinguishing between gifts and income.

As explained by Professor Asimow:

The tax consequences of support payments between cohabitants during their relationship remain unclear. It can be argued that these payments can be excluded by the recipient as gifts, but the IRS may be expected to contend that they are payments for services and thus taxable to the recipient (but not deductible to the payor).

Asimow, Tax Planning for Cohabitation and Marital Dissolution, Nov. 1991 (ALI-ABA). The taxpayer has the burden of proving that the tax collector’s determination is wrong. Welch v. Helvering, 290 U.S. 111 (1933).

To be considered a gift by the transferor, funds or property must proceed from a disinterested and detached generosity, motivated by affection, re-continued, next page
spect, admiration, charity or the like, with the most critical factor being the transferor’s dominant intention. By contrast, a transfer of property is income if it is the result of “the constraining force of any moral or legal duty, constitutes a reward for services rendered, or proceeds from the incentive of anticipated benefit of an economic nature.” Commissioner v. Duberstein, 363 U.S. 278 (1960).

However, the court opined in Pascarelli v. Commissioner, 55 T.C. 1082 (1971), aff’d without opinion, 485 F.2d 681 (3rd Cir. 1973):

“In Pascarelli, the court found that the funds transferred to Lillian were intended to be gifts. The parties had a 20-year live–in relationship that in most respects was akin to husband and wife. The court found that Mr. De Angelis’s dominant interest in Mrs. Pascarelli was personal and not one of employer/employee, notwithstanding that she entertained for business purposes and bought most of his clothes, among other things. The court held that Mrs. Pascarelli did not perform services for Mr. De Angelis for purposes of obtaining compensation, but rather with the same spirit of cooperation that would motivate a wife to strive to help her husband in his business.

The holding in Reynolds v. Commissioner, T.C. Memo 1999-62, was similar. However, when Violet gave up her claim to property acquired in Gregg’s name during their 24-year relationship for a sum paid to her, the tax court observed that the sale of her interest in the property to Gregg was a taxable event to the extent the “selling price” exceeded her basis.

In Starks v. Commissioner, T.C. Memo 1966-134, 24-year-old Greta Starks received substantial moneygifts for living expenses, a house (which she purchased in her name with cash given for that purpose), furniture, an automobile, jewelry, fur coats, and other clothing from a 55-year-old married man. The IRS assessed all against her as taxable income, alleging she received same “for services rendered.” The donor testified that payments were “to insure the companionship of Greta Starks, more or less for a personal investment in the future on my part.” The court held the payments were gifts for “companionship,” not for services rendered.

In Reis v. Commissioner, T.C. Memo 1974-287, the taxpayer was a young female nightclub dancer who met an older man who bought dinner and champagne for the performers in the show. The man paid each person at the table, other than the woman, $50 to leave the table so that he and she would be alone. The man gave the woman $1,200 for a mink stole and another $1,200 so that her sister could have an expensive coat, too. Over the next five years, the woman saw the man “every Tuesday night at the [nightclub] and Wednesday afternoons for approximately 1:00 p.m. to 3:00 p.m. .... at various places including a girlfriend’s apartment and hotels... where [he] was staying.” He paid her living expenses, plus $200 a week, and provided her with money for other things, such as investing, decorating her apartment, and a car. The court held that none of the more than $100,000 he gave her over the five years was taxable to her. The court concluded that she received the money as a gift. The court reached this conclusion notwithstanding the fact that the women had stated she “earned every penny” of the money.

Similarly, in Libby v. Commissioner, T.C. Memo 1969-184 (1969),
the tax court accorded gift treatment to thousands of dollars in cash and property a young mistress received from her older paramour. In response to assertions by the IRS of a lack of documentary evidence of the money given to Libby by her paramour, the tax court noted, “we are not concerned because there is little likelihood that they were interested in ‘keeping books on romance.’”

The court in United States v. Harris, 942 F.2d 1125 (7th Cir. 1991), commented that:

Duberstein, supra, provides no ready answer to the taxability of transfers of money to a mistress in the context of a long-term relationship. The motivations of the parties in such cases will always be mixed. The relationship would not be long term were it not for some respect or affection. Yet, it may equally clear that the relationship would not continue were it not for financial support or payments.

Gifts to Live-ins

When Lyna testified that James “was getting his money’s worth,” the court in Jones v. Commissioner, T.C. Memo 1977-329, held that the funds paid were for sexual relations and thus taxable as compensation. The money was not a gift, the court said, “James did not give money to petitioner from feelings of ‘detached and disinterested generosity,… out of affection, respect, admiration, charity or like impulses’ as required under the holding of Commissioner v. Duberstein…."

Recovery by a long-time girlfriend against her deceased benefactor’s estate, in spite of her characterization of her relationship as that of “an old-fashioned traditional wife,” was held as taxable income Green v. Commissioner, T.C. Memo 1987-503. In her claim against her lover’s estate, Ms. Green sought compensation for past services rendered. She proved that although she had performed what she promised, the decedent negated on his promise to leave her “everything” when he died. The court distinguished Green from Pascarelli because in the latter; the transfers were found to be gifts. But in Green, based on the lawsuit, Ms. Green had a compensatory arrangement with the decedent. The court did offer that the substantial legal expenses, pursuant to I.R.C. §212, in connection with the litigation against the estate, were deductible.

See also Blevins v. Commissioner, T.C. Memo 1955-211, where Thelma Blevins did not sustain her burden of showing that the monies she received were gifts. She testified that the funds were gifts in contemplation of marriage; however, the man had a wife throughout all taxable years, and there was no indication that he or his wife were ever attempting a divorce.

Part Gift, Part Income

The dichotomy in the foregoing cases was exemplified in Austin v. Commissioner, T.C. Memo 1985-22. During his lifetime, Cathy’s benefactor bought her a house and gave her money. She provided him, a married man in his late 60’s, with companionship. After his death, Cathy sued his estate for $7 million, but finally settled for $42,500. The settlement agreement recited that payment was for services in connection with the man’s individual business interests:

[I]n determining whether a transfer is a gift for purposes of section 102, the most critical consideration is the transferor’s intent. For a transfer to constitute a gift in the statutory sense, it must proceed from a “detached and disinterested generosity,… out of affection, respect, admiration, charity or like impulses.” If, on the other hand, a transfer proceeds primarily from “the constraining force of any moral or legal duty,” constitutes a reward for “services rendered,” or proceeds from “the incentive of anticipated benefit” of an economic nature, “the transfer is not a gift.

The court held that what was given in the man’s lifetime were gifts; however, the payment from the estate was compensation and thus was taxable income.

Deductible by Payor

Bruce v. Commissioner, T.C. Memo 1983-121, dealt with whether a taxpayer could deduct payments to a companion, for whom he was the sole support, as he was for her son and dog, all of which lived with him. The girlfriend assisted in acquisition, management, and sale of investment properties.

Noting in Bruce that the taxpayer did not pay self-employment tax on the claimed amount, nor did he execute withholding forms nor withhold employment taxes, the court observed:

[T]he question is purely one of fact, and no one circumstance controls the ultimate resolution of the issue. Specifically, the taxpayer’s failure to withhold, pay social security tax, and meet filing and reporting requirements imposed upon employers by the Internal Revenue Code is not determinative as to the question of whether payments in fact constitute compensation, although these are relevant factors to consider. Likewise, the fact that payments are made indirectly by paying household expenses of the claimed employee, rather than being paid directly by cash or check, is not determinative.

The court concluded in Bruce that payments for household expenses and those related to personal relationships with friends were not deductible compensation; and costs incurred in locating and assisting in acquisition of properties and expenses beyond “incidental repair” of real property were capital expenses. Only portions of payments ordinary and necessary for management, conservation, or maintenance of investment properties qualified for ordinary deduction.

Cohabitation Agreement

Julia Perles and Ruth J. Wiltzum, in “Negotiating a Cohabitation Agreement: a Taxing Expense,” Encyclopedia of Matrimonial practice, 1464 (Prentice Hall 1991), observed:

The best way to avoid any question of income taxes is to include in a cohabitation agreement a provision that neither party has any obligation to support the other, and that each party shall keep his or her own income separately. This does not preclude an agreement as to how

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household expenses shall be paid.

Property Division
An equal division of jointly owned property would cause no tax consequence, as each party would receive what each party owned. However, a transfer of separately (or unequally) owned property would have Davis consequences (U.S v. Davis, 370 U.S. 65 (1962)) — the transferor would be required to recognize a gain or loss, and the transferee would have the then fair market value as a tax basis.

Gifts
If the gift is cash or property, with a value of more than $13,000 for 2009, a gift tax return must be filed. If the donor has exceeded the exclusion amount, a gift tax must be paid.

Estate Taxes
“Live-ins” are not entitled to the marital deduction. Therefore, the idea of “a deathbed marriage” should not be overlooked if a substantial bequest is to be made to one’s “honey.” A marriage at any time prior to death will qualify all amounts passing to the surviving spouse for the unlimited marital deduction. Wren, Gabinet and Carrad, Tax Aspects of Marital Dissolution 323 (Callaghan & Co. 1987).

Retirement Funds/Death Benefits
Death benefits payable to the beneficiary who is a “live-in” will not qualify for the same favorable tax treatment as for a recipient spouse. If the beneficiary was married, he or she could roll over the proceeds from the retirement plan and/or IRA into his or her own IRA and thus avoid a tax at the time of receipt. The “live-in” must report all funds received as current income.

Filing Status
Cohabitants will no longer save on taxes if they do not marry. Furthermore, if a standard deduction is to be claimed, instead of itemizing deductions, “live-ins” are entitled to the same total deductions as married couples.

Sale of Principal Residence
Unmarried taxpayers who jointly own their principal residence may each take up to a $250,000 exclusion from gain if they lived in and owned the home for two of the past five years, if no exclusion had previously been taken during the applicable period. Following is the example used by the IRS:

Example (1). Unmarried Taxpayers A and B own a house as joint owners, each owing a 50 percent interest in the house. They sell the house after owning and using it as their principal residence for two full years. The gain realized from the sale is $256,000. A and B are each eligible to exclude $128,000 of gain because the amount of realized gain allocable to each of them from the sale does not exceed each taxpayer’s available limitation amount of $250,000. Treas. Reg. 1.121-2(a)(4).

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Legal Protection for Cohabiting Couples: The Law and Living Together

By, Patricia C. Kuendig, Esq., and Joshua Goldglantz, Esq.

It is becoming increasingly more common for couples to combine their residence, finances, property and day-to-day lives without getting married. While homosexual couples cannot marry, many heterosexual couples are choosing to forego marriage altogether. Living together may provide couples with a reduction in expenses, but while life partners often consider one another to be family, the law typically does not. The unmarried couple is not entitled to the same rights and financial safeguards enjoyed by their married counterparts.

Due to the lack of legal protections, unmarried partners need to be diligent in preparing in advance for events such as death, illness and separation. Cohabitation agreements are the starting point for these non-traditional families. They can be used to address a wide range of issues, including day-to-day finances, asset and debt allocation, and support. Estate planning, beyond the preparation of a last will and testament, are also important. Documents such as a health care surrogate designation and durable power of attorney are essential in planning for an individual's incapacity during life.

Cohabitation Agreements

A cohabitation agreement is a comprehensive tool for couples that intend to live together for an extended period of time. It is a contract between cohabitants that can establish rights and obligations for the parties that they are not afforded by law because of their unmarried status. It is similar to a pre- or post-nuptial agreement because it creates a road map for how the couple is going to structure their finances and relationship.

Florida courts have consistently recognized and enforced agreements between unmarried couples. The basic tenets of bilateral contract law—offer, acceptance and consideration—must be present. The consideration for such agreements cannot be based solely on sexual services or the agreement will fail due to its illegality. Courts will look beyond what is stated as consideration in the agreement itself, to the conduct of the parties. The mere fact that the parties engage in a sexual relationship will not sabotage the agreement, provided valid and lawful consideration exists.

Cohabitation agreements are different from pre- and post-nuptial agreements in several significant ways. To enforce such an agreement, a lawsuit must be filed in civil court as one would a typical breach of contract action. It will be governed and interpreted by general contract principles. In addition, for couples that are able to marry, a cohabitation agreement will not have the same validity and effect after marriage as a pre-nuptial agreement.

A well-drafted cohabitation agreement should contain many of the basic provisions of a pre- and post-nuptial agreement. The parties should be clearly identified. At a minimum, their addresses and birth dates should be included, but it may also be important to describe their current employment, financial position and health. The purpose of the agreement should be clearly stated along with the intention that the agreement be legally binding on the parties, their heirs and assigns. It should state the method by which it can be modified. Finally, each party should provide a schedule of their assets and liabilities.

The drafting attorney should also include language to indicate that the agreement is intended to be the entire agreement of the parties and to declare any prior agreements or understandings between the parties invalid. An often-overlooked benefit of cohabitation agreements is that they protect against litigation regarding oral and implied contracts.

Substantively, the following provides an overview of the issues that should be considered by the attorney and discussed with the client in negotiating and drafting a cohabitation agreement:

• How long do the parties intend the agreement to last? Will the agreement sunset after a specific term or upon some triggering event? Can either party elect to unilaterally terminate the agreement?

• How should property purchased, inherited or received via gift during the relationship be handled? How will assets be titled? How will accrued savings, retirement assets, and annuities be handled? Will the parties agree to designate each other as beneficiary or co-owner? How will the financial contribution of each party to the acquisition of joint assets be dealt with? As a gift for tax purposes?

• How should debts incurred during the relationship be handled?

• How income will be shared or separated?

• How will household and living expenses be shared or allocated? How will vacations and other luxuries be paid for? Will there be off-sets for contributions by the parties during the relationship?

• Does either party agree to purchase or maintain life insurance for the benefit of the other? If so, who will own the policy and who will be designated as beneficiaries?

• How will property be divided upon the dissolution of the relationship?
Will set-offs or credits be given for any reason? How will they be calculated? If one partner can buy out the other, what are the terms?

- Will either party be obligated to financially support the other during the relationship or upon its dissolution? If so, for what length of time? Under what circumstances will the support terminate? How will the support be taxed – as a gift or as ordinary income for services rendered such as housekeeping?
- How will the parties handle separation? Who will move out and in what circumstances? How will the expenses for the household be shared if the household remains a joint asset?
- If rights of survivorship exist with respect to any real or personal property, will those rights survive the termination of the agreement or will a tenancy in common be created?
- Do the parties own pets? If the relationship terminates, who will retain custody of the animals?
- Are there any circumstances, other than infidelity, under which either party should be entitled to liquidated damages or penalties from the other?
- Will the parties waive property rights in favor of natural heirs? How will future wills executed by either party after the execution of the cohabitation agreement be viewed?
- What law will govern? Will it be the law of the state in which the contract is formed? What venue will prevail? What if the parties relocate?

### Health Care Surrogate Designation

Many hospitals only grant visitation rights to spouses and blood relatives when it comes to seeing a patient who is in critical condition. This rule generally excludes life partners and companions from visiting their loved ones in such situations. Having a valid health care surrogate would enable the individual appointed as surrogate to visit the patient freely because the health care surrogate is one who is appointed to make health care decisions should the patient be unable to make the decision on their own. If the patient does not have the capacity to make decisions and the patient never appointed a health care surrogate, the hospital will look to the spouse and then blood relatives for decision-making authority. Therefore, not only does a health care surrogate designation eliminate the possibility of being shut out from visiting your partner in the hospital, but it may also alleviate any conflict that would arise between the patient’s family and the partner. So long as the health care surrogate is properly drafted, it will be clear who the patient appointed.

### Durable Power of Attorney

A durable power of attorney grants the attorney-in-fact the power to...
make financial decisions on behalf of another. Generally, durable powers of attorney are drafted so that they become effective only upon the incapacity of the individual. Therefore, if one partner becomes incapacitated, the attorney-in-fact would then have the authority to write checks, pay the mortgage, and continue making necessary insurance payments. Without a durable power of attorney, one’s partner would have to go through the expensive and time-consuming process of guardianship. Guardianship proceedings may pit the life partner against the incapacitated party’s family and may not result in the life partner being appointed guardian.

Post Mortem Planning

If an individual passes away without a will, state law pre-determines who the beneficiaries will be. Notwithstanding payable on death accounts and property held jointly, unmarried life partners will receive nothing from a partner who died without a will. For traditional families, state law ensures that the surviving spouse is not disinherited regardless of the existence of a will.

The Defense of Marriage Act (“DOMA”) enacted in 1996, provides that non-traditional families are generally not afforded the same federal tax benefits as traditional families either. DOMA defines marriage as between a man and a woman, and thereby precludes homosexual couples from many of the tax advantages enjoyed by heterosexual married couples. One of the most important planning devises in any estate plan is the use of the marital deduction to reduce or eliminate the imposition of federal estate taxes. The marital deduction allows the unlimited transfer of assets tax-free to a spouse. Unfortunately, non-traditional families are not afforded this advantage and estate planners are forced to be more creative in their planning for non-traditional families. Although the federal estate tax is not in effect for the year 2010, it will likely re-appear at some point this year, and will definitely re-appear in 2011.

There are a variety of trusts available which will help reduce one’s estate tax liability, and without the benefit of the marital deduction, it is essential that non-traditional families consult an estate planning attorney to discuss their options.

An often over-looked element of estate planning is the review of how assets are held between unmarried life partners. In Florida, married couples may hold title to many assets as joint tenancy by the entireties. Unmarried life partners, whether they cohabit within the property or otherwise, must choose among the following options in terms of title: (1) joint tenants with rights of survivorship (“JTROS”), (2) tenants in common (“TIC”), or (3) to hold assets solely in one’s name. There are pros and cons to each and non-traditional families need to understand which form is best suited for their needs.

Holding an asset as JTROS will pass title to the remaining partner automatically upon the death of an owner, and thus avoiding the probate process. In a JTROS, each partner holds an equal share of the property. However, JTROS affords little creditor protection and may expose the property to the creditors of each individual partner. In addition, adding one partner to the title of an asset previously owned will invoke a taxable gift which cannot later be revoked if the couple breaks up.

TIC is a form of ownership which allows the partners to own different percentages of the property, which can be defined and changed over time. One partner can gift shares to the other partner equal to the annual exclusion amount, and thus avoid paying gift tax in adding a partner to the title of an asset. However, unlike JTROS, partners will need to engage in some estate planning to pass title upon death as there is no automatic transfer.

Avoiding probate is a common goal in many estate plans. The most common way to ensure that certain assets avoid the probate process is to appoint a designated beneficiary whenever possible. This means all accounts, retirement plans, life insurance policies and the like should name your partner as the designated beneficiary. Unlike a Last Will and Testament, which can be challenged in court, it is unlikely that a family member would challenge a beneficiary designation of an account, retirement plan or life insurance policy.

Conclusion

The above outlines the basic tools used in planning for cohabitants and unmarried life partners. It is important for family lawyers to be aware of the use and effect of cohabitation agreements for these non-traditional families, but also the need for proper estate planning to fully protect them. Due to the uncertainty in the estate tax law and the ever-changing tax laws, it is important to consult with an experienced estate and tax planning attorney to ensure that the clients’ needs are being met both during their relationship and upon termination of the relationship, whether due to separation or death. It is also important for non-traditional families to review their planning documents every few years because state laws regarding same-sex couples may change over time.

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Endnotes:
1. Posik v. Layton, 695 So. 2d 759 (Fla. 5th DCA 1997); Stevens v. Muse, 562 So. 2d 852 (Fla. 4th DCA 1990).
2. Posik, 695 So. 2d 759(Fla. 5th DCA 1997).
3. Id. at 762. In Posik, for example, the Court recognized and enforced a cohabitation agreement despite the parties’ sexual relationship because the parties contracted for “a permanent sharing of, and participating in, one another’s lives.” Id.
Same Sex Parenting and Divorce

By Theodore Wasserman, Ph.D., Sheila Furr, Ph.D., and Lori Wasserman, Ph.D.
Boca Raton, Fla.

With increasing frequency the configuration of the American family is no longer the 1950's sitcom idealization of a mother, father, two children and their pet. Some of these demographic changes are seen in the single parent family, the blended family and the stepfamily. More common than ever, with the accessibility of donor eggs, sperm and in vitro fertilization, are families with same sex parents, gay or lesbian. This article addresses whether there are substantive differences in the effect of divorce with children of same sex vs. heterosexual unions and whether these potential differences should become issues in parenting planning.

In a review article, Pawelski et al (2006) indicated that since the enactment of the federal Defense of Marriage Act (DOMA) in 1996, 42 states have enacted laws codifying the federal law into state statute that essentially replicates the federal law. These State laws, including Florida’s, contain at least one of the following provisions:

1. Definition of marriage as a legal union between a man and a woman.
2. Prohibition of recognition of same-gender marriages that are granted in other states.
3. Declaration of same-gender marriage as a violation of public policy.

4. Definition of spouse as only a person of the opposite gender who is legally married as a wife or husband.

Florida adopted the federal DOMA definition of spouse as only a person of the opposite gender who is legally married as a wife or husband. Florida defines marriage as a legal union between a man and woman and prohibits recognition of same-gender marriages granted by other states. (James G. Pawelski, 2006).

Despite the legal prohibition against formal same sex relationships, it is clear that there are significant numbers of children living in households with same sex couples, and that many of them involve parenting children. The postmodern social concept of family is moving away from the importance of biological connectivity and more towards finding suitable parents (Appell, 2008). As part of this trend, data suggest that parenting by same sex couples is both an established and growing part of the complex web of American families. Data from the 2000 US census is instructive in this regard:

- Same-gender couples live in 99.3% of all US counties.
- Nearly one quarter of all same-gender couples are raising children.
- Nationwide 34.3% of lesbian couples are raising children, and 22.3% of gay male couples are raising children (compared with 45.6% of married heterosexual and 43.1% of unmarried heterosexual couples raising children).
- Regionally, the South has the highest percentage of same-gender couples who are parents. 36.1% of lesbian couples and 23.9% of gay couples in the South are raising children.
- Six percent of same-gender couples are raising children who have been adopted compared with 5.1% of heterosexual married couples and 2.6% of unmarried heterosexual couples.

- Of same-gender partners raising children, 41.1% have been together for 5 years or longer, whereas 19.9% of heterosexual unmarried couples have stayed together for that duration.
- Eight percent of same-gender parents are raising children with special health care needs, compared with 8.3% of heterosexual unmarried parents and 5.8% of heterosexual married parents.

It is clear then that there are significant numbers of children living in households with same sex couples and as with any couple, some of these unions dissolve. Regardless of the parent composition, there are implications for children’s mental health in divorce.

In general, the prevailing literature indicates that homosexual parents are just as effective as heterosexual parents, There have been no studies that have identified developmental differences between children raised in homosexual households, when compared to those raised in heterosexual households (Camilleri & Ryan, 2006). Most studies have found that outcomes for children of gay and lesbian parents are no better and/or no worse than for other children, whether the measures involve peer group relationships, self-esteem, behavioral difficulties, academic achievement, or warmth and quality of family relationships (Carpenter, 2007). Research findings with lesbian couples where the child was conceived in vitro demonstrate that where the children grow up without a father from the outset, they do not differ from their peers in two parent, heterosexual families in terms of either emotional wellbeing or gender development. The only clear difference to emerge is that co-mothers in two parent lesbian families are more involved in parenting than are fathers from traditional two parent homes.
In response to the question as to whether children who are raised by homosexual parents would more likely be homosexual, Golombok and Tasker, 1996, found that although children raised in homosexual households were more likely to explore and be knowledgeable of same-sex relationships, they were still more likely to identify themselves as heterosexual. There were no substantive differences between traditional parenting unions and homosexual parenting unions in terms of the frequency of children who later identified themselves as homosexual.

Finally, in a survey of professionals working with parenting issues, a study conducted by Camilleri and Ryan (2006), found that when presented with vignettes, social workers had very liberal attitudes towards homosexual parenting, and rated lesbian and gay parents in the highest regards.

The issue appears to be so clear that a report of the American Academy of Pediatrics in February 2002 supported the introduction of legislation to allow the adoption by co-parents of children born to lesbian couples. The Academy took the view that children in this situation deserve the security of two legally recognized parents in order to promote psychological wellbeing and to enable the child’s relationship with the co-mother to continue should the other mother die, become incapacitated, or the couple separate.

There is no doubt that there are social obstacles children will need to face having parents that are ‘different’, and that these will prove challenging. Some of these challenges may arise from religious views and cultural stereotypes. Regardless of the challenge, it is the resiliency of the family and the application of proper parenting techniques that determine the outcome. In sum, children raised by gay and lesbian households tend to have the same developmental and emotional outcomes as children raised in households where the parents are heterosexual.

For the family law attorney this brings up a number of questions, two of which are 1) the implications for the child of divorce (separation) of a same sex union and 2) the issue of what happens when a parent from a heterosexual union divorces and enters into a homosexual union and has the intent to parent children from the first union.

As to the first issue, the research suggests that children of divorce are impacted, irrespective of the parental couple being comprised of a same sex or heterosexual union. Thus, the better question to ask is, “What are the factors in divorcing families that contribute to children having difficulties?” These factors have been suggested to include parental loss, economic decline, increased life stress, the effects of parental adjustment, lack of parental competence and exposure to conflict between parents. In the context of the current discussion, these factors are the same when considering either heterosexual or homosexual relationships.

As to the second question, there appears to be little to argue on a psychological basis that exposure to a homosexual relationship would cause psychological harm to the children. The potential for harm would be determined by the attitude of the parents rather than the circumstance of the relationship. Clearly, there are those situations where religious or moral values will determine a parent response to the ex-spouse’s decision to live in a homosexual relationship. These factors are valid for discussion and inclusion in parenting plans. There just does not seem to be a psychological vector for their resolution.

In summary, despite the legal prohibition against formal same sex relationships these relationships do exist, and with increasing frequency many of these relationships, through developments in the fertility field or through adoption, produce and raise children. When these relationships come apart, whether or not there is a formal and legal divorce process, decisions need to be made as to the best interests of the children for time sharing which transcend biological connections. The literature reviewed suggests that children raised by homosexual parents or children of heterosexual parents fare much the same on measures of peer group relationships, self-esteem, behavioral difficulties, academic achievement and the quality of family relationships. No differences in the ultimate sexual preference in the child appear to be attributable to parental sexual preference. Rather these children, as any children whose parents divorce, are vulnerable to the impact of divorce. Moreover, there is no basis for the attorney to argue there will be psychological harm done to the children of same sex parents on the basis of their sexual preference. Time sharing decisions, therefore, should be based on the usual best interest of the child factors as applied with heterosexual parents.

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Representing Same-Sex Couples in Relation to Time-Sharing

By Monica Pigna, Esq., Orlando, Fla.

Same-sex couples face unique difficulties when making the decision to become parents. Florida law prohibits same-sex adoptions. As a result, if a same-sex couple chooses to have children, only one parent has legal rights, and the other parent is classified as the non-legal parent. The non-legal parent can raise the child or children and be a part of their everyday life yet not have any legal rights to the child or children with regard to parenting, medical or health issues, to name a few.

Florida Statute 61.13 outlines all factors that determine appropriate time-sharing between opposite-sex parents. These factors can apply, and have been applied, to same-sex couples seeking either adoption or time-sharing. One of the major issues affecting a same-sex couple lies in Florida Statute 61.13(3)(f), which addresses the “moral fitness of the parents.” Many early Florida cases have held that engaging in a same-sex relationship renders a parent morally unfit to raise a child.

However, in Dinkel v. Dinkel, 322 So.2d 22, the Florida Supreme Court held that moral fitness is only relevant if there is a “direct bearing on the welfare of the children.” This case has slowly been adapted in District Court decisions today to mean that a person’s sexual orientation is only relevant if it directly affects the welfare of a child. When considering moral fitness, Courts have looked to the parents’ behavior and whether that behavior has had a direct impact on the welfare of a child. A case from the Second District, Jacoby v. Jacoby, 763 So.2d 410, held that a court should not penalize a person for their sexual orientation where there is no evidence that it harmed the child. Therefore, if a same-sex parent is seeking time-sharing of their child, the factor of ‘moral fitness’ should not be an automatic negative against that parent.

Similarly, same-sex couples face controversy and difficulty when attempting to adopt. Currently, there are two appeals from the Third District in Miami, Florida dealing with same-sex parent adoption. It will be interesting to see what direction the Supreme Court of Florida takes when determining this issue in the future.

As stated above, same-sex couples in the State of Florida do not have the right to adopt. However, despite the ban on adoption by same-sex couples, they are able to be foster parents. In order to circumvent Florida law, many same-sex couples seek adoption in another jurisdiction that allows same-sex couples to adopt. Several states now allow same-sex couples to engage in a second-parent adoption. A second-parent adoption allows the non-legal parent to adopt the child so both the legal parent and the non-legal parent, newly second-parent, are afforded the same rights. Florida courts recognize second-parent adoptions granted in other jurisdictions.

If a same-sex couple does not procure a second-parent adoption then the non-legal parent does not have any rights with regard to the child or children pursuant to Florida law. Should the same-sex couple split up, the legal parent has all rights to the child and is in their legal realm to sever all ties to the non-legal parent. Should your practice represent a non-legal parent in the State of Florida, it is best to resolve any disputes without appearing before a Court. Non-legal parents have no “legal” rights with respect to the child. However there are avenues a non-legal parent can take to attempt to gain legal rights to the child or children.

A non-legal parent can only gain standing in a Florida Court with regard to the child under a non-statutory basis because they have no legal rights. One such non-statutory basis is claiming to protect the child from detriment or harm. This standard is difficult to prove because a Court would need to see real evidence of such harm. A way to prove harm or detriment is by the non-legal parent showing that severing the bond between the child and the non-legal parent is detrimental to the child. A case on point is Sinclair v. Sinclair, 804 So.2d 589 (Fla. 2d DCA 2002) and it stands for the proposition that a court can take the relationship between the child and another person into account when determining ‘custody.’ Severing the bond formed between the non-legal parent and the child could have a serious detriment or cause harm to the child.

Two other ways non-legal parents have attempted to gain standing in a time-sharing suit are through the argument of “defacto parent” and “in loco parentis.” Although a sound equitable argument, the Florida Courts have not yet ruled whether a non-legal parent can successfully claim “custody” over a legal parent through the theory of a defacto parent. The same stands for in loco parentis, The Florida courts have not specifically determined whether a non-legal parent can actually prevail over a legal parent based on these theories. However, if you represent a non-legal parent and the issue is brought before the Court, these theories are a good place to start.

Should a legal parent and non-legal parent settle their time-sharing issues outside of Court and reach an agreement, it is important to note that not all jurisdictions recognize agreements between a legal parent and non-legal parent. A Court is not required to enforce an agreement between a legal parent and a non-legal parent regarding time-sharing with the minor child or children. The best way around this issue, should the parties end up in court, is to use the agreement as evidence that the legal parent waived...
Time Sharing
from preceding page

his or her right to exclusive custody of the child.

On the topic of written agreements, since the non-legal parent of a same-sex couple has no legal rights to the child, laws such as probate do not apply. The child of a non-legal parent does not inherit from that parent intestate. It is important when representing same-sex couples to ensure they have a will or trust to protect their family in the event of death.

In addition to a will, same-sex couples should also look into documents to protect their medical decisions. To ensure the partner will be able to make medical decisions for either the other partner or a child, both parties should execute a durable power of attorney to designate the other partner to make decisions on their behalf. In order to guarantee medical decisions for the child or children are kept between the same-sex couple, each partner should also execute a consent to medical treatment.

Although the law is non-existent in the State of Florida when it comes to legal rights of same-sex couples, each day affords new opportunity and case law is slowly molding new Florida law. As an attorney representing a same-sex couple in a time-sharing dispute it is important to remember what rights the State of Florida actually affords the legal and non-legal parent to adequately represent each party.

Monica Pigna is a graduate of Nova Southeastern University, Shepard Broad Law Center. She was admitted to The Florida Bar in 2007 and began practicing exclusively in the area of marital and family law in South Florida. Ms. Pigna is a member of the Publication Committee, CLE Committee and the Rules and Forms Committee of the Family Law Section of The Florida Bar. She participates in the Fast Track Committee of the Rules and Forms Committee working to adopt a supreme court approved parenting plan form. Monica is also very active in the Young Lawyers Division, chairing a community service project this upcoming year.

Update From the Family Law Section of the Broward County Bar Association

By Denise L. Jensen, Section Chair

The landscape of family law has changed dramatically over the last several years on a variety of fronts, from the extraordinary legislative changes relative to parenting, to the continuing decline in the economy and the real estate market. These changes have created challenges for all of us. I am happy to report that the family law attorneys in Broward County, as well as our distinguished judiciary, have confronted these challenges with open minds and creative thinking.

We are all thankful to Judge Renee Goldenberg, who spent countless hours developing an all encompassing Parenting Plan that identifies issues that we may frequently overlook. Additionally, it appears that our attorneys have taken to heart the purpose behind the recent statutory changes and they are counseling their clients in such a way that the words “custody” and “visitation” have virtually vanished from our courtrooms. Timesharing schedules where both parents are able to equally share the joys and responsibilities of child rearing are becoming, where appropriate, more and more popular.

Perhaps even more challenging, is the continuing decline in the real estate market. While the entire state and country has been impacted, reports indicate that South Florida is amongst the most severely impacted area in the country. I commend our members in their multifaceted attempts to deal with these issues in a creative and cooperative manner.

The Family Law Section of the Broward County Bar is committed to continuing legal education and we strive to provide our members with practical and educational seminars. In October 2009, we participated in the Broward County Bar Association’s Bench & Bar Convention, which offered over 100 different seminars and breakout sessions in a wide range of practice areas. The Family Law seminars presented at the Bench & Bar Convention were some of the best attended at this extraordinary event. Additionally, we were very happy to join forces this year with Legal Aid Service of Broward County and Coast to Coast Legal Aid of South Florida to present our annual “Raising The Bar” seminar, featuring many members of our local judiciary, on April 16, 2010. Many attendees graciously agreed to take on a pro bono case from Legal Aid and I would like to take this opportunity to thank those individuals for donating their knowledge and experience to individuals who cannot otherwise afford our services.

Denise L. Jensen is a senior associate at Gladstone & Weissman in Ft. Lauderdale. Since the beginning of her career, Ms. Jensen has limited her practice to complex matrimonial and family law cases, including dissolution of marriage, separation, equitable distribution, alimony and spousal support, parenting issues and timesharing, paternity, and complex financial matters. Prior to joining the firm, Ms. Jensen, worked in several Fort Lauderdale area marital and family law practices as an associate attorney, legal intern, law clerk and summer associate. She joined the Gladstone & Weissman in 2007 to expand her experience and work toward receiving Board Certification from the Florida Bar. In July 2009, Ms. Jensen was named Chair of the Family Law Section of the Broward County Bar Association. She also remains active in the Family Law Section of the Florida Bar. Ms. Jensen earned her J.D. (magna cum laude) and her Bachelors in Science from Nova Southeastern University.
Family Law Practice Guided by Science: Parenting Outcomes in Families of Same Sex Parents

By Jan Faust, Ph.D. and Katie Hoeftling, M.S., Nova Southeastern University

Through the years, the composition of the American family has changed to include many different configurations of parenting such as those households headed by a single parent, children parented by grandparents or other extended family members, or children raised by non relative guardians. In more recent years with the political, legal and sociological advancements, this parenting configuration has grown to include children raised by same gender parent couples. Such movement in the parenting community has sparked debate by opponents regarding the rights of same gender couples. Opponents have alleged that same gender couples should not raise children citing the premises that the children of these couples are bullied by their peers, have problems in their peer relationships, have more psychological and behavioral problems than children of non same sex couples, have greater school and academic problems and will grow up with problems with their own gender identity and/or grow up to become gay. Additionally, those who argue against same gender parenting believe that same gender parenting practices are impaired. In recent years, researchers have begun to scientifically investigate whether such outcomes of same gender parenting exist. While there are studies that include same female and male gender parenting dyads, there is much less available research with same male gender dyads. The latter is likely the result of the lowered frequency of which male couples have children and hence the lack of a comprehensive subject pool by which to collect data. The purpose of this paper was to summarize research findings as to the impact of same gender parenting on children, and the implications of such findings on the practice of family law.

Same Gender Parenting: Impact On Peer and Romantic Relationships

Recent studies have demonstrated that there are no significant differences in adolescent peer relationships of gay versus straight families with respect to their quality, number of peers, level of support offered by peers, and density and interconnectedness among the peer group. In fact, adolescent peers of same gender parents were as likely to be nominated as a friend by their peers as those children of different gender parents (Wainright & Patterson, 2008). This peer nomination is reciprocal such that not only do the children of the same gender parent nominate others to be their friends but also others nominate the children of same gender parents to be their friends in return. It is important to note that data are gathered blindly such that the adolescents’ peer nominations were completely confidential.

With respect to romantic relationships, adolescents of same gender parents are just as likely to have been involved in romantic relationships as adolescents of different gender parents (Telingator & Patterson, 2008). Additionally, research has demonstrated that there is no difference in the rate of selection of partner preference (straight vs. gay) between children of same gender parents and those of different gender parents. For example, Crowl, Ahn, and Baker (2008), in their study comparing children raised by same and different gender parents, discovered same gender parents raised children who were just as likely to select the opposite gender partner as children raised by different gender parents. In fact, this research indicated that the quality of relationships within the family were more important in predicting the number and quality of peer and romantic relationships for youth than the gender of the parents.

Gender Identity Development

The distinction between partner preference and gender identity has often been confused by the public at large as well as in the scientific literature. Partner preference refers to the gender of the partner who is selected irrespective of the biologically assigned gender of the person making the partner choice. Alternately, in general, gender identity refers to the satisfaction one has with their own biologically assigned gender as well as pressure an individual feels to conform to the sociological attributes assigned to that biological gender and often concomitant feelings of superiority of one’s gender over the other gender. It is believed that the strength of one’s gender identity impacts self-esteem, social competence, and psychological adjustment (Bos & Sandfort, 2009). For example, in their study of 63 children of lesbian families and 68 children of different sex families, Bos and Sandfort (2009) demonstrated no differences with respect to global self worth among children. Their results also indicated that children in lesbian families feel less parental pressure to conform to specific gender stereotypes and are less likely to experience their own gender as superior over the opposite gender. They are more likely to question future heterosexual relationships as the only viable partnership but the authors attribute this questioning to greater acceptance of same sex partnerships. This could also mean that children raised by same gender parents are more accepting of individual differences of people in general. There is also no evidence to continued, next page
Parenting Outcomes from preceding page

indicate that children raised by same gender parents grow up wishing to have the opposite gender than was biologically assigned.

Academic Performance

Scientific research indicates no differences in academic attainment or academic outcome such as grades and school delinquency between the two different gender based dyads (Telingator & Patterson, 2008). Furthermore, research indicates that children of same sex couples are as likely to attend college as children of different gender parents. As stated above there are no differences in peer relationships between children of same gender versus different gender couples which could be a viable reason as to why there are not school related differences between these adolescents, as good peer relationships can significantly positively impact school and academic performance.

Psychological Adjustment and Behavioral Problems

With regards to psychological well-being, self-esteem and anxiety, there are no differences between children raised by same gender parents when compared to those raised by different gender parents (Telingator & Patterson, 2008; Croll et al., 2008). Consequently, it appears that the relationships within the family context are more important and influential on a child’s well being than the family type (by parent gender).

To claim that children of same-gender parents experience no added challenges when compared to their peers raised by different gender parents is unreasonable, but these challenges appear to lack significant negative effects on overall psychological adjustment. In one research study, examining one such challenge, teasing, individuals who reported teased from their peers may have experienced related emotional distress, but this distress was not linked to overall negative psychological outcomes. (Telingator & Patterson, 2008).

Parenting Practices of Same Gender vs. Different Gender Parents

Scientific research indicates that there are no parenting differences between same gender and different gender parents, including the level of supervision provided for children; in fact, one study discovered that lesbian mothers are less likely to hit their children than mothers of heterosexual dyads, and lesbian mothers engaged in less frequent disputes with their children than mothers of heterosexual couples. These mothers of same gender dyads also engaged in significantly greater amounts of imaginative and domestic play with their children than mothers of heterosexual couples (Golombok et al., 2003).

Conclusions

In summary, contrary to the argument against same-sex marriage, scientific research demonstrates that children of same gender parents are, in fact, developing quite well. As previously discussed, there are no demonstrated differences with regards to academic achievement, peer relationships, romantic relationships, self-esteem, and psychological adjustment between children raised by the same gender parents and those raised by different gender parents.

Despite the fact Florida does not legally permit gay marriage and gay adoption, the State is confronted with relocated married same gender couples and same gender partners who have children through other avenues than Florida adoption. Despite the lack of legal jurisdiction, the judiciary is encountering more frequently, dissolution actions for same gender parenting dyads. After statutory residency in Florida is established, judges are in the position of having to consider marriage dissolution and make time sharing decisions in cases without legal jurisdiction. Recently Texas State Courts have ruled that the dissolution of such marriages is moot since the State does not recognize the union as a legal marriage. Regardless of whether the marriage can be legally dissolved in Florida (or other states), it is evident that same gender parenting dyads are confronted with similar if not the same dissolution issues as their different gender parent counterparts. From a family law perspective, what continues to emerge from the comprehensive child development literature is that, irrespective of the gender of parents, the family relationships and the functioning of the parental dyad, has significant impact on children’s mental health, peer and romantic relationships, self esteem, and academic performance. There is significant scientific evidence that indicates parent conflict between different gender parents is the most significant predictor of poor child adjustment (e.g., Sandler, Miles, Cookston & Walsh, 2008). In fact this significant body of data furthers this premise to include continued conflict post dissolution of the parenting dyad leads to even poorer adjustment in these children. When couple relationships are legally dissolved, the goal is for parents to effectively co-parent together and to minimize interparental conflict.

With respect to custody evaluation and/or parenting plan development cases and determination of children’s best interests, specific attention should be placed on the quality of relationship between parents and children, the quality of the relationship between the parents, and the quality of parenting skills and not the gender of the parental unit. With many dissolution and post dissolution cases, one of the key focuses should be on strengthening the co-parenting bond of the parenting dyad given the significant literature indicating that it is post dissolution conflict and the poor quality of the relationship between the parenting dyad which adversely impacts child adjustment.

Dr. Jan Faust received her Ph.D. from the University of Georgia. After receiving her degree, she completed a post doctoral fellowship at Stanford University School of Medicine. Upon completion of her fellowship, she joined the Center for Psychological Studies faculty of Nova Southeastern University. She is currently a Full Professor. Furthermore, she has developed a family forensic psychology component to her trauma program wherein her doctoral students conduct forensic evaluations, parenting coordination, reunification therapy, therapeutic supervised visitation, and individual therapy for children and their families.
experiencing family court issues. Dr. Faust engages in part-time independent practice where she conducts post divorce counseling and parent coordination, as well as treats children, adolescents, and adults who have been exposed to maltreatment and other traumas including divorce adjustment. She serves as an academic expert witness, conducts forensic evaluations, and conducts second opinion reviews. She is also a certified family mediator, as designated by the Florida Supreme Court.

Katie Hoefling, M.S. is currently a second year doctoral student at Nova Southeastern University. Under the supervision of Jan Faust, Ph.D., she serves as a research coordinator for the Child and Adolescent Traumatic Stress Program and the Resolution in Family Mediation Project. Her interests include child trauma, the impact of family conflict on psychological adjustment, and children’s adjustment to medical conditions.

References:

The Florida Bar Continuing Legal Education Committee and the Family Law Section present

**Navigating the Perfect Storm: Legal Malpractice in Family Law**

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9:30 a.m. – 10:30 a.m.
Batten Down the Hatches – Aaarrrgggghhh!!!
Craig Hudson, Esq., Fort Lauderdale
Malpractice Defense Counsel lecture on risk avoidance for family law attorneys; malpractice generally; failure of family law attorneys to document advice in writing; family law attorneys acting outside scope of their expertise; prenuptial agreements; risks of consultation; better practices.

10:30 a.m. – 11:30 a.m.
Protecting Your Practice from Pirate’s Plunder
Blair Campbell, Key Largo
Professional Liability Insurance Agent lecture on market conditions; malpractice policy terms; what is “pitch” and what is important coverage; how to complete an application to trigger lower premiums; specific market conditions for family law attorneys; claim information, including how and when to make a claim; risk management practices.

11:30 a.m. – 12:00 p.m.
Questions and Answers
Craig Hudson, Esq., Fort Lauderdale
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The Florida Bar Continuing Legal Education Committee and the Family Law Section present

2010 Family Law Section Legislative Update

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

Telephonic Seminar: Friday, July 30, 2010
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If your practice involves any family law, even if only a small portion, you cannot afford to miss this year’s Legislative Update. There have been MAJOR CHANGES this legislative session which will impact your family law practice or if you simply handle divorces or other family cases for friends. This seminar will explain the new legislation.

A detailed explanation of House Bill 907 will occur, which will include a discussion of major changes to child support and alimony. You will learn about:

- New issues relating to the use of the “gross up method”
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- How the new statute affects the calculation of child support
- Allocation of child support for more than one child
- New alimony factors
- New types of alimony and clear definitions of existing forms

You will be provided an in-depth analysis of the legislative history and the evolution of the changes to alimony and child support from actual participants in its passage. In addition, there will be a discussion of new options for active military personnel and their timesharing and information regarding the newly created “concurrent custody”.

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Attendees may ask questions throughout the seminar. Telephonic participants may email questions to eroy@sasserlaw.com.

House Bills can be downloaded or viewed on The Florida Bar website, www.floridabar.org under Legislative Activity, 10 days before the Legislative Update; or link on Legislative Activity and then Online Sunshine at http://www.leg.state.fl.us/Welcome/index.cfm.

12:10 p.m. – 12:30 p.m. (EST)
Connection Time

12:30 p.m. – 12:35 p.m.
Opening Remarks and Introductions
Carin Porras, Fort Lauderdale

12:35 p.m. – 2:20 p.m.
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Thomas J. Sasser, West Palm Beach, and Elisha D. Roy, West Palm Beach
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