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INSIDE THIS ISSUE:

Chair’s Message.............................................................................................................. 3
Comments from the Chairs of the Publication Committee................................. 4
Vice Chair of Commentator’s Corner......................................................................... 5
Co-Guest Editors’ Corner ............................................................................................. 7
Practicing with Professionalism.................................................................................. 9
Empathetic and Sympathetic Attorneys: Why a Client’s Needs Are Better Responded to With Sympathy Rather Than Empathy.................. 11
Some Initial Observations on the Brave New (Same-Sex) World of Obergefell v. Hodges................................................................. 13
Ten Mobile Apps to Upgrade your Practice ............................................................... 15
Family Law Section Out of State Retreat – Washington, DC ............................. 18
Out of State Retreat – Washington, DC (Photos) .................................................... 20
A Fish Out of Water: When a Career Criminal Defense Attorney Takes the Bench in Family Court. A Q&A with Newly-Appointed Fifteenth Judicial Circuit Judge Scott Suskauer ............................................ 24
Goodwill v. Daubert .................................................................................................... 26
Appendix A.................................................................................................................. 30

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

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

Articles and cover photos to be considered for publication may be submitted to Sarah Kay, Vice Chair of the Commentator, at Sarah@mbc-lawoffice.com. MS Word format is preferred for documents, and jpg images for photos.
I hope you and your families enjoyed the holiday season. The Section has been hard at work throughout the end of 2015.

October 1-2, 2015, the Section was a sponsor and had a table at the Florida Chapter of the Association of Family and Conciliation Courts 12th Annual Conference in Tampa. The Conference was well attended by the judiciary, lawyers, and mental health professionals from throughout the state. Thank you to Vivian Cortes Hodz, Sarah Kay, Daphne Robinson Shaw, and Phil Wattenberg for volunteering their time to continue to strengthen the relationship between the Section and the FLAFCC.

We were also a sponsor at the 12th Annual Kozyak Minority Mentoring Picnic at Amelia Earhardt Park in Hialeah on October 31, 2015. The Minority Mentoring Picnic is well attended by judges, lawyers and law students from every law school in Florida, all in support of the goal of using mentoring as a platform to increase diversity in the legal profession. Thank you to Brandon Arkin, Cash Eaton, Ronald Kauffman and Patricia Elizee for manning the table and volunteering their time at this important event.

This issue of the Commentator will feature photographs from the Section’s Fall Retreat in Washington, DC which took place October 31 - November 4, 2015. Event Chair, Julia Wyda, did an amazing job organizing every detail for the group, including providing masquerade masks for our Halloween-themed welcome reception. What a treat it was for those who attended to hear Retired Major General William K. Suter speak. General Suter did much more than manage the U.S. Supreme Court’s docket and calendar for more than two decades. He compiled briefs and swore in attorneys to the U.S. Supreme Court Bar. He witnessed numerous controversial decisions of the Court and heard more than 1,700 arguments. General Suter’s words brought home a message that the Court is a place of discipline and tradition.

Twenty-three attorney members of the Family Law Section were admitted to practice before the Supreme Court of the United States during our trip. The admission ceremonies took place on November 2 and 3, 2015 and were definitely the highlight of the trip for the candidates and their guests. I was privileged to move the admissions to the Bar and Chief Justice Roberts granted the Motions. Being admitted to practice in the highest Court of our nation was a highlight of my professional career some eighteen years ago… so, it was exciting for me to be able to offer Section members the same memorable opportunity. We remained in the Court to watch oral arguments which were also well worth attending.

The group enjoyed a fabulous bus and walking tour of the city’s monuments by night which provided the perfect opportunity for the group to mix, mingle and get to know one another. The chocolates and champagne while on board helped everyone relax and enjoy some truly spectacular views. The following day, the group enjoyed a private tour of the Capitol and lunch before going about exploring the rest of the city. All good things must come to an end and the Retreat closed with a private reception and farewell dinner at the historic Occidental Grill & Seafood which dates back to 1906 and is located on Pennsylvania Avenue across from the White House. We met and engaged with new colleagues and their guests from every corner of the State, some of which had never attended a Section Retreat. We hope those of you who attended the Fall Retreat will join us again for future Section events. For those who were not able to attend, we hope you will be able to join us for the Section’s In-State Retreat in Ft. Myers which is taking place March 31 - April 3, 2016. A brochure is available for download on the Section’s website at www.familylawfla.org.

I am also pleased to report that ten scholarships were awarded this year to attorneys interested in attending the Marital and Family Certification Review Course in January. The Course was a success. If you missed it, court books will be available for purchase in the near future. Visit the Section’s website at www.familylawfla.org for more details. Thank you to our Certification Review Committee, Aimee Gross (Chair), Philip Wartenberg, Bonnie Sockel-Stone and Laura Davis Smith for all their hard work.

We hope to see you in Ft. Myers in March!

Sincerely,

Maria C. Gonzalez
Chair, Family Law Section
Comments from the Chair of the Publications Committee

On behalf of the Publications Committee, we hope you enjoyed the holidays with family and friends. As we begin 2016, I encourage you to write an article or contact me at julia.wyda@brinkleymorgan.com with a topic you think should be explored in the Commentator. Thank you to everyone who made this edition possible, and I look forward to working with new authors and guest editors in 2016.

Save The Date!

The Family Law Section

In State Retreat

March 31 – April 3, 2016
Sanibel Harbour Marriott Resort and Spa
Fort Myers, FL
Vice Chair of the Commentator’s Corner

By Sarah E. Kay, Esq., Tampa, FL

Included in the definition of professionalism is possessing the skill “that is expected from a person who is trained to do a job well.”¹ Such a simple concept, yet so challenging to employ. As with a musical or athletic skill, legal skill wanes absent attentive cultivation. Attentive cultivation would be easy if the practice of law was the object of undivided attention; but, honestly, how often is that the case? Most of us law practice in addition to fulfilling a plethora of other responsibilities including personal and professional volunteer activities, romantic partnerships, care for young and elderly loved ones, and care for ourselves.

How is it possible to maintain professional legal skills in light of a crowded calendar? You are holding one answer to that question in your hands! Every practitioner can find a moment or two to stay abreast of best practices and legal trends through reading FamSeg, the Commentator, and/or the Florida Bar Journal. Also, the Family Law Section offers CLEs in all shapes, sizes, and formats throughout the year – I am confident there is one that will meet your needs. Finally, Section committees meet live in January, June, and September, offering you three opportunities to network with other professionals in addition to becoming informed of a variety of current and upcoming issues in family law. With a quick visit to the Section website at http://www.familylawfla.org/ you are sure to find an opportunity to refine your legal skills at a time that works for you. Let’s affirmatively answer Section Chair Maria Gonzalez’s call to professionalism by staying sufficiently skilled to practice family law well and encouraging those around us to do the same.

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Recently, life has been going off without a hitch for me, both professionally and personally. I have multiple projects pending, including within my firm, the Family Law Section, with my family, and within in the community. To be honest, I have been successfully knocking out these projects without over-extending myself. One of these projects included being guest editor for the Winter Commentator.

Recently something happened that threw a wrench into my spokes and brought all of this forward momentum to a sudden halt. My 70-pound dog overheard that she was going to the vet, and she bolted for the door. In a heroic effort to catch the dog and get her to the vet, she and I collided. Several broken bones in my right arm later, the dog is unrepentant.

I do not ask for help. It frustrates me. This is a personality quirk that I hope to someday overcome.

When this accident happened, I had to ask my colleagues within the Family Law Section for help and have been overwhelmed by the response.

Leaving Miami this past May is one of the hardest things I have ever done. My fondest memories are wrapped up in towering palm trees, fruit stands on every corner, the electrifying aroma of Cuban coffee, and the melodic sound of strangers speaking Spanish on the street. The blistering heat and the preposterous traffic would evaporate from my mind with a simple walk through downtown Miami to get to work.

My first job as an associate attorney in Miami at Vilar Law, P.A., was nothing short of remarkable either. There was not a day that I did not become a better lawyer under the instruction of my former boss, Patrick Vilar, Esq.

So, why would I leave? One word: love. My first love, Miami, was inevitably trumped by my true love, Cathy, who lived 200+ miles away. Long-distance marriages work for some people (probably the patient, easy-going ones), but we needed to be in the same city. Enter: Tampa.

Being yanked out of my comfort zone was intense. I was in a new city, and I was opening up my own boutique law firm. On top of that, I was rife with angst about meeting the family law attorneys in Tampa; I did not know what to expect outside of my Miami cocoon.

Fortunately, I met a gentleman by the name of Stann W. Givens, Esq., a distinguished Tampa lawyer, who dialed back the uncertainty and pointed me in the right direction. That meeting helped me approach several other prominent lawyers in the area, many of whom have made me feel truly accepted by this community. I still have some legitimate concerns about Tampa: There are no farmers on the corner of Hillsborough Avenue selling...
would specifically like to thank Maria Gonzalez, Esq., Sarah Kay, Esq., Jack Mooring, Esq., Bonnie Sockel-Stone, Esq., Luis Insignares, Esq., Julia Wyda, Esq., Ron Kauffman, Esq., Beth Anne Trombetta, and many others for stepping up and assisting me with my Section duties. I am very grateful to Cary Garcia, Esq., for accepting the call, taking the reins, and finishing this edition.

I am also blessed to work in a firm that is genuinely concerned about my well-being.

So, when life throws you a curve ball, it has been proven to me that I can count on my friends within the Family Law Section for support as if they were family. I am very appreciative of this.

Maybe I took a step in overcoming that quirk.

Without further ado, we present the Winter Commentator which, in addition to a special focus on the Section’s Out of State Retreat to Washington, D.C., includes a Q&A with Judge Suskauer (15th Circuit) by Cindy Crawford, Esq., and articles by Judge Peacock (13th Circuit), Luis Insignares, Esq., Frank Remsen, Esq., Luke Dunteman, Esq., Sarah Kay, Esq., and Thomas Gillmore, CPA.

Enjoy this edition, and watch out for charging 70-pound dogs!

mangos and avocados, and I cannot grab a piping-hot “café con leche” as readily as I used to. But, clearly, the professionalism I hoped for flows abundantly through Tampa and, as a young lawyer in a new city, that is a pretty important item to check off of my list.

To Stann W. Givens, Esq.; Caroline Black Sikorske, Esq.; Sarah Kay, Esq., and Nancy Harris, Esq.: Thank you. Your professionalism allowed me to glean wisdom from you, simply because I asked. You gave me guidance, when you did not need to and, more importantly, you gave me the warm welcome I longed for.

This edition of the Commentator touches upon an assortment of different topics. From relating appropriately with clients, to income-tax issues, to the effects of same-sex marriage, something is bound to interest you. Although not overtly apparent on the surface, the Family Law Section Chair, Maria Gonzalez, Esq.’s, theme of professionalism is also carefully woven throughout this edition. My hope is that it influences you to reach out to your colleagues, encourage them to join the Section, participate in a CLE, or mentor young lawyers. As the grateful recipient of the Tampa Family Law Section’s professionalism, it has already impacted me. Enjoy!

Congratulations to Section Member Abigail Beebe, Esq. of West Palm Beach, FL who was selected by Florida Children’s First (FCF) as Pro Bono Attorney of the Year for 2015. Each year FCF honors individuals, families and organizations that make a significant difference in the lives of at-risk children within their community. FCF highlighted Beebe for her advocacy efforts on behalf of children in foster care.
Practicing with Professionalism

By The Hon. Emily Peacock, Tampa, FL

The Unified Family Court has gained a reputation for unprofessional attorney tactics and angry conduct by litigants. Typically, family court situations are emotionally charged – domestic-violence injunctions, divorces, custody arguments, and arguments over finances. These are all the elements necessary to breed arguments, even in the best of circumstances. Add the stress of major life changes and a few court appearances, and the stress and disparate goals ferment into angry interchange and dysfunction.

It is amazing what the attitude, approach, and demeanor of counsel can do to defuse these situations. Having observed these cases and their participants in a variety of settings over the past 9 years, it is important to stop and note how attorneys can benefit both the court process, and the parties, with their examples of professional, civil behavior.

Even in the most adverse situations, counsel must agree to treat one another with civility and professionalism. This begins long before the matter ever makes it to the courtroom. If counsel act unprofessionally in pre-court or out of court matters, there can be costly consequences to clients. It is more efficient for counsel to timely respond to discovery requests and to scheduling issues for depositions and mediations. Failure to do this leads to multiple additional hearings – costly to both sides and at a high cost to the court’s schedule. Moreover, being completely forthcoming, cooperative, and professional in all out-of-court issues with opposing counsel may lead to a more fluid resolution of all, or part, of a case. The major importance of this in family court matters is the preservation of family relationships, particularly when there are children in the mix.

When counsel refuse to respond to discovery requests, correspondence, or even to clear a hearing time, the court becomes involved in settling these petty disputes rather than reserving court time for the resolution of the core disputes in a case. Additionally, once these issues are before the court for resolution, the conduct of counsel informs the conduct of the parties. Rather than counsel being cooperative with the court and opposing side, they are instigating animosity and lack of cooperation that bleeds over to the parties. Counsel should remember that their most important asset is their reputation, and there is no reason to tarnish it before the courts and their clients by refusing to act professionally and politely.

Professionalism encourages positive interaction between the parties and sets the tone for the litigation. Counsel who are respectful and cooperative from the outset teach the parties that even adversaries respect one another, and that the only issues that should be between them are the legal issues that deserve determination by the court. Parties who respect one another, both in and out of the courtroom, will maintain the respect of the court as well.

Setting the tone of cooperation and respect in the litigation may go far in preserving parent-child relationships, resolving some, or all, of the issues in a case, and in shaping the way that the court perceives the issues between the parties. If counsel can professionally litigate the case, the court can expend its time and energy on hearings and rulings that are truly important in a case. The benefit for everyone is that the court’s perception of the parties, and their attorneys, will remain positive because of this. Most important, it avoids further, sometimes irreparable, damage to families because of vicious tactics and words, and it avoids a tarnished image of counsel’s reputation to the court.

Family law attorneys must talk to their clients about professional behavior early on in the representation. The attorney’s example will dictate the client’s behavior. If a client insists on unprofessional behavior, the attorney should decide whether or not he or she wants to continue to represent such a client at the possible detriment to their reputation. Ultimately, counsel’s professional reputation is his or her livelihood. Civilized behavior leads to civilized processes and civilized rulings.

E. PEACOCK

The Hon. Emily Peacock, Thirteenth Circuit Judge, Unified Family Court since 2007. Judge Peacock’s career includes serving as an assistant state attorney, a public defender, and private practice. She is a member of the Stann W. Givens Family Law Inn of Court and is active in several voluntary bar groups in Tampa.
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Empathetic and Sympathetic Attorneys: Why a Client’s Needs Are Better Responded to With Sympathy Rather Than Empathy

By Luke Dunteman, Esq., Palm Beach Gardens, FL

It has become a sexy issue in recent years to discuss how lawyers are often too “cold” and analytical toward their clients, thus lacking any emotional understanding or attachment to them. This lack of emotional attachment, it is implied, results in the lawyer not viewing the client as a fellow human being and the client feeling as if he or she were just another customer in the queue.

If only the attorney would better place themselves in the position of the client, would these issues be resolved. But would a more empathetic approach result in better representation for the client? Would an “I-feel-your-pain” attitude maintain a solid attorney-client relationship? I am arguing that, instead of focusing on empathizing with a client’s needs and concerns, a client would be better served by sympathizing with the client.

One of the more-common mistakes in communication is to use closely related words interchangeably, and nowhere is this more apparent than confusing “sympathy” with “empathy.” Webster’s defines sympathy as “the fact or power of sharing the feelings of another, especially in sorrow or trouble; fellow feeling, compassion, or commiseration.” Empathy is “the psychological identification with, or vicarious experiencing of, the feelings, thoughts, or attitudes of another.” An attorney who is able to identify with his or her client in this empathetic manner may not be a highly competent attorney for the client’s issue at all.

“Reason, cold, calculating, unimpassioned reason, must furnish all the materials for our future support . . .” – Abraham Lincoln

An empathetic attorney that has a powerful, emotional connection based on an understanding of the client’s suffering will also carry his or her own biases along with it. Imagine, for example, that the attorney is representing a client in a child support matter in which the child has a neurological disorder, and one of the issues is whether it would be in child’s best interest to be sent to a private school that specializes in educating disabled children. The attorney is representing the father, who believes that a public school offers his son more of an opportunity to “socialize and learn to get along in the real world.” This is in opposition to the mother’s wishes that her son go to the private school, where she believes he will receive more attention. The father’s attorney can well understand the parents’ concerns because his daughter is quadriplegic, and he and his wife wrestled with the issue of whether to send their daughter to the local elementary school or find, what he believed to be, a private institution that is more accommodating.

It would be foolish to assert that any attorney who is representing a client faced with a similar situation that the attorney has dealt personally would result in malpractice; however, it is naive to assume that the attorney would not be advising the client under a color of prejudice. Our passions may be tempered, but they always exist in our psyche on some level, and a failure to grasp an issue more objectively may result in strained relations with the client and failure of representation.

“Cultivate an intellectual habit of subordinating one’s opinions and wishes to objective evidence and a reverence for things as they really are.” — William Ian Beardmore Beveridge.

Empathizing too much with your client may also impede representation because it becomes a myopia, and you are limited in the possibilities and solutions for looking at, and resolving, their problems. This can be avoided by remaining emotionally detached from the client and the issues, and as much as we seek to understand others, we have to realize we do not entirely share their lives or even the people who comprise their world. Taking a consideration of the case from a bird’s eye view may not allow you to fully understand the client’s emotional concerns, but you will better understand the intricacies of the case, the viewpoints, and the considerations of the opposition, if any. None of this, of course, is to argue that family law attorneys should disregard their clients’ feelings and experiences. You will never understand the client, or the case, if you do so. This is why sympathizing with clients is preferable to empathizing with clients. A sympathetic lawyer is one who will take the continued, next page
Empathetic and Sympathetic Attorneys
from preceding page

time to listen and understand his or her client’s needs, and one who will be compassionate toward their concerns and individual situation, but not one who can understand because “I was there.”

The sympathetic attorney is a nice middle ground between a purely cold and analytical barrister and an emotional, overzealous advocate. Every client is entitled to a zealous attorney, but why have one with clouded judgment? May objectivity and compassion triumph.

Luke Dunteman, Esq. is an attorney practicing civil law in Palm Beach Gardens, Florida.

Endnotes

ANNOUNCEMENTS

Congratulations to Sonja Jean!
The Family Law Section heartily congratulates Section member Sonja Jean and her husband on the arrival of their baby girl, Andrea Anita, who was born on November 9, 2015!

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Some Initial Observations on the Brave New (Same-Sex) World of Obergefell v. Hodges

By Luis Insignares, Esq., Fort Myers, FL

On June 26, 2015, the United States Supreme Court decided Obergefell v. Hodges, 576 U.S. ___, 135 S. Ct. 2584; 192 L. Ed. 2d 609 (2015), which established that marriage equality is the law of the land in the United States. Specifically, the high court held that the Fourteenth Amendment requires all states to license marriages between two people of the same sex, and to also recognize marriages between two people of the same sex whose marriages were lawfully licensed and performed out-of-state.

As you may recall, a number of trial-level cases in Florida, both state and Federal, had come to the same conclusion and had struck down Florida’s Amendment 2 (2008), which defined marriage as being between a man and a woman. Nonetheless, the appellate courts here, generally, had not ruled and were, instead, awaiting the Supreme Court’s decision as determinative of the issue. However, on April 24, in Brandon-Thomas v. Brandon-Thomas, 163 So.3d 644 (Fla. 2d DCA 2015), the Second District Court of Appeal (“DCA”), rather bravely, came to, essentially, the same conclusion: It required that Florida grant a divorce to a same-sex couple who had been validly married in Massachusetts. In that case, the appellate court issued an unusual per curiam reversal of the trial court’s dismissal of the divorce suit, joined by two separate concurrences, for a total of three opinions in support of the appellant’s right to a Florida divorce. Accord Shaw v. Shaw, 166 So.3d 892 (Fla. 2d DCA 2015)(reversing dismissal of same-sex divorce without opinion, other than to cite Brandon-Thomas).

The obvious question posed by Obergefell is, “What now?” The response can be divided into the immediate future and the more long-term issues. The “immediate-future” issues tend to be more practical in nature, while the long-term issues tend to be more legal.

Obviously, Florida Attorney General Pam Bondi, who intervened in any marriage equality case in which she had not been named as a party (including Brandon-Thomas and Shaw), has had to concede defeat in all the pending marriage equality cases that were on appeal when Obergefell was decided. She has, in fact, done so. However, many of those cases (albeit neither Brandon-Thomas nor Shaw) were brought pursuant to the Federal civil rights statute, Title 42 United States Code Section 1983. Section 1988(b) of the same statute allows for attorney’s fees to be awarded, in the court’s discretion, to the prevailing party.

Of course, Ms. Bondi is claiming that the state should not be held liable, despite the fact that numerous other state attorneys general declined to defend their similar “Defense of Marriage Act” (“DOMA”) statutes once the federal analog was declared unconstitutional, in US v. Windsor, 570 US 12, 133 S. Ct. 2675, 186 L. Ed. 2d 808 (2013). So, far as I can tell, Ms. Bondi’s position is meritless. Applicable Federal case law essentially applies a “double standard” in awarding fees pursuant to this statute, under which prevailing plaintiffs are almost always awarded their fees, but prevailing defendants are, generally, not awarded fees and will be entitled to fees only if the plaintiff’s claim is found to have been, basically, “frivolous.” See, e.g., Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978); Hughes v. Rowe, 449 U.S. 5, 101 S. Ct. 173, 66 L. Ed. 2d 163 (1980).

In addition to the fees question, there are also practical issues with compliance with Obergefell. For instance, in mid-September 2015, Florida’s court clerks were finally provided marriage and divorce forms substituting “spouse” for the prior “husband” and “wife.” Katie Mettler, New marriage, divorce forms replace ‘husband,’ ‘wife’ with ‘spouse’, Tampa Bay Times (Sept. 14, 2015). There are also a few clerks and/or judges, most famously Kim Davis in Rowan County, Kentucky, defying Obergefell, typically on “religious” grounds. These are currently located in Alabama, Kentucky, and one county in Texas. As with Ms. Bondi’s attempt to evade paying the bill for her unsuccessful defense(s) of Florida’s Amendment 2 (2008), these defenses are meritless, as civil servants have no “religious freedom” to pick and choose which of their civil duties they will carry out and which constitutional rights they will deny to their constituents. Similarly, patently unconstitutional anti-Obergefell state legislation, such as the “Tennessee Natural Marriage Defense Act,” Tenn. H. 1412, 106th Reg. Sess. (Sept. 17, 2015), if it continued, next page
ever actually passes, should be unceremoniously laughed out of court when challenged.

This leaves the long-term issues, which involve how the law will have to adapt, and which will probably focus on parenthood issues first. Specifically, the issue now looming in many cases, including the remand of Brandon-Thomas, is to what extent, if any, the traditional “presumption of paternity” will be extended to same-sex couples. In Brandon-Thomas, one spouse had a baby using the assistance of a sperm donor during the marriage. The other spouse did not adopt the child, but she did live with the child and the biological mother as a family unit, and she parented the child as the “second mom.” There, the trial indicated, at least initially, that the child should be considered the legal child of the non-biological mom by ordering temporary time-sharing. It is unclear, however, how the courts will apply the presumption of paternity to same-sex couples by expanding it into a “presumption of parenthood” (instead of only “paternity”). Time will tell.

Luis E. Insignares, Esq., a Board Certified Marital and Family Lawyer, is a member of the Executive Council of the Family Law Section. He has authored numerous Marital and Family Law articles. The firm practices Marital and Family Law at both the trial and appellate level in Fort Myers and Naples, Florida.
Ten Mobile Apps to Upgrade your Practice

By Sarah E. Kay, Esq., Tampa, FL

It is hard to miss the need for technology competency for attorneys. It is also hard to miss the prevalence of mobile technology in our society. To that end, I have compiled a list of mobile apps that may help “upgrade” your practice:

<table>
<thead>
<tr>
<th>App Name</th>
<th>Cost</th>
<th>Available Formats</th>
<th>Purpose/Function</th>
</tr>
</thead>
<tbody>
<tr>
<td>Documents To Go</td>
<td>Free (premium available)</td>
<td>iOS, Google play, Blackberry</td>
<td>View, edit, create, and manage Microsoft Office documents and permits viewing Adobe PDF files on mobile devices and tablets.</td>
</tr>
<tr>
<td>Evernote</td>
<td>Free (premium available)</td>
<td>iOS, Google play, Blackberry</td>
<td>United writing, collection, discussion, and presentation into one workspace. Captures audio, video, pictures, e-mails, and text. Provides real-time updates to co-workers who you have invited to the workspace.</td>
</tr>
<tr>
<td>GoodNotes</td>
<td>$6.99</td>
<td>iOS</td>
<td>Takes handwritten notes on mobile devices with a stylus. Notes can be organized into categories and will allow word searches through OCR technology.</td>
</tr>
<tr>
<td>Lookout</td>
<td>Free (premium available)</td>
<td>iOS, Google play</td>
<td>Automatically saves your device’s location before it runs out of battery, automatically backs up contacts, sounds a loud alarm to help you find a lost device, displays custom “lost” messages on your device screen, and allows you to call your missing device over the web from any browser.</td>
</tr>
<tr>
<td>Microsoft OneNote</td>
<td>Free</td>
<td>Microsoft, iOS, Google play</td>
<td>Powerful mobile-notebook device, which permits handwritten notes on mobile devices, organizes notes in notebooks, will allow capture of audio, video, photos, and text, and can be shared with other users. Can also be shared across your multiple devices and home computer through use of your Microsoft Log-In.</td>
</tr>
<tr>
<td>Microsoft Pocket Magnifier</td>
<td>Free</td>
<td>Microsoft (Similar apps available in other formats)</td>
<td>Uses the mobile device as a magnifying glass. User can pinch or slide for zoom and focus. Can freeze frame for better viewing and save images. Will use the device’s flashlight and filters for image clarification.</td>
</tr>
<tr>
<td>Office Remote</td>
<td>Free</td>
<td>Windows, Google play</td>
<td>Permits the user to start PowerPoint presentations, advance slides, see speaker notes, and control an on-screen laser pointer all from your mobile device through Bluetooth technology.</td>
</tr>
<tr>
<td>Scannable</td>
<td>Free</td>
<td>iOS</td>
<td>Captures documents, receipts, business cards, and other paper, quickly transforming it into high-quality scans you can save or share. Can work in conjunction with, or independently from, Evernote.</td>
</tr>
<tr>
<td>Waze</td>
<td>Free</td>
<td>Windows, iOS, Google play</td>
<td>Community-based traffic and navigation app. Drivers share real-time traffic and road information in the hopes of saving members time and gas money on their travels.</td>
</tr>
<tr>
<td>Zoom</td>
<td>Free</td>
<td>iOS, Google play, Microsoft Lync add-in</td>
<td>Provides video conferencing and web conferencing, including mobile screen sharing.</td>
</tr>
</tbody>
</table>

By Frank P. Remsen, Esq., Tavares, FL

I am not a tax attorney, although I almost became one. I took almost all the tax-law related classes offered at my law school. At my school, I volunteered and co-supervised the VITA program, which offered free tax preparation to anyone in the community. I was accepted into a tax-LLM program, although I ultimately turned it down. Despite all of that, I came to two realizations by the end of law school: 1) The courtroom is where I belong, not crunching tax numbers, and 2) “Income Tax” is a “four-letter word” in family law that no one wants to talk about.

I do not believe that there is a person alive today who fully understands the 74,000+ pages of the Federal Tax Code. Most attorneys avoided tax-law classes like the plague. I, and almost every family law attorney I work with, has a provision in their settlement agreements advising clients that signing the agreement may create tax implications, and that he or she has the right to seek independent tax advice from a tax attorney or CPA. So, why should you care about income tax issues when calculating child support? So that you can be a hero to your client. With just a few tips, you could save your client $5,000.00 - $10,000.00 or more.

Tax Terms

While I am not, in any way, a tax expert, I am going to try to give a small tax lesson to make it a little easier for the reader to understand its effect on child support. Let us start off with a brief description of the different deductions and credits available and how they each affect a person’s tax return.

Total Income: income from all sources including, but not limited to, wages, taxable interest, unemployment, taxable portion of pensions, and Social Security benefits.

Adjusted Gross Income: total income, less deductions for educator expenses, IRA deduction, student loan interest deduction, tuition, and fees.

Standard Deduction: a federally set amount that is deducted from a person’s adjusted gross income. In 2014, it was $6,200.00 for a person filing single or married filing separately; $9,100.00 for a person filing head of household, and $12,400 for people who are married filing jointly or for qualifying widowers.

Itemized Deductions: amounts allowed to be deducted from income, including, but not limited to, mortgage interest, mortgage insurance, property taxes, sales taxes, medical expenses that exceed a certain amount, charitable donations, casualty or theft losses, and certain business expenses. A person would only use this if the total amount of deductions exceeded the standard deduction.

Exemptions: a federally set amount, multiplied by the number of filers and qualifying dependents. In 2014, the exemption amount was $3,950.00 per person.

Taxable Income: the amount of income that would be taxed after subtracting the standard, or itemized, deductions and exemptions.

Tax Amount: the amount of tax that should be paid by the taxpayer based on the taxable income. This amount is listed in the IRS Tax Table.

Credit for Child and Dependent Care Expenses: a credit for expenses paid against the amount of tax owed. The credit can range from 20-35% of up to a maximum of $3,000.00 in expenses for one child, or $6,000.00 for two or more children. This deduction is only allowed if there is tax owed by the taxpayer so that the credit may be applied against the amount owed.

Earned Income Tax Credit (EITC or EIC): a refundable tax credit for working people with low, or moderate, income and who have earned income in the applicable year.

Additional Child Tax Credit: a refundable tax credit available that is over-and-above the amount of the aforementioned child tax credit or if no child tax credit is allowable.

Refundable Credit: a tax credit in which taxpayers receive funds, even if they do not owe any taxes.

Tax Examples

Now, let us look at a few examples of tax returns to illustrate the terms above.¹

Parent “A” makes minimum wage and works 40 hours per week, with a total gross annual income of $16,744.00. She had $1,000.00 in Federal Income Taxes and $519.00 in FICA taxes (“Federal Insurance Contribution Act” taxes, which include Social Security and Medicare) deducted from her paycheck during the year. She has two minor children, both of whom are her dependents and live with her the majority of the time.
She paid a total of $5,000 in child care for the entire year. This year, she filed her taxes as head of household.

Parent “B” makes a total gross annual income of $50,000.00. She had $5,000.00 in Federal Income Taxes and $1,550.00 in FICA taxes deducted from her paycheck during the year. She has two minor children, both of whom are her dependents and live with her the majority of the time. She paid a total of $5,000 in child care for the entire year. This year, she filed her taxes as head of household.

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**Florida Statutes**

Florida Statute §61.30(3) states, “Net income is obtained by subtracting allowable deductions from gross income. Allowable deductions shall include: […] (a) Federal, state, and local income tax deductions, adjusted for actual filing status and allowable dependents and income tax liabilities.”

The examples above show the significant difference in monthly income that is attributable to a parent when looking at the tax-affected, true, net income, and not just the parent’s paystubs. The calculations are for two children with $5,000.00 in total annual day-care costs and no health insurance.

**Child Support Examples**

The following chart illustrates the effects that taxes alone can have on child support amounts. These examples track the examples above, but they use a variety of income combinations for both parents. Additionally, the chart uses two different time-sharing arrangements: one with the mother having majority time-sharing and the father having less than 20%, and the other with both parties having equal time-sharing.

---

<table>
<thead>
<tr>
<th>Parent “A”</th>
<th>Parent “B”</th>
</tr>
</thead>
<tbody>
<tr>
<td>Adjusted Gross Income</td>
<td>16,744</td>
</tr>
<tr>
<td>- Standard Deduction</td>
<td>-9,100</td>
</tr>
<tr>
<td>- Exemptions ($3,950 x 3)</td>
<td>-11,850</td>
</tr>
<tr>
<td>Taxable Income</td>
<td>0</td>
</tr>
<tr>
<td>Tax Amount</td>
<td>0</td>
</tr>
<tr>
<td>- Credit for Child Care Expenses</td>
<td>0</td>
</tr>
<tr>
<td>- Child Tax Credit</td>
<td>0</td>
</tr>
<tr>
<td>Total Tax</td>
<td>0</td>
</tr>
<tr>
<td>Federal Income Tax Withheld (From Paycheck)</td>
<td>1,000</td>
</tr>
<tr>
<td>Earned Income Credit</td>
<td>5,460</td>
</tr>
<tr>
<td>Additional Child Tax Credit</td>
<td>2,000</td>
</tr>
<tr>
<td>Total Payments/Refundable Credits</td>
<td>8,460</td>
</tr>
<tr>
<td>Amount of Refund (Total Payments - Total Tax)</td>
<td>8,460</td>
</tr>
</tbody>
</table>

---

So, why are these examples meaningful? They illustrate the importance of looking at a party’s true income. Parent “A” would most likely claim that her net income for child support is $15,225.00 annually ($16,744.00 - $1,000.00 in Federal Taxes - $519.00 in FICA taxes) or $1,268.75 monthly. However, if you add back the tax refund ($15,225.00 + $8,460.00), Parent “A” has a total net income of $23,685.00 annually, or $1,973.75 per month. That is a difference of $705.00 per month.

The same analysis applies for Parent “B.” If this parent went straight off of her paystubs, her net income would be $43,450.00 annually, or $3,620.83 per month. However, when factoring in the tax refund, her income goes up to $47,736.00 annually, or $3,978.00 per month. That is a difference of $357.17 per month.

This deviation factor is overlooked in most cases and should be argued if there is a significant tax effect or burden on the parties. Looking at Parent “A” above, the actual money in her pocket, which is her true, net income, is almost $7,000.00 more annually than her total gross income shown on her W-2 form for the year. This will be explained further with the child support examples below.

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So, how do you become the hero for your client? How about getting your client more than $50,000.00 extra? Look at the example above in which both parties make minimum wage and have equal time sharing. Say Mom is not working and is imputed minimum wage, so she agrees to let Dad claim both children as his dependents. If Mom’s attorney is not paying attention when they run the child support calculations and they do not put the children to be claimed by Dad, then that could be the difference between Mom paying $4.00
Family Law Section Out of State Retreat – Washington, DC

By Autumn O. Beck, Esq., Pensacola, FL

When I was about ten years old, my parents took my brother and I to Washington D.C. for a family vacation. The highlight of the trip for me was our visit to the United States Supreme Court. While the Court was not in session on the day we visited, we took a tour of the building and sat inside the courtroom while the friendly volunteer familiarized us with the Court’s history and tradition. After the tour, I leaned against one of the huge pillars outside the Court below the inspiring words “Equal Justice Under Law” and posed for a photo. For as long as I can remember I wanted to be a lawyer and I don’t know what made me choose that profession or when, but I absolutely remember the day that my goal of being a lawyer became a dream of being a United States Supreme Court Justice; it was that day.

Fast forward thirty, or so years, that little girl who posed on the Supreme Court steps went to law school, became a martial and family law attorney, opened her own practice and has a husband and blended family with five, yes 5, children. Needless to say that while the ride has been fun and full of many unique and novel experiences as an attorney, the daily stress of a busy family law practice and a busy family were starting to take a toll. So when the email popped in my inbox from the Family Law Section of The Florida Bar and the subject line included the word “RETREAT,” I jumped to action! A retreat sounded like just the break I needed and I could earn a little CLE credit, meet some other practitioners from across the state for referral sources, and get to travel sans children with my husband to Washington D.C. When I read in the email that we had an opportunity to be personally sworn into the U.S. Supreme Court Bar at the retreat, well it was a no brainer.
This was my first section event and I cannot say enough about how wonderful it was for me personally and professionally. The section leaders had every detail planned out so that we all had meaningful experiences yet plenty of time to explore and experience Washington D.C. on our own. While the accommodations excellent, events and tours carefully planned, and other lawyers in attendance interesting and engaging, it was the unique experience of being sworn into the Supreme Court that was the most impactful.

On Sunday, our group heard from the former Clerk of the U.S. Supreme Court William K. Suter who had served as clerk for 22 years. Not only were his stories entertaining and enlightening, but the history and information he relayed to us in that two hour CLE reaffirmed the tradition and dignity of our high court and the national and global magnitude of the decisions the Court made. His presentation set the stage perfectly for our day at the Court.

When we arrived at the Court, our group gathered outside the massive white building near those same columns where I took a photo 30 years before. Along with me, much more seasoned and experienced lawyers than I were taking photos of themselves with the columns and “Equal Justice Under Law” inscription as the backdrop. After our private breakfast and many security checks, we were lined up alphabetically to be walked into the Court room and be seated in the attorney section next to the lawyers presenting their cases at Oral Argument that day. While waiting, several of us joked with each other about the strange and unfamiliar feeling of nervousness which we were experiencing. Strangely this group of gregarious family law attorneys had also become quiet, pensive and reserved in anticipation of the swearing in. I didn’t share this with them at the time, but my astute husband noticed that I was close to tears with the overwhelming feeling of honor at this privilege when we were led into the Court room. Shortly after we were seated, the Court entered the room and the nine justices sat just feet away from behind the bench. Some Justices such as Justice Breyer and Ginsberg made eye contact and some like Chief Justice Roberts and Justice Sotomayor gave a faint smile. As the first order of business of the Court, Motions for Admission were entertained, our Section Chair read our names one by one and we each stood. Chief Justice Roberts granted the Motion and we were admitted. Then all of the new members stood together and took the Oath.

In all likelihood, taking this Oath will be the closest realization of my childhood dream to be a U.S. Supreme Court Justice. I will certainly never be a Justice and will likely never argue a case in front of our high Court. But sometimes as family law attorneys we lose sight of the importance of our role in the administration of justice in our country’s legal system. Being sworn into the U.S. Supreme Court Bar and my experiences on this retreat, served as a much needed reminder of just how privileged we are as attorneys to have the opportunity to participate, on a daily basis, in this American justice system. For the opportunity to retreat from daily practice, be reminded of this privilege and to realize a childhood dream, I am grateful.

Autumn O. Beck, Esq. practices marital and family law in Pensacola, Florida. Autumn is a graduate of FSU and FSU College of Law and opened her own practice in 2015. She is married to Peyton Blackledge and has a blended family of five children; Ashton, Irelyn, Ella, Bryre and Cov.
Out of State Retreat – Washington, DC
Out of State Retreat – Washington, DC
Out of State Retreat – Washington, DC
or Dad paying $421.00. That is a $425.00 swing per month, which is $5,100.00 per year or $51,000.00 over the course of 10 years. What client would not want an extra $51,000.00 in his or her pocket?

Even in the lowest net difference, which is the scenario in which Mom makes minimum wage and Dad earns $50,000.00 per year. The difference is $92.00 per month, $1,104.00 per year, or $11,040.00 over the course of 10 years. Those amounts can really add up for your client.

### Who can Claim Tax Deductions and Credits

<table>
<thead>
<tr>
<th>Income of Parents</th>
<th>Time-Sharing</th>
<th>Mom Claims 2 Children</th>
<th>Each claim 1 child</th>
<th>Dad Claims 2 Children</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mom-Min. Wage, Dad-Min. Wage</td>
<td>Mom-Majority Dad-less than 20%</td>
<td>Dad pays $573</td>
<td>Dad pays $626</td>
<td>Dad pays $670</td>
</tr>
<tr>
<td>Mom-$50,000, Dad-$50,000</td>
<td>Mom-Majority Dad-less than 20%</td>
<td>Dad pays $1,092</td>
<td>Dad pays $1,141</td>
<td>Dad pays $1,184</td>
</tr>
<tr>
<td>Mom-Min. Wage, Dad-$50,000</td>
<td>Mom-Majority Dad-less than 20%</td>
<td>Dad pays $1,291</td>
<td>Dad pays $1,339</td>
<td>Dad pays $1,383</td>
</tr>
<tr>
<td>Mom-Min. Wage, Dad-Min. Wage</td>
<td>Equal</td>
<td>Mom pays $4</td>
<td>Dad pays $211</td>
<td>Dad pays $421</td>
</tr>
<tr>
<td>Mom-$50,000, Dad-$50,000</td>
<td>Equal</td>
<td>Dad pays $116</td>
<td>Dad pays $201</td>
<td>Dad pays $282</td>
</tr>
<tr>
<td>Mom-Min. Wage, Dad-$50,000</td>
<td>Equal</td>
<td>Dad pays $601</td>
<td>Dad pays $730</td>
<td>Dad pays $888</td>
</tr>
</tbody>
</table>

### Other Tax Tidbits

In reaching a final resolution in a family law case, the parents often times fight over who gets to claim the children for tax purposes. However, many times, a parent is fighting over credits or deductions that he or she is not legally allowed to claim, even with a Final Judgment. For example, the non-majority/non-custodial parent is never allowed to claim head-of-household status or the credit for child-care expenses. Here is a list of who is eligible to claim each tax deduction and credit.

<table>
<thead>
<tr>
<th>Time-Sharing</th>
<th>Custodial Parent</th>
<th>Non-Custodial Parent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mom-Majority Dad-less than 20%</td>
<td>Yes</td>
<td>Yes with Waiver**</td>
</tr>
<tr>
<td>Head of Household Filing Status</td>
<td>Yes*</td>
<td>No</td>
</tr>
<tr>
<td>Child and Dependent Care Tax Credit</td>
<td>Yes*</td>
<td>No</td>
</tr>
<tr>
<td>Child Tax Credits and Additional Child Tax Credit</td>
<td>Yes*</td>
<td>Yes with Waiver**</td>
</tr>
<tr>
<td>Earned Income Credit</td>
<td>Yes*</td>
<td>No</td>
</tr>
<tr>
<td>Exclusion for Dependent Care Benefits</td>
<td>Yes*</td>
<td>No</td>
</tr>
<tr>
<td>Tuition and Fees Deduction or the Education Tax Credits</td>
<td>Yes</td>
<td>Yes with Waiver**</td>
</tr>
</tbody>
</table>

**These may still be claimed by the custodial parent, even if he or she has signed a waiver for the non-custodial parent to claim the child’s personal exemption.

Endnotes

1. These illustrations are based on 2014 IRS guidelines. The illustrations use only the facts/figures shown and do not factor in any other deductions or credits that could be available.
A Fish Out of Water: When a Career Criminal Defense Attorney Takes the Bench in Family Court. A Q&A with Newly-Appointed Fifteenth Judicial Circuit Judge Scott Suskauer

By Cindy A. Crawford, Esq., West Palm Beach, FL

While on vacation with his family in New Hampshire over the summer, Scott Suskauer received the call of a lifetime. On the other end of the line was Florida Governor, Rick Scott, advising Suskauer that he had been appointed to the Circuit Bench in Palm Beach County.

Scott Suskauer, a board-certified criminal trial lawyer, has spent his legal career defending the rights of Florida's criminally accused. He began his career in 1988 as an Assistant Public Defender. In 1994, he opened his own criminal defense firm. A few years later, his wife, Michelle Suskauer, joined him in the practice now known as “The Suskauer Law Firm.” The two have practiced together for 18 years, exclusively in the area of criminal defense.

CRAWFORD: What made you want to become a judge?

SUSKAUER: I’ve always thought about doing it; I thought I might be good at it. I have had the honor of watching some great judges over the years. To be honest, I never thought that I would have the opportunity. I would love to continue the legacy of great judges in this circuit.

CRAWFORD: How did you find out that you were assigned to the Family Division?

SUSKAUER: The Chief Judge advised that there were two spots open: one in the Criminal Division and one in the Family Division. Because it was my area of expertise, I expressed my desire to be assigned to the Criminal Division, but... I learned that I had been assigned to the Family Division. I tried to embrace it. I have always found family law to be fascinating, even back in law school. It’s just an area of the law that I have never practiced in.

CRAWFORD: So, how long have you been on the family bench?

SUSKAUER: Almost 2 weeks now.

CRAWFORD: And how is it going?

SUSKAUER: It’s going well.

CRAWFORD: What differences, if any, have you noticed between the attorneys in the Criminal Division and the attorneys in the Family Division?

SUSKAUER: I quickly noticed a big difference in terms of the amount of emotion involved. It has been clear that, at times, emotion has clouded the objectivity of the litigants and, to some extent, that emotion carries over to the lawyers. I have seen how lawyers can easily get dragged down by the emotions of their clients, more so even than in criminal court. When you are dealing with children, money, infidelity … things can get heated quickly.

CRAWFORD: Have you had the opportunity to preside over any trials yet?

SUSKAUER: Yes, I have had two trials so far. I have to say that I was impressed with the skill of the lawyers in both cases.

CRAWFORD: Have you noticed any differences as it relates to the lawyers’ grasp on the rules of evidence and courtroom etiquette in the Family Division versus the Criminal Division?

SUSKAUER: It is definitely more informal in family court, probably because of the lack of juries. The rules can be more relaxed in a non-jury setting. As the trier of fact, I am able to disregard information that isn’t relevant or otherwise not admissible. Juries aren’t able to do that. I am more likely to admit evidence in a non-jury setting than I would be if a jury is hearing it because I understand how much weight should be assigned. I have also noted that some of the lawyers have had a difficult time framing a question. There have been a few times that I stepped in just to keep things moving. I understand that people need to vent. The issues that I have to decide are generally pretty narrow. I am more likely to let people talk when a jury isn’t present than I would be otherwise. As long as I have the time, I am fine with it.

CRAWFORD: The general reputation of family law attorneys isn’t always the best. What have you seen?

SUSKAUER: I have to say that I have been impressed for the most part. I have seen some cantankerous behavior on the Uniform Motion Calendar, but, so far, it has been the exception, not the rule.

CRAWFORD: What has been the most difficult challenge so far?

SUSKAUER: A few of the domestic-violence injunction hearings were tough, particularly the ones with prose litigants. With my criminal background, I am comfortable with the domestic-violence hearings, but the added layer of emotion from dealing with time-sharing and financial issues was trying.
CRAWFORD: What did you do to prepare for coming on the family bench?

SUSKAUER: I spent a lot of time watching and talking to the other judges prior to my first day. I was also clued in about the “red books” by my predecessor (Marital and Family Law Review Course materials). Those have been really helpful. I am really enjoying seeing new, interesting legal issues. For instance, one of my first trials dealt with issues related to foreign jurisdiction.

CRAWFORD: Have you had the opportunity to conduct an attorneys’ fees hearing yet?

SUSKAUER: I have reserved on fees in a couple of instances. I did award temporary fees in one case.

CRAWFORD: Have you been shocked by the amounts sought by attorneys?

SUSKAUER: No. This particular case was pretty modest.

CRAWFORD: Ah, well, just wait....

SUSKAUER: Yes, I have heard...

CRAWFORD: How would you describe your “judicial demeanor?”

SUSKAUER: The judge, clerk, deputies, lawyers – we all share the same workplace. It is important to me that people feel comfortable in my courtroom. I want to be approachable. I don’t want lawyers or litigants to be concerned that their sides won’t be heard.

CRAWFORD: Any closing thoughts?

SUSKAUER: Just that I am really looking forward to the challenge and am excited about my next few years here.

Cindy Crawford, Esq. is Senior Counsel in Greenspoon Marder’s West Palm Beach office. She graduated from George Washington University School of Law and began practicing at a prestigious law firm in Washington, D.C. before relocating to Florida. Crawford served as an Assistant State Attorney in the 15th Judicial Circuit litigating over 50 jury trials during her tenure. For the last 10 years, she has focused her practice on all areas of marital and family law. She finds serving the needs of Florida’s families both challenging and fulfilling.
This article is intended to assist counsel in identifying, comparing and contrasting personal goodwill attributes versus enterprise goodwill attributes. Recently, analysts have begun to opine on the relative importance of each attribute opening the gate for endless debate in court. The authors opine that a binary approach to this issue is best suited for court or at the settlement table.

Florida Courts continue to admonish business valuation analysts who fail to distinguish and quantify goodwill attributes. In *Thompson v Thompson*, 576 So. 2d 267, 270 (Fla. 1991), the Florida Supreme Court stated:

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

Historically, valuation analysts simply ignored the differences between personal and enterprise goodwill other than to identify the personal name of an entity. More recently, analysts have begun to correctly observe the various types and differences of personal goodwill and enterprise goodwill, however, these analysts errantly began to opine on the relative importance of each attribute opening the gate for endless debate in court. The authors opine that a binary approach to this issue is best suited for court or at the settlement table.

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In *Held v Held*, 912 So. 2d 637 (Fla. 4th DCA 2005) the court, during remand, stated; “for purposes of separating enterprise goodwill from professional goodwill, there was no distinction between a non-compete agreement and a non-piracy agreement.”

In *Schmidt v. Schmidt*, 120 So. 3d 31, 33-34 (Fla. 4th DCA 2013) the court, during remand, stated; “Because the $2,520,562 value requires execution of a non-compete agreement, it is clear that such valuation still includes a personal goodwill component.”

Historically, valuation analysts have relied solely on the enterprise name to determine whether personal goodwill exists. For example, upon identification of an individual’s name, e.g. Chris Jones, MD Family Medical Practice, Inc. or Edward Littles Plumbing, Inc. the errant analyst proclaimed cash, accounts receivable, furniture and fixtures, and liabilities to be the only transferrable enterprise value, never minding the existence of other transferrable value such as electronic medical records, client call-back lists, systems in place, operational handbooks, a trained and assembled workforce in place (TAWF), preferable location(s) of the enterprise, phone number, website, etc., all of which have distinct and identifiable values commonly referred to as intangible assets. The analysts’ failure to include intangible asset values will impact a client’s equitable distribution worksheet significantly.


Under *Frye*, expert testimony was admissible if the principles and procedures were sufficiently established to have gained general acceptance in the particular field for which it belongs. Essentially the trial judge determined whether the testimony is relevant, i.e. whether the testimony assists the jury in understanding the evidence or determining a fact in issue.
In Daubert, the Court held that the subject of an expert’s testimony must be founded upon “scientific knowledge” and that this requirement established a “standard of evidentiary reliability.” The Court further explained that the “scientific knowledge” requirement means that the expert’s opinion must be more than subjective belief or mere speculation. The Daubert opinion articulated four factors to consider when determining the admissibility of expert testimony:

- Whether the theory can and has been tested.
- Whether it has been subject to peer review.
- The known or expected rate of error.
- Whether the theory or methodology employed is generally accepted

Under Daubert and its progeny, scientific expert testimony is admissible when the testimony meets the following three part test, according to Kannankeril v. Terminix Int’l Inc., 128 F.3d 802, 806 (3d Cir. 1997).

- The proffered witness must be an expert, i.e., the witness must be qualified.
- The expert must testify about matters requiring scientific, technical or specialized knowledge.
- The expert’s testimony must assist the trier of fact.

Florida Courts receiving Daubert challenges have admonished valuation analysts who fail to defend their positions with scientific methods and who instead rely on subjectivity, opinion, and speculation. See Hedges v. Klaus Doupé, PA, 20th Circuit Florida in and for Collier County, Case No. 08-7526-CA (Jan. 21, 2014); Perez v. Bell South Telecommunications, Inc. 138 So. 3d 492, 497 (Fla. 3d DCA 2014); Giamo v. Florida Autosport, Inc 154 So. 3d 385 (Fla. 1st DCA 2014).

Using the binary approach to goodwill allocation, counsel’s valuation analyst and/or expert witness will preempt and prevent a Daubert challenge by eliminating references to the subjective “utility and importance” of goodwill attributes which is common in a Multi-Attribute Utility Model (MUM); and non-existent historically. In the binary approach, an attribute either exists or it does not. Recently, as seen on the national level, while using the multi-attribute utility model the valuation analyst by him or herself subjectively compares the relative importance of intangible assets such a workforce in-place, electronic medical records, systems and organization, a physician’s name, a person’s likability, etc. invites endless and costly debate. Disciplined simplicity in this analysis of goodwill attributes, e.g. using the binary approach, will alleviate the desirability and necessity of debating the importance of each specific attribute.

True, in the binary approach, there may be discussion about whether the attribute rises to the level of “making any difference whatsoever,” but that threshold is far less extensive than the burden of proving that the utility of an attribute rises to a specific level. For example, if an analyst concludes that a utility rises to an importance or effectiveness level of “4” on a scale of 1 to 10. An obvious response would be to question why that utility does not rise to a level 7 or 8. Additionally, one may ask how a level 4 differs from a level 7 in the analyst’s conclusion of the business interest’s fair-market value.

The experienced counsel or trier of fact will have a field day with the experts chosen utility level, finally proclaiming that the analyst’s method is too subjective to be reliable or repeatable.

### Side-by-side comparison of each attribute

<table>
<thead>
<tr>
<th>Enterprise Attributes</th>
<th>Attribute Existence</th>
<th>Historic Approach</th>
<th>(MUM) Importance 1-10</th>
<th>Binary Approach</th>
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*continued, next page*
### Personal Attributes

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<th>Binary Approach</th>
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<td>Work Habits</td>
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Here is a comparison table showing three very different monetary outcomes associated with an $800,000 business enterprise; based on the approaches to goodwill allocation mentioned in this article:

#### Binary Approach

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<th>Valuation of Enterprise</th>
<th>Marital Equity (Enterprise Percentage)</th>
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<td>Enterprise Personal</td>
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<td>57% 43% 100%</td>
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<td><strong>Equitable Distribution Worksheet</strong></td>
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#### MUM Approach

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<td>45% 55% 100%</td>
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<td><strong>Equitable Distribution Worksheet</strong></td>
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#### Historic (Arbitrary Opinion) Approach

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<th>Valuation of Enterprise</th>
<th>Marital Equity (Enterprise Percentage)</th>
</tr>
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<tbody>
<tr>
<td>Enterprise Personal</td>
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<td>10%</td>
</tr>
<tr>
<td>10% 90% 100%</td>
<td></td>
<td><strong>Equitable Distribution Worksheet</strong></td>
</tr>
</tbody>
</table>
Appendix A

The work-flow analysis which follows this article as “Appendix A” is an excerpt of this author’s valuation-report narrative developed in contemplation of relevant Wood/Cimasi goodwill attributes on a start-up clinical laboratory offering on-site collections. To provide fairness, the author uses an equal row-count of personal attributes to enterprise attributes as shown in the table of binary values.

The subject business is three-and-a-half years old as of August, 2015; owned by three shareholders with 40/40/20 voting rights, and employs 1099 contractors who perform the phlebotomy work on-site at nursing homes, residences and the like. Gross revenues are approaching $800,000.00 and are scheduled to reach $2 million in the coming years.

In conclusion

In family law and commercial litigation settings with enterprise gross revenues ranging up to $2.5 million the author has found many physician-owners, business-owners, spouses, attorneys, and judges to be accepting of the binary approach to goodwill analysis described here.

The author hopes that you also will find general acceptance of this model and that you experience smooth sailing with the binary approach to goodwill allocation.

Thomas Gillmore, CPA, CFE, CVA, is a self-employed forensic accountant serving the Central Florida legal community from his office in Winter Park, Florida since January 2009. Tom has attended advanced training in collaborative divorce and is passionate about encouraging spouses to attain their full potential post-divorce. He can be reached at tom@GillmoreAccounting.com and www.FloridaDivorceCPA.com.

Endnotes

1 For further discussion on goodwill, see Thomas Gillmore, Goodwill or a Good Guess, Fla. Fam. L. Commentator 9-10 (Summer 2015).

2 Editor’s comment: On October 26, 2015, Florida Bar President Ramón A. Abadin published a letter stating that the Florida Bar Board of Governors recently voted in support of retaining the Frye standard and sought comments to respond to the question: “Should Florida Statutes § 90.702 and §90.704, as amended by Chapter 2013-107, adopting the Daubert standard, be adopted as rules of evidentiary procedure, to the extent they are procedural?” The Board of Governors must consider and vote no later than December 15, 2015 on the procedural rule change before they are submitted to the Florida Supreme Court as part of the three-year cycle report due February 1, 2016. More available at: www.floridabar.org/daubertfrye. As of the writing of this Article, the Board of Governors had not yet taken a vote.
Enterprise Goodwill

Assemblage of Assets (-)

The analyst considered the following premises of value when contemplating whether the combination of total assets (or the assemblage of assets) can be differentiated from the mere fact that certain individual assets exist.

Premise 1: Value in continued use as part of a going-concern i.e., the value of the firm as an ongoing entity as opposed to the liquidated value of its assets.

Premise 2: Value in place, but not in current use in the production of income.

Premise 3: Value in exchange, i.e. the orderly disposition of a mass assemblage of assets, in place, which does not include current use in the production of net economic cash-flow and will not include consideration of the assets as a going-concern enterprise.

Premise 4: Value in exchange as part of an orderly disposition, i.e. where the assets are sold on a piecemeal basis, the sale not subject to significant time constraints.

Premise 5: Value in exchange as part of a forced disposition, i.e. where the assets are sold on a piecemeal basis, the sale being subject to significant time constraints.

The assemblage the clinic’s assets is in place and is used to generate revenue as described in Premise 1. However, the assets are easily replicated, e.g. tables, chairs, etc. Therefore, value allocation is not appropriate.

Barriers to Entry (-)

Depending on the specialty and location, it can be difficult and/or may take considerable time for new entrants in this industry to establish a referral base and other relationships with other physicians, hospitals and the local community.

However, the clinic, only three-and-a-half years in existence, has developed insufficient differentiating factors such as size, presence, long-term relationships and cost differentiators in this industry and in its geographic operating area to create difficulties (or barriers) to competitors entering the marketplace. Therefore, value allocation is not appropriate.
APPENDIX A

Business Location (-)

A business that is easily accessible and ideally located may have more enterprise goodwill. Convenience and recognition may be important factors to a particular business. Alternatively, a hard-to-find location may indicate that consumers are returning for other reasons, such as personal attention, price, or customer support.

The clinic’s physical location is not relevant to the home-bound patient base which comprises approximately 98% of revenues. Therefore, value allocation is not appropriate.

Business Locations Multiple (+)

If a business has multiple locations, it may mean that goodwill is more associated with the enterprise, and less with the individual, an individual cannot be in all locations at the same time and consumers’ satisfaction is more likely to be associated with factors that are not personal.

The clinic’s revenues are derived from on-site visitation to the patient’s location. Therefore, value allocation is appropriate.

Business Name (-)

If the name of the business carries the name of the business, there may be a greater level of enterprise goodwill present which will likely transfer to a willing buyer.

The clinic has roughly three-and-a-half years of activity to assess; meaning it is still in the development phase and is not yet well-established in the marketplace.

The clinic is still reliant on the personal efforts of the owners to gain new business. So, the business name itself is not recognized well enough to entice new business activity. Therefore, value allocation is not appropriate.

Business Reputation (-)

Business reputation is frequently a factor in determining the attraction of new business and a consumer’s likelihood to return for future business. If the reputation is more directly related to the business in general, as opposed to the individual providing the service, then the goodwill is more likely enterprise goodwill.

The clinic has roughly three-and-a-half years of activity to assess; meaning it is still in the development phase.

The clinic is still reliant on the personal efforts of the owners to gain new business. So, the business name itself is not recognized well enough to entice new business activity. Therefore, value allocation is not appropriate.

Intangible Assets (-)

Custodial rights to medical charts and records, electronic medical records, and patient recall lists, are considered goodwill because they create the propensity for the continued patient-provider relationship. Therefore, value allocation is not appropriate.
Marketing and Branding (-)

Name recognition of a product or service that is established through a marketing program and has achieved significant branding may indicate a higher level of enterprise goodwill. Marketing of the business, as opposed to the individual, helps to establish the enterprise as the source of the satisfaction.

The clinic is still reliant on the personal efforts of the owners to gain new business. So, the business name itself is not recognized well enough to entice new business activity. Therefore, value allocation is not appropriate.

Patient Base (+)

When a practice has a large, established patient base that requires recurring care, a greater business value is likely to exist. Some examples are:

- Direct contracting customer lists
- HMO enrollment lists
- Patient Lists

The clinic patients do not require recurring care similar to that which brought them to the clinic in the first place. The clinic interacts with a transient patient base. However, those patients are likely to need annual or more frequent recurring care. Therefore, value allocation is appropriate.

Repeating Revenue Stream (-)

The nature of some businesses is that the consumer finds a need for the service on a regular or even scheduled basis. Vaccinations of pets, routine dental cleanings, and annual physicals are examples of specific services that generate repeat business. A consumer relationship that generates revenues through the year(s), although not necessarily on a scheduled basis, could also generate repeat business.

Although the clinic interacts with a transient-patient base there is a continued relationship with the nursing homes.

However, the clinic is still reliant on the personal efforts of the owners to retain current business. So, the business itself is not yet well-established in the marketplace. Therefore, value allocation is not appropriate.

Systems & Organization (+)

The systems-and-organization attribute refers to all of the decisions made by management that create the structure of the business. It is broader than computer systems, and encompasses policies, manuals, procedures, methodology, forms, and documents developed to support the operations.

Systems and organization attributes include but are not limited to:

- Treatment Plan / Care Mapping
- Procedures and manuals
APPENDIX A

- Laboratory notebooks
- Computer and software integration
- Maintenance and support relationships

The transferrable value of necessary systems and organization exists in the clinic and an established patient-base is the key. Therefore, value allocation is appropriate.

Workforce In-Place (+)

In his work titled Valuing Intangible Assets in Exempt Healthcare Organizations, Volume 16, Number 03, January/February 2013, Mr. Cimasi writes:

1. The existence of any particular asset in a valuation is, of course, dependent on the facts and circumstances of that particular appraisal. However, the consideration of trained and assembled workforce (TAWF) as a class of intangible assets is in accordance with well-established economic valuation theory and principles.

2. TAWF can be separately identified, classified, and appraised, as a human capital intangible asset that is not bound up as an inextricable part of any goodwill, which may exist in a physician practice enterprise. The following characteristics should be observed:
   a. TAWF can be specifically identified.
   b. TAWF can be legally protected through contracts.
   c. TAWF can be privately owned and transferable.
   d. Employment contracts can be considered tangible evidence of TAWF existence.
   e. TAWF comes into existence at the point of assemblage of the workforce.
   f. TAWF can be "destroyed" by termination of employment.

3. The cost approach is commonly used in the valuation of an assembled workforce ... the value of the debtor company assembled workforce is based on the cost to recruit, hire and train new employees of comparable experience and expertise to that of the subject workforce.

4. [Furthermore], bankruptcy courts have stated that a debtor company's assembled workforce is, in fact, an asset that is subject to valuation and transfer. In Glosband v. Watts Detective Agency, Inc., (S-07-345, Docket Number: Civ. A. No. 70-1336-N, Filed: 8/28/1981) the court emphasized that while individuals themselves are not property, if an assembled group of employees are transferred, there is a reasonable assumption that at least some would remain with a new owner for a period, giving them property value within the meaning of the Bankruptcy Act.

During the appraisal of the subject clinic the appraiser considered the following cost items:

- Replacement cost new – the cost to create the ideal workforce
- Reproduction cost new – the cost to recreate the actual current workforce
- Four cost components
APPENDIX A

- Direct costs – recruitment/relocation fees
- Indirect costs – interview/hiring/training time
- Developer’s profit – return on direct and indirect costs
- Entrepreneurial incentive – lost income during the workforce assemblage period (i.e., an opportunity cost)

The clinic has a workforce in place that would be transferrable to a buyer. Therefore, value allocation is appropriate.

Personal Goodwill

Professional (or personal) goodwill is not transferrable. Even with long transition periods of introduction for a new acquiring physician owner, the charisma, skills, reputation, and personal attributes of the seller cannot, by definition, be transferred.

Personal goodwill is what would make a doctor’s patients follow him or her even if he or she changed location, staff and phone number.

Ability, Skills, and Knowledge (-)

There are insufficient differentiating factors in this category to distinguish the owners from their competition in this industry. Therefore, value allocation is not appropriate.

Age & Health (-)

There is likely less personal goodwill in the case of an older or unhealthy practitioner, because future earnings are not expected to continue for a long period of time.

The age and health of the individual is considered when weighing the likely longevity of the continuing goodwill. This could be particularly important if the individual’s health is poor and/or his or her age is advanced.

There are insufficient differentiating factors in this category to distinguish the owners from their competition in this industry. Therefore, value allocation is not appropriate.

Closeness of Contact (-)

When a service is performed or product is offered by the individual, the closeness of contact generally increases the likelihood that the goodwill that is generated will be personal. For example, an anesthesiologist may have little or no personal contact, while an ophthalmologist can have substantial personal contact.

The clinic is still reliant on the personal efforts of the owners to gain new business. So, the business name itself is not recognized well enough to entice new business activity. However, the owners themselves do not generally perform the on-site work.
There are insufficient differentiating factors in this category to distinguish the owners from their competition in this industry. Therefore, value allocation is not appropriate.

**Comparative Professional Success (-)**

There are insufficient differentiating factors in this category to distinguish the owners from their competition in this industry. Therefore, value allocation is not appropriate.

**Marketing & Branding (+)**

Name recognition for the individual, as opposed to the product or service that is established through marketing efforts to tie the individual’s name to the business may indicate a higher level of personal goodwill. This might involve the individual’s direct involvement in media advertisements and other marketing efforts.

The clinic is still reliant on the personal efforts of the owners to gain new business. So, the business name itself is not recognized well enough to entice new business activity. Therefore, value allocation is appropriate.

**Personal Referrals (+)**

A personal in-bound referral is defined as a referral from an outside source, such as a patient or a referring physician which has been made to a particular individual. The person making the referral is aware of some trait that makes the individual an appropriate referral. Typically, referrals are made because an individual has a specialized skill, talent, or reputation, and has inspired confidence in the referral source.

The clinic is still reliant on the personal efforts of the owners to gain new business. So, the business name itself is not recognized well enough to entice new business activity. Therefore, value allocation is appropriate.

**Personal Reputation (+)**

If the reputation of the individual whose personal goodwill is being assessed is positive and strong then the likelihood increases that the resulting goodwill is personal.

For example: The best plastic surgeons are internationally renowned in their field and can attract patients from around the world. On a smaller scale, word-of-mouth recommendations from satisfied clients go a long way toward drawing new business.

The clinic is still reliant on the personal efforts of the owners to gain new business. So, the business name itself is not recognized well enough to entice new business activity. Therefore, value allocation is appropriate.
Personal Staff (-)

Personal staff employees work for the business because of the personal reputation or knowledge of the individual whose personal goodwill is being assessed. If employees of a business chose to work for the business specifically to have the opportunity of working with and learning from this individual, they are more inclined to leave if this individual is no longer associated with the business.

There are insufficient differentiating factors in this category to distinguish the owners from their competition in this industry. Therefore, value allocation is not appropriate.

Personalized Name (-)

If the name of the business carries the name of the individual, there may be a greater level of personal goodwill present. The goodwill may be more difficult to transfer, particularly if a name change is anticipated. Therefore, value allocation is not appropriate.

Work Habits (-)

When comparing two business owners working the same amount of hours in the same specialty the physician who works more efficiently is likely to have more personal goodwill. Increased time spent per patient is also a likely-indicator of personal goodwill.

There are insufficient differentiating factors in this category to distinguish the owners from their competition in this industry. Therefore, value allocation is not appropriate.

Binary Table:

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APPENDIX A

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</tbody>
</table>

In this example the clinic sought to buyout or push-out a 40% shareholder who had allegedly misappropriated funds caused EBITDA (earnings before interest, taxes, depreciation, and amortization) to be unreliable.

Goodwill summary: The author compared the clinic’s gross profits and net sales to known market transaction of similar companies; applied the goodwill ratio; and then added in discounts and premiums for a conclusion of value.

<table>
<thead>
<tr>
<th>Gross Profits Valuation</th>
<th>$393,038</th>
</tr>
</thead>
<tbody>
<tr>
<td>Net Sales Valuation</td>
<td>$496,153</td>
</tr>
<tr>
<td>Indicated Value by Market</td>
<td>$444,595</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Market Comparable Valuation</th>
<th>$444,595</th>
</tr>
</thead>
<tbody>
<tr>
<td>Value of Personal Goodwill</td>
<td>43%</td>
</tr>
<tr>
<td>Value of Enterprise Goodwill</td>
<td>57%</td>
</tr>
<tr>
<td>Enterprise Goodwill</td>
<td>$253,419</td>
</tr>
<tr>
<td>Minority Discount 10%</td>
<td>-$25,342</td>
</tr>
<tr>
<td>Brokers’ Fee 10%</td>
<td>-$25,342</td>
</tr>
<tr>
<td>Prepare for Sale (Mgmt.. Time)</td>
<td>-$15,000</td>
</tr>
<tr>
<td>Liabilities</td>
<td>TBD</td>
</tr>
<tr>
<td>Recapture of Funds</td>
<td>-$24,000</td>
</tr>
<tr>
<td>Transferrable Value</td>
<td>$163,736</td>
</tr>
</tbody>
</table>

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<td>Up to 12% off</td>
<td>FedEx Ground® services</td>
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