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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 enjoy this special edition of the Commentator. Although I already knew this concept from my own years of service in the Family Law Section, it is the team effort enjoyed by members of the Section that makes the “wheels-go-round” and positive things happen. No one person single-handedly can do it all and, yes, it takes time to make a difference or change in the law, procedures, rules and forms. It is this team effort that truly makes an impact in our practice. This issue of the Commentator aims to highlight and recognize the outstanding work of your Executive Council members of the Family Law Section. As a result of the Council’s labor and dedication, joined by many other active volunteer members of the Section (including many active Trustees of the Section), the direction of Family Law in the state of Florida is substantially improved. Among our duties and aspirational goals as a voluntary Section of the Florida Bar is to improve our practice from all perspectives (mediation, collaborative law, social services, education, trial advocacy, and litigation) such that the turmoil encountered by children and families during their time in the judicial system is minimized.

We are excited that the Section’s new website (http://familylawfla.org/) was finally launched in January in conjunction with the Section’s annual live program of the Marital and Family Review Course in Orlando at the Hilton Orlando Bonnet Creek. I encourage you to use our website as a resource for up to date information about upcoming CLE programs, publications, committee meetings, retreats, and staying up to date on fast pace legislative issues. Remember to also check us out on Facebook (https://www.facebook.com/FamilyLawSection), Twitter (https://twitter.com/FamilySection), and LinkedIn (https://www.linkedin.com/groups/5096432/profile).

Although the Section’s annual Marital and Family Review Course in partnership with the AAML Florida Chapter has a solid and proven track record, this year’s 2016 Review Course was OFF THE CHARTS when it exceeded 1,600 attendees! What an outstanding accomplishment that close to half of our total Section membership attended this Course seeking to learn, grow, and become better lawyers, advocates and counselors for our clients. We hope we reached our goal and delivered high caliber speakers and topics. This year we introduced new speakers and new cutting-edge topics such as guardianships, social media evidence, and artificial reproductive technology (ART) and surrogacy in an effort to improve and expand our program. We wish the best to those registered to take the Marital and Family Certification exam this year and invite those successful candidates to join us on June 15, 2016 at the Section’s Installation and Awards Luncheon in Orlando at the Hilton Bonnet Creek to be recognized by your peers. It would be my pleasure to hand out those Certificates to newly Board Certified lawyers. Likewise, we thank our Review Course Committee Chair, Aimee Gross and members, Laura Davis Smith, Philip Wartenberg and Bonnie Sockel-Stone for their outstanding work in putting the Course together. Thank you to our AAML President, Charles Fox Miller, our Chapter Liaison, Jorge Cestero, and to Susan Stafford, our wonderful Chapter Administrator for all her hard work. Thank you to our many vendors, exhibitors and sponsors at this year’s Review Course.

One of the privileges as Chair of the Section is the ability to select the Chair’s Visionary Award for outstanding service and invaluable contributions to the practice of family law throughout the State of Florida. This year, the Section recognized General Magistrate Susan Keith from the Fifth Judicial Circuit for this award. I have been privileged to work with Magistrate Keith in many Section subcommittees and in particular, Rules and Forms. The Section and the Florida Bar are fortunate to have someone with such dedication, wisdom, and humility on their team. Congratulations, Magistrate Keith!

Your Executive Council met on January 30th and voted to approve amendments to its Bylaws which will now be submitted to the Florida Bar Board of Governors for approval. Special recognition and thank you to members of the Ad Hoc Bylaws Committee for their outstanding work: Douglas Greenbaum, Aimee Gross, Amy Hamlin, Magistrate Diane Kiring, Carin Porras, Reuben Doupe, Magistrate Norberto Katz, Nicole Goetz, Lori Caldwell-Carr, Magistrate Robert Jones, Laura Davis Smith and...
Ronald Bornstein. Special thank you to all Executive Council members for their thoughtful debate and deliberations on this massive project. The Domestic Violence Committee accomplished creation of two new Domestic Violence pamphlets which will be published by the Florida Bar for distribution to the public. Special recognition to Robin Scher, Judge Victoria del Pino, Gina Beovides, Andrea Reid and others on finalizing this important project.

The Membership Committee is doing a great job reaching out to our affiliate membership to update membership contact information on the website roster. Thank you Lori Caldwell-Carr, Avery Dawkins, Lisa Franchina and Anthony Genova. Your CLE Committee leadership (Heather Apicella and David Hirschberg) is working hard to produce a fantastic live CLE program for the Fall and other webinars this year. The Litigation Support Committee is working on a new bundle series CLE program for the summer. Thank you Sonja Jean, Sarah Saull and Beaulah Blanks for your hard work. The Technology Committee is working on creating a new video to promote board certification among other projects such as more future technology based CLE programs. Thank you Jack Moring and Eddie Stephens for your leadership. The Rules and Forms Committee leadership (Reuben Doupe and Sarah Kay) continue to work on several projects. The Publications Committee leadership (Julia Wyda, Sarah Kay, Ronald Kauffman, Cash Eaton, and Patricia Elizee) are doing an amazing job with FAMSEG, the Commentator, the Florida Bar Journal and our social media connections.

The Legislation Committee is working harder than ever during this legislative session monitoring all family law related bills. Thus far, members have made five appearances before committee meetings in Tallahassee to speak on behalf of the Family Law Section and either oppose or support pending legislation. Special Thank you to Christopher Rumbold, Philip Wartenberg, Bonnie Sockel-Stone, David Hirschberg, Amy Hamlin, Taryn Sinatra, Joe Hunt for your time and efforts. In addition, special thanks to Thomas Sasser, Elisha Roy and Abigail Beebe for your invaluable collective efforts and contributions during this legislative session.

The ADR Committee leadership (Steven Berzner and Ronald Bornstein) is working on anticipated rules if the collaborative bill passes this session. The Ad Hoc Parentage leadership (John Foster, Amy Hickman, Judge Raymond McNeal) approved nomenclature revisions to various statutes. The General Magistrate and Hearing Officers Committee (GM/HO) leadership (Magistrate Jennifer Kuyrkendall, Magistrate Robert Jones and Douglas Greenbaum) continue to work on a host of projects including issues relating to administrative child support orders. The GM/HO Committee also produced an informative webinar in the fall regarding the distinction between the role of general magistrates and that
Vice Chair of the Commentator’s Corner

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

The Florida Bar Standing Committee on Professionalism defines *professionalism* as:

[The pursuit and practice of the highest ideals and tenets of the legal profession. It embraces far more than simply comply with the minimal standards of professional conduct. The essential ingredients of professionalism are character, competence, commitment, and civility.]^{1}

The choice of the term *ingredients* within the definition struck me. My father is a chef with roughly three decades of experience teaching culinary arts in a public vocational high school. Because of him, I grew up watching, discussing, and occasionally participating in the art of cooking.\(^2\) The one thing I learned above all else was that “cooking” does not result from simply possessing ingredients. Instead, it results from having *all* of the right ingredients and knowing when and how to combine them to achieve the desired result. That knowledge, which comes with years of education, apprenticeship, and practice, is the difference between enjoying a dinner and living a disaster. Likewise, being a *professional* family law practitioner does not mean simply having character, competence, commitment, or civility. Being a professional family law practitioner means having *all* of them and adeptly integrating every one of them into your practice of law, to live the highest ideals and tenants of what it means to be a family law attorney. You can cultivate your professionalism by reading the enclosed articles, attending a Section event or CLE, authoring an article for a Section publication, or volunteering on a Section committee. Find out more by visiting the Section’s new website at: [http://familylawfla.org/]. Bon appétit!

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1 Fl. B. Standing Cmte. On Prof., Professionalism Expectations, (Jan. 2015)
2 No, the author did not inherit the cooking gene. She is thrilled to have married someone who does not burn water like she does.
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When asked to be the Guest Editor for this edition of The Commentator, I immediately agreed to do so. This is my second time “guest editing” our magazine. I would not have been able to do so with the invaluable assistance of our Publications Chair Julia Wyda and Vice-Chair of the Commentator Sarah Kay. My office, the Legal Aid Society of the Orange County Bar Association, Inc., has also been gracious in allotting me the time to devote to this edition.

This edition focuses on professionalism yet provides substantive articles regarding equitable distribution and family law appeals.

Judge Ray McNeal discusses the need for increased professionalism in The Bar. He encourages us to be mindful of our actions and the effects that unprofessionalism might have on our clients.

We also have “Six Shades of Gray Divorce,” in which Lori Caldwell-Carr provides an educational insight on challenges representing clients in gray divorces.

Amy Hamlin and Judge Susan Stacy provide us with an interview that discusses the different perspectives from a practitioner to a judge. Their article also discusses the professionalism of the 18th Circuit Family Law Attorneys.

Michael Giel gives us direction on how to appeal a case without a transcript. He provides a foundation for “Appellate 911”.

Henny Shomar discusses the Court’s viewpoint on professionalism. We also have a rhyming accountant in this edition! CPA Gerard Samoleski provides us with a poem about goodwill.

Judd Bean provides us insight and suggestions on how to assist clients who may be struggling or know someone who is struggling with an addiction.

Sarah Kay helps bring us all into the new technology age. Her article encourages us to increase our technological IQ and provides a few websites to help us get started.

We appreciate the time that you have set aside for reading the Commentator. We hope that you find this issue to be informative and a catalyst to help enhance professionalism throughout your legal community.

We are excited about the Section’s NEW website!

Visit the Family Law Section website and see what’s new...

www.familylawfla.org
Practical and contemporary, the resources in The Florida Bar family law library lend a real-world approach to your practice in this area. Whether you’re a seasoned family law attorney or looking to expand your client base, look no further.

**Florida Dissolution of Marriage, Twelfth Edition**
This publication details the dissolution process from interview through temporary relief and discovery to final judgment. It examines what comes after the final judgment, including practical analysis for deciding what action can be taken effectively and the procedures to follow. Key areas covered include: parental responsibility, child support, alimony, equitable distribution, and attorneys’ fees. The publication includes sample form language and checklists. New edition highlights provide the latest updates on:
- The representation of battered spouses
- Financial relief options
- Federal tax code citations

**Florida Proceedings after Dissolution of Marriage, Twelfth Edition**
This manual examines what comes after the final judgment, including practical analysis for deciding what action can be taken effectively and the procedures to follow. Also addressed are registration, enforcement, and modification of foreign judgments in Florida, the Child Support Enforcement Program, and the Uniform Interstate Family Support Act. Highlights of the new Twelfth Edition include:
- Points addressing the appeal of extraordinary writs in family law cases
- Additional explanation regarding child support modification
- An author rewrite on the property rights concerns

**Adoption, Paternity and Other Florida Family Practice, Eleventh Edition**
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Mandatory Professionalism Brings Options for Resolving Complaints

By Raymond T. McNeal, Esq., Ocala, FL

In 1996, the Florida Supreme Court and The Florida Bar established a Center for Professionalism (later renamed the Henry Latimer Center for Professionalism in 2005) and created a Commission on Professionalism by administrative order. The purpose of these entities was to improve the ethics and professionalism of lawyers and judges, beginning with legal education in our law schools. This program is a model for the nation. However, after almost 25 years of professionalism initiatives, the Florida Supreme Court found that “professionalism is one of the most significant adverse problems that negatively impacts the practice of law in Florida today.” In re Code for Resolving Professionalism Complaints, 116 So.3d 280, 281 (Fla. 2013).

In response, the Florida Supreme Court adopted a Code for Resolving Professionalism Complaints. The first section, Standards for Professionalism, provides in part, “Members of The Florida Bar shall not engage in unprofessional conduct. ‘Unprofessional conduct’ means substantial or repeated violations of the Oath of Admission to The Florida Bar, The Florida Bar Creed of Professionalism, The Florida Bar Ideals and Goals of Professionalism, The Rules Regulating The Florida Bar, and the decisions of The Florida Supreme Court.” (emphasis added). Id. at Exhibit A. Based on this language, professionalism is mandatory. Since it is mandatory, it can be enforced with sanctions, if necessary.

On January 30, 2015, The Florida Bar Board of Governors approved Professionalism Expectations to replace the Ideals and Goals of Professionalism. Both documents are available on the Henry Latimer Center for Professionalism website. The Florida Bar Standing Committee on Professionalism’s Professionalism Expectations are based on the Rules Regulating The Florida Bar and, according to the Preamble, “long-standing customs of fair, civil, and honorable legal practice in Florida.” The Ideals and Goals of Professionalism were purely aspirational. Conversely, the Professionalism Expectations include both mandatory and aspirational provisions. The difference between mandatory and aspirational provisions is explained in the Preamble. Where a Professionalism Expectation is addressed in the Rules Regulating The Florida Bar, the expectation is stated in terms of “must” and “must not.” Compliance with these expectations appears to be mandatory and therefore, enforceable with sanctions. Professionalism Expectations based solely on custom are stated in terms of “should” and “should not.” These expectations are aspirational. However, as noted above, the Court has defined “substantial or repeated violations” of some aspirational standards as “unprofessional conduct” which is prohibited. In re Code for Resolving Professionalism Complaints, 116 So.3d 280 (Fla. 2013). The Florida Supreme Court amended the Code for Resolving Professionalism Complaints to substitute the Professionalism Expectations for the Ideals and Goals of Professionalism. In re Amendment to the Code for Resolving Professionalism Complaints, 174 So.3d 995 (Fla. 2015).

In 2013, the Supreme Court set up a structure to address professionalism complaints through Local Professionalism Panels (LPP) and the Attorney Consumer Assistance and Intake Program (ACAP) created by The Florida Bar. The professionalism panels are created by administrative order in each circuit to allow the circuits to resolve “complaints of alleged unprofessional conduct by attorneys practicing in that circuit.” In re Code for Resolving Professionalism Complaints, 116 So.3d 280, Ex. A, 1.5 (Fla. 2013). The LPP may receive and act upon complaints of unprofessional conduct and, if necessary, refer the matter to The Florida Bar. The Court also reaffirmed the use of the Attorney Consumer Assistance Program (ACAP) to receive and resolve complaints of unprofessional behavior without formal grievance proceedings. The LPP may refer a complaint to the ACAP and the ACAP may refer a complaint to the LPP. If the complaint can be resolved informally through the LPP, the entire matter is confidential. Id. at Ex. A, 3.5. A complaint that deserves further review because it involves a violation of the Rules of Professional Conduct may be referred to The Florida Bar’s Lawyer Regulation Department for further consideration. Id. at Ex. A, 2.5. The LPP provides an opportunity for the local bar to influence the way law is practiced in the community. Links to the circuit administrative orders and contact information are available at the Henry Latimer Center for Professionalism website. The goal of these panels is to help lawyers correct problems before they get in trouble with the bar. Beckels v. Brit, Case No. 3D14-2320 (3d DCA Oct. continued, next page
Court pointed out that: discussing the lawyer’s behavior, the years with a public reprimand. In a one year suspension. Instead, the kin ethics school. rude behavior” and directed to attend publicly reprimanded for “disrespect for similar conduct. In 2003 he was time the lawyer had been sanctioned professional manner during the legal repeatedly behaving in an unpro the Court sanctioned a lawyer for v. Norkin, 2015 WL 5853915 (Fla. Oct. 8, 2015). The potential significance of this decision was discussed in Gregory R. Hanthorn, When Breaches of Professionalism Become Sanctionable, ABA, Litigation Section, Ethics and Professionalism Newsletter, Winter 2014. The Florida Supreme Court’s approach may be just the beginning of a national trend to enforce the professionalism codes which exist in most state. The professionalism efforts of The Florida Bar and The Florida Supreme Court have elevated the practice of law in Florida. Lawyers should embrace this movement and be personally involved. We are the caretakers of our justice system. We can make a difference by setting an example of professional responsibility in the way we live and practice law. Professional responsibility is more than being civil to one another. It is defined in the Professionalism Expectations by seven characteristics which include fairness, competence, preparation, civility and service to others. Our efforts to be professional and to promote professionalism should be an intentional process. Every year, family lawyers should read all of the materials in The Florida Bar’s 2014-16 Professionalism Handbook that is provided to law students in their Professional Responsibility class. Family lawyers should also read the Bounds of Advocacy: Goals for Family Lawyers in Florida, promulgated by the Family Law Section in 2004. I have resolved to do this at the beginning of each year to remind myself of what is expected from a professional lawyer. It is a lot to digest, but like reading Chapter 61, Florida Statutes, every year, it is a worthwhile practice.

At the same time, it is helpful to examine how we make decisions. Mari anne M. Jennings, a professor of legal and ethical studies in business, recommends adopting a personal credo as a way to prepare ourselves for making ethical decisions. A credo is a statement of values to guide decision making. Jennings suggests that we first answer the questions: Who are you? And, what would I never do to make money or be successful? We have learned that unethical and unprofessional behavior is usually a matter of choice. In the final analysis, we make our choices on the values we hold dear.

In 1990, a group of family lawyers asked me to help create a family division in Marion County. I agreed to accept the assignment only if they agreed that we would do our best to leave families in better conditions than when their cases began. I had witnessed first-hand how the adversarial system drives families apart at a time when we need them to work together. I wanted no part of unhelpful litigation. This became the credo by which we measured our local family practice and Marion County became one of the best places to practice family law in Florida. I challenge you to try this in your own practice.

Today, profanity and vulgar language is prevalent in music, movies, television, and social media. Now, this language is in our courtrooms. Most often it is used to intimidate and demean another person. This is unacceptable. To address the growing concern with civility in the legal process, in 2011, the Florida Supreme Court amended the Oath of Admis-
sion to The Florida Bar by adding, “To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in written and oral communications.”716 Civility is mandated in Expectations 2.2 and 2.3 of the Professionalism Expectations. Also, Rule 4-8.4 of the Rules of Professional Conduct prohibits conduct that “is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers.”

Words are the tools of our profession. Words matter and they should be used carefully. I am moved by a quote attributed to Sai Baba, an Indian spiritual leader. “Before you speak, ask yourself: Is it necessary? Is it true? Is it kind? Will it hurt anyone? Will it improve on the silence?” Following this rule will go a long way towards restoring civility to the legal process.

Raymond T. McNeal, Esq. is a retired circuit judge and certified family, dependency, and appellate mediator. His practice is limited to mediation and volunteering with Community Legal Services of Mid-Florida.

Endnotes
10 Gary Blankenship, How Are Local Professionalism Panels Working?, The Florida Bar News, August 15, 2014 is the most recent report on how the panels operate.
15 In re Code for Resolving Professionalism Complaints, 116 So.3d 280, 281 (Fla. 2013).
16 In re: Oath of Admission to The Florida Bar, 73 So.3d 149, 150 (Fla. 2011).
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Six Shades of Gray Divorce: Challenges in Representing Clients Over Fifty

By Lori M. Caldwell-Carr, Esq., Maitland, FL

I recently read a research study conducted by the National Center for Family and Marriage Research at Bowling Green State University titled “The Gray Divorce Revolution: Rising Divorce among Middle-aged and Older Adults.” The overall conclusion of the 32-page study is that the divorce rate for people aged 50 and older doubled between 1990 and 2010, with 1 in 4 divorces in 2010 involving clients 50 and older. The title of the study is hard hitting, “The Gray Divorce Revolution.”

In reviewing my cases that involved clients in their 50’s, 60’s and even 70’s, I was able to identify six areas that came up frequently in “gray divorces”:

1. Pre-marital property with a marital component;
2. Military benefits;
3. Pension plans (non-military);
4. Stock options;
5. Business ownership; and
6. Tax issues (tax effecting and capital gains and losses).

These cases generally require the use of ancillary experts, such as appraisers, valuators, forensic accountants, tax specialists or tax attorneys, military experts, and trust attorneys, to name a few. As family law attorneys, we are expected to spot issues and know when to call on the right experts to assist our clients.

1. Pre-Marital Property with a Marital Component

Many “gray divorces” are second marriages where one spouse purchased the home, in which the parties resided, prior to the marriage. Section 61.075(6)(b), Florida Statutes, states that a non-marital asset may be altered into a marital asset to the extent that its value has been enhanced by marital funds or labor.

To determine whether premarital property has a marital component, we must ask the following: How does a court determine if a marital asset component exists in a home purchased prior to the marriage by one spouse, but resided in during the marriage by both spouses? Further, is there an active and/or passive component?

The Florida Supreme Court in Kaaa v. Kaaa, 58 So.3d 867 (Fla. 2010), upheld the ruling of the trial court in this case which concluded that when marital funds are used to pay down a mortgage resulting in increased equity in the home, that increased equity is a marital asset subject to distribution. The Supreme Court went on to say that not only would this active pay down of the mortgage with marital funds be considered marital, but the passive component could also be considered marital for the purposes of equitable distribution.

The Court laid out a five-step process that must be followed prior to awarding equitable distribution of passive appreciation:

1. Determination of the overall current fair market value of the property.
2. Has there been any passive appreciation in the property's value?
3. Pursuant to section 61.075(5)(a)(2), Florida Statutes, is the passive appreciation a marital asset after primarily taking into consideration what the non-owner spouse personally contributed to the appreciation of the property?
4. Determination of the actual value of the marital passive appreciation subject to equitable distribution.
5. Allocation of value.

This same analysis applies to premarital properties that the parties did not reside in (i.e. rental properties) and pre-marital businesses.

There are a line of cases in the First, Third and Fourth District Courts of Appeal which state that once one spouse proves active appreciation of a non-marital property or business, the burden then shifts to the other party to establish whether any portion of the enhanced value should not be part of equitable distribution.

2. Military Benefits

I have recently seen in many of my “gray divorces” where one of the spouses was either active or reserve military for over twenty years during the marriage. When I see these facts in a case I call a military expert, because there may be a military pension along with survivor and/or life insurance benefits that are marital. These benefits, if not properly identified, pled, and ordered, may be lost.

- In gray divorces, dealing with military benefits becomes more of a pertinent topic because some benefits require 20 years of service before becoming eligible to receive substantial benefits.

continued, next page
Six Shades of Gray Divorce
from preceding page

• Navigating military benefits can be confusing, due to:
  o Acronyms: The military uses a lot of acronyms; attorneys need to be familiar with an acronym soup that includes LES, BAH, COLA, DFAS, DI-EMS, and, many more.
  o Calculations: Different calculations must be computed to determine the amount of the military benefit and how much of that benefit a spouse may be entitled to.
  o Applicable Laws: There are several bodies of law that require comprehensive understanding such as: Uniformed Services Former Spouses’ Protection Act, Title 10 of the United States Code, Title 37 of the United States Code, at the Defense Finance and Accounting Service (DFAS) rules, just to name a few.

• Military Retirement Benefit/Military Pension
  o Have to calculate how much a service member may be entitled to
  o There are different ways to calculate the benefits a service member is entitled to, which depend on when the service member entered the armed forces and whether a service member is or was on active military duty or on the Guard or Reserves
  o During discovery, forms can be filled out to obtain required information directly from the military. To name a few:
    ▪ Proof of active duty service
    ▪ Proof of Reserve duty
    ▪ Proof of Guard duty
    ▪ Annual points statements
  o There are different types of military pensions that can be divided
  o When dividing a military pension, there are two different ways to calculate the marital share; one way is based upon the date of retirement, but in Florida, it is based upon the date of the marital couple’s separation
  o The wording of the payment of pension to the non-military spouse is crucial because incorrect wording can cause the non-military spouse to lose out on the cost of living adjustment (COLA)
  o Dividing Reserve retirement pensions are different in that the Reserve service member is only eligible after a certain age (60 years) and the marital portion of the retirement can be calculated in two different ways
  o The order containing the division of the military pension must be very specific; DFAS will interpret the order and failure to include appropriate language will result in DFAS failing to honor the order

Make sure that your final judgment of dissolution of marriage contains specific language regarding the actual percentage of the retirement pay the non-military spouse will receive or the Defense Finance and Accounting Service (DFAS) will not honor the order. When the military spouse is actually retired, the non-military spouse will receive a percentage of the military pension, which can be calculated with a coverture fraction. Further, a percentage carries a cost of living component which makes an adjustment to the monthly received benefit at a percentage based upon location to help compensate individuals living in an area with a high cost of living.

A Survivor Benefit Plan (SBP) is another area that can be difficult. I recently had a case where the parties had been married for over the 20-year required term of military service, but the husband had the wife sign a document disclaiming her entitlement to the SBP. Our military expert could come up with no explanation as to why the husband would do this, but was able to identify the discrepancy and we were able to add the wife onto the plan.

• Survivor Benefit Plan
  o The purpose of the Survivor Benefit Plan (SBP) is to provide the non-military spouse with continued payment after the military spouse’s death because retirement pay immediately stops upon the military spouses death.
  o Enrollment in SBP requires premiums to be paid and affects the military pension monthly payments.
  o The survivor must be specifically designated via forms that must be sent to DFAS.
  o Divorce affects the SBP coverage and there are strict timelines associated with the election of coverage after a divorce.

The First District Court of Appeals tells us in Wise v. Wise, 768 So.2d 1076 (Fla. 1st DCA 2000), that if a dissolution of marriage action is filed while the military spouse is still on active duty after 20 years of service, the SBP is a marital asset. Heldmyer v. Heldmyer, 555 So.2d 1324 (Fla. 5th DCA 1990) says that the Court has the ability to name the non-military spouse as the irrevocable beneficiary of the SBP to secure his or her portion of the military pension.

In order to secure the SBP for the non-military spouse, the final judgment of dissolution of marriage and agreement (if any) must be properly filed with DFAS along with a form to convert the spousal SBP to a former spouse SBP. This must be done within one year of entry of the final judgment. If one year passes and the proper forms are not filed, any new spouse of the military member...
will automatically receive the SBP benefit.

3. Pension Plans (Non-Military)

We know that, pursuant to section 61.075(6)(a)1(d), Florida Statutes, all vested and non-vested benefits, rights, and funds accrued during the marriage in retirement, pension, profit-sharing, annuity, deferred compensation, and insurance plans and programs are marital for the purpose of equitable distribution.

In *Trant v. Trant*, 545 So.2d 428 (Fla. 2d DCA 1989), the Second District Court of Appeals tells us that a pension should be appropriately valued by one of two methods, being either the “immediate offset method” or “deferred distribution method.” The result of either method should be a fixed dollar amount, not a percentage.

This is a specific instance of where I will use an expert to value the marital portion of the pension based upon the pension holder’s present time in the retirement plan and the present value of the plan. Pension plans can sometimes be complex to value.

All vested retirement plans such as an IRAs or 401Ks should be part of equitable distribution.

Pensions, 401Ks, and some limited IRAs require that a separate order called a Qualified Domestic Relations Order (QDRO) be entered and provided to the plan administrator for the receiving spouse to obtain his or her share. If you do not have specific knowledge of QDROs or the plans, this is another area where an expert who specializes in the drafting of QDROs may become necessary. A poorly drafted QDRO can cause problems years down the road!

4. Stock Options

Employee stock options can be tricky when it comes to determining whether there is a marital portion and the value of that portion. Again, I always involve the appropriate experts in any case where I have a spouse that has an extensive benefits package, particularly if options are included.

Employee stock options differ from publicly traded stock in that the employee stock options:

1. Generally have some expiration date;
2. Typically are non-transferable; and
3. Typically are not marketable (unlike publicly traded stock which typically are marketable).

In *Seither v. Seither*, 799 So.2d 331 (Fla. 2d DCA 1999), the Second District Court of Appeals held that when a stock “option is given as compensation, it can be deferred compensation for past services, compensation for present services, or compensation for future services.”

continued, next page
The Seither Court also points out that:

The difficulty with stock options in a divorce proceeding is that they have a dual nature. They have characteristics of an asset in that they represent a right to purchase an ownership share in the underlying corporation’s stock. Under some circumstances, they can be alienable. On the other hand, they have characteristics of income in that the whole purpose behind options is to allow the owner to capture the appreciation in value of the stock prior to its actual purchase. They are usually exercisable over time. Options are often designed to be exercised immediately, not held over the long term. Also, they are given as a form of compensation.

Seither, 779 So.2d at 332–33.

A major issue courts seem to be concerned with is whether the options are marital or non-marital.

The First District Court of Appeals in Jensen v. Jensen, 824 So.2d 315 (Fla. 1st DCA 2002), stated that the unvested stock options were in recognition of past service (even though they were contingent upon continued service) so the date that the options were given to the husband (which was during the marriage) made the options a marital asset for the purposes of equitable distribution. Though the unvested stock options could not be valued or transferred, the trial court ruled that the unvested stock options were marital property and created a constructive trust upon the husband for the benefit of the wife. “In imposing a constructive trust…the trial court expressly retained jurisdiction over the parties until the expiration of all unvested options.” Jensen, 824 So.2d at 317.

The Second District Court of Appeals in Ruberg v. Ruberg, 858 So.2d 1147 (Fla. 2d DCA 2003), further clarified the issue of whether options were marital or non-marital by determining that the Court should look at whether the option is awarded to the employee as deferred compensation for past service or as an incentive for future service. In Ruberg, the “trial court specifically found that the unvested stock options and restricted shares constituted incentives that looked to future labor and ‘continued superior performance’ by Mr. Ruberg – not past performance” – making them clearly non-marital.

5. Business Ownership

In many of my “gray divorces” there are multiple variations of business ownership. You may encounter everything from one spouse owning a business to both spouses owning a business (sometimes together). Business ownership creates additional legal issues that I have to watch out for.

An important step early on is to determine what type of business entity you are dealing with. If you determine that there is a corporation, you must consider if that corporation should be joined as a party to the divorce action. The court has no power to transfer corporate assets, which are determined to be marital and should be awarded as part of equitable distribution, if the corporation is not joined.

Valuation of businesses can be tricky, as well. Many questions must be answered in order to value the marital portion of a business. If the business was started prior to the marriage there may be a marital portion. See the above section titled “Pre-Marital Property with a Marital Component.”

One of the main distinctions that must be made in business valuations is what portion of the value of the business is based on personal goodwill of the individual and what portion is based on business goodwill, which is independent from the person. In general, business goodwill is transferrable to a fair market buyer upon purchase of the busi-
ness, whereas personal goodwill is not transferrable to the buyer.

In Young v. Young, 600 So.2d 1140 (Fla. 5th DCA 1992), and Held v. Held, 912 So.2d 637 (Fla. 4th DCA 2005), the Courts noted “that when valuing the enterprise goodwill of a business, the necessity of a cov-

The Court in Schmidt v. Schmidt, 120 So.3d 31, 32 (Fla. 4th DCA 2013), actually defines enterprise goodwill in the following way: “Enterprise goodwill, defined as the value of a business ‘which exceeds its tangible assets’ and represents ‘the tendency of clients/patients to return to and recommend the practice irrespective of the reputation of the individual practitioner,’ is a marital asset subject to equitable distribution.”

Schmidt further goes on to define personal goodwill as follows: “Personal or professional goodwill attributable to the skill, reputation, and continued participation of an individual is not a marital asset.” Schmidt, 120 So.3d at 32.

For a more in depth look analysis of both stock options and business ownership issues please refer to the materials provided under the general heading of Equitable Distribution by Thomas J. Sasser, Esq., Staci L. Burton, Esq., and David L. Manz, Esq. at the 2016 Certification Review Course.

6. Tax Issues (Tax Effecting and Capital Gains and Losses)

The trial court is required to consider the consequences of income tax laws on the distribution of marital assets. Failure to do so is a reversible error.

The Vaccaro case out of the Fifth District Court of Appeals clearly states:

The purpose of considering tax consequences is to strive for a fair and equitable distribution of marital assets to both parties. One party should not be charged with the full value of an asset that is burdened with an inevitable payment of taxes. The effect of the burden should be considered so that neither of the parties gains an unfair advantage or suffers an unfair burden because he or she receive a particular asset in distribution. (footnote omitted)

Vaccaro v. Vaccaro, 677 So.2d 918, 922 (Fla. 5th DCA 1996).

Evidence must be presented in court for tax consequences to be con-

Additionally, courts should consider the potential capital gains or losses of all assets that would be applicable to those tax implications. Generally everything owned by the spouses individually or jointly such as real prop-

The difference between the value at the time of purchase (or its value at time of inheritance), which is called the asset’s basis and the amount it is sold for determines the capital gain or loss. There is a capital gain if the asset is sold for more than its basis and a loss if it’s sold at less than its basis, which all plays in to how taxes are paid.

Though this is more of a retirement issue than a tax issue, it is something you should make a client aware of and have them discuss with a tax expert. When looking at overall retirement money available to the lower-income earning spouse, consider that under the IRS code, if there is a marriage of ten years or longer, the spouse has the right to obtain half of their ex-spouse’s benefit, starting at age 62, so long as the collecting spouse is not remarried. This does not change the amount that the ex-spouse receives.

Additionally, should the ex-spouse die first, the collecting spouse can get a step up to a higher benefit.

Again, this is something that a family law attorney should advise his or her client of, but direct the client to discuss this with an accountant or other trusted financial advisor. Many factors come into play when determining what the potential future benefit might be.

In conclusion, if the predictions of “The Gray Divorce Revolution” study are accurate, as the baby boomers continue to age, the divorce rate of middle-aged and older adults will continue to rise. As family law prac-

Lori Caldwell-Carr, Esq. is a family law attorney practicing in Maitland Florida as InFocus Family Law Firm. She has a true passion for helping people work through family law matters with the goal of making positive, well-informed and future-focused decisions about their case. Lori is ac-

In conclusion, if the predictions of “The Gray Divorce Revolution” study are accurate, as the baby boomers continue to age, the divorce rate of middle-aged and older adults will continue to rise. As family law practitioners, we will be spending more time focusing on finding ways to protect assets and create financial secu-

Endnotes

1 Susan L. Brown & I-Fen Lin, The Gray Divorce Revolution: Rising Divorce among Middle-aged and Older Adults, 1990–2010 , Na-

2 See Young v. Young, 606 So.2d 1267 (Fla. 1st DCA 1992); Gaetani- Slade v. Slade, 852 So.2d 343 (Fla. 1st DCA 2003); Adkins v. Adkins, 650 So.2d, 61 (Fla. 3d DCA 1994); Yitzhaki v. Yitzhaki, 906 So.2d 1250 (Fla. 3d DCA 2005); O’Neill v. O’Neill, 868 So.2d 3 (Fla. 4th DCA 2004); Chapman v. Chapman, 866 So.2d 118 (Fla. 4th DCA 2004).
The Family Law Section announces its charitable donation of $75,000 to the Florida Bar Foundation. The Section continues to support the efforts of the Children’s Legal Services Grant Program and the ability to assist Florida’s local legal aid organizations.

The Section warmly joins Executive Council Member, Lauren Alperstein, and her husband, Ian, in celebrating the birth of their new daughter, Rose Michelle Alperstein, on January 13, 2016.

The Family Law Section offers its heartfelt congratulations to the following members for their accomplishments:

• Gina Beovides was appointed to the 11th Judicial County Court Bench for Miami-Dade County. Judge Beovides has been an active Section member including currently serving as the Vice-Chair of the Domestic Violence Committee.

• Elizabeth Blackburn was appointed to the 7th Judicial Circuit Court. Judge Blackburn has been an active member of the Family Law Section’s Rules and Forms Committee and is currently an officer of the Children’s Issues Committee.

• Executive Council member Lori Caldwell-Carr was elected President of the Central Florida Family Law American Inn of Court.

• Magistrate Susan Keith from the 5th Circuit was awarded the Family Law Section Chair’s Visionary Award at the Marital & Family Law Review Course in Orlando on January 29, 2016.

• Brenda Lee London received the 2016 Judge J.C. ‘Jake’ Stone Distinguished Service Award from the Legal Aid Society of the Orange County Bar Association, Inc. for her outstanding service as a pro bono attorney.

• Judge Raymond McNeal was 1 out of 21 attorneys honored by the Florida Bar in Tallahassee on January 28, 2016 with The Florida Bar President’s 2016 Pro Bono Service Award for his work on behalf of poor and indigent clients.

Congratulations to All!
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A message from the President of the Florida Chapter of the AAML
Charles Fox Miller

Dear Colleagues,

Great things happen when the Family Law Section and the American Academy of Matrimonial Lawyers work together, as they do for the annual board certification review course. There is no better opportunity for us to connect with our colleagues across the state and share new ideas and best practices. This year’s review course was the best attended ever, with a record 1,600 registrants. It was a pleasure to meet so many of you there and I look forward to more collaboration in the future.
2016 Marital and Family Law Review Course
**Professionalism: Comments from a Former Practitioner and Current Judge**

By Amy Hamlin, Esquire, Winter Park, FL and Hon. Susan Stacy, Sanford, FL

In November, 2014, Susan Stacy was elected to fill a vacancy in the civil division in the Eighteenth Judicial Circuit. She became a member of the Florida Bar in 2001 and joined the law firm of Stenstrom, McIntosh, Colbert & Whigham, P.A. in Sanford, practicing mostly civil litigation. Over the years I’ve come to know her as a highly ethical and extremely professional individual. Given the Family Law Section Chair’s theme of professionalism, I knew Judge Stacy was the perfect person to talk to, to get her perspective on the practice of law and how she sees things differently now that she’s on the Bench.

I asked her questions not just about being a new judge but about how her new position has changed her perspective on attorneys and, more importantly, what does she see lawyers doing or not doing, that she wasn’t aware of as a practitioner.

Q: Before you became a judge, what kind of law did you practice?

A: I had a general civil practice, addressing litigation and transactional issues involving real estate, contracts, and employment.

Q: Did you practice any family law?

A: I practiced very little family law. I started my career in a law firm that already had a full ensemble of family law practitioners so my career went in a different direction.

Q: Did you notice a difference between the family lawyers and other civil practitioners: in the way they conducted themselves when interacting with you, in the courtroom, or how they connected with their clients?

A: The family law attorneys who have appeared before me seem very bonded to their clients and to their colleagues. There is a comradery among family law attorneys. It seems to be a network of attorneys helping one another irrespective of the adversarial nature of the proceedings. I would have loved to have had that type of connection with other attorneys as an attorney. The family law attorneys seem to have a level of comfort and poise in the courtroom. I really enjoy that, generally, family law attorneys are confident and comfortable when they appear in Court.

Q: As an attorney, what was your impression of how lawyers treated each other?

A: As an attorney, I felt some practitioners assumed the identity of their clients. The cases I enjoyed the most were those where I had a gentleman or lady attorney who knew their cases, and the law, but were kind and compassionate in their delivery.

Q: Were you involved in any organizations like the Inns of Court or CFAWL? Some people think if we socialize with our fellow lawyers, it’s harder for us to be unprofessional to each other – what do you think? Did you have that experience?

A: I was involved in Association of Women Lawyers and Inns of Court. I completely agree. Knowing someone outside the courtroom helped the level of professionalism inside the courtroom. Being involved in the various organizations, the Bar Association, Women Lawyers, and Inns, assisted me in learning new areas and issues in the law and gaining “best practices” on how to address issues with opposing counsels when they arose.

Q: What are some of the things you’re doing in the Juvenile division?

A: The Juvenile Division includes Delinquency, Dependency, Probate, Guardianship and some Mental Health issues. We are currently addressing Crossover issues and adhering to the One Family, One Court model. Any divorce, custody, injunction or other family law issue that might arise is heard by the Judges in the Juvenile Division if there is a Dependency case already opened.

This ensures that the Orders are consistent and helps the family receive better service from our Courts.

Additionally, in an effort to meet the needs of our “Crossover Kids,” children subject to proceedings in both Delinquency and Dependency, I, with the assistance of the Clerk and Courthouse staff, have begun to identify a system where the children can be identified, share information between the dockets and better serve the needs of our youth. We have been able to bring all parties from both Delinquency and Dependency together to help children navigate through the Delinquency system, get on the right track personally so that they could either be reunited with their parents, or find an appropriate long term placement. It is an extremely rewarding feeling to know you helped a young person to overcome the obstacles to their achieving their goals and finding a forever family.

Q: You didn’t practice in this area as an attorney, what has the learning curve been like?

A: The learning curve was not as steep as I expected. Having had a general practice, I addressed many areas of the law and often found my-
self researching and learning for the first time how to handle different types of cases or address issues. When I went on the bench, my state of mind did not change. I knew I was as responsible, if not more, for knowing the cases and the law. I spend most lunches and many nights reading cases and ensuring I am doing my part to ensure the wheels of justice work correctly.

Q: Is being a Judge exactly like you thought it would be?

A: I did not have any set expectations of what it would be like to be a Judge. I really wanted to be a Judge for selfish reasons: To help others and to see all the great attorneys litigating their cases and continue to learn and grow myself through the process. I am often uncomfortable with the attention that comes with being a Judge and the awkwardness that sometimes comes along with that. When I am not donning the robe, I like to hear about what is occurring in other people’s lives, about their family, their travels, their cases and their opinions.

Q: What’s the biggest surprise that you’ve had as a Judge?

A: My biggest surprises as a Judge definitely came in the courtroom. As an attorney, I was so focused on evidentiary issues, I was not cognizant of what it takes for a Judge to control a courtroom and ensure everyone has equal access to the law and an opportunity to be heard. As a lawyer, I ignored inflammatory comments that were made in the courtroom if there was not a legal objection. As a Judge, I am very cognizant of ensuring everyone has the opportunity to be heard.

Q: You have a different perspective now, sitting on the other side – what have you been able to see now, as a judge, that you couldn’t before, as an attorney?

A: As a Judge, I feel the pain of everyone in the courtroom. I do not show it, but it is there. I appreciate and admire practitioners who present their facts and evidence in a manner that does not cause more pain and upset than necessary for the witness or the litigants.

Q: How do the lawyers behave in your courtroom? Have you seen any unprofessional behavior, either toward the Bench or opposing counsel?

A: The lawyers in the courtroom are very professional, and generally, very courteous to one another. I did continue, next page
have one bad experience: It was during a moot court event for law students. The Judges were required to make certain decisions that ordinarily they would not in order to ensure the case proceeded according to the rules of the competition.

One of the Moot Court Team Members did not like the ruling I made: She did not know I was required to make that ruling per the rules of the competition. She rolled her eyes, huffed, and made some angry comments about how she would “like to do x, but the Judge won’t let me do it.”

Since it was a competition and could very well be her first appearance before a Judge, I chose to ignore the actions until the end of the competition. During the feedback portion of the program, I yielded the floor to the attorneys who were acting as jurors and they provided some real world examples of what some Judges have done in response to the actions the young woman took. I am sure she learned a lot that day.

Had it been an attorney appearing before me in a real court case, I would have the judicial assistant set up a meeting and talk to the attorney about the issues and how important it is to mask reactions. As I told the law student, you want a jury/trier of fact to feel connected with you and your client. Acting disgust and angry is not going to assist you or the client. It is a disservice to your client, your profession and to the Court system.

Q: How many new, young lawyers have you had in your courtroom?
A: We have had several new, young lawyers come to the courtroom. Some attorneys have been intimidated by certain types of hearings and cases. On one occasion, a new attorney called an hour before a three hour complex evidentiary pre-trial hearing and disclosed he did not feel he was competent to address the hearing. Due to the gravity of the hearing and the critical need to have a competent attorney represent the litigant, I continued the hearing and assigned new counsel.

The next time I saw the young gentleman in Court on another case, he had a great legal argument prepared with case law in hand and his Motion was granted.

I recognize most attorneys are graduating law school and hanging out their shingle as a solo practitioner. In the county we work in, there are not a lot of opportunities with law firms that provide mentors.

That being said, there is a first time for everything. An attorney once told me some of the best legal work she ever did was at the start of her career. She was researching everything, turning over every leaf and looking behind every rock to find the law and present it correctly. I agree that new lawyers can do some very thorough and intense litigation. Do not be afraid: You can do it!

I also encourage all new lawyers to find a group of people who can provide mentorship. So many people really enjoy the satisfaction of helping promote professionalism and proper advocacy. It is wonderful to have people you can discuss issues with. Joining paraprofessional organizations such as the Inn of Court, the Bar Association, the Young Lawyer’s Division of the Bar, Florida Women’s Lawyer group, the Paul Perkins or Hispanic Bar Association, or a similar group will help you to identify people who can help you in your professional growth and development.

Q: Everyone has advice for new lawyers but what about those of us who have been around for a while – Do you have any advice for us?
A: For the more experienced attorneys, please remember to be patient, with the new attorneys and the new Judges. Remember what it was like when you first started, and rejoice in the fact that you have the confidence and satisfaction of knowing you know your way around this area of the law. For a new attorney, you are the benchmark. You have the opportunity to be a role model and help shape the future attorneys. Keep learning and increasing the scope of your knowledge. I look forward to hearing your arguments and addressing your needs.

Amy Hamlin, Esq. is an attorney with the Aikin Family Law Group in Winter Park, Florida. She has been a member of the Florida Bar Family Law Section since 2004 and has been on the Executive Council of the Family Law Section since 2007. She has been actively involved in several FLS standing committees such as Legislation, Publications, and Continuing Legal Education, written articles for the Commentator, and lectured for the Florida Bar as well as other organizations.

The Hon. Susan Stacy is a Circuit Court Judge in the Eighteenth Judicial Circuit. She was elected to the bench in November of 2014 and was seated in January of 2015. She is currently serving families in the Dependency, Delinquency, Probate, Guardianship and Mental Health. As an attorney, Judge Stacy devoted her practice to civil litigation involving such issues as construction defects, lien law, contracts, real estate, and business/commercial litigation. She has litigated on behalf of municipal corporations, educational institution and individuals. Prior to becoming an Attorney, Judge Stacy worked for and at multiple large corporations including Tosco Oil, Honeywell IAC, Ciba-Geigy Corporation, Temple University and various other small businesses. She has served as a Human Resources Director, Manager, Supervisor and in several employment capacities in College Administration. Judge Stacy holds a Bachelor’s degree in Business Administration in Finance and Marketing, a Master’s of Business Administration with emphasis in Labor Relations and a Juris Doctor with emphasis in employment law.
Appellate CPR: Resuscitating Your Case on Appeal Without a Transcript

By Michael M. Giel, Jacksonville, FL

You’re holding a final judgment peppered with errors. Maybe the court awarded certain relief without making statutorily required findings. Or some of the findings aren’t supported by the evidence and trial testimony. Or the order adopted a magistrate’s report that misconceived the legal effect of the evidence. The case is ripe for appeal.

Or it should be. If only someone had paid a court reporter to attend the final hearing! But there’s no transcript; so much for your array of promising arguments.

Except you may still have an arsenal of challenges to employ. Before you start drafting a motion for rehearing or try to construct a Rule 9.200(b)(4) statement of the proceedings, consider the kinds of issues that an appellate court may address despite the lack of a transcript.

This article outlines various circumstances in which courts have reversed judgments at least in part despite failures to supply transcripts. It’s not deep or exhaustive, and it’s not an endorsement for leaving your favorite court reporter at home for your final hearing. But it highlights some of the factors and patterns to look for when considering an appeal with an incomplete record.

The Big Applegate: The Case Citation an Appellant Doesn’t Want to See

The bane of litigants who fail to have their hearings transcribed is Applegate v. Barnett Bank of Tallahassee, 377 So. 2d 1150 (Fla. 1979). There, the Florida Supreme Court held that, without a transcript, an appellant could not prove that the trial court incorrectly resolved questions of fact in reaching its decision. The holding rested on four bedrock principles:

- The appellate court presumes the trial court’s decision was correct.
- The appellant bears the burden of proving the trial court erred.
- Even if the trial court’s reasoning is wrong, its decision will usually be affirmed if the evidence or another theory supports it.
- Without a transcript, an appellate court can’t tell if (1) the trial court’s resolution of the facts was incorrect, (2) its decision is supported by the evidence or an alternative theory, or (3) the trial court so misconceived a principle of law that reversal is required.

Applegate analysis turns primarily on whether the untranscribed hearing was an evidentiary one in which the court resolved contested facts. If a hearing is non-evidentiary and turns on legal argument, then the lack of a transcript won’t necessarily hamstring appellate review.

Of course, virtually every significant hearing in a family law case is at least partly evidentiary. But you’re not necessarily out of luck. When you peruse the final judgment, look for errors on the face of the judgment or misconceptions of controlling principles of law like those below.

Challenging Equitable Distribution is Difficult, But Possible

It is difficult to challenge the equitable distribution in a final judgment without a transcript. The incomplete record frustrates an appellate court’s ability to determine whether there was a sufficient factual basis for the distribution. What’s more, no transcript means that the appellant often cannot establish that any error that occurred was harmful or caused a miscarriage of justice.

That said, case law reveals several avenues of attack that have convinced appellate courts that error occurred on the face of the judgment. Here are some questions to bear in mind.

- Did the judgment fail to identify or distribute certain assets?
- Did the judgment fail to value all, or certain, assets?

Such an argument faces worse odds on appeal. Where an asset is distributed equally but not valued, the court may conclude that the lack of a transcript precludes review. It may affirm even where the judgment fails to value indisputably significant assets, because the incomplete record could make it impossible for the appellant to establish that any error was harmful.

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But some cases support reversal even without a transcript for failure to make findings regarding the values of marital assets. For instance, if none of the marital assets are valued at all, the appellate court may remand for findings regarding their values. So too if there are no specific findings regarding marital assets or liabilities, though a court remanding for necessary findings may affirm, based on the lack of a transcript, findings that certain assets were marital. Your odds of a successful challenge improve if the record shows that, despite the failure to make findings on value, there was considerable evidence regarding value presented.

- Did the judgment order an unequal distribution?

This is a more promising basis for appeal. Notwithstanding the difficulties in attacking an equitable distribution award without a transcript, appellate courts often reverse where there has been a substantially unequal distribution unsupported by findings to justify it, especially where the obligations resulting from the judgment leave one spouse with practically no resources to support himself. Additionally, if the final judgment shows the court intended an equal distribution, but contains an error causing an unequal distribution, then the appellate court may remand for correction.

- Is exclusive use and possession of an asset an issue?

The treatment of exclusive use where there is no transcript is somewhat inconsistent. Courts reversing such awards have held, for example, that an award of exclusive use and possession of the marital home—which does not contain within the judgment the reasons or time period for the award—can require remand. Similarly, the court may reverse an award of exclusive possession until the spouse’s death or remarriage if the record does not reflect a special purpose justifying the award—even if the trial court made such an award as permanent alimony.

But another court held that, where the final judgment awards exclusive possession, the court would not hold that the award is precluded because, among other reasons, “without having a transcript of the trial proceedings, it cannot be determined whether the issue was in fact tried with the express or implied consent of the parties.” The lack of a transcript similarly required affirming where an order required the former wife and parties’ child to move out of the marital home, even though the appellate court expressed confusion about why the trial court reached that conclusion. Conversely, another court later considered a similar provision—one that would require the wife and child to vacate the home on the child’s 17th birthday—and wrote at length why such a provision required remand and further testimony despite the lack of a transcript.

In short, it’s challenging to successfully appeal an award of exclusive use and possession without a transcript, but it has been and can be done.

- Are there any unanswered questions arising from the equitable distribution?

There are several other reasons why a court may remand an equitable distribution award.

Are there arithmetical errors in the judgment? Double-counting assets may justify reversal.

Does the judgment purport to reallocate property rights settled in a previous final judgment or mediated agreement? In a modification proceeding, the trial court may not redetermine and restructure property rights previously settled through equitable distribution in the underlying final judgment. An order impermissibly modifying a mediated settlement agreement may justify reversal. So too if the parties agreed to a temporary property/asset settlement agreement in which they agreed a property would be sold and the proceeds split, but the trial court for unknown reasons awarded one party exclusive use and possession.

Does the judgment grant relief neither party pled for? A court may reverse a judgment ordering the partition and sale of the marital home if neither party requested that relief. Some courts conclude, even absent a transcript, that an appellant is denied due process where no pleading raised the issue that the court adjudicated. On the other hand, a court may decline to reject a challenge on that basis because, among other reasons, “without having a transcript of the trial proceedings, it cannot be determined whether the issue was in fact tried with the express or implied consent of the parties.” A similar argument can be made that the lack of a transcript should preclude reversal if the court cannot determine whether an issue was preserved.

Are there critical unanswered questions in the final judgment? A judgment providing that the parties will cooperate to sell the marital home and split the proceeds may remand for clarification if there are unanswered questions such as (a) who will pay for homeowners’ association fees, the mortgage, insurance, and taxes, or (b) what happens if the home doesn’t sell.

Does the equitable distribution create the possibility for post-judgment confusion? For example, where a judgment divvies up one spouse’s retirement pay—which is subject to an annual cost-of-living adjustment—the court may reverse where the judgment uses specific dollar amounts that could cause confusion about how annual increases will be calculated in the future.

Challenging the failure to make requisite findings as to equitable distribution is grueling without a transcript. But it’s worth the effort if you have colorable grounds: reversal on equitable distribution may justify reexamination of all other financial aspects of a financial judgment.
Child Support: The Crux of Your Appeal

The majority of recent opinions describing successful appeals without transcripts deal with child support and, to a much lesser extent, alimony awards. Child support is a right belonging to the child, cannot be waived, and is governed by fairly clear statutory guidelines. For these reasons, courts appear less reluctant to find error on the face of the judgment concerning child support.

- Does the combined award leave the obligor with virtually nothing?

Awards that take most of the obligor’s net income can require reversal even without a transcript. The central question in such cases is whether the alimony and child support awards leave the obligor without the means to support himself. But even if you think the answer is yes, you don’t necessarily have a win. If the judgment reflects that the court believed a party was earning more than the income imputed to him “and based the financial award on that belief,” then the appellate court may hold that the lack of a transcript bars review.

- Are there problems with the child support income calculations?

A final judgment that doesn’t make findings as to the parties’ net incomes as a starting point to calculate child support, or explain how the calculation was performed, can justify reversal without a transcript. If you’re challenging a judgment for this reason, remember to explain why the failure to make necessary findings harmed your client.

Similarly, if the trial court fails to account for its alimony award or its allocation of retirement benefits when computing the parties’ incomes for child support, then you have another promising argument. Scrutinize any unusual method of determining income. For instance, if a court simply takes the value of the parties’ assets and divides them by the years of marriage to arrive at an annual “income” for the breadwinning spouse, then—no surprise—the appellate court will reverse without a transcript.

Look for impermissible deductions from a party’s income. For example, though court-ordered child support for other children that is actually paid is an allowable deduction from gross income when calculating child support, the court may reverse if the worksheets show that the magistrate or court deducted support paid for children who weren’t subject to a prior support action.

Nevertheless, the lack of a transcript can still hurt your appeal of the income determination. If the judgment and record reflect that the trial court relied on appellee’s representation of appellant’s income, then the lack of transcript can be cited as a basis to affirm.

A missing transcript may present the same problem in an imputed income case. The failure to

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make specific findings of fact regarding the amount and source of imputed income won’t necessarily justify reversal if the judgment indicates that imputation was based on record evidence and trial testimony.

Even so, income calculations demand a close look. This article already mentioned that, even if the incomplete record initially hamstrings review, a reversal on equitable distribution can lead to reconsideration of the alimony and child support awards. So too for reversals of income findings or calculations: the trial court may often revisit its alimony and child support awards after correctly recalculating income.

Are other child support expenses miscalculated or ignored?

Child support awards meriting reversal without a transcript often involve improperly allocating, or ignoring altogether, other child support expenses. Does the judgment:

• Fail to address health care coverage, child care costs, or noncovered medical, dental, and prescription medication costs?

• Ignore travel expenses associated with visitation?

• Provide for child care costs to be split evenly rather than being reduced and added to the basic obligation under Section 61.30(7)?

• Split evenly noncovered medical, dental, and prescription medication costs when appropriate factual findings would’ve resulted in an unequal percentage share of child support?

• Misallocate health insurance expenses or credit for uncovered medical expenses?

Recent opinions have reversed child support awards despite incomplete records where such errors appeared on the face of the judgment.

Does the child support award reflect other miscalculations or discrepancies?

In similar fashion, courts have reversed where other inconsistencies or miscalculations appear in the judgment. One example is where there are conflicting amounts of child support due in different paragraphs of the final judgment. Another is where an order specifically finds that overpayment of support has occurred, but fails to appropriately credit against arrearages the correct amount of overpayment. Likewise if the parenting plan and child support guidelines attached to the final judgment contain conflicting numbers for the parties’ overnights, but the discrepancy is not explained in the final judgment. And if a trial court orders makeup visitation, reversal may be necessary where the judgment fails to adjust the child support obligation for the months in which the makeup visitation is to occur.

Similar errors can creep into a judgment after rehearing. For instance, where a court grants rehearing for the purpose of recalculating child support payments based on an apparent miscalculation of a party’s gross income, but the record does not show that the child support was recalculated to comport with an amended schedule that the court directed to be submitted, then the appellate court may remand for the court to address that issue.

Does the child support award deviate from the presumptive guideline amount?

A judgment that inexplicably requires a spouse to pay substantially more than the presumptive guidelines child support amount may justify reversal without a transcript. And an upward deviation may be reversed even if the judgment purports to justify the deviation by referencing the “added expenses of the minor child.”

On the other hand, the incomplete record may cripple the odds of overturning the trial court’s decision not to deviate upward from a guidelines support award.

Are you challenging the ruling on retroactivity?

The lack of a transcript can be similarly fatal to challenges of retroactivity rulings. If a party doesn’t request support retroactive to the date of filing in his petition or motion for rehearing, and there’s no transcript of the final hearing, the appellate court may hold there’s insufficient record support to conclude the parent established need and ability to pay retroactive support.

• Does the order require the provision of insurance without necessary findings?

Some cases have held that, despite the lack of transcripts, it is error to (1) order a spouse to provide for the other spouse’s and children’s health insurance absent a finding that such health insurance is reasonably available, or (2) require life insurance where there are no findings of availability and reasonable cost. Note that there is some tension between such rulings and the principle that, given the lack of a transcript, it’s possible that the court heard evidence and made the required findings during the final hearing. Appellee in such a case should argue that, given the incomplete record, appellant can’t establish harmful error or a miscarriage of justice.

Does the support award contain any particularly unusual requirements?

Look for particularly onerous or uncommon requirements that are ordered as part of the support award. One example: a judgment ordering the designation of a child as a beneficiary in a parent’s will and providing that child support shall be an obligation of the estate—and therefore won’t cease with the obligor’s death—will justify reversal.

• Is there a plausible explanation for how the trial court reached its decision?

You likely can’t prove error on the face of the judgment if there’s a plausible explanation for the trial court’s conclusion at the hearing. For instance, the Fourth District affirmed a recalculation of child support where
the magistrate had calculated a certain figure after disregarding the former husband’s claim he would no longer enjoy overtime, but the trial court used a lower income calculation that assumed no overtime. Because the trial court could have found that the magistrate misconceived the effect of former husband’s testimony—that overtime would rarely occur in the future—it could have relied properly on a lower amount assuming no overtime.\(^60\)

Note the tension, however, between that result and a different one from the Second District in a paternity case. There, the DCA concluded that—given the statement of the evidence and the mother’s failure to argue that evidence presented at the hearing supported the court’s conclusion—there was no competent, substantial evidence for the finding of the father’s income.\(^61\) This focus on the mother’s failure to argue about evidence at the hearing is noteworthy. That, and similar language in other cases highlighting appellees’ failures to argue that evidence at the hearing supported the judgment, implies an appellee may need to address evidence at the hearing—despite the admonition against referring to matters outside the record.

**Alimony: The Tougher Challenge**

Attacking a decision on alimony is much more difficult without a transcript. Here, trial courts enjoy considerable discretion, and appellate courts are understandably reluctant to conclude that discretion was abused without a transcript.

Unlike the child support discussion above, an argument that the court failed to make required findings to support an alimony award is more likely to end with the appellate court concluding that your failure to provide a transcript makes it impossible to show harmful error.\(^62\) And forget challenging the award if the judgment reflects consideration of most Section 61.08 factors.\(^63\) Since the First District’s 2001 decision in Klette and Second District’s 2007 decision in Esaw, courts are increasingly inclined to affirm alimony awards on the basis that no transcript means it’s impossible to examine whether an alimony error was harmless.\(^64\) This is so even where the final judgment fails to even address alimony at all. Even where alimony was requested, the court may hold the lack of transcript bars review because it can’t tell if the party presented evidence regarding alimony at the final hearing.\(^65\)

*Does the order’s alimony discussion show the court applied the wrong legal standard?*

Nevertheless, language within the judgment that shows the trial court used the wrong standard to decide alimony may permit reversal. For instance, the Second District reversed an order denying permanent alimony after a long-term marriage because the wife had not proved entitlement by clear and convincing evidence—i.e., the burden of proof for a moderate-duration marriage.\(^66\) The same DCA found error on the face of another judgment where the order denied rehabilitative alimony because “[t]he Wife [was] not entitled to an award of alimony for a 10 year marriage.”\(^67\)

Several pre-Klette cases reversed alimony rulings despite the lack of transcripts on the basis of technical errors. One concluded it was error to order rehabilitative alimony where there was no rehabilitative plan presented, and the judgment on its face ordered rehabilitative alimony for non-rehabilitative purposes.\(^68\) It also held it was erroneous to award permanent alimony without providing that such alimony terminates on the obligee’s death or remarriage.\(^69\) Another opinion reversed a lump sum alimony award where there were no findings of fact that showed unusual circumstances that would make the award reasonable.\(^70\) And a third opinion overturned a provision establishing an automatic alimony increase after child support ended where the judgment lacked findings to show extenuating circumstances justifying an automatic increase.\(^71\)

A trial court’s decision to put off a decision on permanent periodic alimony may also invite reversal. If the court finds that a spouse is entitled to permanent alimony that the other spouse cannot pay at the time, it reserves jurisdiction for only two years to set alimony rather than awarding nominal alimony, the appellate court may reverse.\(^72\)

Of course, the court won’t necessarily agree with you that the trial court applied the incorrect legal standard. In one case, a court held that the former wife failed to provide enough evidence that she could not work and imputed $1000 monthly income for purposes of calculating need for alimony. She argued on appeal that the judgment improperly shifted the burden because the former husband bore the burden to prove that she was voluntarily underemployed. The Second District disagreed: the judgment reflected the conclusion that the former wife hadn’t adequately presented evidence of need. Without a transcript, it wouldn’t conclude that error occurred.\(^73\)

*Do the judgment’s factual findings or the record otherwise support your challenge?*

For the best chance to prevail without a transcript on an alimony issue, scrutinize the judgment’s factual findings and the facts reflected within the record. They may offer the best grounds to convince the appellate court that the judgment is erroneous on its face.

Take the Fourth District’s Wofford opinion. There, despite (1) the lack of a transcript, (2) the fact that the marriage was of moderate duration, and (3) the discretion afforded a trial court on alimony determinations, the appellate court held that it was error on the face of the judgment to award only bridge-the-gap alimony and deny permanent periodic alimony. On remand, the trial court was continued, next page
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instructed to award either permanent or rehabilitative alimony.\textsuperscript{74} Or consider the Second District’s decision in Boone. There, the court reversed an order denying modification of alimony to a nominal amount where (1) the judgment failed to contain specific findings regarding one spouse’s ability to pay and the other spouse’s need, and (2) the financial affidavits showed the obligor lacked ability to pay and the obligee didn’t need alimony.\textsuperscript{75} It’s more difficult to challenge an alimony determination without a transcript than it is to attack a child support award, but it remains possible. (It’s too early to say, but if the legislature passes some version of the alimony bill that’s circulated recently, one indirect effect could be that challenging an alimony determination without a transcript could become somewhat easier.)

Parental Responsibility, Timesharing, and Visitation: More Mixed Results

Florida’s public policy emphasizing the importance of frequent, continuing contact between a parent and her children makes it somewhat more likely that an appeal challenging a provision contrary to that policy can succeed without a transcript.

Provisions that strike you as extraordinary may offer grounds for reversal. Absent extreme circumstances, a court will likely overturn a provision that (1) holds a parent waives visitation if he’s 20 minutes late to pick up his child, (2) denies overnight visitation unless there’s a spare bedroom for the child, or (3) denies special visitation on the holidays.\textsuperscript{76} Similarly, an order suspending visitation, absent a substantial change of circumstances and a finding that the child’s welfare would be promoted by suspension, invites reversal.\textsuperscript{77}

The court may not delegate to a third party its responsibility to determine and establish custody and visitation in accordance with the children’s best interests.\textsuperscript{78} Nor may it essentially grant to a party the right to seek modification in the future without a judicial finding of a substantial change. Accordingly, an appellate court may reverse a provision holding that a parent need not establish a substantial change to seek modification of visitation in the future,\textsuperscript{79} or a provision purporting to grant one party the right to seek modification of child support at her discretion.\textsuperscript{80} An order changing primary residential custody, though neither parent requested a change, may justify reversal despite a lack of transcript.\textsuperscript{81} Courts have also reversed orders modifying timesharing where the trial court did not find, and factual findings did not support, a substantial change of circumstances,\textsuperscript{82} especially where the other parent did not allege a change.\textsuperscript{83}

Again, what you and the appellate court believe to be legal error may differ. One common example? Best interest findings concerning majority timesharing. If the court finds that the children’s best interests are served by one parent’s majority timesharing, specific written findings are unnecessary, and the missing transcript can derail a challenge to the ruling’s evidentiary basis.\textsuperscript{84} In another modification case, the lack of transcript was similarly fatal; the court couldn’t determine if the trial court made any best interest findings during the trial.\textsuperscript{85}

Even so, depending on the judgment’s findings, a court may conclude that a modification of timesharing may be reversed even without a transcript if “it is clear from the record that no findings regarding the child’s best interests were made at the hearing.”\textsuperscript{86} But it must be clear. Even where the appellate court strongly suggests a parenting plan was incorrectly decided and lacked evidentiary support, it may conclude it can’t “conduct a meaningful review in the absence of a transcript [and is] unable to determine from the face of the judgment that the trial court abused its discretion when it decided on the parties’ parenting plan and time-sharing schedule.”\textsuperscript{87}

The failure to provide a transcript may not prevent the appellate court from remanding, however, to address conflicting provisions in a judgment or an overlooked key issue regarding parental responsibility. For example, if a final judgment and statement of evidence conflict about the amount of a parent’s makeup visitation, the court may reverse for the trial court to correct the final judgment to conform with its statement of evidence.\textsuperscript{88} Additionally, where one parent sought sole parental responsibility, and the final judgment does not address the issue of sole or shared parental responsibility, the court may remand for clarification.\textsuperscript{89}

Don’t Forget Attorneys’ Fees

If the final judgment fails to include findings to justify a fee award, then the appellate court may remand for the *necessary findings.*\textsuperscript{90} It could go even further if the factual findings undermine the ruling on attorneys’ fees; thus, if the findings clearly show one party’s need and the other party’s ability to pay, the court may reverse the denial of fees to the party in need.\textsuperscript{91}

Oddly enough, an appellant can be worse off if the judgment does not address attorneys’ fees at all. Then the appellate court may hold that the lack of transcript bars review because it can’t determine if the party requested and presented evidence on attorneys’ fees at the final hearing.\textsuperscript{92} That changes, though, if the court can determine from the record that no attorney was called at the hearing and the fees affidavit was not submitted until the date of the final judgment — which means appellant had no opportunity to challenge the
hours and rate. If you’re claiming on appeal that the court erred with respect to a party’s income, then you should also seek reversal of any fee award that was based at least in part on the finding of your client’s ability to pay. And reversal on other grounds may justify reconsideration of any rulings on attorneys’ fees once the trial court addresses the issues that merited remand.

Conclusion

If you don’t have a transcript, spend extra time examining your judgment, its factual findings, and the record as it stands to best craft a compelling argument on appeal. Ensure you argue why the error harmed your client. Sure, you’re at a disadvantage. But cases like those above show that appellants can secure reversals notwithstanding an incomplete record. If you’re the appellee, don’t just cite Applegate and call it a day. Hammer any failure to establish harmful error and a miscarriage of justice. Highlight any preservation issues, which are often exacerbated by the lack of a transcript. And consider offering a plausible explanation for the trial court’s action that, in the absence of the transcript, precludes appellate relief.

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Endnotes
1 Problems that can arise when attempting to construct a statement of the proceedings abound. The other party will likely object. By the time a final judgment issues, the trial court may not be able to settle and approve a statement. An appellate court may conclude the statement consists largely of conclusory assertions, statements of law, or recitations from the judgment, and therefore sheds little light on the evidence presented below. Have your hearing transcribed; if it’s not, assume the appellate court might disregard any statement of the proceedings you supply.

2 Rollet v. de Bizonet, 159 So. 3d 351, 357-58 (Fla. 3d DCA 2015).
3 Chestnutt v. Chestnutt, 752 So. 2d 1287, 1288 (Fla. 2d DCA 2000).
4 Aguirre v. Aguirre, 985 So. 2d 1203, 1207 (Fla. 4th DCA 2008).
5 Silverman v. Silverman, 940 So. 2d 615, 616-17 (Fla. 2d DCA 2006).
6 Aguirre, 985 at 1207 (concluding there was no way to tell without a transcript whether parties introduced evidence about valuation of life insurance proceeds); cf. Whelan v. Whelan, 736 So. 2d 732, 733 (Fla. 4th DCA 1999) (reversing apparent unequal division of assets where none of the assets were valued).
7 Esaw v. Esaw, 965 So. 2d 1261, 1264-65 (Fla. 2d DCA 2007).
8 Calderon v. Calderon, 730 So. 2d 400, 403 (Fla. 5th DCA 1999); Whelan, 736 So. 2d at 733.
9 Green v. Green, 788 So. 2d 1083, 1085 (Fla. 1st DCA 2001); Burke v. Burke, 864 So. 2d 1284, 1284-85 (Fla. 1st DCA 2004); Dorsett v. Dorsett, 902 So. 2d 947, 954-55 (Fla. 4th DCA 2005).
10 Burke, 864 So. 2d at 1284-85.
11 Silverman, 940 So. 2d at 617-18 (noting that record showed that evidence of value included loan closing statements, business bank statements, business profit and loss statements, documents prepared by a business expert, and a CPA’s testimony).
12 Marshall v. Marshall, 953 So. 2d 23, 26-27 & n.3 (Fla. 5th DCA 2007); see also Bright v. Bright, 721 So. 2d 1215, 1215-16 (Fla. 1st DCA 1998) (“We cannot discern from the final judgment why the trial court apparently unequally distributed the parties’ principal marital assets—the home and the former wife’s pension—in a way that seems to favor the former husband. Accordingly, we vacate the portion of the final judgment which distributes those assets and remand. . . .”); Porzio v. Porzio, 760 So. 2d 1075, 1077-78 (Fla. 5th DCA 2000); Holmes v. Holmes, 709 So. 2d 166, 167-68 (Fla. 5th DCA 1998); Mobley v. Mobley, 18 So. 3d 724, 727 (Fla. 2d DCA 2009).
13 Smith v. Smith, 39 So. 3d 458, 459-60 (Fla. 2d DCA 2010).
14 Sugrim v. Sugrim, 649 So. 2d 936, 937 (Fla. 5th DCA 1995).
15 Marshall, 953 So. 2d at 26.
16 Sugrim, 649 So. 2d at 938.
17 Chirino v. Chirino, 710 So. 2d 696, 697 (Fla. 2d DCA 1998).
18 Dorsett, 902 So. 2d at 950-52.

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19 Soto v. Soto, 974 So. 2d 403, 404-05 (Fla. 2d DCA 2007).
20 Encarnacion v. Encarnacion, 877 So. 2d 960, 963-64 (Fla. 5th DCA 2004); Klinka v. Klinka, 959 So. 2d 383, 385-86 (Fla. 5th DCA 2007).
21 Ferguson v. Ferguson, 54 So. 3d 553, 556 (Fla. 3d DCA 2011) (holding court erred by voiding a paragraph of mediated settlement agreement because it was obligated to enforce the MSA as voluntarily agreed on); Encarnacion, 877 So. 2d at 963-64 (concluding the court “lacked jurisdiction to reevaluate and restructure the settlement agreement with regard to the marital properties”).
22 Marshall v. Marshall, 953 So. 2d 23, 26 (Fla. 5th DCA 2007).
23 Worthen v. Worthen, 991 So. 2d 400, 401 (Fla. 2d DCA 2008).
24 Klinka v. Klinka, 959 So. 2d 383, 385 (Fla. 5th DCA 2007); see also Worthen v. Worthen, 991 So. 2d 400, 401 (Fla. 2d DCA 2008) (reversing the part that neither party sought).
25 Sugrim, 649 So. 2d at 938.
26 Banks v. Banks, 168 So. 3d 273, 276-77 (Fla. 2d DCA 2015) (holding where the court could not determine whether the wife was present at the teacher's request, the court should not have made a finding of fact related to the money).
27 Matteis v. Matteis, 82 So. 3d 1048, 1048-49 (Fla. 4th DCA 2011).
28 Banks, 168 So. 3d at 276.
29 Arias v. Arias, 28 So. 3d 157, 157 (Fla. 2d DCA 2010).
30 Mead v. Mead, 726 So. 2d 865, 866-66 (Fla. 1st DCA 1999).
31 Casella v. Casella, 599 So. 2d 848, 849 (Fla. 4th DCA 1991) (reversing the portion of the judgment where the alimony and child support award constituted 70% of the former husband's net income); Dennis v. Dennis, 852 So. 2d 422, 423-24 (Fla. 5th DCA 2003) (reversing where alimony and child support consumed 83% of former husband's monthly salary; Ballesteros v. Ballesteros, 819 So. 2d 902, 902-04 (Fla. 4th DCA 2002) (reversing alimony award where alimony and child support constituted about 60% of income and left former husband without the means to support himself); Calderon, 730 So. 2d at 401-02 (reversing where monthly alimony, child support, mortgage payment, and attorneys' fees exceeded what the court found to be his net income).
32 Ballesteros, 819 So. 2d at 902-04.
33 Guirgis v. Guirgis, 46 So. 3d 156, 157 (Fla. 2d DCA 2010); see also Todd v. Guillaume-Todd, 972 So. 2d 1003, 1007 (Fla. 4th DCA 2008) (holding lack of transcript barred argument).

A View from the Bench: Professionalism in Court

What does that mean to a Judge?

By Henny Shomar, Esq., Ft. Lauderdale, FL

What is the definition of professionalism in the legal community? In the past, scholars have distinguished ethics from professionalism by emphasizing the consequences; ethics reflected the codified and enforceable standards of the profession, while professionalism was a higher, aspirational standard. Dean Roscoe Pound of Harvard Law School described a professional as follows: “The term refers to a group . . . pursuing a learned art as a common calling in the spirit of public service, no less a public service because it may incidentally be a means of livelihood. Pursuit of the learned art in the spirit of a public service is the primary purpose.” The 1996 Report of the Professionalism Committee of the American Bar Association Section of Legal Education and Admissions to the Bar, Teaching and Learning Professionalism, states a definition to the practice of law:

A professional lawyer is an expert in law pursuing a learned art in service to clients and in the spirit of public service; and engaging in these pursuits as part of a common calling to promote justice and public good.

The Florida Supreme Court recognizes that definition, or standard, as being codified and set forth in (1) the Oath of Admission to The Florida Bar; (2) The Florida Bar Creed of Professionalism; (3) The Florida Bar Ideals and Goals of Professionalism; (4) The Rules Regulating The Florida Bar; and (5) the decisions of the Florida Supreme Court. The Supreme Court further recognizes that violations of the above referenced standards may very well be grounds for discipline as a violation of the Florida Rules of Professional Conduct. Yet with such a broad scope for a definition of professionalism, some practitioners at times struggle to delineate between professional and unprofessional. Between passionate advocacy and bad-mannered argument. Between the right way, and the wrong way. One way to find that answer is to seek the advice of the persons that stand at the front lines everyday: judicial officers.

Retired Justice Sandra Day O’Connor of the United States Supreme Court set forth a description of professionalism: “To me, the essence of professionalism is a commitment to develop one’s skills to the fullest and to apply that responsibly to the problems at hand. Professionalism requires adherence to the highest ethical standards of conduct and a willingness to subordinate narrow self-interest in pursuit of the more fundamental goal of public service. Because of the tremendous power they wield in our system, lawyers must never forget that their duty to serve their clients fairly and skillfully takes priority over the personal accumulation of wealth. At the same time, lawyers must temper bold advocacy for their clients with a sense of responsibility to the larger legal system which strives, however imperfectly, to provide justice for all.”

As Justice O’Connor illustrates for us, professionalism is not simply being courteous and showing manners to judges, attorneys, and others while in the courtroom. Professionalism is a higher standard which includes zealous advocacy for your client who is counting on you to defend their rights to the best of your abilities. Thinking of your client before thinking of yourself. Being sufficiently prepared to represent them to the best of your abilities. This is what Seventeenth Circuit Court Judge Timothy Lawrence Bailey believes. Professionalism does not necessarily mean “calm and peaceful” in the court room, Judge Bailey says. “Fiercely supporting your client is not a bad thing. In order to be professional, you need a combination of two things: courtesy and good lawyering. If you are missing one, you are not being professional. You can be loud, you can advocate, just don’t be rude.” (emphasis added) Examples Judge Bailey gave of conduct: (1) “Show up on time when you have a hearing. If you are late, apologize”; (2) “Don’t interrupt others in Court unless there is an objection to be made. Wait your turn and allow [the Judge] to hear everyone”; and (3) “No name calling.” “Polite versus rude is something we’ve learned as children. I want advocacy, I don’t mind loud passionate argument, but just don’t cross that line we all learned growing up.”

Judge Bailey emphasizes good lawyering as being prepared and ready to advocate for your client. He added that he “can handle loud” and if it crosses the line, he can address it, however he does not want lawyers to forget to be good lawyers. “Know the rules of evidence and procedure. Know how to identify hearsay. Make objections. Know how to tell a Judge he or she is wrong. Argue emotionally, persuasively. I want to see courtesy and well mannered conduct in Court, but if the cost is fear of lawyering, I don’t want that. Advocate for your client, advocate with passion. I would much rather see loud and passionate advocacy than quiet if it comes at the continued, next page
expense of good lawyering.” As the Judge added, “There is no substitute to knowing your file when you come to Court.” When you are prepared, make the arguments and know the facts of the case sufficiently, that is the essence of being professional. However, when you are ill-prepared, you are doing a disservice to your client, and as the Judge addressed, “That is unprofessional.”

Judge Bailey’s take on the meaning of professionalism in the practice of law is a strong one. Undoubtedly attorneys throughout the state have found courtrooms with plaques promoting the statement: “We who labor here seek only the truth.” Professionalism is not simply being courteous to others, although as attorneys we should strive to work together to further the practice of law. It also means doing your job on behalf of your client(s), to the best of your ability, to seek justice and equity, as professionalism is not simply professionalism with the court and other lawyers, but also with your clients. “… in order to arrive at good decisions, one needs not only good judges, but also good lawyers.”

A Judge, bound by the legal requirement to adjudicate only matters involving a real controversy, needs and in fact welcomes such advocacy in order to come to a just and confident decision on the matter. So you may be asking: where the balance is for you? I would argue that is different from lawyer to lawyer, and it is up to each of us individually to determine what we consider to be acceptable and unacceptable. But remember, as Judge Bailey hinted toward, and as we have heard since we were young: do unto others as you would have them do unto you.

Henny Lawrence Shomar, Esq. is an associate attorney at Tripp Scott, P.A. in Fort Lauderdale, Florida. He focuses his practice in complex litigation matters, including marital and family law, probate litigation, creditor’s rights, and general commercial litigation, in state and federal court throughout the great State of Florida.

Endnotes
1 See Rizzardi, Professionalism: I Know It When I See It?, 79 FLA. B. J. at 38 (July/August 2005).
5 Unprofessional conduct, as defined above, in many instances will constitute a violation of one or more of the Rules of Professional Conduct. In particular, Rule 4-8.4(d) of The Rules Regulating The Florida Bar has been the basis for imposing discipline in such instances. See generally, The Florida Bar v. Ratiner, 46 So. 3d 35 (Fla. 2010); The Florida Bar v. Abramson, 3 So. 3d 964 (Fla. 2009); and The Florida Bar v. Martocci, 791 So. 2d 1074 (Fla. 2001). Id.
7 “We who labor here seek only the truth.”
9 “in whatever form adjudication may appear, the experienced judge or arbitrator desires and actively seeks to obtain an adversary presentation of the issues. Only when he has had the benefit of intelligent and vigorous advocacy on both sides can he feel fully confident of his decision.” (American Bar Association; and the Association of American Law Schools 1958 Professional Responsibility: Report of the Joint Conference. American Bar Association Journal, 44: 1161).
Goodwill Poem

By Gerard L. Samoleski, CPA, Boca Raton, FL

It's the rhyming accountant and I'm here to say
If you want to know about goodwill, follow me, walk this way
We must talk about case law, it's boring, I know
So we start with the Thompson case, come on and let's go

Now this is the case that made goodwill very hot
It says enterprise goodwill is divisible and personal is not
What's the difference you say as you sit there my friend?
It's a matter of nuance that vexes us to no end
Personal goodwill is about the reputation of the seller
Enterprise goodwill can be sold no matter the buyer

And then there was Young, it sets a two pronged test
You must prove that goodwill sets it apart from the rest
Of the reputation of the owner and if that is proved first
Then proof of its value must now quench our thirst
Trust me, from here, the rhyming gets worse

And then there was Weinstock, and it went like this
It was about the sale of the practice of a dentist
On appeal comparable sales were a problem
because the evidence
Included goodwill with the owners continued presence

We move on to Walton, a CPA like me
Another case about goodwill, now how can it be?
The non-CPA spouse lost out on value the Court ruled because
No one would buy the practice without a non-compete clause

We must move now to the Christians case, I know tired you are getting
But this case is the first to consider personal goodwill in a non-professional setting
The husband made trapeze equipment he sold only to Club Med
The ruling, not good for the wife it was said
The skill of this craftsman was known across the nation
So the goodwill can't be divided because it rested solely on his reputation
And now on to Held, the last case before Schmidt
This case is also a real big piece of CAKE, I am going to go with cake on this one

The husband was an insurance agent with an exclusive list
He sold high risk insurance for the finest condos that exist
In this case, it was found no distinction between
A non-compete agreement or a non-solicitation agreement, that's mean
Remember in Walton, goodwill can't include a non-compete
Well now goodwill can't include value if former clients you can't meet
If you cannot solicit your old clients, it said
There is lots of goodwill that is personal, instead

And now on to Schmidt, a name whose rhyme we must avoid
A very bad word that may get some people annoyed
Mr. Schmidt is an optician of very fine name
Whose practice is based on reputation they claim
So the forensic accountant had tried to divide
Personal and Enterprise Goodwill and the Court said who is he to decide
It seems that this case leaves us further in mess
As there is no accepted way to divide goodwill without readdress
In Florida, business divided at fair market value is the law of the land
But in Schmidt they decided to stick their heads in the sand

So this is what happens when an accountant puts together a poem about case law with no tether
Many cases were mentioned, no worries if you didn't catch them all my friend
For I have asked the Commentator to list them at the end

Gerard L. Samoleski is a Certified Public Accountant in the State of Florida. He is a graduate of the University of Miami (Miami, FL) and holds a Masters of Science of Taxation degree, a Bachelor of Business Administration degree and a Certificate in Financial Planning. He is Certified Valuation Analyst, Certified Fraud Examiner, and Accredited in Business Valuations.

Endnotes
1 Thompson v. Thompson, 576 So. 2d 267 (Fla. 1991).
2 Young v. Young, 600 So. 2d 1140 (Fla. 5th DCA 1992).
3 Weinstock v Weinstock, 634 So. 2d 775 (Fla. 5th DCA 1994).
4 Walton v. Walton, 657 So. 2d 1214 (Fla. 4th DCA 1995).
5 Christians v. Christians, 732 So. 2d 47 (Fla. 4th DCA 1999).
6 Held v. Held, 912 So. 2d 637 (Fla. 4th DCA 2005).
7 Schmidt v. Schmidt, 120 So. 3d 31 (Fla. 4th DCA 2013).
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After Facing Addiction, Husband and Wife Find Life They Always Wanted

By Judd Bean, Esq., Riverview, FL

Maddy and Thomas (“Tom”) Cooke recently celebrated their 25th anniversary but, as Maddy reveals with a knowing smile, “We’ve really only been married for three-and-a-half years, pretty much winging it.”

After meeting on a blind date in 1987, they were quickly married. Back then, Maddy saw a quiet guy with some emotional baggage that she assumed was related to his divorce. She figured that his divorce, like many others, was related to incompatibility.

But, as Maddy would painfully discover, that was not the case. Her beau’s years-old secrets actually ran deep. They originated from Tom’s days as a self-styled teenage “redneck,” who began drinking at age 14, started hitting drugs not long after that, and then descended into a haze of painkillers, denial, and lies. In reality, his drug addiction had ended one marriage and threatened to end his second when Maddy discovered Tom’s painkillers hidden, and everything changed.

“We were 20 years into the marriage, and I thought he was having a nervous breakdown and having a midlife crisis,” she described. “I thought he was going crazy and taking me with him, but when I realized it was drugs, I thought this was fixable. I thought he was having an affair, and when I learned it was drugs, it was almost a relief.” Nevertheless, Maddy had reached the end of her rope and delivered an ultimatum to Tom: “Get help or get out!”

Desperate to save their marriage and her husband’s life, Maddy filed a Marchman Act petition (discussed in detail below) for involuntary treatment against Tom. At Tom’s hearing, the judge heard testimony to determine whether or not Tom should have been sent to treatment against his will. The judge decided there was “clear-and-convincing” evidence presented to enter an order for involuntary treatment. Maddy had done prior research on treatment facilities, so she suggested to the judge that Tom attend Michael’s House, a dual-diagnosis treatment program designed to provide drug-and-alcohol treatment while addressing any present mental-health issues. The judge agreed and felt it was a perfect fit for Tom. Ironically, Tom flew to Michael’s House in California on June 22, 2012, which was their 20th wedding anniversary. “It was my anniversary present to him,” Maddy mused. Upon his return, 55 days later, Tom was on the road to becoming the man he always wanted to be. “I really started being honest with myself,” he confessed. “When I went into recovery, I put every ounce of myself into the treatment program. It was such an overwhelming feeling of freedom to realize that I successfully saved my marriage and myself.”

“We truly love each other now, and it’s deeper than just words,” Maddy expressed. The Cookes know it’s been a long journey, and both understand that everything could come crashing down again. Sadly, such is the life of an addict. “I’ve realized that I can only take care of myself,” Tom said. “Because of my trouble with my addictions, I know I’m a better and stronger man.”

In Florida, we are very fortunate to have the “Hal S. Marchman Alcohol and Other Drug Services Act of 1993” statute, familiarly known as the “Marchman Act,” which implemented standards, procedures, and rules to govern substance-abuse evaluation and treatment services. The Marchman Act, located in Chapter 397 of the Florida Statutes, provides that an individual, whether a minor or adult, in need of substance abuse services with emergency services and temporary detention for substance abuse assessment and treatment when required, either on a voluntary or involuntary admission basis. A voluntary admission, which is the rarer of the two types, occurs when a person seeks out their own substance abuse treatment and applies to a service provider to receive such treatment.

Regarding involuntary admissions, a petition may be filed by the individual’s spouse, a guardian, any relative, a private practitioner, the director of a licensed service provider or designee, or any three persons with personal knowledge of the person’s substance abuse. For a minor, the petition may be filed by a parent, a legal guardian, a legal custodian, or licensed service provider. Alleged substance abusers are cared for in the least restrictive environment, which is aimed to protect and respect the rights of persons seeking or receiving services. Using a non-adversarial approach, prosecution and defense counsel promote public safety while protecting participants’ due process rights. The respondent has the right to counsel at every stage of a proceeding relating to an involuntary petition. For respondents who meet income requirements, a public defender may be appointed by the court.

Following receipt of the petition continued, next page
by a circuit court, a hearing must occur within 10 days, which takes testimony under oath on the merits of the petition. The proceedings will begin by the inspection of the facts of the case, evidence, testimonies and other relevant details of the case by the judge alone or by a general magistrate. At the conclusion of the hearing the court shall either dismiss the petition or, if “clear and convincing evidence” of substance-abuse impairment is shown by the petitioner, order the respondent to undergo involuntary substance abuse treatment for a period not to exceed 60 days, with the respondent’s chosen licensed service provider to deliver the involuntary substance abuse treatment where possible and appropriate. The “clear and convincing evidence” standard is met when there is good faith reason to believe the person is substance abuse impaired, and because of such impairment, the person has (a) lost the power of self-control with respect to substance use, and either (b) has inflicted or attempted/threatened to inflict, or, unless admitted for treatment, is likely to inflict, physical harm to him/herself or another; or (c) the person’s judgment has been so impaired because of substance abuse that he/she is incapable of appreciating the need for substance abuse services and to make a rational decision regarding substance abuse services.

Whenever a service provider believes that a client who is nearing the scheduled date of release from involuntary treatment continues to meet the criteria for involuntary treatment, a petition for renewal of the involuntary treatment order may be filed with the court at least 10 days prior to the expiration of the court-ordered treatment period. The court must immediately schedule a hearing to be held not more than 15 days after filing of the petition.

If the court finds that the petition for renewal of the involuntary treatment order should be granted, it may order the respondent to undergo involuntary treatment for a period not to exceed an additional 90 days. When the conditions justifying involuntary treatment no longer exist, the client must be released. As far as enforcement of the treatment order, if the respondent is non-compliant, an injunction may be entered and a hearing will be scheduled within 15 days.

There have been no appellate decisions applying, construing, or passing on the constitutionality of the Marchman Act or any of its provisions, so there is a very scant amount of case law on the subject. The following are two cases that have been found to relate specifically to the Marchman Act. First, in Steven Cole v. State of Florida, the Tenth Judicial Circuit court convicted Cole of indirect criminal contempt for violating the court’s order directing him to complete a program of treatment for substance abuse and sentenced him to 90 days in jail. Cole petitioned the Second DCA for a writ of habeas corpus and for other relief. The Second DCA ordered his release, quashed his conviction and sentence, and prohibited the circuit court to enforce Cole’s involuntary treatment order. The Second DCA based its decision on the failure to inform Cole of his right to counsel and that if he could not afford an attorney, he could ask the court to appoint one to represent him. The Court noted that Cole was not given meaningful prior notice of the charges against him, the trial was not recorded as required by law, and the court order included directives and prohibitions beyond the judicial authority granted by the Marchman Act. Although the Act empowers the court to order a respondent’s submission to involuntary substance abuse treatment and to enter such further orders as the circumstances may require, that authority does not extend to prescribing the specific modalities of the treatment. That authority is placed with the licensed service provider. Second, in Carolyn Blue v. State of Florida, the First DCA held that evidence presented to the court that a respondent was unsteady and threatening to herself and others, did not meet the statutory standard of clear and convincing evidence that there was a good faith reason to believe the person is substance abuse impaired. The First DCA reversed the circuit court’s order of involuntary admission and treatment under the Marchman Act, and remanded the case for further proceedings.

If you, or a loved one, is suffering through any sort of substance abuse, disorder, and/or addiction, please know you are not the only one suffering. More and more ex-addicts, current addicts, and those affected by these poor life decisions, are bravely sharing their life-altering experiences publicly, helping others who are dealing with addiction, and their families, feel more comfortable getting help. Substance abuse is a major health problem and it leads to profoundly disturbing consequences. It is a disease, affecting families and society as a whole. There are specialized prevention, intervention, and treatment services designed to strengthen and support family units dealing with substance abuse impairment that should be explored. For Florida Bar members, there are resources designed specifically for licensed bar members who are undergoing substance abuse, mental health, or other disorders which negatively affect their lives and careers. One of the most dynamic and well-respected entities, Florida Lawyers Assistance, Inc. (“FLA”), a non-profit corporation formed in 1986 in response to the Florida Supreme Court’s mandate that a program be created to identify and offer assistance to bar members, including judges, attorneys, law students, and support personnel. Paramount to FLA is the protection of confidentiality for those who contact FLA for help. Confidentiality in vol-
untary cases is protected by a written contract with The Florida Bar which guarantees the confidentiality of FLA records, as well as by Bar Rule 3-7.1(j), Sections 397.482-486, Florida Statutes, and other state and federal regulations.

For attorneys who may come across substance abuse issues in the course of their family law practice, there are several resources available that provide guidance to assist the Marchman Act process, namely the “Marchman Act Handbook,” published by the Florida Department of Children and Families. It is vital for an attorney to understand the Marchman Act and related laws, both voluntary and involuntary admission procedures, the rights given to the client alleged to be impaired, inmate substance abuse programs, and information concerning different substance abuse treatment facilities.

**Judd R. Bean, II, Esq.** is a medically-retired U.S. Air Force veteran, with 100% total and permanent service-connected disabilities, having served as Judge Advocate (JAG) in locations from Japan to Washington, D.C. Now, Mr. Bean, practicing out of Tampa, sets himself apart from the typical attorney, having gained a unique perspective on the practice of law working worldwide in many areas of law. Mr. Bean, is currently enrolled in an LL.M. program (Masters of Law) in Health Law at Loyola University Chicago School of Law and maintains a bloc on Florida’s Marchman Act (Fla. Stat. 397) at marchmanact.blogspot.com.

**Endnotes**

11. Id.
12. Id.
15. Blue v. Fla., 764 So. 2d 697 (Fla. 1st DCA 2000).
16. Id.
17. Id.
18. More information on FLA can be found at their website: http://fla-lap.org.
Upgrading Technical Competence

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

The use of technology within the legal community is a continually developing reality. Depending on their comfort levels, practitioners vary in their speed of incorporating technology into their practice.

It is easy to understand some practitioner’s reluctance to embrace technology. The number of electronic gadgets and gizmos available can be overwhelming and that number seems to increase exponentially every day. Nevertheless, savvier technology is not required to be tech savvy. Developing technical competence can be as simple as learning to be a good steward of the resources that are already available because it is not unusual for practitioners to not use technology to its fullest capacity.

Learning and employing all the bells and whistles of existing technology may be slightly uncomfortable at first; but, as with first learning to ride a bicycle, deliberate practice will cultivate expertise. Technologically-adverse practitioners often cite a lack of time for training as a reason to maintain status quo; however, more time is lost than would have been spent training, when technology offers a more effective solution to traditional practices. In other words, a short-term loss of time in learning to maximize all that existing technology has to offer is exchanged for the long-term gain of efficiency.

While the internet is so prevalent, most would not consider it “technology” even though it is. The internet is a technological tool often not used to its fullest potential. Below are ten websites that Florida family law practitioners should explore to “upgrade” their practices.

Family Law Section

The Florida Bar Family Law Section
http://www.familylawfla.org/

If you have not yet visited The Family Law Section’s new and improved website, it is time you did! The website is a treasure-trove of relevant resources to the practice of family law including, but not limited to, links to The Bounds of Advocacy and past editions of FamSeg and the Commentator, links to frequently visited family law sources on the internet, information about board certification in marital and family law, suggestions on how to become more involved in the Section, and a list of upcoming CLEs and other Section events. You can stay informed by following the Section on its Facebook, Twitter, and LinkedIn pages too.

Legal Resources

The Florida Bar Rules of Court Procedure
https://www.floridabar.org/tfb/TFBLegalRes.nsf/

It is not unusual for practitioners to maintain book subscriptions for rules of procedure, however the books can become out of date in between publications. Whereas, the PDFs available on this website are updated almost instantaneously. Plus, the PDFs have searchable text. The rules available include: Florida Rules of Appellate Procedure, Florida Rules of Civil Procedure, Florida Rules of Criminal Procedure, Florida Family Law Rules of Procedure, Florida Rules of Judicial Administration, Florida Rules of Juvenile Procedure, Florida Probate Rules, and Florida Small Claims Rules.

File Transfer

Instashare
http://instashareapp.com/

This website offers file transfer between mobile devices and desktop computers with simple drag-and-drop functionality. The software is available for iOS, Mac, Android, and Windows platforms. The site offers a trial version and the full version cost is nominal.

Distance Calculator

FreeMapTools
https://www.freemaptools.com/how-far-is-it-between.htm

This website helps calculate the distance between two named points on a map. The distance is calculated by land transportation (such as roads) or as the crow flies (air distance).

Meeting Coordinators

All three of the websites below offer alternatives to the traditional phone calls and e-mails to coordinate meetings with groups of people.

Need to Meet
http://www.needtomeet.com/

This is an on-line meeting scheduler. It offers free options including one without registration and one with registration. For a yearly subscription of $20 (6 month free trial available), the website offers calendar share, personal calendar, and outlook integration.
When is Good
http://whenisgood.net/

This is an on-line meeting scheduler. It offers free options including one without registration or a log-in requirement. For a yearly subscription of $20, it offers additional features including ad-free events, expanded options for respondents, and the ability to export results to Excel.

Xoyondo
https://xoyondo.com/

This website offers meeting coordination through polling as well as surveys and private on-line discussions on message boards. The site is free and no registration is required.

More Gadgets

If this article has inspired you to venture more into the world of technology, you should not go without a guide. The two sites below offer you feedback and suggestions on gadgets and gear, both new and old.

Wirecutter
http://thewirecutter.com/

The Wirecutter and its sister website, The Sweethome (http://thesweethome.com/), both provide research and reviews on electronic gadgets and gear. Wirecutter focuses on things like headphones, small office products, smartphones and accessories, software, networking, projectors, and TVs. Sweethome focuses on household items such as appliances, tools, home office, lawn & garden, and cleaning items.

Consumersearch
http://www.consumersearch.com/

The website's logo is "Love what you buy." It collects what the editors consider to be the best reviews of consumer products, analyzes the reviews, then recommends purchases to the site's visitors. The site covers six categories of products: home & garden, kitchen, fitness & sports, computers & electronics, family & pets (products - not people or animals), and health & beauty.

Happy Browsing!
Keep up with what’s new in the Section!!

Follow us on Social Media!
- Be the in the know!
- See lots of pictures!
- Stay Connected!
- Get Involved!

Florida Bar Family Law Section
www.familylawfla.org