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MS Word format is preferred for documents, and jpg images for photos.
Chair’s Message

It has been a privilege and pleasure both professionally and personally to have served as Chair of the Family Law Section this year. My sincere thanks to our Executive Committee, Laura Davis Smith, Nicole Goetz, Abigail Beebe and Magistrate Norberto Katz who were engaged all year long with the many issues we faced. Special thanks to our Executive Council and all Committee Chairs for their hard work and dedication this year and a special thank you to Magistrate Diane Kirigin for her commitment and dedication to our efforts. By all accounts, the Section exceeded its goals and priorities. Our multi-day programs (Trial Advocacy Seminar and Marital and Family Certification Review Course) were both sold-out. Fifteen scholarships were awarded this year in association with these programs which facilitated lawyers attending incredible programs for the first time which they would otherwise not have been able to attend. The Section continued to advance diversity, mentoring and membership by sponsoring several events throughout the state. Our efforts to promote board certification paid off with an 11% increase in initial applications for the 2016 certification exam. We met new members who joined us at the Fall Retreat in Washington, D.C. and our Spring Retreat in Fort Myers. Our Legislation Committee in particular worked tirelessly this session on bill monitoring and providing assistance to bill sponsors. I am pleased to report that Governor Scott vetoed the equal timesharing bill so it did not become law this year. My sincere appreciation to all of those who worked on the Nomenclature Committee towards gender neutral laws. There still remains much more work to be done next year and we hope you will consider joining us in Committee meetings and becoming active in the Family Law Section. Thank you for giving me the opportunity to serve as your Chair this year.

Maria C. Gonzalez
Chair, Family Law Section

We are excited about the Section’s NEW website!

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

www.familylawfla.org
Comments from the Chair of the Publications Committee

This is the last edition of the Commentator during Maria Gonzalez’s year as Chair of the Family Law Section. She has been an inspiration to the members of the Publications Committee, and it has been a pleasure and an honor watching her lead our group through what feels like a very special year in the history of the Section. The Publications Committee thrived this year, and I am incredibly proud of the work we have done and the publications put together by everyone involved in this Committee.

A special thank you to Sarah Kay for all of her work as Vice Chair of the Commentator. She is a superstar, and the Publications Committee is lucky to have her. Another special thank you to Eddie Stephens, who has been a guest editor and author for us this year and continues to provide us with Stephens’ Squibs for each and every edition of FAMSEG. He is our behind-the-scenes warrior, always there to combat any issues we face.

I would also like to thank our Florida Bar Administrator, Gabrielle Tollok, and layout designer, Donna Richardson. They helped us as we tried to improve colors, format and font this year, and we hope you enjoyed those changes. Thank you to all of our guest editors, who spend a tremendous amount of time securing and editing articles. Lastly, I want to thank all of our authors this year. They are the real heart of the Commentator, which provides value to family law practitioners throughout the State with articles, useful tips, helpful charts on important topics and updates needed to make our practices the best they can be. If you enjoy the Commentator, please join me in thanking all of our authors!

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**Family Law Guardian Ad Litem Training**

Yueh-Mei Kim Nutter, Esq., President

Two Day Seminar
Friday & Saturday, October 20 - 21, 2016
8:00 am – 5:00 pm
Broward County Bar Association
1051 SE 3rd Avenue • Ft. Lauderdale, FL • 954-764-8040

Limited Seating and Live Presentation Only
Cost: $400; includes breakfast and lunch.
www.browardbar.org/calendar
The theme Maria Gonzalez chose for her year as Chair of the Family Law Section was practicing with professionalism. The word practicing recently struck me while I was watching my five year old daughter writing. While my daughter’s reading comprehension and math skills are well beyond her years, her fine motor skills have not yet caught up. She became visibly frustrated when her fingers did not cooperate with what her mind wanted them to do. While forcefully slamming the marker onto the table she exclaimed with a glimmer of tears in her eyes and whine in her voice something to the effect of “I’m NEVER going to be able to do this!” That was it - in that instant she relegated herself to a life of building with Legos while watching My Little Ponies relinquishing any aspirations of writing, attending to college, or becoming a productive member of society because the skill she was developing was proving to be a challenge. That’s when it hit me. ALL skills, including writing and being a lawyer, require practice. Practice requires time, patience, determination, and perseverance to bear any fruit. And, throughout practice, challenges will present themselves... more frequently than any of us would like. But it is imperative in the moments when the challenge appears insurmountable to reach out to others for help. Part of being a professional is recognizing the times when a task appears beyond our skill development. If you do not know who to turn to, the Section offers experienced member attorneys who have agreed to mentor other Section member law students and less-experienced family law attorneys. A list of mentors is available on the Section’s website at http://familylawfla.org/get-involved/. There is no need to give up or go it alone. Oftentimes what appear to be the most tremendous of problems have simple solutions. Such as with my daughter who, after some encouragement, a short break, and a snack, picked her marker back up and resumed writing what ended up being a twenty-one page book and her latest pride and joy.

Speaking of writing tasks that cannot be done alone, publication of the Commentator requires the time, skill, and dedication of numerous professionals. For this particular edition, in addition to the brilliant and unsinkable Publication Committee Chair, Julia Wyda, the versatile and prodigious Eddie Stephens, and all the authors who contributed the informative, insightful, and high-quality articles, I would like to specially thank our Guest Editor, Alicia de la O for whom this edition is her inaugural guest-editing experience. Alicia is an Associate at The Law Offices of Greene Smith & Associates, P.A. in Coral Gables, Florida who earned her J.D. degree from St. Thomas University School of Law in 2015. While in law school, she was on the Dean’s List, a member of the Honorable Peter T. Fay Inn of Court, and a judicial intern for the Honorable Ariana Fajardo Orshan in the Unified Family Court Complex Litigation Division. Thank you, Ali, for all your help. This edition would not have been possible without you.
Sometimes you *can* rewrite history.

Family Law Appeals

Michelle R. Brinner, Esq.

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The Bounds of Advocacy –
Its Beginnings and Evolution

By Stephen W. Sessums, Tampa, FL

In November 1987, the American Academy of Matrimonial Lawyers (AAML) elected a new President – James Friedman of Chicago, Illinois. He was recognized as an outstanding matrimonial lawyer and author of a popular book for layman on family law – The Divorce Handbook.

The next day, my wife, Diana, and I had breakfast with Jim and his wife, Carolyn. He talked about his plan for a project for the AAML to draft and create ethical standards for members of the AAML that took into account the unique issues that occur in family law cases. It would call upon Academy members to rise above the minimum standards of the Codes of Professional Conduct as promulgated in the various states and applicable across the broad spectrum of legal fields.

I immediately thought this was a meaningful project for the AAML to undertake. However, he then surprised me and asked me to be the chair of the committee to accomplish exactly that. He envisioned a small but diverse committee of outstanding members of the AAML from all corners of the USA. We proceeded to discuss his idea for the committee and its members, and he formed the initial group as follows:

Gaetano Ferro
Westport, Connecticut
Jan Gabrielson
Los Angeles, California
Reba Razor
Dallas, Texas
Gary Silverman
Reno, Nevada
David Walther
Santa Fe, New Mexico
Stuart Walzer
Los Angeles, California
Errol Zavett
Chicago, Illinois
Stephen Sessums, Chair
Tampa, Florida

And so we began. First we tried to focus on a process and decided preliminarily on topics, grouping them into categories and formulating questions within each category. We met initially in Chicago. For the next 2 ½ years we met bi-monthly over a long weekend. We debated and discussed every issue we could anticipate in great detail for 2 days. As exhausting as these lengthy meetings and discussions were, all of us left for home on Sundays full of energy and excitement about our discussions, our work and the things we had accomplished.

For our work to have any organizational validity, we decided we needed the thoughts of the entire AAML members. During the rest of 1988 and early 1989 we drafted and refined questionnaires which in May 1989 were sent to the AAML membership. The questionnaires provided room for detailed comments and responses on all the topics.

During this same time period, we recognized that the committee needed an expert called a “reporter” who had detailed knowledge of the field of legal ethics. We found Professor Robert Aranson, who taught in the law school at the University of Washington in Seattle and was the author of a successful book on legal ethics. And what a treasure he was. We prevailed upon him to work with us and immediately he bonded with the committee and became a vital and essential part of the process.

In response to the survey, hundreds of detailed, well-considered and thought-provoking responses were received from AAML members from every section of the country. The original responses were sent to Professor Aranson with summaries and comments from the Committee on the issues raised. We outlined for him a suggested format of the final product. He then began to form this into a coherent draft for the committee to consider.

After meeting with the committee again, Professor Aranson began the drafting Section by Section that he, in turn, submitted to the committee. We met, discussed and returned these drafts with our thoughts, suggestions and modifications. Back and forth we went until we had a draft we were satisfied with to send out for further review by selected family law experts, the Executive Committee and Board of Directors of the AAML. This was sent in September 1990.

In turn, all thoughts and suggestions that came back to us from these sources were again considered by the committee in detail in late 1990 and early 1991. The original draft was revised in light of these comments. In February 1991, the Executive Committee of the AAML approved the draft after making some language changes. In March of 1991, the substantive provisions of the Bounds were approved by the Board of Directors of the AAML.

continued, next page
The Bounds of Advocacy was published in the fall of 1991.

It is clear that not everyone agreed with the goals or even that we should have a separate set of standards for family law attorneys. There was fierce opposition from the most litigious of our members who in some cases were the very type of litigators whose abuses gave rise to the need for these standards. But we listened to them and found areas of agreement that ultimately improved our product without sacrificing the high standards the AAML agreed should be upheld by its membership.

Much has happened since 1991. In 2000, the AAML had a committee update and revise the original Bounds in light of changes and events in that intervening time. Various states also embraced these standards or some modified version of them as applicable to the general family law bar of their states.

In 2002, Caroline Black Sikorske, Chair of the Family Law Section and Richard West, Chair-elect of the Section appointed a committee to review, modify and adapt the AAML Bounds of Advocacy to conform to Florida law and practice. These Bounds of Advocacy – Goals for Family Lawyers in Florida – was approved and published in 2004.

This committee was:
Melinda Gamot
West Palm Beach
Ky Koch
Clearwater
Circuit Judge Judith Kreeger
Miami
Circuit Judge John Lenderman
St. Petersburg
Carroll Lee McCauley
Panama City
Circuit Judge Raymond McNeal
Ocala
James Fox Miller
Hollywood
Second DCA Judge Stevan
Northcutt
Tampa
Richard D. West
Orlando
Circuit Judge Kenneth Williams
Pensacola
Professor Robert Atkinson
Tallahassee
Stephen Sessums
Tampa, Chair

Great progress has been made in the last 40 years in the development of family law in Florida and throughout our country. Our field has been recognized as a significant and unique area of the law. We now have our own set of specific rules of procedure. We are a recognized specialty in the practice of law. Certification of lawyers in Marital and Family Law has become a reality, and the courts and the legislature have made real and substantive progress in recognizing the rights of all parties and their children in matrimonial litigation.

Lawyers today can take all of this progress as a given. But it was not always so. It has been a thrilling time to be one of the early pioneers in this field with such giants like Burton Young, Judge Gavin Letts, Mel Frumkes, Justice Ben Overton, and many others.

What will the next 40 years be like? It will be exciting I am sure.

Stephen W. Sessums served both as Chair of the original AAML Bounds of Advocacy Committee and the Bounds of Advocacy Review Committee ten years later. He served as Chair of the Florida Bar Family Law Section, the Board of Certification for Marital and Family Law, and the Florida Bar Committee on the Bounds of Advocacy. He served on the Florida Bar Committee on Family Law Rules, the Florida Bar/Bench Commission, and the Supreme Court Commission on Matrimonial Law. He is a Past President of the Hillsborough County Bar Association and the Hillsborough County Bar Foundation. He presented the proposal from the Family Law Section for specialization to the Supreme Court of Florida and was in the original class of Board Certified lawyers in Marital and Family Law in Florida in 1985.
It’s practically common knowledge, especially to family law practitioners, that litigation is terrible for families. This is likely why use of alternative dispute resolution (“ADR”) options such as mediation and collaborative divorce have been on the rise. I vaguely recall learning about collaborative divorce and other alternative dispute measures at a Family Law Society meeting during law school, but I really didn’t understand the practical effects of these being used for family law cases. Since I have begun to practice family law, I have been able to directly see the benefits of pursuing a more cooperative approach versus a “traditional” model. To effectively implement ADR methods, we attorneys must prepare not only clients but ourselves from the moment the case begins.

Alternative Dispute Resolution refers to any method used to resolve a case by means other than by a judge in court. Most often these methods consist of mediation and arbitration, but it also includes negotiation and, most recently, collaborative law. This Article will focus on use of all of these practices and interchangeably refer to them as ADR unless a certain type is otherwise specifically noted.

A Brief History of Alternative Dispute Resolution

ADR has been a topic of discussion with The Florida Bar since 1987, when it was first asked by the Florida Supreme Court to provide an opinion on proposed ADR legislation that was pending. While The Florida Bar as a whole has cautiously adapted to ADR practices, the Family Law Section has enthusiastically embraced it. Moreover, the Florida lawmakers have come to appreciate the benefits of ADR as, on March 24, 2016, HB 967 was signed into law creating the Collaborative Law Process Act, allowing families to resolve family law cases without the need for litigation.

With ADR solutions becoming more accepted by the legal profession, especially among the family law practitioners, why is it that some attorneys are so hesitant to try it and clients are unaware of the benefits? Each will be discussed in turn.

The Zealous Advocate through Knowledge of Alternative Dispute Resolution

I have observed two different frames of thoughts by family law practitioners, those who have embraced ADR, and those who staunchly stand by their tried and true traditional courtroom methods. Why the reluctance to embrace ADR? Perhaps it is simply a lack of understanding of the impact of litigation on the family or the benefits of alternative dispute resolution which makes some attorneys, and clients, so hesitant to try the collaborative or ADR route over traditional litigation.

In May 2004, the Family Law Section of the Florida Bar Family Law Section published the *Bounds of Advocacy: Goals for Family Lawyers in Florida* ("Bounds of Advocacy") which was revised and adapted specifically to Florida family law from the original publication by the nationally based American Academy of Matrimonial Lawyers. The *Bounds of Advocacy* serves as a reminder that family law practitioners are truly zealous advocates but in a unique way, whether engaged in a traditional or alternative dispute resolution processes. Preliminary Statement of the *Bounds of Advocacy* notes that zealous advocacy for family law attorneys should be distinguished from other types of litigation:

The family lawyer serves many functions. The Goals reflect a broad range of skills and methodologies to resolve disputes. When litigation is employed, the family lawyer should conduct it constructively because of the continued relationship of the parties after conclusion of the case. Advocacy skills may also be used to the client's advantage in arbitration or mediation. An effective advocate's stock in trade is the power to persuade.

One traditional view of the family lawyer (a view still held by many practitioners) is that of the "zealous advocate," whose only job is to win. However, the emphasis on zealous...
representation of individual clients used in criminal and some civil cases is seldom appropriate in family law matters. Public opinion increasingly supports other models of practice and methods of conflict resolution.12

**Bounds of Advocacy Goals 2.4 and 2.5** encourage attorneys to not only be knowledgeable about available alternative dispute resolution methods, but consider if each dispute can be resolved by agreement if possible. Comment to Goal 2.5 states, in pertinent part:

In family law matters, a cooperative resolution of disputes is highly desirable. Family law is not a matter of winning or losing. At its best, family law should result in disputes being resolved fairly for all parties, including children. Major tasks of the family lawyer include helping the client develop realistic objectives and attempting to attain them with the least injury to the family. The vast majority of cases should be resolved by lawyers negotiating settlements on behalf of their clients.

Regardless of whether an attorney prefers to regularly employ alternative dispute practices in his/her cases, the attorney should at least inform clients of their available options and hopefully be open to a cooperative approach even within a traditional litigation model. Florida Rule of Professional Conduct 4.2.1 requires Florida attorneys to render candid advice not only considering legal ramifications but also “other considerations such as moral, economic, social, and political factors that may be relevant to the client’s situation.”13 Not only will this openness help solve cases, but engaging in alternative dispute methods over traditional litigation may even have benefits for attorneys and their practices, including, among other things, a reduction in length of time it takes to resolve cases which may permit attorneys more time for personal commitments.14

Some attorneys may shy away from ADR as they pride themselves on their lawyering skills and are concerned that using ADR diminishes the practice of law. This could not be further from the truth. Specifically, comment to section 2.4 of the Bounds of Advocacy observes “the ability of the attorney to understand and assess the probable outcome of litigation are essential to the problem-solving process.” To help clients effectively engage in ADR, an attorney needs to understand the case from every angle demonstrating an intimate knowledge of the law, rules of evidence, and the likely outcomes a client can face in order to carefully evaluate the decisions being made within the ADR process. It may seem counterintuitive, but stepping away from the courtroom can reveal an attorney’s true knowledge and skills as they explore alternative resolution means.

**The Zealous Advocate through Educating Clients**

When clients come to a family law practitioner they are hurt, emotional and raw. They have seen countless films and television shows, which give them the impression they that they can get their day in court and get some vindication from their case.15 But, Hollywood is not reality. Attorneys, as zealous advocates for these clients, must help them to understand the reality of what they can expect for any route they choose which includes discussing ADR options with them, educating them on the benefits of pursuing a non-litigation approach.16

The reduction of fees can be extraordinary for those clients who can successfully resolve their case outside of the courtroom.17 For most clients still recovering from the 2007 recession,18 pursuing a traditional divorce through the court system is almost a non-option when you look at potential costs they can expect to pay.19 Perhaps the most important benefit to ADR, but perhaps the hardest to demonstrate to them, is that the emotional impact on themselves and their families is greatly reduced when pursuing an ADR approach.20 In a traditional litigation case, parents and spouses are pitted against one another and they have this need to win, when in reality, they’re in a lose-lose situation. When employing ADR, they are instead learning how to brainstorm and problem solve together. The benefits of this will long outweigh the process. Parents who use the collaborative process are more apt to be able to co-parent, during the process and after. Some practitioners may be skeptical and see this as the chicken and the egg scenario questioning which came first, the rational couple who likely would co-parent well together choosing an ADR method to resolve their case, or is it the ADR methods which taught them how to co-parent and adjust to their new reality? Either way, it is important that clients understand the benefits of this sort of approach versus the courtroom. The comment to Goal 2.5 observes that parties are more likely to follow through on an agreement they have made rather than an outcome imposed on them by a court.21 Agreements are more likely to establish positive tones conducive to positive post-divorce relationships between the parties rather than the “animosity and pain” of a court battle.22 Furthermore, engaging in an alternative dispute resolution method gives the parties more autonomy over their decisions rather than putting it in the hands of a judge who is limited by time and by the outcomes dictated by the law.

Once a client has chosen an ADR mechanism, it is important to prepare the client for the process.23 This can be as simple as explaining the ADR process and clarifying your role as well as the role of any other participants so that the client has an understanding of what to expect. For instance, clients need to understand that the
attorney’s role in a particular ADR process, such as mediation, is not the same as with traditional litigation. It is also helpful to explain to the client the differences between ADR and traditional litigation. By informing the client of possible outcomes they can expect in a courtroom and with a judge versus the outcome they can craft through ADR can provide a reference point for clients and help them to better make decisions and engage in the ADR process. Just because they have chosen a non-traditional litigation method does not mean they fully understand it or their emotions won’t derail the process. Clients need to understand how the process truly works and they also need an outlet for those emotions. In a collaborative model a mental health professional may be involved, but other alternative dispute resolution mechanisms do not necessarily require one. As such, make sure your client is, not only aware of, but it taking advantage of all of the different resources they need to help get them through their divorce. Comments to Goal 2.2 of the Bounds of Advocacy points out that family law attorneys are often counselors for our clients, specifically stating “[a] lawyer’s role in family matters is to act as a counselor and advisor, as well as an advocate. The Rules of Professional Conduct specifically permit the lawyer to address moral, economic, social, and political factors that may be relevant to the client’s situation. When consultation with a professional in another field is appropriate, the attorney should make such a recommendation.” As such, it is important that we as practitioners understand what services may be offered within our communities to help our clients and their children while they undergo this transition in their life. For instance, local organizations may offer services geared toward helping children through a divorce or offer counseling and services for the parents as well. Clients also need to be aware that often times, many of the decisions made regarding support and assets are business decisions, not emotional ones. This is hard for most clients to fully appreciate, but if they can approach decision-making on a more rational basis, the better the process will go for them and likelier the happier they will be.

Conclusion
Alternative dispute resolution in all forms is here to stay. It is important that clients understand their options and it is important that we as practitioners begin to explore these methods as well, if not to benefit just our clients, but ourselves and our practices as well. Jennifer Burns, Esq. is an associate attorney in Sarasota, Florida with Carmen R. Gillett, PLLC. She earned her Juris Doctor from Stetson University College of Law in 2014 and has been practicing exclusively in marital and family law since her admittance to the Florida Bar. Ms. Burns is collaboratively trained and strives to better serve her clients through alternative dispute methods.

Endnotes
1 The Florida Bar, Bar Issue Papers: Alternative Dispute Resolution (ADR), https://www.floridabaronline.com/divcom/pb/bips2001.nsf/1119bd38ae090a7485256760053b606/ff878a7d942a618525669e004d2735?OpenDocument (last revised Jan. 2009) (stating that “Over the last 25 years, the Florida State Courts System has been increasingly dedicated to offering litigants opportunities to peacefully [resolve] their disputes without the need for judicial intervention”).
3 For purposes of this Article, mediation can also include parenting coordination. For more on parenting coordination, please see Janice S. Rosen et al, Parent Coordinators: An Effective New Tool in Resolving Parental Conflict in Divorce 76 Fla. B. J. 101 (June 2000) (available at https://www.floridabaronline.com/divcom/jn/journal011.nsf/Author/SEASICA571660C479259ADB805D6304).
5 For more on collaborative law, see Int’l. Acad. Collaborative Prof., Collaborative Practice https://www.collaborativepractice.com/ (accessed Apr. 4, 2016).
7 Id.
8 The Family Law Section unanimously supported the 1987 rules implementing ADR legislation and opined that mediation was of particular significance within the practice of family law. The Florida Bar, Bar Issue Papers: Alternative Dispute Resolution (ADR), https://www.floridabaronline.com/divcom/pb/bips2001.nsf/1119bd38ae090a7485256760053b606/ff878a7d942a618525669e004d2735?OpenDocument (last revised Jan. 2009). More recently, the Family Law Section has standing legislative positions supporting more widespread implementation of alternative dispute resolution mechanisms in family law cases such as #4 “Supports the establishment and funding of programs to provide mediation services in each judicial circuit” and #7 “Supports the statutory recognition of collaborative law as a form of alternative dispute resolution in family law cases...” Family Law Section, 2014-16 Legislative Positions, https://www.floridabaronline.org/tb/TFLegNovW.nsf/730c2d260557f18352700200472357e/dd0d16e2bd03ea5a257940067030?OpenDocument (last revised Mar. 11, 2015).
13 Fla. R. P. C. 4-2.1. The comment states in continued, next page
pertinent part “Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral adviser as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.”

14 Shifting the practice of law from a pure litigation model may involve a shift in mindsets. The Florida Bar has recently made efforts to help attorneys focus on their mental health. Part of those efforts is the April 2016 Florida Bar Journal edition being dedicated to mindfulness. While attorneys should never involve themselves in the emotions of their clients and their cases, this is not always so easy to do. At its most basic form, we as attorneys are taking on the problems of others and trying to fix it for them. Engaging in a more cooperative approach to the practice of law reduces the stress put on attorneys and in turn their clients. For more on the benefits of mindfulness, see e.g. Paul Steven Singerman, The Return on Investment from My Study and Practice of Mindfulness 90 Fla. B. J. 26 (Apr. 2016) (available at http://www.floridabar.org/DIVCOM/JN/JJournal01.nsf/8c9f13012b96736985256aa90662482956566ed?OpenDocument).


16 Fla. Fam. L. Section, Bounds of Advocacy Goal 2.4 & Comment ( Fla. Bar May 2004) (stating “It is essential that family lawyers have sufficient knowledge about dispute resolution to understand the advantages and disadvantages for a particular client and to counsel the client appropriately concerning the particular dispute resolution mechanism selected”) (available at http://familylawfla.org/wp-content/uploads/2015/12/Family-Law-Bounds-of-advocacy.pdf).


19 For more about the financial consequences of divorce, see generally Jay D. Teachman & Kathleen M. Paasch, Financial Impact of Divorce on Children and their Families 4 Children and Divorce 63 (Spr. 1994) (available at https://www.princeton.edu/futureofchildren/publications/docs/04_01_04.pdf).

20 The many tangible and non-tangible benefits to ADR have been embraced throughout the United States. For example, the Judicial Branch of California promotes ADR as follows: “ADR is usually less formal, less expensive, and less time-consuming than a trial. ADR can also give people more opportunity to determine when and how their dispute will be resolved.” Jud. Branch of Cal., ADR Types & Benefits, http://www.courts.ca.gov/3074.htm (accessed Apr. 4, 2016). The benefits have also been embraced internationally. For example, see generally New Zealand Ministry of Justice, 4 Advantages and Disadvantages of ADR, http://www.justice.govt.nz/publications/global-publications/a/alternative-dispute-resolution-general-civil-cases/4-advantages-and-disadvantages-of-adr (accessed Apr. 4, 2016); [Australian] Resolution Institute, Benefits of ADR, https://www.iama.org.au/what-we-do/what-adr/benefits-adr (accessed Apr. 4, 2016).


22 Id. See the multiple internal citations in Footnote 18 of the Comment to Goal 2.5 for additional reading.

23 Bounds of Advocacy Goals 2.4 and 2.5 encourage family law practitioners to educate their clients on the benefits of and available options of alternative dispute resolution. Fla. Fam. L. Section, Bounds of Advocacy 2.4 & 2.5 (Fla. Bar May 2004). The Comment to Goal 2.4 states, in pertinent part, “It is essential that family lawyers have sufficient knowledge about dispute resolution to understand the advantages and disadvantages for a particular client and to counsel the client appropriately concerning the particular dispute resolution mechanism selected.”


No Residency Requirement? No Problem. The Benefits and Pitfalls of Florida’s Support Unconnected with Dissolution of Marriage

By Cary Garcia, Esq., Tampa, FL

C. GARCIA

Roy E. Martin, Jr., thought that he was simply taking a connecting flight from Columbus, Georgia, to Miami, FL, to ultimately fly into the Bahamas, for a business trip. What he did not know is that his wife, Miriam Henson Martin, had employed counsel in Miami to file a complaint for “separate maintenance” and support for their minor children.1 He was also unaware that a process server would personally serve him with his wife’s complaint during his short pit stop at the Miami International Airport.2 While “tag service” is not uncommon, he may have wondered why his wife filed a lawsuit against him in Florida when the couple was living in Columbus, Georgia, with their children, and neither of them had ever resided in Florida.3 The answer is quite simple: because she could.

Florida’s legislature placed a residency requirement on dissolution of marriage actions,4 but not on actions for “separate maintenance” (now called “support unconnected with dissolution of marriage”).5 Mrs. Martin was, apparently, free and clear to pursue her case in a state that was completely foreign to her, and when the husband challenged the jurisdiction of the lower court, the trial judge sided with Mrs. Martin. Unfortunately for her, the husband appealed, and the Third District Court of Appeal overturned the trial court’s ruling. The case ultimately reached the Florida Supreme Court’s desk, and our justices were ready for the task.

The Florida Supreme Court had already grappled with this question about twenty years earlier in Kiplinger v. Kiplinger, 2 So. 2d 870 (Fla. 1941). In Kiplinger, the parties resided in Muncie, Indiana, but spent their Winter months in Florida.6 During one of their trips to Tampa, the Wife found herself “without the necessities of life” after the Husband threatened her with violence,7 and she filed an action for separate maintenance in Hillsborough County. The husband raised the issue of jurisdiction by arguing that the wife was not a permanent resident of Florida at the time of filing.8 Mrs. Kiplinger retorted by testifying about her “avowed intention” to make Florida her home, having lived here years before and having close relatives in Florida.9 The Second District Court of Appeal agreed with the husband, and the wife appealed to the Florida Supreme Court.10

Although the Court addressed all of the arguments that the wife made to the Second District about her intention to make Florida her future permanent home, it essentially decided that those arguments were all irrelevant. The Court specifically ruled that “there is no definite period of residence required” for this type of action, and that “the question as to whether or not the respondent was a bona fide resident of the State of Florida is immaterial, since service of process was had” upon the petitioner in the state.11 The ruling could not be any clearer: “The residential prerequisites of one of the parties as being essential to invoking the jurisdiction of the court under this Section is pure fiction, illogical, imaginary, and not supported by any reasonable construction of the statute, and interferes with rather than promotes the administration of justice” [emphasis added].12 In other words, as long as personal jurisdiction over the respondent is achieved (i.e., tag service or otherwise), the case may proceed. The petitioning party never has the obligation to prove his or her residence for the case to survive.

The curious fact about Martin is that the Third District somehow read Kiplinger and relied upon it to rule that Mrs. Martin had no jurisdiction to proceed with her case in Florida. The Third District somehow read Kiplinger and extracted the doctrine that it is against the policy of the State of Florida for its courts to take jurisdiction of such a marital dispute unless one of the parties has a Florida domicile, or at the least is a bona-fide resident of our state at the time suit is brought.13

Needless to say, the Florida Supreme Court quickly rejected that analysis, noting that there was actually a conflict between the rulings in Martin and Kiplinger.14 In fact, the Court reasoned that they were the same. In the Kiplinger case, the Court pronounced the parties’ home state of Indiana a “subterfuge,” where the husband could claim immunity from suit while his family became public charges of Florida.15 In Martin, the husband was on his way to a foreign country where he could do the exact same thing.16 Again, “domicile or residence of either party in this state is unnecessary to confer jurisdiction on the courts”17 in actions for support unconnected with dissolution of marriage.

When reading Kiplinger and Martin together, the reader is left with a large rift between the separate analyses of the Third District and the Florida
Support Unconnected with Dissolution of Marriage
from preceding page

Supreme Court. If, the Court said in Kiplinger that any residential prerequisites in these types of actions are “pure fiction,” there is no explanation as to why the Third District in Martin would see that and rule otherwise. Yet, it is in Martin’s dissenting opinion by Justice E. Harris Drew that we gain some clarity about why the Third District may have distinguished Martin from Kiplinger. 18

In fact, Justice Drew pointed out that Kiplinger actually did not conflict with Martin. The Third District in Martin had ruled only that, in a suit for support unconnected with dissolution of marriage, one of the parties must be a bona-fide resident of Florida. 19 just like any other case involving a marital dispute. It was Florida’s long-standing policy. However, Kiplinger was the exception. 20

If the petitioner finds him or herself residing temporarily in Florida, having no other convenient forum, and he or she and/or the children will become public charges of the state without the court’s assistance, then Florida should exercise jurisdiction. 21 In other words, Kiplinger and Martin could co-exist without conflict because the facts were different. In one case, there were circumstances present that would justify the court exercising jurisdiction without either party being a bona-fide resident of Florida (Kiplinger). In the other case, those circumstances were just not there, and Florida’s initial policy of requiring residency to resolve a marital dispute should apply (Martin).

Although Justice Drew carved out an exception that gave Mr. Martin the windfall that he needed, his formative dissent was exactly that: a dissent. Regrettably for Mr. Martin, the majority of the justices on the bench in 1961 ruled that the doctrine of the Kiplinger case was the law governing this question. 22 no exceptions.

Today, 55 years later, nothing has changed. Many of the cases that address the subject of support unconnected with dissolution of marriage are somewhat antiquated, but still good law. Any petitioner can still maintain this type of action in Florida, without ever proving his or her residency, regardless of the particular circumstances of the case.

Be that as it may, the real inquiry that the bench and the bar should be making is whether Justice Drew’s dissenting opinion is actually a cogent, logical roadmap to the way jurisdiction should be treated in these types of actions. The concern in Kiplinger was that the family would become public charges of the State of Florida. Invoking Justice Drew’s opinion and having a legal mechanism by which Florida courts could separate these two types of fact patterns into two, separate categories, and advised that a Florida court should take jurisdiction only when the aforementioned concerns are present, while the Florida Supreme Court made no distinction between the two.

Invoking Justice Drew’s opinion and having a legal mechanism by which Florida courts could separate these two types of categories would be beneficial on several fronts. As it stands, any petitioner, residing in any state or country in the world, is welcome to file an action for support unconnected with dissolution of marriage.
in a Florida court, no questions asked. Screening these cases at the beginning would eliminate forum shoppers who specifically choose to file in Florida to obtain superior results. This would not only prevent these disingenuous petitioners from misusing our courts, but it would also reserve our judicial system for those who truly need the help. Allowing our judges to quickly disqualify a potentially lengthy, protracted case early on in its inception would only serve judicial economy.

Additionally, although residency was irrelevant to the Court, we see in Kiplinger that residency is defined by the Court as “fact and intention,”24 and that “residence indicates place of abode, whether permanent or temporary...a resident is one who lives at a place with no present intention of removing from.”25 Putting this definition to use may be a valuable tool in creating this proposed legal mechanism. An example may be the respondent filing a responsive pleading, raising the issue of whether the petitioner is, indeed, a resident of Florida based upon the aforementioned standard of residency in Kiplinger. The court may then conduct a preliminary hearing on the limited scope of the petitioner’s residency, inquiring only as to the petitioner’s present living situation, whether it is permanent or temporary, the reasons why the petitioner filed in Florida, and his or her intention of staying or leaving. The court may then rule solely on whether the petitioner is, in fact, a bona-fide resident of Florida and, if so, the case may then continue on. If not, the case would then be dismissed without prejudice until the petitioner’s residency has been established.

There are still two alternatives to implementing this type of mechanism: 1) applying a six-month residency requirement to these types of actions would put those who are in a Kiplinger scenario in a deadlock; he or she has been completely denied support and has no funds to return home to file a court action, but he or she also cannot file an action in Florida until the six months have elapsed. That would lead to six months of the stifled petitioner, and possibly his or her children, becoming a public charge of Florida, which is precisely what Florida courts have been seeking to avoid. In the worst case, it may even lead to homelessness, hunger, and exposure to crime. If there are, indeed, children involved, this would gravely offend Florida’s long-standing policy of protecting the best interests of children and would cause more harm than good.

However, the other alternative, which is having no inquiry whatsoever as to residency, leaves our court system open and vulnerable to those who wish to forum shop, like Mrs. Martin. Our distinguished judges, who are tasked with adjudicating and resolving massive caseloads filed by true Florida residents as it is, are having the added burden of addressing cases that, frankly, do not belong in our state or on their dockets. Not to mention, respondents who are residents of other states or countries will be unnecessarily, and unfairly, haled into our courts to address marital disputes that have no connection whatsoever to our state. As a matter of fact, both parties will have to bear the burden of traveling hundreds, if not thousands, of miles each and every time a court appearance is required by their judge. This renders these cases inconvenient and difficult to properly adjudicate.

The Kiplinger court correctly provided an avenue for potentially poverty-stricken residents of foreign jurisdictions to seek support in our state. Nonetheless, the way to preserve the integrity of Kiplinger and to protect petitioners who genuinely deserve the assistance of our courts is to ensure that our judicial resources are expended properly. If the purpose of having no residency requirement for this type of action is to protect the Mrs. Kiplingers of the world and to avoid making public charges of insolvent families, it follows that allowing the Mrs. Martins of the world to choose Florida as a filing destination is contrary to that purpose. Implementing a process by which the two may be differentiated may be an effective way to protect the dignity of our courts while still opening our courthouse doors to those who need it most.

Cary Garcia, Esq., practices exclusively marital and family law throughout the Tampa Bay area, as well as other counties throughout Florida. She is a graduate of the FIU College of Law and opened her own practice in 2015. Cary is active with the Florida Bar and is a member of the Stann W. Gaines Family Law Inn of Court, the Hillsborough Association for Women Lawyers, and the Hillsborough County Bar Association. She can be reached at Cary@CGFamilyLawPA.com.

Endnotes
1 Martin v. Martin, 128 So. 2d 386, 387 (Fla. 1961).
2 Id.
3 Id.
5 § 61.09, Fla. Stat
6 Id. at 871.
7 Id. at 874.
8 Id. at 871.
9 Id.
10 Id.
11 Id. at 872.
12 Id. at 873.
13 Martin v. Martin, 128 So. 2d 386, 387 (Fla. 1961).
14 Id. at 388.
15 Id.
16 Id.
17 Id.
18 Id. at 389-390.
19 Id. at 390.
20 Id.
21 Id.
22 Id. at 388.
23 Weinschel v. Weinschel, 368 So. 2d 386, 387 (Fla. 3d DCA 1979).
25 Id. (citing Minick v. Minick, 111 Fla. 469, 149 So. 483).
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Choice of Law Issues and Foreign Marriage Contracts

By Patricia Elizee, Esq., Miami, FL

According to the latest U.S. Census, Florida surpassed New York and is now the third most populous state. It is estimated that about 1,000 people move to Florida every day. Many of these new Floridians were previously married and entered into marriage contracts in other states or in other countries before migrating to Florida. In the event that these marriages end up in Florida dissolution actions, how should we, as family law attorneys, and the courts determine which laws to apply?

Marriage contracts are divided into three categories: premarital or prenuptial agreements; postnuptial agreements; and marital settlement agreements. Premarital or prenuptial agreements are entered into in contemplation of marriage. Postnuptial agreements are entered into after marriage, usually in contemplation of the continuation of the marriage relationship. Marital settlement agreements are entered into after marriage, usually in contemplation of the dissolution of the marriage. The practice point in drafting a contract is to include both a Choice of Forum and a Choice of Law clause in the contract to protect your client’s expectations.

Procedural vs. Substantive Issues

Firstly, the same rules of contract construction apply to marriage contracts. When confronted with a substantive issue, Florida will follow its choice of law rules. Meaning that where Florida public policy is not offended, the courts will apply another forum’s law. However, where confronted with a procedural, rather than a substantive issue, Florida law shall govern. Where Florida is the forum state, Florida courts will determine whether the issue is a substantive or procedural one for choice of law purposes.

Lex Loci Contractus v. Lex Fori

For substantive issues, where there is no choice of law provision within the contract and the place of making a contract, including marriage contracts, differs from the place of enforcing or performing it, Florida courts will apply the laws of the place where the contract was made. The Florida Supreme Court explained that the knowledge that the contract will be governed by the laws of the place the contract is made is imputed to the contracting parties, unless the contract provides to the contrary. This presumption is necessary to ensure stability in enforcements of contracts, including marriage contracts. It is important to take note that the application of the foreign law is not automatic in these cases. The party seeking to enforce the laws of the contracting state or country has the burden of proving that the foreign law should be enforced and that the foreign law is different from Florida law. Where the party does not meet that burden, the courts will assume that Florida law applies or that the foreign law mirrors the laws of Florida.

Where the marriage contract does have a choice of law provision, Florida courts will generally enforce the provision, unless enforcing the chosen forum’s law will contravene strong public policy. Pointing out the mere difference between Florida law and the foreign jurisdiction is not enough to make an argument that the enforcement of the foreign law is contrary to Florida public policy. The movant must show that applying the foreign law will injure some strong interest of the public, or contravene some established interest in society. There are a number of settled public policy reasons that may keep a court from enforcing a marriage contract that will be discussed further in this article.

As an interesting side note, take into consideration that even where the foreign law does not violate Florida public policy, courts may still refuse to enforce a foreign jurisdiction’s laws. For example, a Florida appellate court explained, “[w]here the foreign sovereign has no significant interest in the issue being adjudicated, there is no basis for the invocation of comity.” The practice point in drafting a marriage contract is to include both a Choice of Forum and a Choice of Law clause in the contract to protect your client’s expectations.

In Florida, there are a number of public policies that push the courts to find that marriage contracts are unenforceable. For example, there is a strong public policy to protect a spouse’s right to temporary support. Florida courts have therefore nullified provisions waiving an award of temporary support as being against public policy in a foreign marriage contract litigated in Florida, even though the waiver of temporary support was valid under the foreign jurisdiction laws and the foreign law applied.

The state’s public policy of protecting children and homestead rights may also render provisions in foreign law
Foreign Marriage Contracts

From preceding page

marriage contracts void. A court is free to ignore any provisions in a marriage contract regarding child support, time sharing, parental responsibility, and the like.14 The court explained that one important reason for this principle is that the court must guard against the possibility that a parent might bargain away valuable rights of a child for reasons unrelated to the child’s best interest. Another Florida appellate court limited the application of a foreign marriage contract that violated the party’s Florida homestead laws and protections. The court explained that a citizen’s right to homestead protection is paramount and protecting that right would justify a departure from the normal rules of comity.15

Florida will not enforce any marriage contract entered into under duress, fraud, or with no proper prenuptial financial disclosure.16 However, Florida public policy does not protect a spouse who signs a foreign marriage contract freely and voluntarily, has some understanding of his or her rights, and who has or reasonably should have had, a general and approximate knowledge of the proponent’s property.17

The Uniform Premarital Agreement Act (UPAA)

Keep in mind that the analysis of whether a foreign marriage contract is valid or enforceable may differ per state. The Uniform Premarital Agreement Act (UPAA) was drafted in 1983 to respond to concerns over the lack of uniformity in the enforcement of prenuptial agreements. At the time, twenty-five states and the District of Columbia adopted the UPAA. Florida later adopted its version of the Act on October 1, 2007. Florida’s adoption is codified in Section 61.079 of the Florida Statutes. Prenuptial and marital settlement agreements are not classified in Section 61.079 per se. However, Florida Statutes do contemplate and presume postnuptial and marital settlement agreements will be entered into and enforced by the courts.18 Florida case law is also clear that postnuptial and marital settlement agreements are interpreted and enforced like any other contract.19

The UPAA20 contains a choice of law provision that permits parties to choose the law that will govern matters of contractual construction, however, it is silent on matters of validity and enforceability.21 As a result, some courts construe it narrowly and only apply it to construction disputes, while others construe it broadly and apply it to questions of validity, enforceability, and construction.22 For example, in one case, the California courts were called to enforce an Arizona premarital agreement waiving the wife’s right to the division of marital property and spousal support. The California Supreme Court upheld the validity of the premarital agreement except as to the waiver of support which the Court deemed to be invalid and against California public policy.23 This approach illustrates the tension between the individual’s right to contract and the public policy of the enforcing jurisdiction.

Section 3(a) of the UPAA identifies the matters which parties may contract. That section particularly lists that parties may contract to “the choice of law governing the construction of the agreement, and... any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty.” The drafting committee of the UPAA expressly debated the scope of the choice of law provision and there was a clear intended distinction between legal questions related to validity and enforceability.24 The Act has been adopted by 26 states, however, there is no guidance for courts determining choice of law disputes and it does not make a distinction between validity and enforceability. Every state has their own method of determining whether a foreign premarital agreement is valid and whether it should be enforced under local public policy.

Florida’s adoption of the UPAA, expressly states that parties are able to contract as to the choice of law governing the construction of the agreement. Fla. Stat. §61.079(4)(a) (7). Florida will follow the choice of law analysis described above. Under the statute and case law, Florida will find that a premarital agreement is unenforceable if the party against whom enforcement is sought can prove that the agreement was the product of fraud, duress, coercion or overreaching.

The UPAA is also silent as to whether spousal support that can be limited or eliminated should be enforceable. There is a split among the states. Some states do not permit a premarital agreement to control spousal support. Florida specifically states in Fla. Stat. §61.079(4)(a)(4) that spousal support can be waived or even established in a premarital agreement.

As a family attorney in Florida, you will most likely come across foreign marriage contracts in your practice. You must determine whether the agreement was properly entered into under the signatory jurisdiction. It is important that you understand the foreign law and be able to present the differences between Florida law and the law of the foreign jurisdiction to the court. Lastly, you must be prepared to argue that the foreign law should or should not be applied under Florida’s public policy and that the foreign court has or does not have a significant interest in the matter warranting the application of the foreign law.

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Endnotes

2. Castro v. Castro, 508 So.2d 330 (Fla. 1987) (The same considerations as those relating to prenuptial agreements generally apply to postnuptial agreements); Griffith v. Griffith, 860 So.2d. 1069, 1073 (Fla. 1st DCA 2003), citing Zern v. Zern, 737 So.2d 631, 633 (Fla. 1st DCA 1999).
4. Id.
5. The law of the place where a contract is executed or to be performed. Lex Loci Contractus, Black Law’s Dictionary (3rd Pocket Edition, 2006).
6. The law of the forum; the law of the jurisdiction where the case is pending. Lex Fori, Black Law’s Dictionary (3rd Pocket Edition, 2006).
10. McNamara v. McNamara, 40 So.3d 78, 80 (Fla. 5d DCA 2010).
11. McNamara v. McNamara, 40 So.3d 78, 80 (Fla. 5d DCA 2010).
12. McNamara v. McNamara, 40 So.3d 78, 81 (Fla. 5d DCA 2010).
13. McNamara at 82; Aguilar v. Montero, 992 So.2 872 (Fla. 3rd DCA 2008) (holding that the wife was entitled to support from the date that the husband filed for dissolution to the date of final judgment regardless of the fact that the wife waived her right to temporary support.)
15. Re Estate of Nicole Santos at 281-282.
17. McNamara v. McNamara, 40 So.3d 78, 81 (Fla. 5d DCA 2010).
19. Id.
22. Id.
23. Id.
24. Id.
ANNOUNCEMENTS

CONGRATULATIONS!

The Family Law Section of The Florida Bar congratulates the recently elected members of the 2016-2017 Executive Committee and Executive Council as follows:

The Nominating Committee has placed the following persons in nomination for the respective positions:

Laura Davis Smith
Coral Gables
2016-2017 Chair

Abigail Beebe
West Palm Beach
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Nicole Goetz
Naples
2016-2017 Chair-elect

Amy Hamlin
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2016-2017 Secretary

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ANNOUNCEMENTS

Patricia Alexander, a distinguished long-time member of the Family Law Section Executive Council who recently completed her final term, was installed as the 2016-2017 President of the South Palm Beach County Bar. Congratulations, Patricia!

On May 20-21, 2016, several past Chairs and other active members of the Florida Family Law Section attended the 2016 Collaborative Family Law Council Annual Conference of the Florida Academy of Collaborative Professionals (FACP). Pictured here from left to right are: Caroline Black Sikorske ('02-'03), Jeff Wasserman ('00-'01), Allyson Hughes ('07-'08), Norman Levin ('01-'02), Deborah O. Day, Psy.D., Richard West ('03-'04), Evan Marks ('04-'05), Peter Gladstone ('09-'10) and Ky Koch ('99-'04).

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An Analysis of the Times: The Importance of Cohabitation Agreements to Address the Rising Trend Toward Cohabitation Over Marriage

By Anya Cintron Stern, Esq., Miami, FL

In the most recent Florida legislative session, the Florida Legislature passed SB498, a proposed repeal of the cohabitation ban—the law making it a misdemeanor or crime for unmarried men and women to “lewdly and lasciviously” live together without being married to each other. Since Florida Governor Rick Scott signed the repeal bill, all of those cohabitating unmarried men and women have been able to breathe a sigh of relief, and the threat on Florida’s jails converting to motels has been abated.

Data recently released from the National Survey of Family Growth conducted from 2011 to 2013 by the U.S. Department of Health and Human Services, show that while 47 percent of women and 44 percent of men in 2002 said divorce is “usually the best option” for couples struggling to get by, those numbers have dropped to 38 percent and 39 percent, respectively. Additionally, 45% of members in a recent survey of the American Academy of Matrimonial Lawyers (AAML) reported that legal disputes between unmarried couples who had previously lived together are on the rise during the past three years. The rise may be attributed to the range of legal disputes that arise from the breakdown of relationships between unmarried cohabitating couples purchasing real properties together, creating companies, and raising children common to both. Consequently, unmarried and cohabitating couples would be best advised to execute an agreement delineating their respective rights, obligations, and agreed expectations as to what would result should the parties’ relationship terminate. This article will provide guidance as to the applicable law on this topic in Florida.

Cohabitation agreements are a specific type of contract which expressly establishes the legal duties and obligations between unmarried individuals residing together. Cohabitation agreements are legally enforceable in the State of Florida despite Florida law not recognizing common law marriages—marriages that are created by the parties’ agreement to cohabitate and carry themselves out as husband and wife. In fact, Florida courts have heard cases where the unmarried cohabitating parties memorialized what they had agreed to in regard to: the division of real and personal property; the reservation of the other party as beneficiary of a life insurance policy; where the parties delineated their respective responsibilities toward obligations such as utility bills or child expenses; and, cases where the parties decided what obligations each party was expected to be responsible for in the event of a termination of their relationship. Florida courts also have upheld cohabitation agreements which upon the face of the agreement appear to be extremely favorable to one party or overreaching. This is so because Florida courts acknowledge that the freedom to contract includes the right to make a bad bargain. The controlling question that the court seeks to answer is whether there was overreaching and not whether the bargain was good or bad.

Reducing a cohabitation agreement to writing is important as Florida courts have ordered the enforcement of alleged oral agreements between unmarried cohabitating parties via imposition of a constructive trust. A constructive trust is a legal concept created by the court against a party who has obtained or holds legal right to property which he ought to not, in good conscience, keep and enjoy. A constructive trust is used to prevent unjust enrichment. It is not necessary that a court find that a party whose property is subject to it has acted wrongly in order to impose a constructive trust.

Circumstances which a court considers for the imposition of a constructive trust include:

- the reasonable value of capital, materials and labor invested in residential and commercial property;
- income contributed toward food, utilities, furnishings and household services including cooking, washing and cleaning;
- contribution of money to a business and performing services for the business;
- contribution of money, labor and materials separate and apart from spouse-like services;
- the pooling together of monies,
and obligations one party has contracted to the other via the cohabitation agreement such as the payment of certain obligations and joint residency. Examples of “terminating events” include:

- notice, in writing, that the Agreement has terminated;
- service of an eviction notice;
- abuse;
- harassment;
- drug use;
- breach of the Agreement; and
- any other event that the cohabitating individuals agree to.

It is advised that a party include “breach of the Agreement” as a terminating event and also include a liquidated damages clause. Liquidated damages for breach of contract clauses between unmarried live-ins are enforceable so long as the amount is reasonable given the circumstances. In evaluating the reasonableness of the amount of liquidated damages, courts will consider:

- Moving expenses incurred as a result of the breach;
- The parties’ relative incomes; and
- The benefit expected by the party that had the agreement not been breached.

Should a terminating event occur, the parties should designate which party would be responsible for costs related to any relocation including movers, moving supplies, motor vehicles leased or rented for the move, purchase or lease of new residence, payment of security deposit on a new residence, purchase or lease of furniture, fixtures, rents and mortgage payments. In addition, although Florida law is already clear on the issue, a cohabitation agreement should also expressly provide that once a terminating event has occurred, one need not continue to perform the contract.28

Cohabitation agreements should also provide that prior to the execution of the agreement, the parties exchanged written schedules, inventories, or financial statements providing for all assets and obligations. Each party’s financial obligations should appear reasonable in light of the parties’ respective incomes.

In conclusion and in light of the recent trend toward cohabitation while unmarried, couples should memorialize their agreement dictating the terms and obligations of their relationship respective to one another and to their child, if any. Prior to SB498 becoming law, it was best not to record such agreement in Florida public records to avoid any allegations of committing the misdemeanor of “lewdly and lasciviously” living together without being married. These concerns have now been eliminated and couples are to make their agreements public record.

Anya Cintron Stern, Esq. is an associate at Marilyn Colon, P.A. where she focuses her practice on all aspects of marital and family law. She began her legal career as an Assistant Public Defender at the Miami Dade Public Defender’s Office where she gained valuable litigation experience handling over 50 jury and bench trials.

Endnotes


4. Forrest v. Ron, 820 So.2d 1163 (Fla. 3d DCA 2002); Evans v. Wall, 542 So.2d 1055 (Fla. 3d DCA 1989); Posik v. Layton, 695 So.2d 759 (Fla. 5th DCA 1997); Craig v. Feldman, 673 So.2d 903 (Fla. 2d DCA 1996); Stevens v. Muse, 562 So.2d 582 (Fla. 4th DCA 1990).


6. Id.

7. Posik v. Layton, 695 So.2d 759 (Fla. 5th DCA 1997).

8. Id. continued, next page
An Analysis of the Times
from preceding page

9 Id.
10 Id. (emphasis supplied).
11 Dietrich v. Winters, 798 So.2d 864 (Fla. 4th DCA 2001) (citing Crossen v. Feldman, 673 So.2d 903 (Fla. 2d DCA 1996); Poe v. Estate of Levy, 411 So.2d 253 (Fla. 4th DCA 1982).
12 Evans v. Wall, 542 So.2d 1055 (Fla. 3d DCA 1989).
13 Id.
14 Botsikas v. Yarmark, 172 So.2d 277 (Fla. 3d DCA 1965); Evans v. Wall, 542 So.2d 1055 (Fla. 3d DCA 1989).
15 Poe v. Estate of Levy, 411 So.2d 253 (Fla 4th DCA 1982).
16 Id.
17 Id.
18 Id.
19 Dietrich v. Winters, 798 So.2d 864 (Fla. 4th DCA 2001).
20 Crossman v. Feldman, 673 So.2d 903 (Fla. 2d DCA 1996).
21 Id.
22 Id.
23 Id.
24 Forrest v. Ron, 820 So.2d 1163 (Fla. 3d DCA 2002); Posik v. Layton, 695 So.2d 759 (Fla. 5th DCA 1997); Steven v. Muse, 562 So.2d 852 (Fla. 4th DCA 1990); Poe v. Estate Levy, 411 So.2d 253 (Fla. 4th DCA 1982).
25 Forrest v. Ron, 820 So.2d 1163 (Fla. 3d DCA 2002).
26 Steven v. Muse, 562 So.2d 852 (Fla. 4th DCA 1980).
27 Postik v. Layton, 695 So.2d 759 (Fla. 5th DCA 1997) (citing City of Miami Beach v. Carner, 579 So.2d 248 (Fla. 3d DCA 1991).
28 Postik v. Layton, 695 So.2d 759 (Fla. 5th DCA 1997).
29 Postik v. Layton, 695 So.2d 759 (Fla. 5th DCA 1997) (citing City of Miami Beach v. Carner, 579 So.2d 248 (Fla. 3d DCA 1991).

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“The Honorable Raymond T. McNeal Professionalism Award” – Chair Maria C. Gonzalez, Magistrate Robert Jones, and the Honorable Raymond McNeal.
A petition for dissolution of marriage must be filed in the single county where the parties last resided as a married couple with the common intent to remain married. *Bowman v. Bowman*, 597 So. 2d 399, 399-400 (Fla. 1st DCA 1992). While this works well in the majority of cases, it can lead to serious hardship and injustice. Sadly, neither our legislature nor our courts have addressed this shortcoming in family law practice. This article seeks to present justification for a statutory amendment to Florida Chapter 61, which can address and correct this longstanding deficiency in family law practice and procedure.

**Venue Generally**

Florida Statutes §47.011, states that “Actions shall be brought only in the county where the defendant resides, where the cause of action accrued, or where the property in litigation is located. This section shall not apply to actions against nonresidents.” In tort or contract actions, litigants can often choose from multiple venues. This is important not only for the initiating party, but for all parties. This statutory flexibility creates the “right” of any party to seek to transfer venue when circumstances make such action appropriate.

As the family law cases discussed in this article demonstrate, no party may seek to transfer venue of the dissolution action under Florida’s change of venue statute. By limiting the venue to file a dissolution action to a “single” county, no party may seek transfer of the action. Specifically, Florida Statute Section 47.122, provides, “For the convenience of the parties or witnesses or in the interest of justice, any court of record may transfer any civil action to any other court of record in which it might have been brought.”

**Venue in Dissolution of Marriage Actions**

The Florida Supreme Court pronounced, “To protect the beneficial purposes of both the marriage dissolution legislation and the venue statute, we are required to look ... to the single county where the marriage last existed.... Ordinarily the court will recognize that county naturally, as do the parties themselves, and the venue problem will be no more difficult than finding where the marriage partners called home.” 341 So.2d at 772 (emphasis added). *Goedmakers v. Goedmakers*, 520 So. 2d 575, 578 (Fla. 1988).

This Goedmaker Court, however, failed to consider the extraordinary circumstances which may arise in the context of a dissolution context, especially those involving children. Without acknowledging that a “single” venue denies the parties to a dissolution proceeding the right to seek transfer, the Court shackled every family law litigant to the one court, in one county. The Court’s decisions have led to harsh results in dissolution proceedings. One example, is *McGee v. McGee*, 145 So. 3d 955, 957 (Fla. 1st DCA 2014).

In *McGee*, the First District Court of Appeal examined a dissolution action involving domestic violence and a respondent wife, fleeing to protect herself and her minor child. As the *McGee* court described:

“This divorce proceeding was initiated in September 2013 by Former Husband in Leon County, where, according to both parties’ Uniform Child Custody Jurisdiction and Enforcement Act (“UCCJEA”) affidavits, the parties lived as a married couple with their minor child. During September 2013, Former Husband and Former Wife got into a heated argument, and Former Husband attempted to leave the marital home with the minor child. When Former Wife tried to stop him, according to the ensuing probable cause affidavit for his arrest, he punched her in the face multiple times. Former Husband was arrested for domestic abuse, and an investigation by the Department of Children and Families (“DCF”) ensued. In the meantime, Former Wife left Leon County to stay with her mother in Miami–Dade County, and the DCF investigation was transferred there; she also sought and received, a temporary injunction against domestic violence against Former Husband from the Miami–Dade Circuit Court.”

*McGee* at 956.

**continued, next page**
Certainly, this “fact pattern” does not involve the majority of dissolution proceedings. However, domestic violence is real and too often a spouse who remains in close proximity to her abuser is beaten or worse. Is it not reasonable to flee to the safety and security of family after being beaten and your child put at risk?

The respondent Wife argued that Miami-Dade was more convenient for the witnesses and that the interests of justice supported a change of venue. Specifically, the McGee Court opinion reflected the following additional facts:

(1) All the teachers, therapists, counselors, GALs, DCF workers who interacted with the child following the domestic violence are all in Miami-Dade, as well as the records of the child's interviews, therapy, counselling, and schooling;
(2) Former Wife was forced to flee to Miami for her and the child's safety due to Former Husband's violence;
(3) The financial burden of Former Wife traveling to Leon County to litigate the dissolution;
(4) The Leon County arrest/probable cause affidavit of Former Husband;
(5) Former Wife's Petition for Injunction of Protection against Domestic Violence; and
(6) The Miami-Dade County circuit court's issuance of a Temporary Injunction against Domestic Violence in Former Wife's favor against Former Husband.

McGee at 957.

Despite these egregious circumstances and an apparent desire to “do the right thing” the McGee Court determined that it could not. The court’s hands were tied. The McGee court explained that it had NO ability to even consider a change of venue under Florida Statute Section 47.122. Specifically, the court ruled, “While we sympathize with Former Wife’s arguments, they fail...

the transfer statute—despite providing reasons a case may be transferred—expressly limits the ability of a court to transfer a case to “any other court of record in which [the proceeding] might have been brought.” § 47.122, Fla. Stat. (emphasis added),...
The limitation of the transfer to “any other court of record in which it might have been brought” in section 47.122, means that any transfer is limited to a county that would have been a proper venue initially. Vitale v. Vitale, 994 So. 2d 1242 (Fla. 4th DCA 2008); Tindall v. Smith, 601 So. 2d 627 (Fla. 2d DCA 1992). A court cannot transfer venue for the convenience of the parties or witnesses, or in the interests of justice, to a forum that would not have been appropriate for the filing of the complaint or petition in the first place.

McGee at 957-58 (emphasis in original).
At a time when practitioners, judges and the judicial system as a whole are to be more “aware” and more “sensitive” to the plight of those involved in family and domestic violence actions, the time appears ripe for a commonsense approach to correcting these draconian results. Indeed, venue in dissolution actions deserves a place in Florida Statute Chapter 61. Certainly, that chapter already contains special venue provisions for Support of Children; Parenting and Time-Sharing, Fla. Stat. § 61.13(2)(d); Enforcement and Modification of Support, Maintenance, or Alimony Agreements Or Orders, Fla. Stat. § 61.142; Alimony and Child Support; Additional Method for Enforcing Orders and Judgments; Costs, Expenses, Fla. Stat. § 61.17.3.

Proposed Statutory Amendment

The venue deficiency in dissolution matters can be remedied by the following proposed amendment: “Florida Statute Section 61.052(9): Venue for a cause of action for dissolution of marriage shall accrue in the county where the parties last resided as a married couple with the common intent to remain married. However, when there exists extraordinary circumstances justifying a party’s departure from such county, the action may be brought or transferred in accordance with Florida Statute Section 47.122.” Such provision is consistent with Florida courts focus on “a single county;” however, it creates a limited exception to prevent unnecessary hardship. In addition, this narrow statutory exception protects against forum-shopping in dissolution matters. Compare Goedmakers v.

Goedmakers, 520 So. 2d 575, 579-80 (Fla. 1988) (permitting plaintiffs to bring divorce actions in any county where either of the parties’ property is located would defeat the primary purpose of the venue statute).

Amending Chapter 61 as discussed above provides the needed statutory flexibility for parties to seek transfer of venue in extraordinary cases. Battered spouses and at-risk minor children deserve such consideration. Allowing an endangered spouse’s county of safe retreat to be considered an appropriate venue appears justified. There is little doubt under the facts of McGee that the convenience of the parties, the witnesses and the interest of justice all demand such a result.

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Endnotes

1 Fla. Stat. § 61.13(2)(d), Support of Children; Parenting and Time-Sharing states: The circuit court in the county in which either parent and the child reside or the circuit court in which the original order approving or creating the parenting plan was entered may modify the parenting plan. The court may change the venue in accordance with s. 47.122.

2 Fla. Stat. §61.14, Enforcement and Modification of Support, Maintenance, or Alimony Agreements Or Orders states: (1)(a) When the parties enter into an agreement for payments for, or instead of, support, maintenance, or alimony, whether in connection with a proceeding for dissolution or separate maintenance or with any voluntary property settlement, or when a party is required by court order to make any payments, and the circumstances or the financial ability of either party changes or the child who is a beneficiary of an agreement or court order as described herein reaches majority after the execution of the agreement or the rendition of the order, either party may apply to the circuit court of the circuit in which the parties, or either of them, resided at the date of the execution of the agreement or reside at the date of the application, or in which the agreement was executed or in which the order was rendered, for an order decreasing or increasing the amount of support, maintenance, or alimony, and the court has jurisdiction to make orders as equity requires, with due regard to the changed circumstances or the financial ability of the parties or the child, decreasing, increasing, or confirming the amount of separate support, maintenance, or alimony provided for in the agreement or order... (3) This section is declaratory of existing public policy and of the laws of this state. (emphasis added)

3 Fla. Stat. § 61.17, Alimony and Child Support; Additional Method for Enforcing Orders And Judgments; Costs, Expenses states: (1) An order or judgment for the payment of alimony or child support or either entered by any court of this state may be enforced by another chancery court in this state in the following manner: (a) The person to whom such alimony or child support is payable or for whose benefit it is payable may procure a certified copy of the order or judgment and file it with a complaint for enforcement in the circuit court for the county in which the person resides or in the county where the person charged with the payment of the alimony or child support resides or is found. (emphasis added)

4 The authors acknowledge that the Bowman Court used “husband and wife” but believe that “a married couple” is a more appropriate term following Obergefell v. Hodges, 135 S. Ct. 2584, 2604, 192 L. Ed. 2d 609 (2015).
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Juvenile Courts and Special Immigrant Juvenile Status

By Melisa Peña, Esq., Coral Gables, FL & Fritznie Jarbath, Esq., Coral Gables, FL

Special Immigrant Juvenile Status (hereinafter “SIJS”) is an immigrant classification enumerated under the Immigration Act of 1990 for undocumented children present in the United States who have been abused, neglected or abandoned by a parent. In order for a minor to benefit from this status, there must be a determination of dependency by the state court. Until recently, SIJS had not been scrutinized under substantial appellate activity; however there has been an increasing trend to deny these petitions and expand on the limited language provided in the Florida Statutes. As a result, family practitioners will need to pay closer attention when accepting and now litigating these cases.

In Florida, the statute that governs eligibility under SIJS is Fla. Stat. § 39.5075(1)(b), which states that a child may be eligible for special immigrant juvenile status under federal law if:

1. The child has been found dependent based on allegations of abuse, neglect, or abandonment; 2. The child is eligible for long-term foster care; 3. It is in the best interest of the child to remain in the United States; and 4. The child remains under the jurisdiction of the juvenile court.

The federal law governing SIJS for immigration purposes can be found in 8 U.S.C. § 1101 (a)(27)(J). It defines a Special Immigrant Juvenile as an immigrant who is present in the United States

(i) who has been declared dependent on a juvenile court located in the United States . . . , and whose reunification with 1 or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under state law; (ii) for whom it has been determined in administrative or judicial proceedings that it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence; and (iii) in whose case the Secretary of Homeland Security consents to the grant of SIJ status.

At first glance, this does not appear to be a difficult standard. Does this mean that any child simply claiming abuse, neglect or abandonment qualifies? No. In application, these cases are very fact specific and the way the allegations are pled and litigated in court will make a difference. In some instances, there has been very little participation by the governing agency, which means a lack of investigation of the allegations, and as a result, the appellate courts have been increasingly involved.

For example, In re: Y.V., 160 So. 3d 576 (Fla. 1st DCA 2015), the lower court denied the petition because they believed the minor's desire to seek SIJS was intended to circumvent immigration laws. The lower courts cited a lack of jurisdiction as a reason to deny the petition. Id. However, the appellate court held that the undocumented minor's intent to seek SLJ status does not invalidate the petition for dependency as long as it is determined that the child is in fact dependent on the basis that he or she was abused, neglected or abandoned pursuant to Florida Statute. Id. at 579. The court further stated that the juvenile court should determine whether a petition for dependency has merit, and then it is up to the federal authorities to make the ultimate determination as to whether SIJS should be granted. Id. That holding has been distinguished by subsequent rulings, as the courts continue to voice their disapproval with the dual motives behind filing dependency petitions related to an application for SIJS.

While the appellate courts overruled the denial of the petition above, the subsequent cases upheld the lower's court's denial. Three months after In re: Y.V., the courts decided In the Interest of K.B.L.V., 176 So. 3d 297 (Fla. 3d DCA 2015), which reiterated that “the purpose of dependency laws of this state is to protect and serve children and families in need, not those with a different agenda.” Id. at 299 (concurring J. Shepard). Amidst the increasing number of private petitions for SIJS purposes, the courts are outlining distinctions in their opinions to help keep the original intentions of Fla. Stat. § 39.

For example, In re: K.B.L.V., the court expressed its frustrations with the following language in Justice Shepard concurring opinions.

It is as if we are customs agents, although the federal government continued, next page
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will make the final decision. I admit to an erosion of roles between state and federal responsibilities in our federal system in recent times. However, we are not yet colonies or territories of the United States government. We correctly decline to subordinate ourselves to the whim of the United States Congress in the case.

The purpose of dependency laws of this state is to protect and serve children and families in need, not those with a different agenda.

- *Id.* at 301.

The appellate court upheld the denial of the dependency petition because there was no “continued threat of harm” to the minor child. *Id.* at 299. The court further stated, “incidents of alleged abuse found to be too remote in time will generally not support a dependency adjudication.” *Id.* The Court made a similar finding a few months later. See *In the Interest of S.A.E.*, 184 So.3d 615., (*Fla* 1st DCA 2016) (decided on Feb. 2, 2016).

A week after *K.B.L.V.,* the court decided *O.I.C.L. v. Dep’t of Children & Fam.*., 169 So. 3d 1244 (*Fla* 4th DCA 2015), holding that “a child living in conditions of poverty, in and of itself, is insufficient to sustain a finding of either abandonment or neglect, for purposes of adjudication of dependency.” A few months later, the third district made a similar decision. The court held *In re: S.A.R.D.,* that without evidence to demonstrate that the Mother willfully failed to provide financially for the children, there would be no finding of dependency. *In re S.A.R.D.,* 182 So. 3d 897 (*Fla.* 3d DCA 2016). More notably however, was the court’s frustration with the use of the court system by undocumented children to seek status rather than protection from abuse, neglect or abandonment.

Obtaining an order of dependency and Special Immigrant Juvenile (SIJ) status under the Immigration Act of 1990 allows the child who entered the United States or stayed in the United States illegally to jump to the front of the line of those who are attempting to immigrate to the United States lawfully and to bypass many of the requirements established for regular legal immigration.

Primary goal of dependency statute is to preserve the family structure, not to provide a gateway to citizenship for children who are entering this country illegally in search of a better life.

- *In re S.A.R.D.,* 182 So. 3d 897 (*Fla.* 3d DCA 2016)

While it is important to seek the best outcome for the client, family practitioners should be cognizant of the changing attitudes towards these types of petitions. As time has gone by, the Courts are being more careful with private petitions of dependency alleging abuse or neglect without objection or participation by the government agency.

In *O.I.C.L.*, the court listed a few factors to be considered. The factors include:

- the nature severity and frequency of abuse, neglect or abandonment
- the time lapsed between the abuse, neglect or abandonment and the filing of the petition
- whether the child is presently at a continued, but not necessarily imminent risk of harm before turning 18 years old
- the availability of a caregiver capable of providing both supervision and care;
- and any other relevant factors unique to this particular case.

The Courts are continually making decisions that would affect dependency determinations in Florida. Family practitioners filing a private dependency petition on behalf of a child that is also seeking SIJ, should work with an immigration practitioner. It is likely many of these children are simultaneously in removal proceedings in immigration court. There are also local programs that are reaching out to practitioners in an effort to fulfill the increased demand for minors to have representation in court. The 2016 Child Advocacy Project of Dade Legal Aid, which provides critical legal representation to the community’s fragile foster youth and teens in dependency, is looking for volunteer attorneys to take Pro Bono cases. They are willing to guide these attorney’s within the Juvenile Court System.

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Giving Birth to A Better Understanding of Birth Certificates

By Alice H. Murray, Esq. Shalimar, FL

As a result of the historic and controversial U.S. Supreme Court decision in Obergefell v. Hodges, 135 S. Ct. 2584 (2015), same sex marriage is now legal across the country. While legal scholars may debate the merits of the 5-4 decision and the ramifications of this ruling, even a small child knows what comes next after same sex marriages. The answer is in the playground song “K-I-S-S-I-N-G”--first comes love, then comes marriage, then comes a baby in a baby carriage.

But who will be listed as the parents on the baby’s birth certificate when a same sex couple has a child? The decision in Chin v. Armstrong, filed August 13, 2015, in the Northern District for the State of Florida may answer that question. The three plaintiff couples in Chin are same sex couples who were legally married when one of the spouses gave birth to a child. In each instance, the State of Florida refused to issue “accurate” two-parent birth certificates with the mother’s spouse being listed as the other parent. The Chin plaintiffs claim that the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the U.S. Constitution were violated by Florida’s unwillingness to provide them with a birth certificate listing both spouses as parents as the State would do for married opposite sex couples. They also allege that the defendants’ refusal to provide an “accurate” birth certificate precludes their ability to establish parental rights or demonstrate authority to take action on their children’s behalf.

Clearly, the plaintiffs in Chin view a birth certificate as a crucial and essential government issued document. Yes, a birth certificate is a piece of paper, but it is not just any piece of paper. It defines who one is by giving a legal name. The document also identifies where one came from and with what people (family) one is associated. A birth certificate is also a tool to obtaining other important documents, such as a passport. Given the value and importance of a birth certificate, it would behoove the legal practitioner to have a good understanding of this government issued paper, the one legal document which all clients, with or without children, are most likely to have.

Definition And Value

What exactly is a birth certificate? F.S. Chapter 382, Vital Statistics, provides no express statutory definition of the term. According to Black’s Law Dictionary, a birth certificate is a formal document which certifies as to the date and place of one’s birth and his/her parentage, which document is issued by an official in charge of such records. Given the basic definition of a birth certificate as evidence of one’s parentage, the Chin plaintiffs are understandably concerned that they cannot obtain this government document showing both spouses of a marriage legally in existence when the child was born as the child’s parents.

A birth certificate is a vital record that is truly vital. Archbishop Desmond Tutu has recognized the importance of a birth document because it “proves who you are.” Tutu describes a birth certificate as: “...a small piece of paper but it actually establishes who you are and gives access to the rights and the privileges of...citizenship.”

In fact, Tutu has characterized an unregistered individual as a “nonentity” –someone who does not officially exist.

The children of the Chin plaintiffs do have birth certificates and can prove that they officially exist. Their litigating parents, however, would argue that simply having a birth certificate for a child is not enough; they believe that a birth certificate should establish not only who a child is but whose child it is. Specifically, the Chin plaintiffs take the position that the birth certificate issued must be an “accurate” birth certificate bearing the correct information; in their case, it would be to show not just one parent, but two parents of the same gender.

The issue of an “accurate” birth certificate has made headlines before, particularly during Barack Obama’s presidential campaigns. So-called “birthers” accused Barack Obama of having a birth certificate that incorrectly states his place of birth, i.e., Hawaii rather than Kenya. The accuracy of a presidential candidate’s birthplace is crucial because, pursuant to the U.S. Constitution, only natural born citizens are eligible to be president. The controversy ultimately led President Obama to post a copy of his long form birth certificate on the White House’s website.

While the fate of a nation’s leadership may not hang in the balance...
Understanding Birth Certificates
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for the Chin plaintiffs, the ability to manage a family might. For example, one spouse/parent may be unable to register his/her child for school if that parent’s name does not appear on the child’s birth certificate. One’s ability to take necessary actions as a parent is impeded or precluded without documentation, i.e., a birth certificate, that he/she is indeed viewed as the child’s parent in the eyes of the law.

Birth Registration

So why are birth certificates issued? The short answer is that their issuance is a legal requirement. In the United States, state laws mandate birth certificates be completed for all births.13 The federal government does not distribute certificates for vital records; the issuance of birth certificates is a state function.14 Federal law, however, requires national collection and publication of birth and other vital statistics data; this task is accomplished through the National Vital Statistics System.15 With 3,999,386 births reported in 2010, the states have a massive undertaking to record information on each birth.16

An individual document is filed for each and every birth in this country; this document is typically called a Certificate of Live Birth.17 The U.S. National Center for Health Statistics devises standard forms that states are encouraged to use to document births.18 In 1900 the Census Bureau produced the first standard certificates used to register live births.19 The form has been revised eleven times since its creation.20

Until 1917, birth registration was not required by Florida law; nevertheless, there are some records on file in this state going back to 1865.21 Current Florida law imposes a deadline for filing a certificate for each live birth that occurs in this state; such a certificate must be filed within five days after the birth.22 The certificate is filed with the local registrar of the district in which the birth occurred.23 If the birth occurs in a hospital or other health care center, the medical facility has the responsibility for preparing the certificate.24 For births occurring outside of a medical facility (such as a home birth), the licensed medical professional in attendance at the birth or immediately thereafter must prepare and file the certificate.25

Types of Birth Certificates

Birth certificates come in various forms. Not only may they vary from state to state, but states may issue different types of birth certificate. A long form birth certificate is an exact photocopy of the original birth record prepared by the hospital or attending doctor when the child was born; this type of birth record is also known as a book copy.26 It contains information on the child’s parents (date/place of birth, race, etc.) and information on the attending doctor.27 A short form birth certificate confirms the existence of the actual birth record; this type of birth record is also known as a computer certification.28

Since the mid-1980’s Florida has issued computer certifications.29 This type of birth record is a computer certification on safety paper meeting requirements set by Homeland Security and other groups; it contains an embossed seal.30 Certifications for years 2004 to present contain the following information:

–child’s name;
–date of birth;
–sex;
–time of birth;
–weight at birth;
–place of birth (city, county and location); and
–information on parent(s).31

Certifications for years 1917 to 2003 provide the child’s name, date of birth, sex, county of birth and parent’s/parent’s names.32 Conspicuously absent from F.S. Section 382.002, the definitions section of Chapter 382 of the Florida Statutes (Vital Statistics), is any definition of a “parent.”

Commemorative birth certificates are issued by many hospitals nationwide; these certificates often bear the infant’s footprint. Hospital-issued birth certificates are merely keepsakes and are not legally acceptable proof of age or citizenship.33 In Florida, for an additional fee, the State will issue a commemorative birth certificate suitable for display which may bear the state seal and the present Governor’s signature.34 The certificates are decorative; they contain calligraphy style printing and gold embossed state seals.35

Who Is Listed On A Birth Certificate

Any birth certificate issued in Florida will bear at least two names—that of the registrant (i.e., person whose birth is being registered) and at least one parent of the registrant. When a woman is married at the time she gives birth, F.S. §382.013(2)(a) requires that her husband’s name be listed on the birth certificate unless paternity has otherwise been established by a court.36 Although the husband may not be the child’s biological father, he is the legal father because of Florida law’s presumption of legitimacy, i.e., a child born in wedlock is the issue of the marital partners.37 The statute in its current form does not expressly address what happens when a woman married to another woman gives birth to a child while married, the case with the three plaintiff couples in Chin. Unless F.S. §382.013(2)(a) is revised to substitute “spouse” for “husband,” the express wording of that statute would not require the Chin defendant Kenneth Jones, State Registrar, to issue a birth certificate listing two parents to the Chin plaintiffs.38

The existence of a legal father who is placed on a birth certificate when his wife gives birth to a child who is not his biological child puts the Chin buzzword of “accuracy” in a different light. “Accu-rate” in the birth certificate world is not a factual/biological
If an unmarried woman gives birth to a child, she cannot on her own add the name of a father to her child’s birth certificate; an unmarried biological father can only be placed on the birth certificate initially if he has signed an affidavit acknowledging paternity of the child. While undeniably, the child has a biological father, he is not listed because, in the eyes of the law, he has not been established to be the child’s father either by his own admission or by a court determination. Thus, the birth certificate is “accurate” from a legal point of view in showing only one recognized parent of the child.

When a child is adopted by a same-sex couple, the Bureau of Vital Statistics issues a birth certificate listing both members of the couple as the child’s parents, i.e., parent one and parent two. A birth certificate issued for the child of a married opposite sex adoptive couple will list a mother and father for the child. These birth certificates are “accurate” in that they record parents who have a legally established relationship to the child; such relationship exists either because a court has conferred parental status through a judgment of adoption or because the parents’ marriage has conferred parental status on the non-birthing spouse as statutorily recognized and required by F.S. §382.013(2)(a).

Confidentiality Of Birth Records

Generally birth records are confidential and except from the provisions from Florida’s public records law, F.S. §119.07(1). In particular, information concerning parenthood, marital status and medical details are expressly characterized as confidential and exempt from the provisions of F.S. §119.07(1) except for department approved health research purposes. As a result of certain court proceedings, a new certificate of birth may be issued, such as in an adoption or paternity case; in those instances, the original certificate of birth is placed under seal which may not be broken except by court order.

Obtaining A Florida Birth Record

Because of the confidentiality of birth records, certified copies of such records may only be issued to a limited category of individuals/entities. The following may obtain a certified copy of the birth record upon payment of the prescribed fee and submission of an appropriate request:

1. A registrant of legal age (18);
2. A parent, guardian or legal representative of a registrant;
3. A deceased registrant’s spouse, child, grandchild or sibling of legal age or to the representative of such a person upon receipt of a death certificate;
4. Any person if the record is over 100 years old and not under seal pursuant to court order;
5. A law enforcement agency for official purposes;
6. Any state or federal agency for official purposes with department approval.

Birth records may also be issued upon court order. The Florida Department of Health has a form Application For Florida Birth Record; DH Form 726 may be used by registrants, parents, guardians and legal representatives to order computer certifications or photocopies of birth records. Current and valid photo identification must be provided along with the requisite fee and completed form; a driver’s license, state ID card, passport or military ID card are acceptable forms of picture identification.

Again going back to Chin, the spouse of the mother who gave birth does not appear on the child’s birth certificate. Accordingly, that spouse would be unable to obtain a copy of the child’s Florida birth record because she would not be listed as a “parent” thereon. Admittedly a birth certificate could be obtained by court order, but such action to obtain the document would be time-consuming, expensive and burdensome.

Use Of Birth Certificates

Birth certificates may be used to obtain other important forms of identification and to establish entitlement to receive various benefits. They are typically produced to obtain a driver’s license and to obtain a passport. A certified copy of one’s birth certificate may be submitted to establish citizenship in order to receive a passport. The Social Security benefits application process requires that an individual provide proof of U.S. citizenship; if one is born in the United States, a birth certificate is proof of U.S. citizenship and may be submitted to meet that requirement. If a child is attempting to obtain benefits through a deceased parent, the absence of that parent’s name on the birth certificate would likely result in a denial of that application. Accordingly, a non-birthing parent in Chin would not have assurance that her child could receive benefits through her.

Changes To Birth Certificates

Birth certificates are not like the Ten Commandments set in stone and unchangeable. Under certain circumstances, changes may be made to a registrant’s birth certificate, either by the registrant, by a registrant’s parent(s) or by court order.

Corrections/Changes To Infant’s Birth Certificate. Court action is not necessary to amend a child’s name prior to his/her first birthday. The parents listed on the birth certificate may sign an affidavit and pay the prescribed fee to effect the change. Name Changes. An adult may initiate court action to change his/her name legally. The proposed judgment submitted to the judge in that case should include language directing the Department of Health to file a new birth certificate reflecting the

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new name; failure to include such language in the judgment will mean that the birth record will merely be amended by attaching a DH Form 427 (Report Of Legal Name Change) to the original birth certificate and become a part of the permanent record. Upon express court order, the department will file a new birth certificate; the original birth certificate will be removed and placed under seal along with the order granting the name change.

Establishment Of Paternity. If, as a result of a paternity action, the court determines that a man is the child’s biological father, his name must be entered on the child’s birth certificate in accordance with the finding and order of the court. Since paternity cases take time, the original birth certificate will already have been issued, requiring an amendment thereto.

Conclusion

As attorneys are fond of saying, “If it isn’t in writing, it didn’t happen.” A birth certificate is a legally recognized writing to prove you exist or to prove that you are a parent. This piece of paper opens the door to various rights, privileges and authority not only for the registrant but also for a parent listed thereon. A birth certificate is a crucial tool in establishing family relationships and obtaining benefits. Unless it is apparent that you are a parent from the face of this document, one will be impeded in acting as a parent. Since the Florida Statutes which govern these vital records fail to define who a parent is, litigation and confusion have ensued from the recent advent of legally recognized same sex marriages in Florida where such couples take the natural next step and have children. Legislative and judicial attention will be required to hash out who may be listed on these children’s birth certificates. Regardless of the disposition of the Chin case, its filing has brought birth certificates to the forefront of public consciousness. For attorneys, laboring to gain knowledge of this invaluable document and its uses will result in the delivery of better legal services.

Alice H. Murray, Esq. has handled adoptions in the Florida Panhandle for over 25 years. She graduated from the University of Georgia and the University of Dayton School of Law. Ms. Murray is a member of the Florida Adoption Council, currently serving as Secretary of its Board of Directors.

Endnotes

2. Id.
3. Id. at p. 3.
4. Id.
8. Tutu calls for child registration.
15. Birth Data.
16. Id.
18. Id.
20. Id.
23. Id.
24. Id. at (1)(a).
25. Id. at (1)(b).
27. Id.
28. Id.; DH 726.
30. Id.
31. DH 726.
32. Id.
40. Chin at p. 2.
42. Id.
45. Id. at 7.
46. DH 726.
47. Id.
49. U.S. Passports & International Travel.
52. Id.
55. Id. at (b).
U.S. Supreme Court Justice Antonin Scalia: An Originalist in a Constructionist’s World

By Christopher W. Rumbold, Esq., Wilton Manors, FL

“We remember his incisive intellect, his agile wit, and his captivating prose. But we cannot forget his irrepressible spirit.”

Chief Justice John Roberts

A Family Man

Scalia was born on March 11, 1936 in Trenton, New Jersey and grew up in Queens, New York, as the only child to Salvadore Eugene, an emigrant from Sicily, and Catherine Panaro Scalia, a first generation Italian-American. Scalia and his Wife, Maureen, were married on September 10, 1960. The couple had 9 children and were grandparents to 36 grandchildren. When asked during an interview why they had so many children, Maureen responded that they were “overachievers.”

Scholar to Solicitor


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Introverted, Impartial, Inoffensive and Innocuous

Scalia, with nearly 30 years on the bench, was the longest-serving member of the current court and has been considered the most influential justice of the last quarter-century. He is quoted as stating that, “So long as you stay awake on the bench and don’t drool, there’s nothing they can do about it [lifetime appointments].” During his tenure, he participated in 2,358 cases, and he authored 248 majority opinions, 216 dissents, 17 judgments, and 129 regular and 166 special concurrences. Whether in the opinion of the court or as in the following dissent, subtlety was not Scalia’s forte – “The operation was a success, but the patient died. What such a procedure is to medicine, the Court’s opinion is to law.”

Scalia’s firm views on most matters regularly caused his colleagues to rally around or rail against his viewpoint. Scalia often, but not always, joined his fellow Republican appointees – Roberts, Thomas, Kennedy and Alito polarizing Democratic appointees – Ginsburg, Sotomayor, Breyer and Kagan. Justice Ginsburg stated that, “when I wrote for the Court and received a Scalia dissent the opinion when ultimately released was better than my initial circulation. Justice Scalia nailed all the weak spots – “the applesauce” and “argle bargle” – and gave me just what I needed to strengthen the majority opinion.” Interestingly, no current Justice has ever served on the Court without Scalia as a colleague.

Scalia was a staunch originalist, insisting that “judges should render constitutional decisions based on the eighteenth-century understanding of the text.” When asked what is a “moderate interpretation” of the Constitution’s text, Scalia replied, “Halfway between what it really means and what you would like it to mean.” Scalia opined that the Constitution was not supposed to facilitate change but to impede change to protect citizens' basic fundamental rights and responsibilities, and, as such, he abhorred “judicial activism” instead believing that legislative change should result from and reflect the will of the people. On the issue of originalism versus constructionism, Scalia is quoted as stating, “The Court must be living in another world. Day by day, case by case, it is busy designing a Constitution for a country I do not recognize.”

“Every time the Supreme Court defines another right in the Constitution, it reduces the scope of democratic debate.”

“Our manner of interpreting the Constitution is to begin with the text, and to give that text the meaning that it bore when it was adopted by the people . . . this is such a minority position in modern academia and in modern legal circles, that on occasion I’m asked when I’ve given a talk like this a question from the back of the room – Justice Scalia, when did you first become an originalist? – as though it is some kind of weird affliction that seizes some people – ‘when did you first start eating human flesh?’

Similarly, Scalia disfavored the concept of stare decisis stating, “I took an oath to support and uphold the constitution … but I didn’t take any oath to uphold my predecessor’s misreading of the Constitution.” Quixotically, for instance, Scalia sought to reverse Roe v. Wade in subsequent abortion cases, while he sought to uphold Bowers v. Hardwick in subsequent sexual orientation cases.

And Then There Were Eight

Scalia’s death represents only the third time in our Nation’s history when a Supreme Court Justice died during a president’s final term in office. In 1988, in his last year as President, Reagan appointed and Kennedy was confirmed to the Court, while in 1969, in his last year as President, Johnson’s attempted appointment failed. Historically, pending the 1844 presidential election, a Supreme Court seat sat vacant for 2 years, 3 months and 18 days. It may be unclear whether President Obama will make an appointment during his last months in office, but it is clear, as McConnell has threatened, that any nomination will be blocked. As such, the Court may remain incomplete until at least January 20, 2017. Practically, on March 22, 2016, only days after Scalia’s passing, the Court’s paralysis was axiomatic as evidenced by its simple ruling, “The judgment is affirmed by an equally divided court.” Presently, ten (10) cases are scheduled for oral argument during the Court’s April 18, 2016 term, and approximately forty-six (46) cases previously heard by the Court await ruling and written opinion.

Larger than Life - Legacy

Scalia passed away on February 13, 2016. His legacy and larger than life personality live on – not just through his family, legal theory or jurisprudence but also through his wit, wisdom and word. In honor and to honor the outspoken late-Justice, I recommend visiting any number of Scalia insult generating websites – particularly, Slate Magazine/Slate.com for your own personalized insults, or Mother Jones Magazine/motherjones.com for generalized and genuinely entertaining “scalia-isms.”

Christopher W. Rumbold, Esq., Principal of the LAW OFFICE OF CHRISTOPHER W. RUMBOLD, PLLC, situated in Wilton Manors, litigates and mediates complex, high-net worth matters in the Tri-County region as he has done for more than a decade. He is AV Preeminent rated, regularly listed in SuperLawyers (2011-2015), a Member of the National Association of Distinguished Counsel and he serves the Florida Bar as a member of the Family Law Section’s Executive Council, Co-Chair of its Legislation Committee and Vice-Chair of its Nomenclature Committee. Additionally, he frequently publishes and presents on various family law topics.
Is Technology Ruining The Legal Profession for Family Lawyers?

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

I was asked to write an article relating to technology. But what do I know about technology? Isn't that why firms, including mine, hire IT guys? After bouncing a few ideas off of the editor, I decided to try and answer this question, “Is technology ruining the legal profession for family lawyers?”

I haven’t been practicing law as long as many of you out there. I am sure there are those that can tell stories of when motions were carved into stone tablets and hand delivered by horse and buggy. However, I can only remember back to the first firm that I worked for. That firm, at the time, was not very technologically advanced. There was no email correspondence. We typed letters on letterhead and mailed or faxed them. Calendaring was done in a big red book with a pencil, not an electronic/online calendar. (Don’t you dare write in the book in pen!) The firm did have a fax machine which was probably the most advanced piece of electronics in the office. Right as I started, the firm got dial up internet on one computer, but that was only used when someone wanted to do research on Westlaw. So with that background in mind, let me try to answer the question.

There is no doubt that technology has improved the practice of family law in many ways. Technology has made the practice more efficient in relation to both time and costs, made the practice more accessible and made many tasks have become easier.

Efficiency is probably one of the most important ways that technology has improved the practice of law. For example, back when there was just the big red calendar book, you would have to go page by page to look for a hearing or a certain appointment. If what you were looking for was in a previous year, you would have to go find the previous red book to look it up. Now, with a few keystrokes, you can search years’ worth of calendar in a few seconds. Client databases make it easy to look up client information extremely fast.

e-Portal filing and email delivery has made the filing process fast and easy, when it works right. No longer do you have to hand deliver that new case to the clerk or mail hundreds of pages of mandatory disclosure documents to opposing counsel for $20.00. Everything can be filed or sent instantly and without postage costs.

Before, you would have to go to the clerk and pay $1.00 per page for copies of documents, even those documents that you filed in the case. Now, in most cases, documents can be printed online free of charge.

Now, almost everything is at your fingertips. Attending Pre-Trial/ Scheduling Conferences is much easier. No longer do you have to say that you didn’t copy your calendar for that far out into the future. Your entire calendar is on your phone/tablet. Need to look up a statute or rule? A quick search on your phone and you can recite the exact statutory language.

It certainly has made things easier for a lot of attorneys. Thankfully, long gone are the days of having to manually calculate child support, especially cases with multiple children and multiple timesharing schedules. Manually calculating child support five times in one case could be very time consuming. Now, child support calculators do the same tasks in a fraction of the time.

The list of technology advancements and ways in which it has improved the practice of law can go on and on. However, that does not fully address the question. Let’s look at the ways technology has hurt the practice of family law.

The biggest impact technology has had on lawyers is the inner workings of everyone’s fingers. It seems that attorney’s fingers work just fine typing on a keyboard or using a smart phone/tablet. However, attorney’s fingers no longer work when it comes to dialing a phone. It seems that technology has caused the pointer finger to forget how to dial ten numbers. Honestly, how often do attorneys actually pick up a phone and call each other about their cases. It seems to me that it is far less often than it used to be.

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Family attorneys’ livelihoods depend on their ability to communicate. We have to communicate to sell our services to clients. If we don’t communicate well, we don’t get hired. We have to communicate with opposing counsel, mediators and pro-se parties to progress cases and to try to reach amicable settlements. We have to communicate with Judicial Assistants to schedule hearings. We have to communicate with Judges at hearings and trials. In new courtrooms, we even have to communicate with the Deputies/Bailiffs as to where to sit. The list goes on. Yet despite all of the communicating we have to do, the more impersonal and non-verbal it becomes.

Is it a coincidence that the rules and orders more and more are requiring attorneys to meet and/or confer? Attorneys are supposed to make good faith attempts to obtain discovery before filing Motions to Compel. Most Pre-Trial Conference Orders require attorneys to meet and/or confer prior to attendance at the Pre-Trial Conferences. Yet, despite the requirements, it is more and more common that attorneys will send an email stating that this is their good faith effort or that the email shall serve as their conference before the Pre-Trial Conference.

Even clients are becoming more and more impersonal. Many potential clients would rather do phone consultations than meet face to face. I’ve seen attorneys at Final Hearings meeting their clients for the first time. I’ve even heard some attorneys are so good at closing a client that clients will pay by credit card after a phone consultation without having actually met the attorney. I would like those names because I have some swamp land to sell.

Even some Judicial Assistants and Judges are giving up on the personal communication. Many JAs require you to look up hearing times online and email in the request. It seems more and more rare that JAs speak to attorneys or paralegals on the phone. I miss the days when you could talk to the JAs about life and kids and build a rapport with them. Even Judges are getting in on this act. I have seen on several occasions a Judge request that the attorneys submit closing arguments in writing, thus depriving everyone in the courtroom of hearing the greatest closing argument ever spoken. At least that’s what I think every time I give a closing. For many clients, they just want closure which trial brings but which can only come from hearing the Judge tell them how things are going to be. However, Judges are more often reserving ruling at trial and submitting written Final Judgments as their ruling (using the attorneys’ submitted Final Judgments as a guide). Rather than articulate the ruling and rationale to the attorneys and clients so that clients understand what the Judge is thinking, they are left to interpret the ruling from the written Final Judgment. The clients are deprived of hearing the inflection in the Judge’s voice, hearing the voice level and tone of the Judge’s words or feeling the heat from the Judge that will hopefully make them a better person or parent.

Technology has further lead to the instant gratification age. Unfortunately in the legal world, instant means conveniently and selectively instant. In the days before email, if you weren’t in the office, the client was fine with a call back the next day. Now, with email on every smartphone, clients expect responses immediately. They don’t care that its 2:00 A.M. or that you are at your child’s school event. The other parent using the wrong laundry detergent is an emergency that needs addressing immediately. Yet, those are the same clients that are sent discovery requests within minutes of receiving them and then are being threatened with Motions to Compel more than 30 days later because they didn’t comply with the requests. E-filing is supposed to make everything run much faster, but have you ever tried to get a summons in one day? Either the clerk will refuse to accept the case that you are walking into the clerk’s office to get an immediate summons, or you will e-file the case and get told that you have to wait several days to be issued the summons when they go to it. It’s always fun to explain to a client that with all the technology available, a clerk’s office can’t or won’t issue a summons immediately so that a party can be served the same day.

I have also seen a trend, more so in younger attorneys, that they have a case of keyboard courage. They advocate hard for their clients in emails and seem like they would be a warrior in the courtroom. Then you see them in person, in action, and they are timid, shy and not anything like their keyboard persona. Family law clients want and need their attorneys to be litigators. They need advocates that will fight for them in trial, if the case can’t be settled. Technology is keeping the younger generation from building the people skills necessary to be a great lawyer.

The iPhone generation is hooked on electronics. Lawyers appear to be no different. Don’t get me wrong, cattle call hearings are so much nicer with Facebook, Candy Crush or other apps to pass the time. But many lawyers have an inability to disconnect from the practice of law. Family law is particularly stressful, which makes decompressing at home so vital. I am sure I am not alone, that when your phone buzzes, you are reading a client’s email, even while lying in bed at night. I take a personal investment in my clients and I want to do the best for them. However, sometimes, the best thing you can do for your clients is to put the phone away, spend time with the family, decompress, and show up refreshed and ready for the next day.

There are many other drawbacks
to technology, such as the exorbitant costs that come with the best computers, best programs, and best computer accessories. There are attorneys who are too dependent on technology and cannot function without it. But for the sake of everyone reading, I don’t want to turn this article into a novel.

Is technology ruining the legal profession for family lawyers? I think the jury is still out on this question. If I had to answer the question, I would have to give the typical lawyer answer, “Maybe”. There are definite positives for technology. There are definite negatives against technology. I believe that everyone needs to have a balance. Take advantage of the benefits technology brings. But, don’t let technology take over your life. Remember that law is still a business of people, for people and by people. I wonder if anyone will call me, instead of email me, with feedback on this article.

Frank P. Remsen, Esq. earned his J.D. at St. Thomas University School of Law and owns his own practice in Lake County, Florida. He is admitted to practice law in the state courts of Florida and United States District Court for the Middle District of Florida.
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