Section calendar

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

2017-2018

SAVE THE DATE!

May 18-21, 2017
In State Retreat
Cheeca Lodge & Spa
Islamorada
June 16, 2017
Paralegal Seminar
Live CLE
South Florida
June 21-22, 2017
Annual Meeting
Wednesday, June 21:
Committee Meetings
Thursday, June 22:
Executive Council Meeting
Boca Raton Resort & Club
Boca Raton
July 20-23, 2017
Trial Advocacy Workshop
Live CLE
Renaissance Vinoy
St. Petersburg
September 6-10, 2017
Out of State Retreat
C Lazy U Ranch
Granby, CO

Details and registration at www.familylawfla.org

INSIDE THIS ISSUE:

Chair’s Message........................................................................................................... 3
Comments from the Chair of the Publications Committee.................................... 5
Co-Vice Chairs’ Message ....................................................................................... 7
Announcements ......................................................................................................... 7
Avoiding Strategic Gamesmanship: A Fitting Issue for a Case Called Sherlock........ 8
Social Security Retirement Benefits: Marital Property Subject to Division Between Spouses?.......................................................... 10
Everything’s Coming Up ACES ......................................................................... 13
2017 Marital and Family Law Review Course (Photos) ........................................ 14
“The Big Three” ........................................................................................................ 18
Divorce Ambivalence: It’s Not Over Till It’s Over .......................................... 19
What Not To Do in A Collaborative Divorce Case ............................................. 21
Recent Changes in Military Divorces & How Florida Divorces are Affected .............. 23
Technology Corner: Let’s Be Careful Out There! – A Brief Compendium of Tech Safety Tips ........................................................................ 25
Application for Membership................................................................................... 27

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

Laura Davis Smith, Coral Gables – Chair
Nicole L. Goetz, Naples – Chair-Elect
Abigail Beebe, West Palm Beach – Treasurer
Amy Hamlin, Winter Park – Secretary
Maria C. Gonzalez, Fort Lauderdale – Immediate Past Chair
Heather L. Apicella, Boca Raton – Vice Chair of Commentator
Tenesia C. Hall, Orlando – Vice Chair of Commentator
Gabrielle Tollok, Tallahassee – Administrator
Donna Richardson, Tallahassee – Design & Layout

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

Articles and cover photos to be considered for publication may be submitted to Heather Apicella (hla@gwpa.com), or Tenesia Hall (tchall@legalaidocba.org), Vice Chairs of the Commentator.

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

Spring is in the air, and we are busy as bees in the midst of the legislative session in Tallahassee, monitoring proposed legislation for discussion during our weekly telephonic Legislation Committee meetings. To highlight but a few of the Section’s works in process: Tampa-based Executive Council member, Sarah Kay, has been tweaking our website to increase its user friendliness; the Technology Committee completed its wonderful Board Certification Video soon to be available on the Section website; Applications for Section Leadership and Committee Preference Forms are out; please be sure to complete and submit yours, so that Chair-Elect, Nicole Goetz, has the opportunity to place you where you would like to be!

We encourage you to write articles—short ones for FAMSEG, practice-oriented mid-length articles for the Commentator, or lengthy, scholarly pieces for submission to the Bar Journal. Is there a topic that intrigues you? There is no better way to become an expert on a subject than researching and writing about it! Perhaps there is an expert, colleague or judicial officer you would like to know more about—do an interview piece and submit it to the Publications Committee!

The Section’s success comes from the involvement of its members, and we are so very grateful for all of you. We hope to see you at our next live meetings held in conjunction with the Bar’s Annual Meeting in June in Boca Raton. All are welcome, and all are invited!

Laura Davis Smith
Section Chair

The Florida Bar
FAMILY LAW SECTION

The Family Law Section’s FAMSEG is a monthly eNewsletter which keeps Section members apprised of Section activity, including upcoming meetings and events announcements and occasionally features substantive topics of interest.

Visit FAMSEG and see what’s new!

www.familylawfla.org
Kravit Estate Appraisals is a certified appraisal and estate liquidation firm that offers assistance to grantors, beneficiaries and fiduciaries regarding the valuation and representation of tangible personal property assets. Our comprehensive services, across all collecting categories, including confidential advice and assistance for valuations for a variety of purposes including estate tax, equitable distribution and insurance. Sale advice, including sale and marketing plans for private sale and auction recommendation, consignment and collection management.

**AREAS OF EXPERTISE**

- Arts & Antiques
- Automobiles
- Coins, Currency & Stamps
- Firearms
- Historical
- Jewelry, Timepieces & Luxury accessories
- Sports, Entertainment & Music
- Domain Names
- Wine and Spirits

2101 NW CORPORATE BLVD. STE 300 BOCA RATON, FL 33431
PH: 561.961.0992  |  FAX: 561.939.2100
WWW.KRAVITESTATEAPPRAISALS.COM  •  INFO@KRAVITESTATE.COM
Comments from the Chair of the Publications Committee

I hope you enjoy this Spring Edition of the Commentator. Many thanks to Heather Apicella and Tenesia Hall, our Vice Chairs of the Commentator, and all of the authors who contributed to this Edition. Some of you are now preparing for the Section’s Spring Retreat at the Cheeca Lodge and Spa in Islamorada from May 18-21, 2017. Please consider sending us your photographs so we can include them in our Summer Edition. The Florida Bar Annual Convention will be held at the Boca Raton Resort and Club, with our Section’s committee meetings on June 21, 2017 and Executive Council meeting on June 22, 2017. We again ask you to send us your photographs taken during these meetings so we can share them in a future edition. In addition to sending photographs, I continue to encourage all of our members to send us ideas for topics and issues to be addressed in our upcoming editions. You can e-mail me directly at: julia.wyda@brinkleymorgan.com.

Family Law Section
In State Retreat
May 18 - 21, 2017
Cheeca Lodge & Spa
81801 Overseas Highway • Islamorada, Florida 33036
Reach your clients’ financial goals.

Choose the right crew.

Roderick C. Moe CPA, PA
certified public accountant

3199 Lake Worth Road, Suite B3 | Lake Worth, FL 33461
Rod@RodMoeCPA.com | www.RodMoeCPA.com

561.649.5109

Litigation Support | Business Valuation | Collaborative Divorce | Forensic Accounting
Co-Vice Chairs’ Message

By Heather Apicella, Esq., Boca Raton and Tenesia Hall, Esq., Orlando

Spring is here! We wish you a wonderful spring season full of joy! We are hopeful that the spring is full of bright sun and beautiful days! We know you will enjoy reading this Spring Edition of the Commentator as much as we have enjoyed putting it together! This Edition contains a wide array of informative and interesting articles, spanning from imputation of income for the purpose of determining alimony to what should be avoided when involved in collaborative law cases.

Judge Tim Bailey, of the Seventeenth Judicial Circuit, provides his prospective from the bench regarding “The Big Three” qualities that distinguish the good family lawyer from the rest." Barbara Goiran, a Hearing Officer in the Sixth Judicial Circuit, discusses the ACES test and how to identify and become aware of trauma which your client may have gone through that is now impacting them. Jack A. Moring provides great insight on security and tech-related information which we all can benefit from. Marni Feuerman is a licensed clinical social worker and licensed marital and family therapist who guides us as to how we can detect if our respective client (or potential client) truly wants a divorce. Anaya Cintron Stern provides insight regarding social security retirement benefits and whether we should include the benefit in equitable distribution. Tim Voit explains recent changes in the law which impact retirement benefits when handling a military divorce. Alicia M. de la O explains imputation of income on liquid vs. non-liquid assets for purposes of alimony. Stann Givens explains the tips he has learned when handling a collaborative divorce case and specifically what to avoid.

You will also enjoy looking at the photographs from the 2017 Marital & Family Law Review Course – which was attended with record breaking numbers! Finally, and as always, we truly appreciate our sponsors who you may find helpful to your practice.

ANNOUNCEMENTS

February 18, 2017, Julia Wyda, our Chair of the Publications Committee, gave birth to a healthy baby girl, named Olivia Anne Martin. Olivia was 7 pounds, 6 ounces.

The Florida Bar Annual Convention will be held at the Boca Raton Resort and Club from June 21-24, 2017. The Family Law Section committee meetings will be held on June 21, 2017 and Executive Council meeting will be held on June 22, 2017.
Avoiding Strategic Gamesmanship: A Fitting Issue for a Case Called Sherlock

By Alicia M. de la O, Esq., Coral Gables

I. Imputation of Income on Liquid vs. Non-Liquid Assets for Purposes of Alimony Pursuant to Florida Statute 61.046(8), “income’ is any form of payment to an individual, regardless of source, including, but not limited to: wages, salary, commissions and bonuses, compensation as an independent contractor, worker’s compensation, disability benefits, annuity and retirement benefits, pensions, dividends, interest, royalties, trusts, and any other payments, made by any person, private entity, federal or state government, or any unit of local government.” §61.046(8), Fla. Stat. (2016).1 In 2000, the Florida Supreme Court held, in Mallard, that alimony may not include a savings component. Mallard v. Mallard, 771 So. 2d 1138, 1142 (Fla. 2000). By the same token, limiting a party’s income by refusing to impute income on liquid assets would essentially introduce a savings component into alimony. Niederman v. Niederman, 60 So. 3d 544 (Fla. 4th DCA 2011). It was that reasoning that led to the Fourth District Court of Appeal’s decisions in Greenberg and Rosecan, finding that a court should impute income that could reasonably be earned on a former spouse’s liquid assets. Rosecan v. Springer, 985 So. 2d 607, 609 (Fla. 4th DCA 2008); Greenberg v. Greenberg, 793 So. 2d 52, 55 (Fla. 4th DCA 2001). “When a party receives an asset in equitable distribution that will result in immediate investment income,” that income should not be excluded for purposes of determining alimony.

Sherlock v. Sherlock, 199 So. 3d 1039, 1044 (Fla. 4th DCA 2016) (quoting McLean v. McLean, 652 So. 2d 1178, 1181 (Fla. 2d DCA 1995)). Likewise, “when a spouse with under earning investments has the ability to generate additional earnings—without risk of loss or depletion of principal—but fails to do so, it is fair for a court to impute a more reasonable rate of return to the under earning assets, comparable to a prudent use of investment capital.” Rosecan, 985 So. 2d at 610) (quoting Overbay v. Overbay, 376 N.J. Super. 99, 869 A. 2d 435, 441 (2005)) (emphasis added).

However, until now, the issue of whether a trial court should impute income based on non-liquid assets had not been well-defined. One example of a non-liquid asset is a marital home that is lived in by a former spouse. See Levine v. Levine, 29 So. 3d 464, 465 (Fla. 4th DCA 2010). The Fourth District Court of Appeal held that a trial court should not impute income from the home that a spouse occupies after the divorce. See Levine, 29 So. 3d at 464–65 (Fla. 4th DCA 2010); Adelberg, 142 So. 3d 895, 898 (Fla. 4th DCA 2014). Additionally, even though the Second District Court of Appeal has not directly held this, it has suggested that a party should not be required to change the character of an asset to maintain the standard of living established during the marriage. Suit v. Suit, 48 So. 3d 195, 197 (Fla. 2d DCA 2010). Judge May’s concurring opinion in Levine brought further light to the issue that “no Florida case has yet held that a non-liquid asset must have income imputed to it.” Levine, 29 So. 3d at 465 (May, J., concurring). Specifically, Judge May expressed concern that a spouse could intentionally seek to receive non-liquid assets in equitable distribution so as to benefit his or her claim for alimony:

I write simply to call attention to the issue raised in the briefs and in oral argument that was not specifically made to the trial court: whether a spouse can request a non-liquid asset in equitable distribution, leaving the liquid assets to the other spouse, thereby generating income and ability to pay for one spouse while increasing the need for alimony of the spouse with the non-liquid asset. It would seem that this could result in strategic maneuvering to the benefit of the spouse seeking alimony and the detriment of the one who will be required to pay.

Levine, 29 So. 3d at 465 (May, J., concurring).

II. Strategic Gamesmanship

This brings us to Sherlock v. Sherlock, 199 So. 3d 1039 (2016), where the Fourth District Court of Appeal has now found it reasonable to allow the trial court to consider a party’s non-liquid assets for purposes of imputing income. Specifically because “[a] contrary rule would simply encourage spouses with substantial non-liquid assets to engage in the kind of strategic gamesmanship contemplated by Judge May in Levine, such as delaying the liquidation of their assets, for purposes of advancing or defending alimony claims.” Sherlock, 199 So. 3d at 1045 (2016).

While the District Court in Sherlock did find that the lower court...
abused its discretion in imputing income to the husband based on his current residence since he was living in it, the lower court did not abuse its discretion “in imputing income to the husband from his real estate and financial holdings, even though those assets included those of the non-liquid category. Id. The District Court reasoned that the holding in Canakaris “does not limit a trial court’s consideration of a party’s financial situation to the party’s liquid estate.” Sherlock further provided that such consideration was required by Florida Statute 61.08(2)(i) and that the imputation of income only applied to the husband’s financial and real estate assets, which are typical investment assets. (Emphasis added). 2 Ultimately the District Court decided that “[i]t would be unfair to require the wife, whose net worth is about half of the husband’s net worth, to use her post-dissolution income to support the husband simply because he chooses not to use his assets in a manner that would produce the income necessary to support him.” Sherlock, 199 So. 3d at 1045-46.

III. Ethics and Strategic Gamesmanship

As alluded to by Judge May and the Court in Sherlock, it would be inappropriate for a party to negotiate for or ask the court to distribute non-liquid assets to the alimony-seeking party to purposefully increase their need. While the holding in Sherlock helps to avoid concerns of “strategic gamesmanship,” it is pertinent to remember the Rules of Professional Conduct and that “as a negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others.” Preamble to Florida Rules of Professional Conduct. Instead of practicing strategic gamesmanship, as professionals we have a duty to disclose material facts and legal authority. 3 Likewise, a lawyer cannot engage in conduct involving dishonesty or engage in conduct prejudicial to the administration of justice. 4 It is our duty to remain professional and be open as to all the factors affecting alimony in each particular case. No matter whether there are liquid or non-liquid assets at issue in a case; it is incumbent upon all of us to explain the Sherlock case to our clients facing an alimony issue and to disclose those facts to ensure an equitable result.

Alicia M. de la O is an Associate at Greene Smith & Associates, P.A. She obtained 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, which is focused on professionalism, and an intern for the Honorable Ariana Fajardo Orshan during the Spring of 2015 in the Unified Family Court Complex Litigation Division.

Endnotes
1 “United States Department of Veterans Affairs disability benefits and reemployment assistance or unemployment compensation, as defined in chapter 443, are excluded from this definition of income except for purposes of establishing an amount of support.” §61.04(8), Fla. Stat. (2016).
2 “In determining whether to award alimony or maintenance, the court shall first make a specific factual determination as to whether either party has an actual need for alimony or maintenance and whether either party has the ability to pay alimony or maintenance. If the court finds that a party has a need for alimony or maintenance and that the other party has the ability to pay alimony or maintenance, then in determining the proper type and amount of alimony or maintenance under subsections (5)-(8), the court shall consider all relevant factors, including, but not limited to... (i) All sources of income available to either party, including income available to either party through investments of any asset held by that party.” §61.08(2), Fla. Stat. (2016).
3 Florida Rules of Professional Conduct, Rule 4-3.3 Candor Toward the Tribunal.
4 Florida Rules of Professional Conduct, Rule 4-8.4 Misconduct.
Social Security Retirement Benefits: Marital Property Subject to Division Between Spouses?

By Anya Cintron Stern, Esq., Miami

Generally in Florida, all vested and non-vested retirement monies that accrued during the marriage constitute marital assets subject to equitable distribution. Social Security, a social insurance program created in 1935 by President Franklin D. Roosevelt, consists of retirement benefits which accrued as a result of workers paying Social Security taxes on their earnings. Applying the plain language of Florida’s general rule concerning retirement benefits, are Social Security benefits negotiable in a divorce settlement? Are there any benefits afforded to an ex-spouse who did not work and pay into the Social Security program? Can a spouse who will not receive Social Security benefits receive an offset to counterbalance the recipient spouse’s income? This article explores these equitable distribution issues regarding Social Security benefits and provides a post-divorce Social Security hack for those ex-spouses seeking a bigger piece of the pie.

Although the United States Supreme Court has not directly addressed whether the federal provisions of the Social Security Act preempts state courts from distributing Social Security benefits upon marriage dissolution, similar anti-assignment provisions have characterized such property as non-marital property not subject to division. Subsequent legislative action has enforced those positions that Social Security benefits are not subject to equitable distribution. In perhaps the most influential case discussing the characterization of Social Security benefits as non-marital property, Hisquierdo v. Hisquierdo, the U.S. Supreme Court interpreted the anti-assignment provision of the Social Security Act to preempt states from treating railroad retirement benefits as community property. In correlating the lower tier of railroad retirement benefits to those an employee would expect to receive if he were covered under the Social Security Act, the Court reasoned that property claims against such retirement benefits could not subject such benefits to garnishment. Subsequently, when Congress amended the anti-assignment clause of the Railroad Retirement Act to permit distribution of some benefits in divorce cases, Congress made sure to add a caveat to the Social Security Act that no other modifications were to be interpreted from such amendment unless so expressly provided for in the Act. Congress’ actions thus enforce the Hisquierdo commentary on Social Security benefits whereby state courts are precluded from distributing Social Security benefits in a dissolution of marriage. Keep in mind though, that Congress reserves the right to amend the Social Security system at any point, even if vested rights are affected. For the time being, it appears that Social Security Retirement benefits are an exception to the general rule that a spouse’s retirement benefits earned during a marriage are marital assets.

Florida courts, citing federal law, have held that Social Security benefits are not marital assets subject to equitable distribution. The Social Security Acts thus preempts Florida courts from distributing a spouse’s Social Security benefits in the equitable distribution scheme. Pensions plans which deduct an equivalent amount from a worker’s salary and placing them in replacement plans in lieu of making federal Social Security contributions, however, are not preempted by the Social Security Act and thus, not precluded from the equitable distribution scheme. This is so even if the replacement plan is one that is run by a municipality and the spouse would not receive any federal Social Security benefits as a result of his employment. The out-of-state courts upon which Florida has relied seem to differentiate Social Security benefits, a system of “social insurance for working citizens nationally,” to a locally-managed plan. Knowledge in this nuanced area of equitable distribution law is key for practitioners as a spouse can find themselves indebted to directly pay their ex-spouse a portion of their Social Security benefits towards property distribution in the absence of a timely objection.

What about an offset in equitable distribution as a result of one spouse’s receipt of Social Security benefits? The Hisquierdo Court rejected the Wife’s argument that the court could nonetheless offset assets of equal value for the spouse’s Social Security benefit. Florida’s holdings are consistent with Hisquierdo in that a spouse’s social security benefits cannot be used as an offset to counterbalance the participating spouse’s Social Security benefits. The policy being that a spouse cannot receive an offset because it would result in
an inequitable windfall because since the spouse would also receive their own Social Security benefits.21

What if the Social Security benefits were deposited and commingled into a joint account? Does that convert the social security benefit payments to marital property? Although Florida has yet to publish an opinion on this issue, a New York court decision may prove persuasive with its holding that a spouse's Social Security benefits became marital property when they were placed in the spouse's joint account.22 However, the United States Supreme Court has previously held that Sec. 407(a) applies broadly to benefits already received and deposited into a savings account.23

In any event, even if not included within the equitable distribution scheme, some ex-spouses may still benefit from the Social Security benefits accumulated by their former partner. Pursuant to the Social Security Act, if you are divorced, and regardless of whether you are remarried, your ex-spouse is entitled to receive benefits based on your record if the following conditions are met:

(1) Your marriage lasted 10 years or longer;
(2) your ex-spouse is not currently married;
(3) your ex-spouse is at least 62 years of age;
(4) the benefit that your ex-spouse would receive based on their own income is less than the benefit they would receive based upon your work record; and
(5) you are entitled to receive social security retirement or disability benefits;
(6) you have been divorced from your ex-spouse for at least two (2) years.24

The benefit your ex-spouse is entitled to receive is one-half of what you would receive based on your income, or disability record.25 However, your death would result to your ex-spouse being entitled to 100% of your benefit. Note: this article is not advocating for such action.

A quick note on Social Security disability benefits: a Court cannot equitably distribute a spouse's compensation received for disability.26 This is so because a disability pension ‘by its very nature replaces future lost income, and thus is not a marital asset subject to equitable distribution.”27 However, when a “disability pension” (as opposed to the receipt of Social Security disability benefits) is involved, the trial court must determine ‘what portion of the pension represents compensation for pain and suffering, disability and disfigured.
Endnotes


2 42 U.S.C. §901.

3 42 U.S.C. §407(a) (stating that “[t]he right of any person to any future payment under this title shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this title shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.”

4 Hisquierdo v. Hisquierdo, 439 U.S. at 590.

5 45 U.S.C. Sec. 231m(b)(2).

6 Id.

7 Id.

8 Id.

9 Id.

10 Id.

11 Hanks v. Hanks, 53 So.2d 393 (Fla. 1st DCA 1952).

12 See id.

13 See id.

14 See id.

15 967 So.2d 394, 395 (Fla. 2d DCA 2007) (determining that because the husband failed to raise in the trial court the issue of whether the federal law regarding the nonassignability of veterans’ benefits precluded enforcement of an alimony provision, the Husband failed to preserve the issue for review.

16 Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979)

17 58 So.3d 1064, 1066 (Fla. 1st DCA 2007) (citing Proctor v. Proctor, 530 So.2d 1064, 1066 (Fla. 1st DCA 1988) (ordering determination of what portion of the husband’s pension was disability and what portion was retirement pay, where evidence indicated that some portion was retirement pay despite pension’s “disability” designation).

18 See also Mann v. Mann, 92 So.2d 340, 343 (Fla. 4th DCA 1989).

19 Hisquierdo v. Hisquierdo, 58 So.3d 1064, 1066 (Fla. 4th DCA 2007) (reversing for the trial court to determine that portion of the pension was disability and what portion was retirement pay, where evidence indicated that some portion was retirement pay despite pension’s “disability” designation).

20 See also Mann v. Mann, 92 So.2d 340, 343 (Fla. 4th DCA 1989).

21 Id.

22 See also Mann v. Mann, 92 So.2d 340, 343 (Fla. 4th DCA 1989).

23 See also Mann v. Mann, 92 So.2d 340, 343 (Fla. 4th DCA 1989).

24 See also Blaine v. Blaine, 872 So.2d 383 (Fla. 4th DCA 2004) (holding that the retirement portion of the pension is subject to equitable distribution when the Husband applied to convert the FRS Retirement Pension to an FRS Disability Pension before the divorce petition was filed. In this case, the Husband received workers compensation on a monthly basis, social security on a monthly basis, and his FRS on a monthly basis (reimbursement). Altogether, about $100,000 per year. The trial court found that by converting the FRS Retirement Pension to a FRS Disability Pension the Husband changed the nature of the asset from a marital asset to a non-marital asset. The Fourth DCA, relying on Davis v. Davidson, 882 So.2d 418, 420 (Fla. 4th DCA 2004), held that the trial court’s characterization of the Husband’s pension as a non-marital asset was erroneous.

In both our private and professional lives we encounter all sorts of people on a daily basis. Clients, coworkers, store clerks, family and friends. Most are reasonable, but there are a few...

well, you know! We all can immediately call to mind that one case (or unfortunately several cases) where one or both parties were so irrational and unreasonable it was difficult to see why. In the court system, we see people every day who have made every single wrong choice in life. What makes some people travel through life relatively blissfully with little conflict and strife, while others seem to make mountains of every molehill they encounter?

While I am not a psychiatrist, psychologist, or Ph.D., I have been fortunate to attend several trainings and seminars during the past few years that have enlightened me to the effect of Adverse Childhood Experiences, or ACES. This led me to study of the associated phenomenon of Compassion Fatigue and Vicarious Trauma. What I took away from these experiences is a new knowledge and appreciation for those who suffer the effects of ACES and how that can guide my interactions with them in an effort to understand and assist them in the best way possible. I’d like to share a bit of that knowledge with you.

ACES were first identified in a study conducted by Dr. Vincent Ferlitti and colleagues in San Diego, California by Kaiser Permanente between 1995 and 1997. The study consisted of a 10 question quiz administered to over 17,000 participants, plus related follow-up and further study. The quiz measured certain experiences that could cause trauma on a scale from 0-10. Those who had zero to three ACES had relatively low childhood trauma; four to seven, moderate to severe; and eight or more, extremely severe. The study was designed to measure the effects of trauma on the health outcomes of patients, but the information gleaned from the study is useful in many contexts, including the workplace, court system, and educational settings as well as health care. For more information on the health ramifications of ACES resulting in toxic stress, I recommend Dr. Nadine Burke-Harris’ outstanding TED MED talk which can be found at http://tedmed.com/speakers/show?id=293067. Dr. Harris’ website is www.drnadineburkeharris.com.

The ACE test asks the following ten questions. For every “yes” the participant will receive one point. All questions relate to an individual’s childhood, the first 18 years of his or her life.

1. Did a parent or other adult in the household often or very often swear at you, insult you, put you down or humiliate you OR act in a way that made you afraid you may be physically hurt?
2. Did a parent or other adult in the household often or very often push, grab, slap or throw something at you OR ever hit you so hard that you had marks or were injured?
3. Did an adult or person five years older than you ever touch or fondle you or have you touch their body in a sexual way OR attempt or actually have oral, anal or vaginal intercourse with you?
4. Did you often or very often feel that no one in your family loved you or thought you were important or special OR your family didn’t look out for each other, feel close to each other or support each other?
5. Did you often or very often feel that you didn’t have enough to eat, had to wear dirty clothes and had no one to protect you OR your parents were too drunk or high to take care of you or to seek medical attention for you if necessary?
6. Were your parents ever separated or divorced?
7. Was your mother or stepmother often or very often pushed, grabbed, slapped or had something thrown at her OR sometimes often or very often kicked, bitten, hit with a fist or hit with something hard OR ever repeatedly hit at least a few minutes or threatened with a gun or knife?
8. Did you live with anyone who was a problem drinker, alcoholic or used street drugs?
9. Was a household member depressed or mentally ill, or did a household member attempt suicide?
10. Did a household member go to prison?

SCORE: ______________

The ACE score calculator and further information can be found at: http://acestudy.org/the-ace-score.html.

As you can see from the questions, there is a very high likelihood that most people have at least one or two ACES and many have far more. In fact, despite the fact that the Kaiser Permanente study took place in a mostly Caucasian, middle class area (40% had a bachelor’s degree or higher) and consisted of individuals who had employer based health insurance with Kaiser. Two-thirds of the participants had experienced at least one type of childhood trauma. Of those, 87% had experienced at least
2017 Marital and Family Law Review Course
Orlando, Florida
2017 Marital and Family Law Review Course, Orlando, Florida
FAMILY LAW SECTION
OUT OF STATE RETREAT
September 6 - 10, 2017
C Lazy U Ranch • Granby, CO

Save The Date!
two. Two in nine people had an ACE score of 3 or more, and one in eight had an ACE score of 4 or more. Not surprisingly, the higher the score, the higher the likelihood of chronic physical or mental health problems, social dysfunction, involvement with the criminal justice system, drug and/or alcohol abuse, and death.

The study had enormous ramifications for the health profession, but what does this mean for the legal profession? Negative health effects aside, a high ACE score has behavior and societal consequences as well. Those with higher ACE scores are more prone to drug and alcohol use, which makes them more likely to interact with the criminal justice system. They are also more likely to practice the same poor parenting techniques on their own children, often necessitating the intervention of the juvenile justice system or child welfare authorities. They are more likely to have multiple marriages, thereby impacting the family courts. They are less likely to hold a stable job, as absenteeism due to a lack of responsibility or poor health is particularly high in this population, impacting their ability to pay child support or alimony. And finally, childhood trauma often results in poor familial relationships, which probate practitioners and judges will tell you, definitely comes out after a death in the family.

Dr. Burke-Harris, a pediatrician, found that children with four or more ACES were 32 times more likely to have learning or behavior problems in school than those with no ACES. Failure to thrive in school leads to a lack of learning, frustration and acting out, which often leads kids into the juvenile and ultimately criminal justice system. A lack of learning results in a low socioeconomic class. Drug and alcohol use and abuse are rampant, as sufferers are desperate to self-medicate. Anger, defiance and general unpleasantness make the suffering individual incredibly hard to deal with in a professional context.

What can we do as legal practitioners about the problem of ACES? Just recognizing the high probability of underlying trauma in those we encounter can lead us to taking extra care to treat others with dignity and respect. My friend and mentor, Circuit Judge Lynn Tepper, likes to frame this by changing the question “What is wrong with you?” to “What has happened to you?” Being aware of potential trauma and how to avoid re-traumatizing those with whom you are dealing is an important first step. Creating a trauma informed justice system includes ensuring individuals are not re-traumatized by an authoritarian way of speaking and acting but are operating in a safe and nurturing environment.

Recognizing that trauma is almost always multi-generational, taking an approach to address the healing of the family as well as the individual in order to break the cycle. For example, it is imperative in domestic violence situations to enter an injunction to prevent further harm, but just leaving it at that continues to traumatize the family. Instead, viewing domestic violence through a trauma lens involves recognizing that both the perpetrator and victim likely exhibit high ACE scores and their children do too. Just entering an injunction and considering the case over ignores the fact that the perpetrator could go on to form relationships with others, the victim is highly likely to seek out other abusive relationships, and the children, having observed inappropriate coping mechanisms in the home will likely perpetuate that behavior into the future. An awareness of the suffering of all parties and therapeutic approaches that not only stop the behavior but address the underlying causes of the behavior can often provide a basis for strong, healthy family relationships now and into the future. Of course this does not absolve abusers from responsibility for their actions, but a proactive approach to prevent the behaviors in the future will have a lasting positive effect not only on the immediate family, but for generations to come, thereby creating a positive outcome for society as well.

The bottom line is, although you may not be in a position to clinically treat the underlying childhood trauma identified in the ACES test, you can be aware of where your clients are coming from. Often the poor behaviors displayed by clients or litigants stem from underlying trauma. Having sensitivity toward these individuals, taking care to treat them with dignity and respect, and being aware of where they are coming from might help to lessen the intensity of your interactions. While an awareness of the ACES in no way absolves people of personal responsibility, it may be possible to coordinate mental health and possibly health care services so that some of these underlying issues can be resolved and the outcome of law related issues can be a successful one. And it is also important to recognize your own ACES and get help, or practice self-care so that the underlying trauma you encounter does not continue to affect your years into the future.

For more information, please visit www.acestoohigh.com. You can access the Trauma Informed Court toolkit at http://www.flcourts.org/resources-and-services/court-improvement/judicial-toolkits/family-court-toolkit/. Another resource in creating a trauma informed system with tips that can be incorporated into your practice, see https://www.nasmhpd.org/sites/default/files/JudgesEssential%202013finaldraft.pdf.

Barbara Casey (Barb) Goiran is the Child Support Hearing Officer for Pasco County. She is a graduate of the University of Arizona and Stetson University College of Law. She has continued, next page
Everything’s Coming Up ACES
from preceding page

been a member of the Florida Bar since 1993. She has spent her entire legal career in the service of the Sixth Judicial Circuit. She has served on various committees of the Family Law Section and on the Board of Directors of several youth sports organizations, her homeowners association and her children’s charter school. She is the mom of two college aged children and a military spouse.

Endnotes
2 http://www.acestudy.org/yahoo_site_admin/assets/docs/ARV1N1.127150541.pdf.
3 “The Hidden Epidemic: The Impact of Early Life Trauma on Health and Disease” http://www.cambridge.org/bg/knowledge/isbn/item2709685/?site_locale=en_GB.

“The Big Three”
By Judge Tim Bailey, Fort Lauderdale

Throughout my handful of years on the family law bench I have been taught by the lawyers that have appeared before me, all have left their mark, not all positive. I have discovered a “big three” list of qualities that distinguish the good family law lawyers from the rest. I’d venture to say that if you get these three requirements down cold, the wins will pile up and your reputation will soar. If you sit in on a good lawyer’s trial, these three are always present:

1. **KNOW THE LAW:** How can I get the 7th grader’s report card into evidence? How can I let the Judge know what 12 year old Karen told her swimming coach? The one hundred thousand dollars that was in the parties joint checking account on the date of filing was used by the wife to support the family during the 12 months of litigation, on the date of trial ten thousand dollars remained in the account, for equitable distribution purposes, what value should be used for that checking account? The good family lawyers would not think of going to trial without knowing the answers to these questions. Rule number one, always….know the law.

2. **TAKE THREE DEPOSITIONS:** Take at least three long detailed depositions. The deposition can be of the other party, the Guardian Ad Litem, the Accountant, the girlfriend, the boyfriend, the grandparents and/or the person most likely to testify at trial. The good family law lawyers want no surprises at trial, none. Also, long depositions guarantee great impeachment material for trial. Always take at least three.

3. **SHOW PASSION:** “Mr. Smith, did you really tell the kids that mom does not love them? What were you thinking? Who does that?” “Mrs. Smith, did you really take off with the kids to your parent’s house in Chicago without any advance notice to dad? What were you thinking? Who does that?” The good family law lawyers show emotion, and it’s genuine.

A final word on the importance of passion. Do not show it for the dollars in the case but for the children. Having a passion for children is universal. Get your nose out of the notes and go eye to eye when your emotions start racing. Believe me, your client will love it…and in all likelihood so will the Judge.

Here’s the beauty of the three qualities or prerequisites mentioned above, they build confidence. You feel bullet proof and unbeatable if you walk into trial with these three bases covered. You will not ramble, you will speak with clear authority and you will be able to quickly pull out the case, statute or deposition passage that supports your argument.

**Judge Timothy Bailey:** Prior to serving on the bench as a circuit court judge for the Seventeenth Judicial Circuit, Judge Bailey practiced law for 33 years in private practice: general civil and family law. He is the Past President of the Broward Bar Association, Past President of the North Broward Bar Association, Chairman of the Broward County Judicial Nominating Committee, and two-term member of the Board of Governors of The Florida Bar.
Divorce Ambivalence: It’s Not Over Till It’s Over

By Marni Feuerman, L.C.S.W., L.M.F.T., Boca Raton

During your initial consultation with a client, you can often determine how strongly they feel about getting a divorce. Many clients are coming to you because they must respond to their spouse’s filing, but do not wish to get divorced. Others are beyond a doubt certain that their marriage is over. After enough time, you will likely have seen all the gradients in-between those extremes. You may not realize it, but as a lawyer, you do have a significant influence on marriage preservation.

Of those presenting to a divorce attorney’s office approximately 30% will have some degree of divorce ambivalence. By asking a few simple questions you will be able to find out if your client is in this category. In fact, you can even include a brief screening in your initial paperwork that assesses the client’s degree of divorce ambivalence.

Here are some helpful questions to ask:

1. Are you done with the marriage even if your spouse were to make major changes?
2. Do you have mixed feelings about getting divorced?
3. Would you consider reconciling if your spouse got serious about making major changes?
4. Would you make significant changes to get your spouse to hold off on the divorce?

A “no” response to question one, or a “yes” to the others would be a key indicator of divorce ambivalence. At this point, you should probe your client for more details. For example, a conversation might go something like this:

**Attorney:** Mrs. Jones, you are indicating you have mixed feelings about getting divorced. Could you tell me more about that? (Asking an assessment question)

**Mrs. Jones:** Yes, I am so confused. I am tired of the fighting all the time. My kids are almost out of the house. I need to see what my options are at this point.

**Attorney:** That sounds like a tough place. I see many clients in that boat. So, you really are not entirely sure you want to leave your marriage? (reflecting back the answer to show empathy and get clarification)

**Mrs. Jones:** Not really. I would love for my husband to make some changes, but I have given up on him. I have read every self-help book there is to no avail.

**Attorney:** Have you tried anything else to help? How about marriage counseling? (Finding out everything they have tried to make it better)

**Mrs. Jones:** We tried marriage counseling once but only for a few sessions. He hated the counselor and wouldn’t go back.

**Attorney:** People can often get on track with the right help. I may be able to help you find a competent marriage therapist. Someone who has a good reputation and that your husband was at least be willing to give a try. Would you feel okay asking him again? (listening for the efforts made as a couple to get help and listening for the reasons given for seeking a divorce)

It’s helpful to explore the descriptions the clients provide about the problems in the marriage. Listen for “hard” versus “soft” reasons. Hard reasons are abuse, addictions, and infidelity. Soft is everything else such as fighting too much, growing apart, or personality differences. In the above example, Mrs. Jones describes a “soft” reason for considering divorce. This does not mean that this is less painful for her. However, it does mean that marriage is more easily saved, as soft reasons are more amenable to marriage counseling. You will also want to know if this is an impulse decision, such as when an affair has just been discovered. You can encourage your client to slow down and carefully think through the next step instead of making a rash decision they could come to regret.

If there is a way to explore a divorce alternative, then this needs to be more closely probed. All family law attorneys are ethically obligated to help keep families together, if possible. You may offer to move forward with the divorce process, but you may also offer to guide the client toward reconciliation until a firm decision is made. The best option, if available in your area, is called Discernment Counseling. This is a specific protocol developed to take a couple through a brief (one to five session) counseling process, with the goal to decide the future of the marriage. If the client is willing, you may direct him or her to the website www.DiscernmentCounseling.com to get a better description of the counseling and a list of counselors in their area.

If your client refuses Discernment Counseling, you might then encourage closure counseling to help the couple peacefully part ways. This can continued, next page
Divorce Ambivalence

be accomplished by referring the client to a local therapist with extensive training in couples’ dynamics. Both discernment counseling and closure counseling has been proven to help couples divorce more cooperatively.

Alternatively, there are two highly recommended books that address divorce uncertainty. *Should I Try to Work it Out?* by Dr. Alan Hawkins, Dr. Tamara Fackrell and Steven Harris. This is a good book for clients leaning out of the marriage. For the client wanting to save their marriage, and perhaps only in your office in response to a spouse’s divorce filing, then you can guide them to *Divorce Remedy* by Michele Weiner-Davis. These books are self-help options that guide readers towards clarity on reconciliation, separation, and divorce decisions.

It’s frustrating to have a potential client in your office who is in an uncertain state of mind. You are ready to get down to business and his/her ambivalence delays the process of moving forward. However, be mindful of the fact that as a divorce lawyer you are in a powerful position to impact the direction the client takes in making one of the most important decisions of their life: the future of their marriage, and in effect, all of the far-reaching consequences this decision entails.

**Marni Feuerman** is a licensed clinical social worker and licensed marriage and family therapist in private practice in Boca Raton, Florida. She specializes in relationship problems, marriage and couples counseling. Marni writes articles on these topics for About.com, Huffington Post, Gottman Institute, YourTango.com, and Dr. Oz’s Sharecare.com. As an expert in her field, she is frequently quoted in local and national media. In order to successfully work with couples, she is certified in Emotionally-Focused Therapy (EFT) which is considered the "gold standard" of couples therapy. She is also certified in Discernment Counseling to treat “mixed agenda” couples (one or both may be considering divorce). For more information, visit www.TheTalkingSolution.com.

---

**Advertise in the Commentator!**

<table>
<thead>
<tr>
<th>Ad Size</th>
<th>Cost</th>
</tr>
</thead>
<tbody>
<tr>
<td>1/3 page</td>
<td>$275.00</td>
</tr>
<tr>
<td>1/2 page</td>
<td>$350.00</td>
</tr>
<tr>
<td>2/3 page</td>
<td>$550.00</td>
</tr>
<tr>
<td>Full Page</td>
<td>$680.00</td>
</tr>
<tr>
<td>Back Cover</td>
<td>$1,050.00</td>
</tr>
</tbody>
</table>

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

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

For further information, contact Gabrielle Tollok, Section Administrator, 850/561-5650 or gtollok@floridabar.org

Company Name: __________________________________________________________________________________________

Address: __________________________________________________________________________________________________

Contact: ___________________________________________________________________________________________________

Phone No: (    ) ___________–___________  E-mail: ____________________________________________________________________________

Payment Enclosed: $ __________________ (payable to: The Florida Bar)

Item #8100091

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

_____________________________________________ _________________________

Contact Signature                  Date

Send to:   Gabrielle Tollok, Administrator, The Florida Bar, 651 E. Jefferson St., Tallahassee, FL 32399-2300
What Not To Do in A Collaborative Divorce Case

By Stann Givens, Esq., Tampa

We have had collaborative dissolution of marriage in the Tampa Bay area for 11 years now. It all started when we heard about collaborative divorce cases through contacts with out-of-state lawyers who were into it.

Twenty-five lawyers, in the Hillsborough and Pinellas County area combined, selected ourselves to start the process based on the requirement that, to be in the group, you had to be an experienced divorce litigator who was reasonable in dealing with the court and with opposing counsel.

We flew in two lawyers, a forensic accountant and a psychologist from Texas to train us. Since then, we have brought them back five or six more times to train additional lawyers, accountants and mental health professionals.

This area of divorce practice has caught on and is becoming very popular with clients and with the other family lawyers in this area.

So, what have we learned in the last eleven years? While we realize that we still have much to learn, it is fair to say that we have refined our skills tremendously since day one.

Without a doubt the most significant thing we learned was how vitally important it is to have a neutral mental health professional as part of the collaborative team. In the beginning, we avoided using mental health professionals because we wanted to save our clients’ money and probably because we all thought that, as divorce lawyers, we were all pretty good amateur psychologists. Well, we were wrong. Having the skills of a mental health professional involved has saved many a collaborative divorce case from destruction. The lack of a mental health professional has kept some otherwise potentially solvable cases from getting to resolution.

So the first thing not to do in a collaborative divorce case is to do it without a mental health professional. I felt strongly enough about this that I tried to spread the word by writing a blog which the Huffington post included on their website. Here is the link if you are interested: http://www.huffingtonpost.com/stann-givens/the-best-way-to-divorce-b_3991454.html

If you leave this article with one change in the way you handle these types of divorces, that would be it.

The next mistake I have seen people make is to be overly generous in providing newly trained accountants and mental health professionals with their first involvement in a collaborative divorce. The mistake comes in the form of bringing on a rookie accounting professional and a rookie mental health professional in the same case. No matter how experienced and skilled the lawyers in the case are, that is a recipe for failure. Even if those professionals have been well trained and have observed some collaborative divorce cases, keeping track of two inexperienced professionals in one project is too much to do. So have only one rookie professional in any collaborative case.

Another problem is that some attorneys and neutral professionals try to save their time and their clients’ money by meeting only as the entire group. They avoid, for cost purposes, having a live or telephonic professionals’ preparation meeting before each full collaborative meeting.

Having the mental health and accounting professionals speak individually with each of the clients a week in advance of the next full collaborative meeting provides an opportunity for them to have the clients fully prepared to make the best use of time when the full group meets. Then having a telephone call involving everyone but the clients in advance of each meeting will prepare all involved to better handle any issues that have arisen since the last full meeting. The mental health professional will be particular helpful with suggestions as to how the hot-button issues should be handled. Don’t fail to schedule a pre-meeting phone call with all of the professionals.

Another problem arises when a party is using an outside consultant who is not involved in the collaborative meeting.

It doesn’t take long before it becomes obvious to the team members that this is occurring. The client begins objecting to any finding or suggestion made by the neutral financial or mental health professional.

If that happens, a side meeting between the attorney and the client usually will result in a revelation that the client has been advised by a financial professional, mental health professional or attorney from outside the process. The cure for the problem is to tell the client that he or she is entitled to get advice from anyone who is trusted by the client, but that, from then on, the outside consultant needs to attend the meeting, even if only by telephone. This will educate the outside consultant as to what is going on and will avoid the problem of ideas not getting accurately translated from what happened at the meet-

continued, next page
ings. Once the outside consultant hears all of the details of what really is being discussed, that consultant generally will understand that the group’s options make sense. Don’t let an outside consultant remain outside the process.

The next problem I have seen is when one or more of the clients is a litigation attorney. It is not always a problem, but I have seen several instances where at first, the client/attorney expresses confidence in, and willingness to participate in, the collaborative method of divorce negotiation.

As the case goes on, some strong litigators who are used to living in the world of court battles have a problem letting that mindset go. When that happens, the process begins to more closely resemble the emailed offer/counter offer style of negotiating as opposed to the clients sitting at a table with the neutral mental health professional, the neutral financial professional and both lawyers while working together to complete the puzzle. Don’t allow a client who is a litigation attorney get involved in a collaborative divorce without first explaining the behaviors that cannot occur and, if able, have that client meet with the neutral mental health professional to have that expert evaluate whether the journey through the collaborative process is something that client can accomplish.

Those are some of the basics of what we have learned not to do in handling a collaborative divorce. There are certainly more items, but those stand out as the most destructive mistakes.

If you are reading this and you are not handling any divorces in the collaborative manner, then you are doing the biggest thing not to do in the collaborative divorce process. The more collaborative divorce cases there are, the greater number of divorced people will be able to go to their children’s weddings later on and sit comfortably in the same row during the ceremony. You will also sleep better at night, as the attorney in the process, when your client and the client on the other side are both trying to solve the problem and not reviving the emotional attitudes from their junior high years.

Give it a try. Make the practice of divorce law more effective.

**Stann Givens** is Board Certified in Marital and Family Law and is a partner in the firm of Givens, Givens Sparks in Tampa, Florida. After beginning his career as a prosecutor, he has practiced solely family law for the last thirty years or so. While still handling some traditional divorce and paternity battles, he was one of the early practitioners of collaborative law in the State of Florida and enjoys seeing his clients reap the financial and emotional benefits of that process. His greatest honor as an attorney was when the American Inns of Court renamed the Family Law Inn of Tampa to now be the Stann Givens Family Law Inn of Tampa. He still enjoys working a full load of cases and helping out people in distress.

---

**Are you ready for the challenge?**

**PROVE YOU’RE AN EXPERT**

**BECOME BOARD CERTIFIED**

Board certified lawyers are legal experts dedicated to professional excellence.

FloridaBar.org/certification
Recent Changes in Military Divorces &
How Florida Divorces are Affected

By Tim Voit, Fort Myers

New legislation is affecting the way the military computes a former spouse's share in a divorce. How does this affect Florida cases? Is it something you as a family law attorney should be concerned with when you have a case involving a spouse in the military?

Recently the 2017 National Defense Authorization Act was passed by Congress, as an amendment to the Uniform Services Former Spouses Protection Act (USFSPA) enacted in 1982. Because the military has to cater to the domestic relations laws of every state, each state having their own decisions on how marital portions of pensions are defined, the change limits a former spouse's share to the military spouse's rank and/or pay grade as of the date of divorce, or date of filing for divorce in Florida. This is inconsistent with the majority of states that define marital by a fraction (proration) but more aligned with how a marital portion is defined under Fl. Stat. 61.075.

Some call the change radical, some call it unfair, and some cry foul, like those parties, attorneys, or courts in California, Illinois, New York and 70% of the states across the country, but it is not that significant of a change. Always keep in mind it is the individual states that determine who is entitled to a share of the pension and the method of defining the marital portion of a retirement plan, not the federal government or the military. The military only pays out the monthly amount ordered by the court and if the verbiage of the settlement agreement, final judgment, or court order dividing military retired pay is ambiguous, the military will default to a specific approach to determining a marital share, or ½ thereof of the military spouse's monthly retired pay. This recent legislation only affects the default provision. We will have to wait and see if the military will only accept this new approach as the only approach.

In a nutshell, the new approach is a hybrid of how pensions are traditionally divided in Florida and how pensions are divided in the majority of other states.

The military retired pay, i.e., “pension” is a defined benefit plan designed to pay out a monthly pension stipend for life, beginning at a particular retirement age. The monthly pension benefit is based on years of service and average basic pay, which is then multiplied by a retirement factor to arrive at an “accrued” monthly pension benefit. This is different than a defined contribution plan, e.g. 401(k) Thrift Savings Plan, where an account balance exist and contributions, both by the employee and employer, are made. Here, with a pension plan, and the military retired pay as an example, the accrual of the monthly pension benefit increases as each year passes, based on the additional years of service and the increase in the basic pay (salary).

Both the federal retirement system (for federal employees) and the military have long had default provisions in determining the marital portion of a pension. That is, the plan administrators would simply default to prorating the monthly pension at retirement. The proration of a pension benefit at retirement is typically more favorable to a former spouse of the pension holder. This new legislation, at least for the military, tilts the scale in favor of the military member. The changes discussed here only affect the military though it is suspected that legislation affecting federal employees is not far behind. At this juncture it is worth defining a few terms for those not familiar with retirement plans in divorce.

Introduced in 1982, the Uniform Services Former Spouses Protection Act (USFSPA), under 10. U.S.C. § 1408, defined a former spouses rights to military retired pay and created what is equivalent to a Qualified Domestic Relations Order (QDRO) for the military, though not referred to as a QDRO, i.e. Court Order Dividing Military Retired Pay

The military favored the approach of prorating the retired pay at retirement likely because of its simplicity and the majority of states that favored this approach. Prorating simply means multiplying the monthly retired pay at retirement by a fraction the numerator of which represents the years of marriage which overlaps with service and the denominator representing the total years of service. For example, if the parties were married 10 years but the military spouse ultimately retires with 20 years of service, the former spouse’s share is 25% (50% of 10/20).

The Florida Courts, specifically in Boyett v. Boyett, did not agree with this approach and instead opted to fix a former spouse’s share of a monthly pension as of the date of filing for divorce. The fixed benefit does not increase and assumes that the individual retired or terminated employment on the date of filing for divorce. This is quite different that prorating a monthly pension at retirement as the proration is applied to a much
How Florida Divorces are Affected

from preceding page

larger monthly pension at retirement.

Taking the prior example one step further, assume that the retired pay, which accrued at the date of filing for divorce, was $1,000 per month and the monthly retired pay at retirement ended up being $3,000 per month. Under the prorata approach the spouse’s share would be $750 per month (50% of 10/20 x $3,000/mo). In Florida, and pursuant to Boyett v. Boyett and Fl. Stat. 61.075, the former spouse’s share is $500 per month. In the majority of states a former spouse of a pension holder would enjoy increases in their share the longer the pension holder was employed, under the prorata approach. The courts in the “prorata” states are proponents of the marital foundation theory where had it not been for the marital years the pension would not be as large.

Under the 2017 National Defense Authorization Act the method of fixing the former spouse’s benefit based on the rank and pay grade of the military member at the time of divorce implies that this new approach is consistent with Florida, but it is not entirely. Sure the military computes the former spouse’s share based on the rank and years of service at the time of the divorce, but the basic pay used is not the basic pay at the time of divorce but rather the basic pay for that rank and pay grade at the time of retirement. In effect adding pre-retirement COLAs to the former spouse’s share by virtue of the increases in basic pay over time.

Going back to the prior example, where the former spouse’s fixed share was $500 per month, but their prorata share was $750 per month, assume that there was a post-marital change in rank, or pay grade. Under the old method the benefit based on the higher rank and years of service up to retirement would be used to define the marital portion. Now, only the rank and years of service as of the date of divorce (or filing) will be used. If you represent the former spouse of a military member, this will be good news in the at least they will receive the benefit of COLAs up to retirement. If you represent the military spouse, perhaps not so good news but the risk of prorating a benefit at retirement has been eliminated.

Tim Voit is the author of Retirement Plan Benefits & QDROs in Divorce who’s firm, Voit Econometrics Group, Inc., (www.vecon.com) specializes in the preparation of QDROs and on valuation issues involving pensions, 401(k)s and Investments. Mr. Voit is a regular speaker for CLE credits related to QDROs and financial analysis in divorce and has testified as an expert in state and federal courts.

2017

Family Law Section

Save the Dates!

May 18-21, 2017
In State Retreat
Cheeca Lodge & Spa
Islamorada

September 6-10, 2017
Out of State Retreat
C Lazy U Ranch
Granby, Colorado

July 20-23, 2017
Trial Advocacy Workshop
Renaissance Vinoy
St. Petersburg

October 5-7, 2017
Fall General Meetings
Hyatt Coconut Point
Naples

Cover Photos Needed!!!

YOU COULD HAVE YOUR PHOTO PUBLISHED!

If you would like to submit a large format photo for consideration, please email it to Heather Apicella (hla@gwpa.com) or Tenesia Hall (tchall@legalaidocba.org), Vice Chairs of the Commentator.
Let’s Be Careful Out There! – A Brief Compendium of Tech Safety Tips

By Jack A. Moring, Esq., Crystal River

A spate of recent security/tech-related news stories inspire this column’s subject.

A man living on the French Riviera is suing Uber to the tune of $48 million. It seems he used his wife’s iPhone one time to order a car and logged out of the app. Unbeknownst to him, however, the wife’s iPhone continued to receive notifications of subsequent Uber hails, and the wife, armed with this information, soon learned of her husband’s affair. The now-divorced man blames Uber and is seeking recompense. His attorney, in what may be the understatement of the year, is quoted as saying, “The bug has caused him problems in his private life.”

The Alaska Bar Association, in an October 2016 ethics opinion, stated that it was an ethical violation “for a lawyer to use a ‘web bug’ or other tracking device to track the location and use of emails and documents sent to opposing counsel[.]” For the unjaded among us, the opinion explains this insidious practice:

A web bug is a technology tool that tracks certain information about the document to which it is attached. A common method of “web bugging” – used in email newsletters to help track readers, for example – involves placing an image with a unique website address on an Internet server. The document at issue contains a link to this image. The image may be invisible or may be disguised as part of the document (e.g., part of a footer). When the recipient opens the document, the recipient’s computer looks up the image and thereby sends certain information to the sending party.

One commercial provider of this web bug service advertises that users may track emails “invisibly” (i.e., without the recipient’s knowledge) and may also track, among other details:
- when the email was opened;
- how long the email was reviewed (including whether it was in the foreground or background while the user worked on other activities);
- how many times the email was opened;
- whether the recipient opened attachments to the email;
- how long the attachment (or a page of the attachment) was reviewed;
- whether and when the subject email or attachment was forwarded; and
- the rough geographical location of the recipient.

Think that only election campaigns are prime subjects for foreign intervention? Think again. The place: Cockrell Hill, Texas, a political enclave in the greater Southwest Dallas area. The time: December 2016. The act: an employee at the Cockrell Hill Police Department clicked on an email that appeared to have been from an internal email address at the Department. The result: malware suspected to have originated from either Russia or the Ukraine infected a server at the Department; subsequent emails demanded $4,000.00 in Bitcoin to restore the contents. The outcome: after consultation with the FBI, the Department elected not to pay the ransom and wiped the server completely, destroying years of video evidence and other documents.

These are but a few of the latest stories in the emerging genre known as “Legal Tech Horror.” What can one do to sleep a little better at night? Hence, a few safety tips to render access to your data less accessible (but, alas, none of the following will render you completely safe).

1. Unless you’re already a computer expert – heck, even if you ARE a computer expert – delegate! Hire an Information Technology (I.T.) expert or company to evaluate your system and fix whatever flaws are found. But, do your homework. If you’re in a large firm, chances are you have someone in-house devoted to these tasks. If you’re a small-firm or solo practitioner, ask a few trusted colleagues in your area what they use and get some competitive bids. The days of installing the latest anti-virus software/anti-malware and nothing more are long behind us. If this is the extent of your

continued, next page
A Brief Compendium of Tech Safety Tips
from preceding page

close tech defenses, you are a target, ripe for the picking.

2. Do NOT use the same passwords; do NOT use common passwords. Every year, various news blurs are published with a list of the worst passwords of the prior year. In 2016, once again leading the list was “123456.” Listen, I hear you; I hate remembering them too. So, use a password manager. That way you only must remember one password, and it won’t let you use “123456” as your default.6

3. Do NOT use the auto-fill profiles in your favorite browser, as you may be allowing hackers “to collect information . . . via hidden or invisible fields, which the browser automatically fills with preset personal information and which the user unknowingly sends to the attacker when he submits a form.”6

4. Use a secure authentication tool, where possible. You’ve probably heard of two-factor authentication (2FA). You may have it set up on your smart phone for certain apps. You enter your login id and password and a screen pops up asking for a security key or code, which is sent to you, usually via a message on your phone or tablet. You enter the code, and you’re in. Again, even 2FA is not foolproof, but it is better than nothing. There are various authenticator apps that are available as well, which are generally stronger than a key being sent over a messaging (usually SMS) system, which is inherently unsafe.7

5. Don’t automatically download images with your email. For a reason why, look at the second story at the beginning of this article. It’s an easy setting to adjust on your email program (e.g., in Outlook for Mac, click on “Outlook/Preferences/Reading; in “Security; Automatically download pictures from the Internet”, click “Never;” for Windows or other email programs you can easily search for instructions particular to your product). You can still download the picture after reading the email and determining whether you believe it is safe. You can also add known senders to a “safe senders” list, but I don’t recommend it.

6. Don’t mindlessly scroll through your emails! We have moved light-years beyond the ancient and amateurish “Nigerian prince” email scams (although these too have evolved with numerous new variants). Hackers are well-versed in creating emails that may appear genuine at first glance. But before you click, look at the heading, and look at the address from which the email originated. For example, my email spam filter regularly intercepts email from Wells Fargo regarding my account. I don’t have any accounts at Wells Fargo, but that’s beside the point. Looking at the header, I see the sender, Wells Fargo Online, but the actual address is “alerts.wellsfargo@xxx.com.” (I’ve deleted part of the address but know that it has nothing to do with Wells Fargo). A click on that link would have infected my computer.

7. Keep your computer, phone, and tablet updated with the latest operating system updates and fixes (but avoid beta releases unless you are tech-savvy and have a threshold for inconveniences (freezing apps, etc.) and maladies (system crashes on beta software have been known to corrupt and even delete data)).

8. Biometric security (fingerprint authentication/facial recognition) is a start, but it is far from perfect, and it’s not as safe as you might think.8

In the ‘80s, the critically acclaimed police drama, Hill Street Blues, the late great character actor, Michael Conrad, played Desk Sergeant Phil Esterhaus. In many an episode, morning roll call would end with Sergeant Esterhaus’s admonition to his troops: “Let’s be careful out there.” Words to live by, “out there” and on line.

**Endnotes**


3 Id.


5 But I would be remiss if I didn’t point out that even password managers are not a panacea. In mid-2015, it came to light that one of the most popular password managers, LastPass, was hacked, and certain non-encrypted information accessed and taken. For more, see http://lifehacker.com/lastpass-hacked-time-to-change-your-master-password-1711463571.


Application for Membership
THE FLORIDA BAR FAMILY LAW SECTION
www.familylawfla.org

Please fill out the following and send with a check. You will be added on the mailing list within a week after processing:

Enclosed is my check made payable to The Florida Bar for the appropriate amount: (check one)

☐ Active Member of The Florida Bar $55 (#8101001)
   ***Any member of The Florida Bar in good standing***

☐ Affiliate Member of the Section $65 (#8101002)
   Occupation: ________________________________

☐ Law School Student $25 (#8101002)
   ***Law students enrolled in Florida law schools***
   Law School name: _____________________________ Year: ________

Please check one: ☐ New Member ☐ Renewing my Membership

METHOD OF PAYMENT (CHECK ONE):
☐ Check Enclosed – Made Payable to: The Florida Bar
☐ Credit card

☐ MASTERCARD ☐ VISA ☐ AMEX ☐ DISCOVER Exp. Date _____/_____ (MONTH/YEAR)

CARD NO: ________________________________
Name: ________________________________
Firm Name: ________________________________
Florida Bar number or Customer number: ________________________________

Please check one: ☐ Attorney ☐ Florida Registered Paralegal ☐ N/A
Office Address: ________________________________
City/State/Zip: ________________________________
Office Phone #: ________________________________ Office Fax #: ________________________________
E-mail: ________________________________

Signature: ________________________________ Date: ________________________________

Mail to: FAMILY LAW SECTION, The Florida Bar
Attn: Gabrielle Tollok, Program Administrator
651 East Jefferson Street, Tallahassee, FL 32399-2300
FAX (850)561-9427
Keep up with what’s new in the Section!!

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

Florida Bar Family Law Section
www.familylawfla.org