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Chair’s Message

This is a bittersweet message, since it is my last one as Chair, but one that I am very happy to share with you all, knowing that the Section is in the capable hands of Nicole Goetz, Abigail Beebe, Amy Hamlin, and Douglas Greenbaum. I am so honored to have served the Family Law Section as Chair for the 2016/2017 Bar year. I am very grateful to those who have gone before me, and especially wish to thank my Immediate Past Chair, Maria Gonzalez, who has been my mentor since 1997 when I first set foot in Florida. Maria is an incredible woman, mother, lawyer, leader, mentor and friend. She has been a hard act to follow, and I hope that I have done her proud. Similarly, I am so grateful to my partner and former Chair of the Family Law Section, Cynthia Greene for supporting the time commitment that being Chair required of me, for stepping up to assist in any way she could, for knowing how important this service is, and for her guidance. To Maurice Kutner, Scott Rubin, Peter Gladstone, Jorge Cestero, Thomas Sasser, Elisha Roy, David Manz and Carin Porras, and Magistrates Diane Kirigian and Norberto Katz, all past chairs of the Family Law Section, have been and continue to be important role models for and mentors to me: I thank each one of you from the bottom of my heart for the support, guidance and friendship you have so generously given. I also want to thank the Family Law Section’s Administrator, Gabby Tollok, who is my (much younger) soul sister.

I attach here, below, the text of my presentation of the Chair’s 2016/2017 Trailblazer Award to Elisha Deel Roy at the 2017 Annual Convention of The Florida Bar which took place in Boca Raton on June 21, 2017. I hope that it inspires you all to go out there and blaze some new trails.

According to Webster’s Dictionary, a trailblazer is one who blazes a trail to guide others. The first known use of the word was recorded in 1908. That was just a few short years before women received the right to vote here in the good old USA. I have a feeling that that is no coincidence. Women like Susan B. Anthony, Elizabeth Cady Stanton and Alice Paul most assuredly were trailblazers in the struggle for the enfranchisement of women. Since November 8th, I have done quite a bit of ruminating on the gender differences and the struggle women still face in 2017.

The recipient of this year’s trailblazer award is someone who has never stopped trying to make the section better, nor do I think ever will. This trailblazer has truly demonstrated — by action — the determination to collaborate, to hear others’ opinions, to discuss issues openly and frankly, to grow and learn and change as a result of others’ views and opinions, and to provide and promote institutional knowledge. This trailblazer has chaired almost every committee of the section. This trailblazer is board certified in marital and family law and worked on both the certification review committee and the Bar’s marital and family law certification committee. This person blazed a path to membership in the AAML. This trailblazer has worked with some of the best in the business, and is now, standing alone, one of the best in the business. This trailblazer has accomplished more in just-over 4 decades on the planet than many people accomplish in an entire life. The 2017 trailblazer has continued to blaze trails even when confronted with blatant and unapologetic opposition simply for opposition’s sake. This trailblazer has set goals for self and section, and persevered, all the while recognizing daily that when doing something that matters, there will always be those trying to prove you can’t.

The recipient of the 2017 section’s Trailblazer award is one helluva WOMAN who CAN. Elisha Deel Roy.

Be well, keep striving for excellence in your practices and personal lives, and always remember that what you do makes a difference. Enjoy this wonderful Summer edition of The Commentator.
Comments from the Chair of the Publications Committee

This is the last edition of the Commentator during Laura Davis Smith’s year as Chair of the Family Law Section. The Publications Committee excelled this year in part because of her whole-hearted support. We thank her for her guidance, encouragement and vision.

A special thank you to our Florida Bar Administrator, Gabrielle Tollok, and layout designer, Donna Richardson. Another special thank you to Eddie Stephens and Jack Moring, who never hesitated to help whenever called upon this year. Their commitment to the Section and to making the Commentator a quality publication for our readership was inspiring.

Lastly, thank you to all of our authors this year. The Commentator continues to provide value to family law practitioners throughout the State because of our authors’ willingness to give of their time and talent. This is my last year chairing the Publications Committee, and working with the authors has been a real highlight of serving the Section. I hope more Section members will consider authoring an article for the Commentator in the future!

JULIA WYDA
Family Law Section

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“Summer was on the way; Jem and I awaited it with impatience. Summer was our best season: it was sleeping on the back screened porch in cots, or trying to sleep in the tree house; summer was everything good to eat; it was a thousand colors in a parched landscape; but most of all, summer was Dill.”

— Harper Lee, To Kill a Mockingbird

This Summer Edition of The Commentator includes several noteworthy articles. Adam Cordover, a Collaborative Attorney and Rachel Moskowitz, MS, LMHC, have co-authored a captivating Case Study in Co-Mediation to Collaborative Mediation. Robert Evans, Ph. D., from Clearwater, Florida sheds light on the Prevalence of Parental Alienation. Tim Voit, a Financial Analyst and QDRO expert, provides an in depth look at whether DROP, BacDROP, and PRB accounts are considered marital assets in Florida. Eddie Stephens, a Board Certified Divorce Attorney, reiterates the importance of “putting it in writing” while Charles Thompson, a former lemon law attorney, makes us re-think vehicle valuations. Lastly, Jack Moring from Citrus County updates us on the evolving social media and technology law in Florida.

Finally, and as always, we truly appreciate our sponsors who you may find helpful to your practice.
Why Put It In Writing?
The Consequences of Oral Cohabitation Agreements

By Eddie Stephens, West Palm Beach

Recently, the Fourth District Court of Appeal decided Armao v. McKenney, 42 Fla.L.Weekly D1011 (Fla. 4th DCA May 3, 2017), and affirmed the finding of an “oral cohabitation agreement” between two unmarried cohabitants. The holding is extremely narrow and the facts were not in dispute. Specifically:
The case dealt with the forty-six year relationship between Anthony Armao and Russell Turnbull. During the parties’ extended year relationship, they “pooled” their income into a joint checking account where they paid joint expenses. The parties sold property together, made loans together and filed a joint lawsuit to recover a loan.

At trial, Turnbull testified that within a couple of years of meeting Armao, they entered into an oral cohabitation agreement. They discussed how they would work together, live together, provide for each other, and take care of each other. They agreed to move in together, to be a couple, and take care of each other financially and emotionally, “just like a married couple.” They agreed that all their income, investments, assets, and inheritances would be combined and used to pay their current and future expenses.

The trial court determined that the parties held themselves out as a couple during their forty-six year relationship. They had a blessing ceremony and anniversary parties. They lived together in Rhode Island and then retired together in Florida. They lived in several different homes until they purchased the home that is the subject of the partition action. They created identical trusts and wills leaving everything to each other.

Mr. Armao controlled the parties’ finances. During the relationship, Mr. Turnbull gave $460,000 of his inheritance from his mother and provided over $500,000 in income during the relationship. In addition, the proceeds from the sale of the parties’ condominium in the amount of $289,000 and proceeds from the sale of a yacht were deposited into Armao’s trust account which totaled $1,048,448. Mr. Turnbull sought half that amount.

Under the narrow factual circumstances of this case, the circuit court determined and Fourth District court of Appeal affirmed that an oral cohabitation agreement was established and concluded:

“Florida law recognizes that unmarried cohabitants may agree to enter into an enforceable contract that establishes rights and responsibilities towards each other “as long as it is clear there is valid, lawful consideration separate and apart from any express or implied agreement regarding sexual relations. Additionally, nothing in the statute of frauds, section 725.01, Florida Statutes, requires that such an agreement be in writing. Indeed, among the other states that also recognize contracts between unmarried cohabitants, only three—Minnesota, New Jersey, and Texas—have held that such agreements must be in writing, and all three of those jurisdictions have enacted statutes specifically containing this requirement.”

So what would happen if parties to an alleged oral cohabitation got married without formalizing their agreement with a written premarital agreement?

Can you believe since Armao was decided on May 3, 2017, I have already litigated the issue of a same sex marriage where a spouse attempted to employ Armao to support her argument they were entitled to an equitable distribution of assets and liabilities during the 20 year cohabitation period before the parties’ four-year marriage.

The facts of this case where much different than Armao:

- There was a dispute as to whether there was an oral cohabitation agreement. One party testified they exchanged promise rings to demonstrate they were entering a monogamous relationship. The other testified that exchange of rings was to signify a promise that they will forever share their income, assets and liabilities.
- The parties never pooled their incomes and only had joint bank accounts a few months before the marriage.
- The parties were married and failed to enter into a written prenuptial agreement.

The matter was tried in Palm Beach where the circuit court judge concluded:

The Petitioner disputes that there was a cohabitation agreement, but as a matter of law, even if
the respondent’s allegations were truthful, which the Court finds they were not, the Respondent would not be legally entitled to the relief she requested.

In Armao v. McKenney, -- So.3d -- (Fla. 4th DCA 2017), the Court recently upheld an oral cohabitation agreement; however, it was applied to unmarried cohabitants. In the present case, once the parties married, Chapter 61, Florida Statues applies. Section 61.079, Florida Statutes clearly provides any premarital agreement must be in writing. In addition, any agreement to pay the debt of another must be in writing or it is barred by the Statute of Frauds.

In this case, the Respondent seeks to make the Petitioner responsible for her pre-existing marital debts. This is not a viable claim because a promise to pay the debt of another is barred by the Statue of Frauds unless it is writing. Riba v. Pila, 42 So.2d 249 (Fla. 2nd DCA 1989).

In the case at hand, there were other issues that significantly damaged the claimant’s credibility. For example, she made a claim for alimony despite the fact that she was being fully supported by her fiancé after they became engaged one month after the filing of this divorce. Ultimately, the trial court awarded the defending spouse over $47,000 in Rosen fees for defending against “vexatious, meritless claims”.

**Conclusion:**
What have we learned from these events?

1) In certain narrow situations, an oral cohabitation agreement between unmarried could be enforced between unmarried cohabitants.

2) Once you marry, any agreements concerning rights of the marriage MUST be in writing.

3) If you take an unreasonable position in Court, don’t be surprised to be assessed Rosen fees.

**Eddie Stephens** is an equity partner in Ward Damon, PL, where he leads the family law department and manages community relations for the firm. Eddie is a Board Certified Family Law Attorney who specializes in high-conflict matrimonial law. He has earned the AV® Preeminent™ Peer Review Rating by Martindale-Hubbell, a professional rating indicating the highest ethical standards and professional ability, and has been selected for inclusion in Best Lawyers in America®, a peer-review publication recognizing the top 4% of attorneys in the country.

In addition to practicing family law, Eddie is an author, lecturer, and community leader who supports a number of local civic and charitable organizations including serving on the Board of Directors of the Center for Child Counseling, and program chair for the youth leadership program for Leadership Palm Beach County. His hobbies include cooking, yoga, camping and spending time with his family. Eddie is happily married to Jacquie and has two children, Christopher and Matthew, and they all call Palm Beach, Florida home.

**Endnotes**

1 Clarke v. Maio, Case No. 502016DR008059XXXXNB (Fla. 15th Judicial Circuit, 2017)
What is the Prevalence of Parental Alienation?

By Robert A. Evans, Ph.D., Clearwater

Children live in many family configurations. Some live with a parent or parents who have never been married. Others live with grandparents or guardians when their biological parents are not functional caregivers in their lives. Still, others live in family units that have reconfigured through divorce. Census data are not available about the construction, deconstruction, and remaking of these family units. Further, each state within the United States handles family law uniquely. State court systems are not uniform in their recordkeeping of divorces, with and without children, and are not aware of the possible family configurations in children’s lives. This poses a serious difficulty for any calculation of the incidence and prevalence of Parental Alienation (“PA.”)

Stanley Clawar and Brynne Rivlin (1991, 2013) conducted one of the largest studies into the prevalence of PA over a 12-year period. They reported, in their book entitled Children Held Hostage, published by the American Bar Association, that in 86% of the 1,000 cases they studied there was some element of parental programming and brainwashing in an effort to implant false and negative ideas about the other parent, with the intention of turning the child against that other parent. Their published findings break down as follows:

<table>
<thead>
<tr>
<th>Percentage of Parents Who</th>
<th>Program/Brainwash</th>
</tr>
</thead>
<tbody>
<tr>
<td>23% more than once a day</td>
<td></td>
</tr>
<tr>
<td>22% about once per day</td>
<td></td>
</tr>
<tr>
<td>12% more than once per week</td>
<td></td>
</tr>
<tr>
<td>8% once per week</td>
<td></td>
</tr>
<tr>
<td>21% occasionally</td>
<td></td>
</tr>
<tr>
<td>14% no detection of programming-and-brainwashing</td>
<td></td>
</tr>
</tbody>
</table>

The frequency of alienating behaviors, once or more than once per day, was also found to be at a level of 45% by Johnston and Campbell in their 1988 study where they reported alienation occurring approximately 40% of the time. Other important studies followed, indicating that PA was prevalent in approximately 25% of custody disputes (Bernet, 2008).

Bernet outlines this history in his article Parental Alienation Disorder and DSM-V as follows:

- Janet Johnston (1993) reported the children had "strong alignment" with one parent and rejection of the other parent at a level of 7% in one study and 27% in a second study.
- Larry Nicholas, in his 1997 presentation to the American College of Forensic Psychology, reported on a survey of 21 custody evaluators. The majority of Nicholas’ respondents reported that in about one-third (33%) of their custody evaluation cases, one parent was engaging in clear alienating behavior.
- Sandra Berns (2001) reported PA was found to be present in 29% of court cases reviewed from 1995 to 2000 in Brisbane, Australia.

Bernet (2010) reported that 10% of children (7.4 million) in the United States live with divorced parents and 10% of these (740,000) are involved in custody or visitation disputes of which 25% (185,000) develop PA.

Gardner (2001) conducted a qualitative follow-up of 99 children from 52 families he had previously diagnosed with Parental Alienation Syndrome (PAS). He reported, when the court chose to restrict or eliminate the child’s access to the alienator for 22 of the children, there was a significant reduction or even elimination of PAS symptomatology in all 22 of these cases. In the 77 cases where the court chose not to reduce access or transfer custody, there was an increase in PAS symptomatology in 70 cases (90.9%).

Studying false allegations of sexual abuse and alienation, Kopetski (1998a, 1998b) reported one-fifth (20%) of her sample engaged in alienation. Kopetski’s work on alienation began in the 1970s and was fully developed by the time she learned of Richard Gardner’s work. In 1991, Kopetski presented her work on PAS at the Fifteenth Annual Child Custody Conference in Keystone, Colorado. While unaware of Gardner’s work, she simultaneously arrived at observations and conclusions that were remarkably similar.

The Hetherington and Clingempeel “Study of Divorce and Remarriage” (1992), E. Mavis Hetherington studied divorced parents and their children and commented:

“As obviously destructive as conflict is to all involved in this dilemma, it was surprising to discover that six years after divorce, 20 to 25 percent of our couples were engaged in just such conflictual behavior; former spouses would make nasty comments about each other, seek to undermine each other’s relationship with the child, and fight openly in front of the child. Aside from being damaging, constant put-downs of the other parent may..."
backfire, producing resentment and a spirited defense of the criticized parent by the child. ...Conflicting co-parenting distresses children and undermines their well-being, and it makes parents unhappy, too. They feel guilty about fighting in front of the children, but their preoccupation with their anger and lingering resentment makes it difficult for them to begin focusing on a new, more fulfilling life and on the pain they are causing their children.”

In 2003, Johnston reported on an "alignment" study. She defined alignment as the “child's behavioral and verbal preference for one parent with varying degrees of overt or covert negativity towards the other parent.”

She found that 15% of children from a community sample of divorcing families and 21% in child custody cases experienced either "some" or "much" alignment with one parent or the other. Bernet's group (2006) calculated Johnston's percentages using her raw data and found that 18% of the children in the community sample and 27% in the contested custody cases experienced some degree of alignment.

In 2005, Johnston, Walters, & Olesen (Johnston et al., 2005a, b) reported rates of PA of about one-fifth (20%) of high-conflict populations. Two years later, Amy Baker (2007) reported research wherein she surveyed 106 mental health professionals who conducted custody evaluations. The respondents reported that PAS occurred in as many as 55% of their cases. An average rate over all respondents, whether skilled or unskilled in the differential diagnosis of PAS, was 11.2% (SD = 13). Baker found that the evaluators who identified PAS more frequently were:

1. more familiar with the concept of PAS,
2. were more likely to assess for PAS,
3. were more likely to believe that one parent can turn a child against the other parent, and
4. were more confident in their evaluations.

Bow, Gould, and Flens (2009) reported PA was an issue in an average of 26% child custody cases in their survey of 448 mental health and legal professionals. Bala, Hunt, and McCartney reported in 2010 that between 1989 and 2008, alienation was found by the court in 106 out of 175 cases raising the issue (61%). The mother was the alienating parent in 72 cases (68%), and the father was the alienating parent in 33 cases (31%). It seems that in this study, the alienating parent had sole custody of the children in 89 cases (84%), and joint custody in 14 cases (13%).

A recent study (Baker, 2010) revealed that about 28% of adults in a community sample (i.e., not selected because of a precondition related to divorce or custody) reported that when they were children, one parent tried to turn them against the other. This data is striking in that a significant portion of the sample was probably raised in an intact family. Not surprisingly, the proportion that reported that they had been exposed to parental alienation was higher in the subsample of individuals who had been raised by a stepparent, at 44%.

To learn more about PA and specific strategies to address this issue in the courtroom, go to www.NAOPAS.com and for more continuing legal education on this topic go to: https://naopas-learning-center.thinkific.com/

Robert A. Evans, Ph.D.
He authored the book, The Essentials of Parent Alienation Syndrome: It’s Real, It’s Here, and It Hurts; has testified in family law cases across the U.S. regarding PA. He’s an approved sponsor of CEs for psychologists by the American Psychological Association and approved by FL Bar for CLEs on PA.

References

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What is the Prevalence of Parental Alienation?

from preceding page


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*. 
Co-Mediation to Collaborative Mediation: A Case Study In Client-Focused Dispute Resolution

By Adam Cordover, Tampa and Rachel Moskowitz, Tampa

Introduction

We all know that it is generally better for families to resolve disputes privately and peacefully outside of court. We have tools, like collaborative practice and mediation, to help accomplish this. More recently, Licensed Mental Health Counselor Rachel Moskowitz and Attorney Adam B. Cordover have taken the best aspects of common forms of alternative dispute resolution and put them into action. They have been tailoring dispute resolution models to meet the needs of the particular family in front of them. Here is a case study of a co-mediation, which eventually turned into a collaborative mediation. Names and facts have been changed to protect the privacy of the family involved.

The First Call

Rachel received a call one afternoon from a woman named Pamela interested in mediation for her divorce. Pamela said that she has been married to her husband Brian for 22 years, has 3 young children ages 3, 7, and 11, and that they wanted to get divorced in the most financially conscious and amicable way.

Rachel told her that she would help her find the best way for her and her husband to get divorced. Rachel briefly explained various options including mediation and collaborative practice. She also told Pamela that she does something called co-mediation. Rachel relayed that she finds it to be most efficient because of the way the professionals tailor the process to the needs of the couple.

Rachel explained how co-mediation works. “Both Adam Cordover, an attorney I practice with, and I are neutral. I am a therapist by training, and Adam is an attorney by training; we use the legal and therapeutic skillsets to help you and your spouse reach an out-of-court agreement. With our different backgrounds, we work together to creatively come up with unique solutions for your family. Would you and your husband like to come and meet with us to learn more?”

Pamela scheduled a consultation for her and Brian to meet with Adam and Rachel.

The Consult

Adam showed up at Rachel’s office shortly before the clients were scheduled to come in. This was the first time Adam had met clients at Rachel’s office. Adam thought that Rachel’s office was quite different from what he had experienced from most attorney mediators, he explained that the spouses are put in different rooms, and a neutral mediator goes back and forth with “settlement offers.” The concern that many attorney mediators have is that if both spouses are in the same room, one spouse can say something provocative to the other and mediation could blow up at any time.

Adam next discussed mediation. As typically practiced in the Tampa area and from what Adam has experienced from most attorney mediators, he explained that the spouses are put in different rooms, and a neutral mediator goes back and forth with “settlement offers.” The concern that many attorney mediators have is that if both spouses are in the same room, one spouse can say something provocative to the other and mediation could blow up at any time.

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Co-Mediation to Collaborative Mediation

from previous page

As typically practiced in Tampa Bay usually goes on for many hours until the spouses reach an agreement. The concern here is that if the parties leave a mediation conference without reaching an agreement, they will then go on to litigate against one another. Any spouse without an agreement can decide that they are done and go into the litigation process with relative ease.

Then Adam explained how, in collaborative practice, each spouse is represented by an attorney. The attorneys are retained solely to reach an out-of-court agreement. In the model normally used in Florida, the clients have the help of a neutral Facilitator with a background in communication, family dynamics, and childhood development. The clients also receive the assistance of a neutral Financial Professional. The collaborative professionals work as a team to resolve all disputes.

As another option, Adam talked about co-mediation. In Rachel and Adam’s model of co-mediation, the spouses work with two neutrals: A therapist and an attorney.

The attorney co-mediator draws on his experience to aid the clients and develop options that he has seen work in other cases. If it is helpful, he can identify statutes for the clients to read that may inform them in their decisions without giving legal advice. He is also helpful in wordsmithing the Marital Settlement Agreement, providing required forms, and informing clients of legal protocols.

The therapist co-mediator, on the other hand, can help spouses identify their interests and goals. She helps create a parenting plan that is developmentally appropriate for the kids and tailored to each family’s needs. Because the therapist co-mediator normally practices with couples in conflict, she is well equipped to keep discussions productive and communications effective.

Co-Mediation Meetings

Adam explained that, in co-mediation, he and Rachel set up shorter meetings focused on specific topics. They do this because they find couples are more able to stay focused and emotionally ready to make decisions when meeting for shorter periods of time.

Working together, the co-mediators create a safe environment allowing the couple to remain present in the room together even if tempers flare. Though there may be caucusing at times, the caucus lasts only for a short period, and the couple always come back together to continue the co-mediation. Rachel and Adam find this to be valuable because it allows couples to overcome arguments and gain skills for resolving conflict for their future co-parenting relationship. Meeting face-to-face also creates efficiencies as misunderstandings can be immediately corrected, and the co-mediators do not have to go through the same information twice.

Adam described the first meeting as a 2-hour session focused on completing the parenting plan, including a time-sharing schedule. At the end of this meeting, the co-mediators will give the spouses financial affidavits to complete. They will then schedule the second meeting two weeks out.

The second meeting is typically 3 hours and focuses on the financial aspects including child support, alimony, and division of assets and debts. Because the co-mediators rely heavily on the financial affidavits to guide this discussion, Adam noted that it is imperative that the affidavits be complete and accurate.

Rachel and Adam expressed that most clients find the financial affidavit to be a complicated form. Some people get anxiety just thinking about filling it out. Accordingly, the co-mediators suggested that Pamela and Brian consider meeting separately with a neutral financial professional who can help them complete it and make the next meeting most productive.

If the 3-hour financial meeting is insufficient to address all outstanding issues, another meeting will be scheduled.

Collaborative Mediation Options

Pamela turned to Adam and asked whether he would let them know whether the agreement is good or bad. Adam confirmed that though he cannot provide legal advice, it is the clients’ right to have attorneys counsel them. Because collaborative attorneys are specially trained to work as a team and help clients reach out-of-court agreements, Rachel and Adam suggested that mediation clients choose collaborative attorneys. In fact, Adam and Rachel explained that they have a provision in their co-mediation contract which states that any attorney hired must be collaboratively-trained.

If either client retains an attorney, Rachel and Adam ask, and their contract provides, that the co-mediators be notified. The co-mediators also require that, if both spouses retain attorneys, everyone sign a collaborative participation agreement that states that the attorneys can only be used for private dispute resolution and cannot be used to fight in court. Adam mentioned that the co-mediators do this to give their clients the best shot at successfully reaching a full and durable out-of-court agreement.

Moreover, Adam remarked, in collaborative mediation, clients have different options to the extent which they want to utilize their collaborative attorneys. One option is that the attorneys can be with the clients at each session. Alternatively, clients can limit the representation and just consult with the attorneys outside of
mediation sessions. A third option is that solely the clients can work with the co-mediators for one issue (such as the parenting plan,) but then bring the attorneys in when discussions get to financial matters. It is 100% the clients’ choice.

Pamela and Brian decided that co-mediators would be the best option for them. They figured they did not have to start off with attorneys, but at any point they could hire attorneys. Adam and Rachel then scheduled the parenting plan mediation session.

Parenting Plan Meeting
Rachel set the first mediation session to take place in her office. When the clients came in, the co-mediators utilized a whiteboard and put an agenda up for what was going to be accomplished during this meeting. The co-mediators also provided mediation ground rules, including confidentiality, privacy, transparency, and self-determination.

Next, Rachel asked the clients to articulate their goals, and she wrote them on the whiteboard. Specifically, she asked what goals the clients had for their children. As it turns out, the goals of most clients are similar. The co-mediators point to the whiteboard and remind the clients, when discussions get heated, that everyone is here to help them achieve their goals and that the clients should not belabor the arguments that brought them to divorce.

Rachel next provided Brian and Pamela with a blank copy of the Florida Supreme Court parenting plan form. Everyone then started going through it and filling it out together.

Rachel helped the conversation remain productive and forward-focused. She also helped the clients reframe statements so that they can be best heard by one another. Additionally, Rachel modeled healthy communication for clients to begin productive co-parenting. Moreover, she took the lead when clients were in conflict or emotions were running high. Where appropriate, Rachel allowed the clients to get things off their chests so that they could move forward. Though most mediators are conflict-avoidant, Rachel’s approach is that, oftentimes, conflict can be productive.

Adam was there to provide information about the law. He helped lead the discussion on topics of jurisdiction and the U.C.C.J.E.A., parental responsibility, relocation, and allocation of overnights and how they might affect presumptive child support amounts. While Rachel was facilitating the conversation, Adam also transcribed the family’s agreements in a way that makes sense to the courts.

In less than two hours, the parents worked through and completed the entire parenting plan. Towards the end of the session, the co-mediators provided the clients with blank financial affidavits and asked Brian and Pamela to fill them out prior to the next meeting. Because the next mediation session is largely driven by the financial affidavits, Adam and Rachel reiterated that it may be helpful for both to see a neutral financial professional before the next session.

When Brian and Pamela began to ask questions about the amount of support they could expect, Rachel and Adam suggested they speak with attorneys. The co-mediators provided the clients with names of collaboratively-trained lawyers who offer unbundled legal services.

Pamela and Brian ultimately decided to consult with a neutral accountant to help them complete their financial affidavits prior to the meeting. They also hired attorneys and let Rachel and Adam know that the attorneys would be joining them for the financial discussions. The co-mediators reached out and provided the attorneys with a collaborative participation agreement and asked that they and the clients sign it prior to the next session.

Financial Meeting
The co-mediators set the financial meeting to take place in Adam’s office. Adam has a big screen television connected to the computer so that everyone could go through different equitable distribution schedules and other scenarios together. Adam also has a conference table that allows attorneys to spread out their work.

Adam, Rachel, and the attorneys first reconfirmed that the attorneys were there to represent each client’s interests, but also to work together as a team to help this family reach their best agreement. The clients expressed their feeling of security knowing that they each had an attorney to guide them and answer their questions. The collaborative mediation team then went right into the division of assets and debts, alimony, child support, and everything else.

The clients had some difficult discussions, but there was comfort amongst the professional team knowing that no one was going to threaten impasse to go to court. The fact that both attorneys and the co-mediators were working from a common set of expectations and norms also put the clients at ease and increased the likelihood of success. The disqualification clause also allowed for a broader discussion of option building because the clients were prepared with their attorneys not to give up when the going got tough.

The meeting lasted 3 hours. Brian and Pamela reached resolution on all substantive issues and the team collaborated on writing up and executing the final agreement.

Conclusion
This divorce could have taken several different turns. The clients ultimately voiced and achieved their goals for their own divorce. They had the comfort of knowing that their divorce professionals and the judicial system were not going to turn them into adversaries. They had the level of support they needed - on the issues they needed it for - when they needed it.
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Here are a few questions for us ADR professionals to think about:

- How do you create client-focused processes that meet the needs of each particular family?
- How do you handle conflict?
- Does your view of conflict help or hinder the dispute resolution process?
- Does collaborative training of professionals make a resolution more or less likely?
- What protocols can you put in place to increase the chance of helping clients reach agreements?
- Do you have attorneys who offer unbundled legal services to whom you can refer?
- Are you an attorney willing to offer unbundled legal services?
- Are you willing to get out of your comfort zone and do things differently?
Florida Supreme Court

- Gosciminski v. State, 132 So. 3d 678 (Fla. 2013): in a murder case, a Nextel engineer testified at the trial about Defendant’s cell phone activity, and created a cell phone tower diagram, showing area where Defendant was on morning of murder, and that Defendant received phone call in area close to where victim was murdered (Defendant also accessed voicemail and made a call around same area). Other evidence of locations where Defendant was thereafter was also introduced. Defendant convicted and sentenced to death. Upon direct review by Florida Supreme Court, conviction and sentence affirmed. Admissibility of cellular technology, cell phone records, comparison to locations on cell site maps is not even expert testimony (Supreme Court mentioned that trial “court noted cell phone records and cell tower site information have been routinely admitted in Florida for over fifteen years and that under Florida case law it was not necessary for an expert to testify about these matters because such information is understood by the average juror who owns a cell phone”).

- Smallwood v. State, 113 So. 3d 724 (Fla. 2014): Defendant arrested for robbery of a convenience store. Arresting officer, after placing Defendant in patrol car, accessed and searched through Defendant’s cell phone, finding five digital images (photos) relevant to the robbery. Arrest report did not mention cell phone or data observed by officer. A year or so later, prosecutor learned of what officer had done, informed defense counsel and sought a warrant to view the images. Defendant objected to admission of photo on theory that even though prosecutor obtained warrant to view photos, that act did not cure the earlier violation of Defendant’s privacy by the initial search. Trial court denied a motion to suppress and later allowed photos into evidence at trial, despite Defendant’s assertion of the controlling authority of a 2009 US Supreme Court case, Arizona v. Gant, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009) (search incident exception to warrant requirement extends only to area within arrestee’s immediate control). First DCA affirmed but certified question as matter of great public importance. Florida Supreme Court quashed decision of First DCA and remanded, holding that the seizure of the phone was proper, “a warrant was required before the information, data, and content of the cell phone could be accessed and searched by law enforcement.”

- Note: The US Supreme Court has also held that law enforcement must obtain a warrant before searching a suspect’s cell phone: Riley v. California, 573 US ___, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014). Compare: Burton v. State, 191 So. 2d 543 (Fla. 5th DCA 2016), upholding a cell phone search incident to arrest under the good faith exception to the exclusionary rule.

- Tracey v. State, 152 So. 3d 504 (Fla. 2014): In 2007, a CI provided law enforcement with info that Defendant gets many kilos of cocaine from Broward County and provides law enforcement with a cell phone number of Defendant. Law enforcement secures an order for “pen register” and “trap and trace” on Defendant’s cell phone. A month...
Technology/Social Media Issues
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later, without securing any additional order, and learning Defendant was coming to Broward County, LE used cell phone location data as Defendant used his phone some 10 times (application for order did NOT seek permission to track location of Defendant’s cell phone). After his arrest and charge, Defendant moved to suppress evidence from the real-time monitoring as exceeding scope of original order and was an otherwise warrantless search. Trial court, though acknowledging there was no probable cause for issuance of warrant to perform real-time location monitoring, it denied motion, finding no warrant required as Defendant was driving on public streets where there was no expectation of privacy. Fourth DCA affirmed, finding that any violation of federal or state statutes re: failing to obtain proper warrant did not require exclusion by express language of those statutes (which provide for criminal and civil penalties for violation). Florida Supreme Court reversed, in a 5-2 decision. The Court noted that the US Supreme Court had not answered the issue specifically and that federal courts were divided. The Court, after discussing applicable case law, concluded that regardless of whether federal/state statutes may authorize government’s obtaining real time cell site info on less than probable cause, concluded that obtaining such info is a “search” under the Fourth Amendment, and that Defendant had a subjective expectation of privacy in the location signals transmitted by his phone and his conveying of that info to the service provid-
er was only to be able to use his phone for its intended purpose. Finding also no “good faith” exception for lack of issuance of a warrant, the motion to suppress should have been granted. See also Herring v. State, 40 Fla. L Weekly D 1221 (Fla. 1st DCA 2015). Cf. Mitchell v. State, 25 So. 3d 632 (Fla. 4th DCA) (regarding historical (not real time) cell phone information).

- **Inquiry Concerning a Judge (Krause)**, 141 So. 3d 1197 (Fla. 2015): Judge given thirty day suspension without pay for her reaching out on social media to seek assistance of her friends to help her husband, who was then running for a judgeship, to correct perceived misstatements of his opponent. She was doing it, she alleged, to “correct the record,” but almost immediately thought better of it and took the post down after a few hours. By then, however, her husband’s opponent had been made aware of it and disseminated it further.

First DCA

- **Paris Destinee Cannon v. Thomas**, 133 So. 3d 634 (Fla. 1st DCA 2014): Cannon, believing that Thomas’s daughter had insulted her, told her via a Facebook message that she was going to beat her up the next day, and proceeded to do just that, inflicting grievous injuries upon the daughter (both the attacker and the victim were school age). Thomas sought an injunction for protection against repeat violence. Cannon argued that there was only one act of violence and the petition could not be granted. Thomas argued that a 1999 amendment to the statute allowing o/b/o petitions required only one act of violence where minors were concerned. Trial court entered the injunction. First DCA reversed, finding that the plain language of the statute required two separate acts. Given the nature of the injuries sustained by the daughter, it is clear the court struggled to find some way to uphold the trial court but could not do so. A sobering concurring opinion, replete with statistics on “the hundreds of thousands of violent acts that occur annually while students are going to, at, or coming home from their schools,” urged legislative amendments to create an injunction applying specifically to school-related violence.

- **Antico v. Sindt Trucking, Inc.**, 148 So. 3d 163 (Fla. 1st DCA 2014): In a wrongful death action filed by the estate of a woman killed in an automobile collision with one of Defendant’s trucks, Defendant pled comparative negligence or that the decedent was the sole cause of the accident as she was “distracted by her iPhone.” Defendant sought data from decedent’s cellphone, including use and location information, internet website access history, email messages, and social and photo media posted and reviewed on day of accident. Estate produced only some calling and texting records, and Defendant moved for permission for an expert to inspect cellphone data from day of accident. Estate objected on privacy grounds. Trial court granted motion. First DCA upheld the trial court’s decision, finding that the request was relevant since Defendant already had records that decedent had been texting minutes before the accident and two witnesses indicated she may have been using her cellphone at the time of the accident. The order also set parameters for the inspection, such as it having to occur in the presence of Defendant’s counsel and the inspection could
be videotaped. An expert was also required 1) to install write-protect software to insure that no alteration of the phone's hard drive would be made during the inspection, 2) to download a copy of the hard drive, making a master copy, review copy and copy for Estate's attorney; 3) to return the phone to the Estate's attorney immediately upon completion of inspection; and 4) to review only the data for the nine hours preceding the accident, after which the expert was to prepare a summary of data reviewed, provide same to Estate's attorney, who would have ten days to seek protective order prior to release to Defendant's counsel.

Second DCA

- **Leach v. Kersey**, 162 So. 3d 1104 (Fla. 2d DCA 2015): Ms. Kersey was involved in an affair with Ms. Leach's husband. After learning of the affair, Ms. Leach phoned Ms. Kersey and sent her "friend" requests on Facebook. Every time she would learn of an attempt by Ms. Kersey to make contact with Ms. Leach's husband, Ms. Leach would evidently warn her to stay away from him. Ms. Leach then posted on a public blog, titled "She's a Homewrecker," identifying Ms. Kersey and her involvement in the affair with Ms. Leach's husband. Ms. Kersey sought and was granted an injunction for protection against stalking. The Second DCA reversed, finding that there was no evidence of two required incidents of stalking. The phone call and the Facebook posts were not deemed harassment because they could not be said to have served no legitimate purpose, since Ms. Leach wanted Ms. Kersey to keep away from her husband. Further, the evidence presented at the injunction hearing was insufficient to "show that these contacts would cause a reasonable person in Kersey's circumstances to suffer substantial emotional distress." The Court continued, memorably stating, "A reasonable woman who had an eighteen-month affair with another woman's husband might well expect to hear the scorn of an angry wife." The blog posting may have been when Ms. Leach went too far (the panel does not explicitly say) but indicated that even if it did rise to the level of stalking, it was but one incident.

- **Horowitz v. Horowitz**, 160 So. 3d 530 (Fla. 2d DCA 2015): Wife sought injunction for protection against Husband alleging she was victim of d/v and a victim of cyberstalking. Husband had posted on his Facebook page lyrics to a 1985 hit single by Atlantic Starr, "Secret Lovers" (I didn't remember it either and had to Google it; the video has hilarious fashion and hairstyles but mediocre lyrics and melody). He also posted text of a purportedly private message between Wife and a third party (her secret lover?). Wife claimed Husband must have "hacked" her computer or was spying on her because shortly before the posts, she had been listening to "Secret Lovers" (at home on her personal computer) and her private message could only have been obtained by accessing her Facebook account. She also claimed Husband had installed a "keylogger" program on her computer and testified at the hearing that Husband had told her "he had someone watching her" (not to be confused with the much better 1984 Rockwell hit, "Somebody's Watching Me"). Reversing the trial court's entry of a final judgment of injunction for protection against d/v, the Second DCA reasoned that the two Facebook posts did not constitute cyberstalking because they were not directed at a single person (Facebook posts are "posted for all of the user's Facebook 'friends' to see, depending on the user's privacy settings"). Wife was still Facebook "friends" with Husband. The alleged "hacking" isn't cyberstalking because it is not an electronic communication. Wife also failed to show the posts caused her substantial emotional distress." Her testimony that Husband's posts concerned her and prevented her from having any privacy in her own home was insufficient. Further, her testimony as to three prior instances of physical abuse (the most recent having occurred 15 years earlier), were insufficient (too remote in time) "to be reasonable cause to believe she as in imminent danger of becoming a victim of d/v."

- **Root v. Balfour Beatty Construction, LLC**, 132 So. 3d 867 (Fla. 2d DCA 2014): Mother filed suit on behalf of her 3-year-old son injured in an auto accident in front of construction site, claiming the construction company negligently failed to keep construction site safe for pedestrians. Defendant, having raised affirmative defenses of negligent entrustment (child's 17-year-old aunt was watching child at time of accident) and failure to supervise, sought copies of postings on mother's Facebook account, including any counseling or psychological care mother had obtained.
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Tainted prior to accident and any postings, statuses, photos, likes or videos related to mother's relationship with child, any of her other children, any family members, boyfriends, husbands and significant others, any mental health, stress complaints, alcohol use or other substance use, and any postings related to any lawsuit filed after the accident by mother or others. Trial court granted discovery request. Second DCA reversed, finding that items requested were not relevant to issues as then framed but left door open to possible future discovery should the case, as it progresses, point to a relevant reason for such discovery, but cautioned that the trial judge might "have to review the material in camera and fashion appropriate limits and protections regarding the discovery."

Third DCA

- Gulliver Schools, Inc., v. Snay, 137 So. 3d 1045 (Fla. 3d DCA 2014): Headmaster filed a civil rights and age discrimination action against employer who refused to renew his contract. Settlement agreement reached which included a confidentiality provision providing that majority of proceeds to be paid would be forfeited upon violation. A few days later, headmaster's college-age daughter posted on Facebooook: “Mama and Papa Snay won the case against Gulliver. Gulliver is now officially paying for my vacation to Europe this summer. SUCK IT.” 1200 of the daughter’s friends saw it (many of whom were either past or present Gulliver students). Gulliver refused to pay the majority portion of the proceeds, alleging breach of the confidentiality provision. Trial court found for the headmaster, finding no breach, but Third DCA reversed, finding that his conversation with his daughter that case was settled and he was happy with outcome was a breach of the confidentiality provision. The Third DCA wisely refrained from closing the opinion by telling the headmaster's daughter to SUCK IT (though one can almost hear it in the "penumbra").

- Chevaldina v. R.K./FL Mgmt., 133 So. 3d 1086 (Fla. 3d DCA 2014): Temporary injunction against a blogger (a "very unhappy former tenant" of commercial landlord) reversed. Former tenant had anonymously blogged numerous unflattering statements concerning landlord (e.g., “if you do not want to lose your business..., do your research to learn what can happen to you after signing the lease . . . ” and they are “the most immoral human being[s] in the world” and “take bread from little Jewish special needs child to support their luxury lifestyle.” Landlord obtained discovery from ISP and found former tenant was blogger and had also posted unflattering photo of landlord on blog. Trial court granted injunction ordering tenant “not to enter defamatory blogs in the future.” Third DCA reversed. “Angry social media postings are now common. Jilted lovers, jilted tenants, and attention-seeking bloggers spew their anger into fiber-optic cables and cyberspace. But analytically, and legally, these rants are essentially the electronic successors of the pre-blog, solo complainant holding a poster on a public sidewalk in front of an auto dealer that proclaimed, "DON'T BUY HERE! ONLY LEMONS FROM THESE CROOKS!" Existing and prospective customers of the auto dealership considering such a poster made up their minds based on their own experience and research. If and when a hypothetical complainant with the poster walked into the showroom and harangued individual customers, or threatened violence, however, the previously-protected opinion crossed the border into the land of trespass, business interference, and amenability to tailored injunctive relief. The same well-developed body of law allows the complaining blogger to complain, with liability for money damages for defamation if the complaints are untruthful and satisfy the elements of that cause of action. Injunctive relief to prohibit such complaints is another matter altogether.”

Fourth DCA

- Minakan v. Husted, 27 So. 3d 695 (Fla. 4th DCA 2010): During marriage, parties had access to one another's e-mail. After filing for dissolution of marriage, Husband changed his password. Husband alleged that Wife “hacked” into his e-mail and found e-mail from Husband to his attorney. Wife's sister sent e-mail to Wife's attorney, alleges that attorney's communication, sent it to Husband's attorney. Husband then sought to disqualify Wife's attorney, alleging that attorney's having read letter gave Wife unfair advantage. Wife denied having “hacked” the Husband's account and said she simply used the same password she had always used (the old "my husband is a blooming idiot" defense). Given his failure to change his password, the ar-continued, next page
gument went, the e-mail was not confidential and not subject to any claim of privilege. She also argued that from the content of the e-mail, it was apparent Husband was attempting to commit crime or fraud upon her in the d/o/m action, and so the communication would have fallen within the crime/fraud exception of the attorney-client privilege.

Trial court disqualified Wife's attorneys. Fourth DCA reversed, finding Wife was denied due process when trial court did not allow her to present evidence as to how she obtained the e-mail (the trial court had reasoned that it didn't matter and that the harm had been done when she retrieved it). The Fourth remanded for a further evidentiary hearing to determine if Husband had treated the e-mail as confidential and if the Wife has gained an unfair advantage in discovering it and forwarding it to her attorney. The Fourth opined that disqualification may well be appropriate whether Wife gained an unfair advantage or not if trial court “finds that the wife, in bad faith, discovered the e-mail and had it forwarded to her attorney.” The trial court could consider lesser sanctions too.

- Domville v. State, 103 So. 3d 184 (Fla. 4th DCA 2012): Defendant moved to disqualify trial judge presiding over his case because judge was Facebook “friends” with prosecutor. Trial judge denied motion as legally insufficient. Fourth DCA reversed, citing to Judicial Ethics Advisory Committee Opinion 2009-20 (Code of Judicial Conduct precludes judge from adding lawyers who appear before judge as “friends” on social media sites and from allowing such lawyers to add judge as “friends”).

- Nucci v. Target Corp., 162 So. 3d 146 (Fla. 4th DCA 2015): a personal injury (slip and fall) case, in which Defendant sought discovery of photos from Plaintiff's Facebook account. Prior to Plaintiff's deposition, Defendant's lawyer looked at Plaintiff's Facebook profile and it showed she had posted 1,285 photographs. She was questioned about the photographs and she objected to producing them. Defendant moved to compel production, noting that two days after the deposition, the Plaintiff's profile listed only 1,249 photographs. It also sent an anti-spoilation letter to Plaintiff's counsel. Plaintiff claimed that since her account had always been private and viewable only by those she allowed, not the general public, and thus claimed a privacy interest in the photographs and argued they should not be subject to discovery. At the hearing, Defendant also had surveillance video showing Plaintiff walking with two purses on her shoulders and, on another occasion, carrying two jugs of water. Trial court initially denied motion but later granted a narrower, more tailored request, including photographs in any social media account for two years prior to the incident. Fourth DCA affirmed. Generally, photos posted on a social networking site are “neither privileged nor protected by any right of privacy, regardless of any privacy settings that the user may have established. . . . Such posted photographs are unlike medical records or communications with one's attorney, where disclosure is confined to narrow, confidential relationships. Facebook itself does not guarantee privacy. By creating a Facebook account, a user acknowledges that her personal information would be shared with others. Indeed, that is the very nature and purpose of these social networking sites elsewhere they would cease to exist. Because ‘information that an individual shares through social networking web-sites like Facebook may be copied and disseminated by another,’ the expectation that such information is private, in the traditional sense of the word, is not a reasonable one.” (citations omitted).

Fifth DCA

- O'Brien v. O'Brien, 899 So. 2d 1133 (Fla. 5th DCA 2005): W installed spyware (Spector) on H's computer, without his knowledge. Spyware took snapshots of on-line chats H had with another woman, other chat conversations, instant messages, e-mail (sent and received) and websites visited by any user of computer. H found out, uninstalled the spyware and filed for injunctive relief to prevent W from disclosing communications. Trial court granted injunction (both a temporary and a permanent one). None of the communications or other info ever came in. W appealed, alleging the info obtained were not “intercepted” but were retrieved from storage. H countered that the communications were obtained in real-time and were thus intercepted communications, obtained in violation of Security of Communications Act (Chapter 34, Florida Statutes). Fifth DCA affirmed, finding that the info obtained constituted “electronic communications” and that the method by which the Spector program worked did amount to an “interception” of communications since everything was copied during transmission of
the information. Further, even though the statute did not mandate exclusion, Fifth found that trial court's decision on admissibility or not of the evidence was a matter within sound judicial discretion of trial court.

- **Chace v. Loisel**, 39 Fla. L. Weekly D 221 (Fla. 5th DCA 2014): During pendency of dissolution of marriage proceeding, Wife received a Facebook friend request from trial judge presiding over case. Wife talked to her attorney, who advised against accepting the friend request. Final Judgment entered which "allegedly" put most of the marital debt in the Wife's column and awarded Husband a "disproportionately excessive alimony award." Wife filed complaint against trial judge and also filed motion to disqualify, which trial judge denied as legally insufficient. Fifth DCA reversed. "It seems clear that a judge's ex parte communication with a party presents a legally sufficient claim for disqualification, particularly in the case where the party's failure to respond to a Facebook "friend" request creates a reasonable fear of offending the solicitor. The "friend" request placed the litigant between the proverbial rock and a hard place: either engage in improper ex parte communications with the judge presiding over the case or risk offending the judge by not accepting the "friend" request." Further, the Fifth found the motion sufficient on its face. See also **Hachenberger v. Hachenberger**, 135 So. 2d 413 (Fla. 5th DCA 2014).

- **Holland v. Barfield**, 35 So. 3d 953 (Fla. 5th DCA 2010): In a wrongful death action (child fell from tenth floor balcony of Defendant's residence), Plaintiff sought all hard drives and cell phones in possession of Defendant from 24 hours before accident to date of production. Defendant objected, claiming relevancy, request overbroad, was harassing and a fishing expedition and violated Defendant's privacy. Plaintiff then moved to compel and also sought cell phone text messages and communications on Facebook and MySpace. Trial court granted motion. Fifth DCA reversed since the order did not protect against disclosure of confidential and privileged information.

**Fun was had by all!**

**Jack Moring** is a Board-Certified family lawyer in Crystal River, where he practices with his wife, Patricia. He is also a certified family mediator and serves as attorney-ad-litem for children in dependency court and as guardian-ad-litem for children in both dependency and family court.
Are DROP, BacDrop, & PRB Accounts Marital Assets in Florida?

By Timothy C. Voit, Certified QDRO Specialist, Bonita Springs

In the obscure world of pension benefits, there are benefits or payout options that go unknown or even baffle the most well seasoned family law attorneys. Knowledge of these benefits, over the other spouse, has the potential of creating some exposure for the attorney trying to secure the most for their client. More and more family law attorneys are becoming familiar with Deferred Retirement Option Programs (DROP), and cases have gone up on appeal on the issue of DROP, but the goal of this article is to inform attorneys of other options they may want to entertain when preparing settlement agreements or at least provide for some catch-all phrases. After all, we are talking about tens of thousands of dollars at stake.

DROP is a payout option though some may argue that it is a separate benefit or separate plan. In a pension plan, which is designed to pay out a monthly pension stipend for life, the DROP option allows an individual to retire in the eyes of the retirement plan but continuing working for upwards of five (5) to eight (8) years, depending upon the plan. However, during this period of continued employment, their pension checks are being deposited into an account (DROP account). The catch is the pension plan participant is not allowed to take physical receipt of the money until they actually terminate employment. DROP, BacDROP, and PRB are certainly great options if the individual has a mortgage to pay off or a need for a lump-sum when they actually retire.

For instance, if someone is age 55 and they anticipate physically retiring at age 60, they can enter the DROP program where the monthly pension benefit that accrued at age 55 accumulates from age 55 to age 60, with interest in many cases as well as annual cost-of-living-adjustments (COLAs) in many cases as well. Upon age 60, the individual receives the lump-sum accumulation of the pension payments in DROP but also continues to receive pension payments monthly for life. Please note, not all plans apply interest and COLAs to a DROP accumulation. Ignoring COLAs and interest on DROP, if the monthly pension benefit going into DROP is $5,000, and the individual stays in DROP for 5 years, the DROP balance at the end of 5 years is $300,000. We have seen DROP accounts substantially more than $300,000, therefore quite a bit is at stake here if you represent the non-employee spouse.

The advantage, as mentioned, is having a lump-sum at the true retirement date to do with what they like. The disadvantage is that the monthly pension benefit that could have accrued, from age 55 to age 60 in this example, does not accrue if the individual enters the DROP program. Benefits cease accruing upon the entry into the DROP program. In other words, the individual is considered retired on the date they entered DROP and the monthly pension benefit is fixed.

This becomes particularly interesting when, in a short-term marriage, one spouse enters DROP shortly after getting married. How much is marital? Perhaps not as much as only a few years accrued up to the DROP entry date. For instance if the parties were married 10 years ago, but the spouse with the pension entered DROP 5 years ago, the years of marriage that overlaps the accrual of the pension is only 5 years, not 10.

DROP, BacDrop, and PRB are typically associated with municipal, county or state employees. The problem in marital dissolution cases is that the non-employee spouse or their attorney may be unaware that this payout option exist, while failing to address the potential of this option ever coming into play in either the settlement agreement or Final Judgment. Such is the case in Russell v. Russell where the parties were divorced in July 1995 and the husband entered the DROP program in 1998. The husband in the Russell case argued the DROP accumulation is a post-marital benefit, and the trial court agreed. On appeal, the 4th DCA recognized that the DROP accumulation did not “accrue” after the dissolution, as the trial judge alluded to, but rather the pension payments for which the spouse was entitled to accumulated in the DROP account as did the husband’s share of the pension payments.

Most municipal pensions provide for DROP, just as the Florida Retirement System does for state and county employees, but not all provide other payout options like BacDrop or Planned Retirement Benefit (PRB). BacDROP is similar to DROP except in reverse, that is if someone has a desire to end his or her employment this month, he or she can...
instruct the plan to assume they retired 5 years ago, with the monthly pension that accrued then, and be paid a lump-sum accumulation that would have occurred over the past 5 years. PRB affords the individual, once they attain the normal retirement age, to pick a date of retirement in the past and receive interest or possibly more in gains depending upon the plan’s return on investments. Both are very similar, only PRB tends to offer more flexible options. The point here is that if you represent the spouse of a municipal, state, or county employee, and the employee spouse makes a unilateral decision to elect BackDROP or PRB, the spouse will undoubtedly have their share of the monthly pension reduced with a risk of not sharing in the lump-sum accumulation from the hypothetical retirement date.

When preparing settlement agreements, mediation agreements, or Final Judgments, it is advisable to address the issue of “DROP or similar payout option” verbiage that should probably be in the MSA or final judgment, to ensure that a spouse has the ability to receive a share of these accounts if such an election is made. It has been observed in settlement agreements where an uninformed spouse has been taken advantage of, e.g. inadvertently waiving DROP or waiving the lifetime pension payment in lieu of a portion of DROP, without understanding what they could have been entitled to. Most, if not nearly all, municipal pension plans, will not honor or recognize a QDRO, therefore some creative approaches to facilitating transfers will have to be considered. The court in Russell put it best when they coined that these types of payout options are “virtual retirements”.

Endnotes

1 Russell v. Russell, 922 So.2d 1097 (Fla 4th DCA 2006); see also Swanson v. Swanson, 869 So.2d 735(Fla. 4th DCA 2004)  
2 See also Pullo v. Pullo, 926 So.2d 448 (Fla. 1st DCA 2006);Arnold v. Arnold, 967 So.2d 392 (Fla. 1st DCA 2007); Nix v. Nix, 930 So.2d 711(Fla. 1st DCA 2006).  
3 City of Hollywood for instance offers PRB while the City of Jacksonville, Orlando, and Miami respectively offer DROP and BacDrop.

Tim Voit is the author of Retirement Plan Benefits & QDROs in Divorce with 25 years of experience specializing in the preparation of QDROs and on valuation issues involving pensions, 401(k)s and Investments. Mr. Voit is a Certified QDRO Specialist and has been quoted in Forbes, BusinessWeek, and NewsWeek on a variety of issues involving QDROs.
What’s It Worth?
Re-Thinking Vehicle Valuation

By Charles Thompson, Esq., Delray Beach

$38,115,000: The price fetched by a 1962 Ferrari 250 GTO Berlinetta at a 2014 Bonhams auction in California. To date, this is the highest price ever paid for a car at a public auction, and there are scattered reports of exceedingly rare vehicles trading for even greater sums outside of public auctions. Why should the family law practitioner care? Because vehicles in dissolution and post-dissolution matters are often overlooked or undervalued.

Realistically, very few of us will ever have clients with a classic car worth more than most mansions, but in our quest to zealously advocate for our clients, we need to be aware of the value of the vehicles at play in any given case. Going beyond the basics of year, make, and model can unearth valuable information that may drastically affect the value of a given vehicle.

The starting point for assessing any asset is Section 61.075, Florida Statutes (2016). The basic steps are 1) identify, 2) define, 3) value, and 4) distribute:

1. **Identify:** What is it? For vehicles, this is generally year, make, and model. But, as we will see below, trim, options, mileage, and condition are also equally important.

2. **Define:** Is this a marital or non-marital asset? Was it purchased before the marriage or after? Usually this is a simple and uncontested determination. In most instances where the parties have two vehicles, each spouse simply takes one. However, in the case of parties having multiple vehicles, this bears deeper examination. Perhaps a vehicle was purchased before the marriage, but restored during the marriage with marital funds. Does the non-marital asset then have a marital component? Making this and other complex determinations, however, is beyond the scope of this article, yet something for the practitioner to keep in mind.

3. **Value:** Oftentimes, parties rely on a quick online search to determine the approximate value of each vehicle. And if the parties are satisfied with this level of accuracy, then unless the vehicle in question is of high value, there is usually little reason to spend more of your client’s time or money on this issue. However, as we will see below, a quick online search performed without all of the pertinent information can often lead to an unreliable estimate. Popular websites for vehicle valuation include:

   - Kelley Blue Book: [https://www.kbb.com/](https://www.kbb.com/)
   - Edmunds True Market Value: [https://www.edmunds.com/tmv.html](https://www.edmunds.com/tmv.html)
   - True Car: [https://www.truecar.com/](https://www.truecar.com/)
   - NADA: [https://www.nadaguides.com/](https://www.nadaguides.com/)
   - Hagerty: [https://www.hagerty.com/valuationtools](https://www.hagerty.com/valuationtools)

   As with case law research, if you have checked multiple resources and have begun arriving at a similar conclusion, you can be reasonably assured that you have reached a proper result.

4. **Distribute:** Either via a Marital Settlement Agreement or a Final Judgment, the Court will decide how to distribute the vehicles. If the vehicle is a lease, or is financed, make sure to account for who is responsible for the payments. Has the title been transferred? Has the insurance policy been updated to reflect that there is now only one vehicle whereas before there were two? Does your client realize that their premium may increase now that they no longer have a multi-vehicle policy, are no longer a homeowner, or live in a different ZIP code? These and multiple other questions come into play when transferring an asset of considerable value like a vehicle.

Pop quiz: What was the best-selling vehicle in the United States in 2016, and for several decades before?

The Ford F-Series truck, selling over 820,000 in 2016 alone.¹ With over 2,200 F-Series trucks purchased each day, chances are that one of your clients at some point in time owned or owns this vehicle. And this vehicle is a case study in the broad spectrum of value of a given vehicle when we go beyond the basics of year, make, and model.

At the time of writing this article, according to Kelley Blue Book, a 2016 Ford F150 with 20,000 miles on its odometer varies immensely in value depending on condition, trim, and options:

- $16,582: XL 2 door short bed; private party sale in fair condition
- $47,135: SuperCrew Limited; private party sale in excellent condition
That’s a spread of over $30,000 for the same year, make, and model of vehicle. Put another way, the base model is worth about one-third the value of the high-end model. If we simply look at a financial affidavit line item for vehicles and fail to inquire about the details, we may be doing a disservice to our clients.

How does the family law practitioner find out the details we need to know in order to properly value a vehicle, and how do we then obtain a realistic valuation? If your client or the other party either do not know those details, or is not willing to provide them, ask for a Vehicle Identification Number, i.e. VIN, which should be part of mandatory disclosure or standard family law interrogatories. Then, input that VIN into any number of free VIN decoder tools online in order to obtain a breakdown of the specific trim and options of each vehicle. With that, you can use various valuation tools like those referenced above to formulate a general idea of the value, with the only other variable being condition.

What about condition? As anyone who has ever traded in a car will tell you, the dealer almost never thinks the condition is as good as you do. That door dent from the grocery store parking lot? The coffee stain on the carpet? The curb rash on those expensive wheels? Those will all cause the evaluated condition of the vehicle to be diminished. For everyday vehicles short of exotics or classics, though, most parties will be best served by describing the condition of any given vehicle as “good” or “fair,” with “excellent” or “poor” for those falling outside of the norm. For exotics or classics, though, condition becomes all the more important and the family law practitioner should take the time to obtain an accurate assessment of the true condition of a vehicle.

When proper investigation and thorough research produce a value to which the opposing side still objects, try utilizing a neutral third-party like CarMax for vehicles valued at around $100,000 or less. CarMax generally does value a vehicle in about 30 minutes or less, and will provide you with a written offer. Of course, the written offer isn’t directly admissible as evidence if the case is going to trial, but it does provide a real-world reality check for the actual market value of any given vehicle. And although it is hearsay, will a judge or magistrate during trial sustain your hearsay objection when the opposing counsel asks: “What did CarMax offer you for the vehicle?” If so, and the vehicle is both highly valued and disputed, then you should consider hiring an expert appraiser just as you would if valuing real estate, jewelry, or a business.

For vehicles valued at roughly $100,000 or more, you are leaving the realm of “everyday” vehicles and entering the strata of luxury, collectible, and/or exotic. At this level, clients should hire an expert to provide an opinion of the value of the vehicle in question. Estate appraisers are an accessible source for vehicle valuations, but as with any expert, take the time to interview them and review their qualifications. You may find that a marque expert is needed for your particular case.

Vehicle value trends go far beyond the scope of this article and are above the pay grade of the author, but the family law practitioner should have a very general understanding that the value of certain marques is greater than others. Names like Aston Martin, Ferrari, and Lamborghini should raise eyebrows when reviewing a financial affidavit. That’s not to say any such vehicle will be highly valuable, but broadly speaking, if the name sounds exotic, it is worth investigating. And yet, were you aware that, according to Hagerty - the respected source for classic vehicle valuations - the following older vehicles are worth more than you might expect?

- 1974 Toyota Land Cruiser FJ40: about $32,000.
- 1989 BMW M3: about $60,000.
- 1992 Porsche RS America: about $100,000.

Typically, if one spouse is a car enthusiast, they will know the value of their vehicles, and the other spouse may not. For a deeper investigation, consider requesting discovery aimed at the spouse’s online forum activity. Popular vehicle forums have hundreds of thousands of members.

There is a forum for nearly every single make and model of vehicle. Popular forums which may be of interest to practitioners include:

- Porsche: [https://rennlist.com/forums/](https://rennlist.com/forums/)

If you can identify a screen name with the spouse in question, then you can search their online profile and history in order to determine when a vehicle was purchased, its condition, how much was spent on it, the asking price of similar vehicles, etc. Many spouses would be surprised to learn just how much money has been spent on modifying, repairing, or restoring a prized possession. With this information in hand, not only can you negotiate from an informed perspective, but you can also use such knowledge to encourage your client to be transparent and fair in valuing a given vehicle if they are the enthusiast spouse.

Judges and Magistrates are familiar with valuing assets. A vehicle is no different than furniture or jewelry or artwork in that respect. Discerning Judges and Magistrates know when one party is under-valuing their assets in an attempt to gain an unfair equitable distribution. Do not get caught in this trap with your client. I remember as a very green attorney going up against a very experienced opposing counsel during a divorce trial, the Judge asking the Wife how much she valued the furniture in the home. After an obviously low-ball estimate, the Judge turned to my client and asked if he would like to purchase all the furniture for that amount.
Nearly quicker than you could blink an eye, the Wife recanted, and fumbled over her words in an attempt to explain how the furniture was actually more valuable than originally stated.

With proper research, we can ensure that the equitable distribution of our clients’ vehicles is accomplished in a fair and transparent fashion. We would not rely on Zillow.com to determine the value of a multi-million-dollar estate in a disputed dissolution. Likewise, we should not be relying on a quick Google search to determine the value of our clients’ second or third highest-valued asset. Vehicle valuations are but one small part of equitable distribution, but spending an extra fifteen minutes investigating and valuing such assets are well worth your clients’ time and money to get it right.

Endnotes

Charles Thompson, Esq. is an attorney at Beaulieu-Fawcett Law Group, PA in Delray Beach, Florida, who practices exclusively in marital and family law. A former lemon law attorney, Charles is also a car enthusiast, mechanic, former race team crew member, and was an arbitrator for the Florida New Motor Vehicle Arbitration Board.

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