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Articles and cover photos to be considered for publication may be submitted to Belinda Lazzara (blazzara@mslbb-law.com), or Tenesia Hall (tchall@legalaidocba.org), Vice Chairs of the Commentator. MS Word format is preferred for documents, and jpg images for photos.
Welcome to the Chair

We were honored to be asked to write this “Welcome” to the new chair of the section—Nicole L. Goetz—who will serve during the 2017-2018 Florida Bar cycle. The goal of this article is to tell you a little bit about our chair, her involvement with the section, and the goals she has set for the section for the forthcoming year. Anyone who knows her recognizes that Nicole is a very private person, but she graciously agreed to this interview.

Nicole’s law firm, Nicole L. Goetz P.L., is a boutique law firm in Naples that has focused its practice exclusively on family law issues and appeals.

Nicole is a rarity: She is a “virtual” native of Florida. She was born in the State of Virginia but has lived in Florida since she was two years old when her family moved to LaBelle, Fla., so her dad could operate an agricultural aerial spray business. In fact, during a brief sabbatical from her legal career, Nicole worked in her dad’s business.

Nicole took a circuitous route in obtaining a law degree. As an undergraduate she attended five colleges, ultimately graduating from the University of South Florida with a degree in English literature.

Originally, Nicole thought that law school would be good preparation for a career in business. She attended and graduated from the University of Florida Law School in 1997. While at the University of Florida, her initial goal was to focus her practice in the area of civil litigation. In her third year of law school, she worked in family law at a civil clinic at the University of Florida where she had the opportunity to represent an illiterate, indigent man. She described the experience in representing his interests as eye-opening and “awesome,” deciding then and there that she wanted to work in the public service or legal aid arena. As a result, after graduation she worked for a year and a half at the Brevard Legal Aid Society. Nicole acknowledges that during that time she became frustrated because she felt that children were not adequately protected in the family and juvenile courts, and that their voices were not being heard.

After her experience at Brevard Legal Aid Society, Nicole worked as a staff attorney for the 20th Judicial Circuit in Collier County. She eventually went to work in the private sector with the law firm of Asbell & Ho, initially as an associate, then as a shareholder, and ultimately as a managing shareholder with Asbell, Ho, Klaus, Goetz & Doupé. She remained there until 2010 when she opened Nicole L. Goetz P.L.

Nicole is married to Matt, a sergeant with the Marco Island Police Department. Matt is an extremely friendly and outgoing fellow who is quite a raconteur; his stories have been enjoyed by all of us in the section. Nicole met Matt at a Halloween party where they were introduced to one another by a mutual friend. It must have been fate, because Matt and the friend arrived at the party on motorcycles and Nicole was coincidentally dressed as a “biker chick.” Nicole quickly discovered that Matt is a really nice guy, and during their courtship, she also discovered that Matt is a very good dancer. He taught dance, and those of you who are over 40 will be interested to know that he appeared during the disco era on the television show “Dance Fever” hosted by Deney Terrio. If you have an opportunity to meet Matt over the course of the next year, be sure to ask him to recount the story of his proposal to Nicole. Only he can give the story justice, but we will tell you it involves a horse, an unskilled horseman, and a knight-in-shining armor costume.

Nicole and Matt have two children: a son, Ian, who is 14, and a daughter, Jillian, who is 11. Ian and Jillian have always been involved in sports and they keep both of their parents busy traveling to and attending their various sporting events. Currently Ian is playing football and Jillian travel volleyball. The Goetz family has a second home in North Carolina where they enjoy hiking, whitewater rafting, ziplining and tubing. Nicole is extremely proud of her dad, Robert Smith, who is a decorated Vietnam veteran. Her family was all in attendance at her installation in June 2017 when she took her oath as chair of the section.

We asked Nicole about her favorite author, color, song, team and hobby. Her responses were: Ernest Hemingway, orange, “The Prayer” by Andrea Bocelli, whatever team her children are playing on, and tending to her 25 varieties of fruit trees.

continued, next page
Many of us involved in section activities first met Nicole when she served on the Equitable Distribution Committee that was initially chaired by Charles Fox Miller, and later by David Manz. Nicole was a stand-out on that committee, serving as a vice-chair, co-chair, and special advisor. During the course of her service, she was involved in the creation of the 2008 amendments to Florida Statute section 61.075. In addition to serving on the Equitable Distribution Committee, Nicole also served as vice-chair and secretary of the Ad Hoc Bylaws Committee, preparing the explanation of change for The Florida Bar Board of Governors and presenting those changes to the board on behalf of the Family Law Section. She also chaired the Continuing Legal Education Committee.

One of Nicole’s client testimonials says, “Nicole Goetz has all of the qualities that make a great attorney. She is a great listener and communicator. Nicole has a calming and positive approach to very difficult situations. She also takes a true interest in each and every client.” These traits have been apparent in Nicole’s section service throughout the years and in her leadership role on behalf of the Family Law Section.

We asked Nicole why she got involved in the Family Law Section and why she would encourage others to become actively involved. She enumerated the following reasons:

- The ability to be on the cutting edge of evolving and current developments in the law (legislatively, case law, rules of procedure) coupled with the opportunity to influence positive change with regard to same;
- The opportunity to meet and work with the best and brightest family law attorneys, judiciary, forensic professionals and mediators;
- The networking opportunities and the enhanced financial benefits resulting therefrom;
- The opportunity to contribute and give back to the families and children of the State of Florida;
- To improve the practice of family law in general; and advocacy skills in particular.
- The formation of lasting professional friendships with family law attorneys, forensic professionals, judiciary, and mediators throughout the State of Florida.

Nicole’s theme for the 2017 – 2018 bar cycle is appropriate advocacy. During this year, Nicole would like the section to focus on civility, professionalism, trial skills and advocacy. Toward that end she has formed a committee that is working on revising the Bounds of Advocacy. The Family Law Section's publications, C.L.E. programs, and activities will have a heavy emphasis on appropriate advocacy during this year. For information on future publications, C.L.E. programs, meetings, and other Family Law Section activities, please refer to the section’s website.

In the words of the great southern author William Faulkner:

“Never be afraid to raise your voice for honesty and truth; and compassion against injustice; and in opposition to lying and greed. If people all over the world would do this, it would change the world.”

On behalf of the executive committee and executive council of the Family Law Section, Nicole invites you to enhance your personal and professional life through your active participation in the section’s efforts this forthcoming year.

~ Douglas Greenbaum and Magistrate Diane Kirigin

The Family Law Section’s FAMSEG is a monthly e-newsletter that keeps section members apprised of section activity. It includes upcoming meetings, events and announcements, and occasionally features substantive topics of interest.

www.familylawfla.org
We are very excited to be the 2017-2018 co-chairs of the Publications Committee. Our year started out with plenty of excitement with Hurricane Irma coming to Florida. We hope all of our section members are safe and damage free. We want to thank Shannon Carlyle for being our guest editor for this fall edition of the Commentator. This issue is packed with everything from information for marketing your firm on social media to the proper standard of review for determining a spouse’s intent to make an interspousal gift. The goal of the Commentator is to provide useful information that is timely to your practice. We are always looking for new material for any of our three publications, FAMSEG (monthly email newsletter), Commentator (quarterly magazine style publication), and The Florida Bar Journal (scholarly writings). If you are interested in being published in any one of these three different publications, please contact us (cdw@thewelchlawfirm.com or lcc@infocusfamilylaw.com). As always, we are looking forward to an educational, interesting and fun-filled bar year.

LORI CALDWELL-CARR AND DEBRA WELCH
2017-2018 CO-CHAIRS

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Comments from the Co-Chairs of the Commentator

Belinda Lazzara and I are proud to serve as Co-Chairs of the Commentator. We happily embrace our new chair’s theme of appropriate advocacy and would like to thank our guest editor and authors for putting together a great edition of the Commentator! We hope that you enjoy it. This is going to be a great year! Our future guest editors have already begun to solicit articles. As the year progresses, we welcome your feedback and need your articles, pictures, and announcements. Please feel free to contact us at tchall@legalaidocba.org and blazzara@mslb-law.com, with any questions, comments, or submissions. We hope that you enjoy this edition!

BELINDA LAZZARA

TENESIA HALL

Lauren Alperstein, Abigail Beebe, Bonnie Sockel-Stone, Amiee Gross and Douglas Greenbaum

(2017 Fall Meeting - Bonita Springs, Florida)

Norberto Katz, Lori Caldwell Carr, and Lauren Ilvento.

(2017 Fall Meeting - Bonita Springs, Florida)
This past June while attending The Florida Bar annual convention, I wandered in to the Family Law Section’s Publications Committee meeting and walked out as the guest editor of the Commentator’s fall edition! It’s as easy as that to become involved in the section, and I encourage everyone with an inkling of interest to take the next step and move forward. The experience has been extremely valuable both professionally and personally. Not only have I gotten to know such amazing lawyers as Publication Committee Chairs Tenesia Hall and Belinda Lazzara, Section Chair Nicole Goetz, and EC member Andrea Reid, but I’ve also been able to witness, first hand, the hard work and dedication showed by our Bar administrator, Gabby Tollok, and PR extraordinaire, Lisa Tipton. All of these leaders have not only helped me realize how rewarding section work is, but they have also become good friends. I’ve found that cultivating friendships is one of the best aspects of getting involved in volunteerism.

Although I am relatively new to the Family Law Section, I have been active for many years with The Florida Bar Appellate Practice Section serving on the executive counsel and chairing the Appellate Practice Board Certification Committee. I was eager to accept a new challenge in the Family Law Section because I recognize the value of professional networking and truly hope to make a difference. Volunteering time and energy to make an organization better is an excellent way to increase your profile and work toward participation in the leadership structure. In my experience, volunteering is an excellent return on investment. Presenting at a CLE seminar can become an exercise in personal development. Serving with professional colleagues on section committees can result in lifelong friendships. Contributing articles and blog posts can solidify your reputation as an authority in your field of practice. And, as noted above, the friendships developed are icing on the cake!

Please take the time to honestly assess what the Family Law Section has to offer in terms of CLE, networking, practice development, camaraderie and professionalism. I encourage each of you to make a stronger commitment to the section and reap the rewards from greater involvement.

The fall has been an eventful season so far, to say the least. My main hope as I write this message just weeks after Hurricane Irma’s destruction impacted our state is that our members are safe and secure and that everyone is on the road to normalcy. It is difficult to keep up a positive attitude in light of the devastation to our neighbor Puerto Rico by Hurricane Maria, the unspeakable acts by the Las Vegas shooter, and the deadly wildfires in California, but support from family, friends and colleagues is what us gives light at the end of the tunnel.

In closing, it has truly been an honor to serve as the guest editor of this edition of the Commentator. Enjoy!
The Top 10 Trial Tips In Anticipation of an Appeal

Shannon McLin Carlyle, B.C.S and John Bogdanoff, B.C.S.
Orlando, Daytona Beach, Leesburg

There are some cases where you and your client recognize early on that an appeal is likely regardless of which party prevails. Although appeals can be expensive, some cases are worth it. They generally fall into three categories: financial, family, and constitutional. Cases that have significant financial issues are ripe for appellate review. The granting or denial of permanent alimony can mean hundreds of thousands of dollars in either benefit or payments required. The value of a family business can mean a million dollar swing to a final judgment. Children’s issues also increase the chance that your client’s case will end up on appeal. Time-sharing, relocation, and child support are just a few subjects that can prompt a party to want the appellate court to review a trial court’s decision. Finally, your case may involve important constitutional or other legal issues that warrant appellate review. Perhaps there is a split of authority among the district courts of appeal that should be addressed by the Supreme Court of Florida. Does your case involve a developing area of law such as LBGTQ rights or Assisted Reproductive Technology? These subject matters increase the likelihood that your case will be heading to an appellate court. This article is designed to help you be well prepared if your case ends up in the hands of an appellate court to ensure the best possible outcome for your client.

1. Arrange for a Court Reporter

Without a court reporter at a hearing or trial, including matters that are heard in chambers, the appellate court will not have a record of the proceedings. This poses an insurmountable and many times fatal obstacle on appeal. The Appellant has the burden of providing the appellate court with an adequate record to demonstrate error. See Applegate v. Barnett Bank of Tallahassee, 377 So. 2d 1150, 1152 (Fla. 1979); Kanter v. Kanter, 850 So. 2d 682, 683 (Fla. 4th DCA 2003). Therefore, unless there is error on the face of the judgment an appellate court is required to affirm the trial court’s decision. This is true even where the matter does not involve the introduction of evidence because otherwise, the appellate court will not know what conversations (and potential concessions) occurred among trial counsel and the trial court. Although Florida Rule of Appellate Procedure 9.200(4) enables the parties to prepare and the trial court to approve a Statement of the Evidence in lieu of a transcript, this rarely works. A court reporter is essential to adequately preserve your client’s appellate rights.

Resist efforts by the court or opposing counsel to “go off the record.” Request that the court remain on the record so long as the proceedings are ongoing. As far as the appellate court is concerned, if it’s not a part of the transcript it did not happen.

2. Qualified Witnesses

Make sure your witnesses are qualified to testify about a subject and make sure you have the appraisals with the appropriate valuation dates. For instance, non-owner spouses of real property are not qualified to testify as to value. See Noone v. Noone, 727 So. 2d 972, 973 (Fla. 5th DCA 1998). Does your lay witness have personal knowledge of what he or she intends to testify? Is there an applicable hearsay exception? As for your expert witnesses, make sure to familiarize yourself with sections 90.702 and 90.703, Florida Statutes.

3. Enter Exhibits and Depositions Into Evidence

Identify and mark every exhibit and refer to the exhibit by its letter or number. Even if exhibits are referenced at the hearing or trial, an appellate court cannot consider them unless they are actually entered into evidence. See Jones v. Jones, 671 So. 2d 852, 854 (Fla. 5th DCA 1996) (noting that where attorney read verbatim from affidavit prepared by husband but affidavit was never introduced into evidence, it was as if husband presented no evidence on the issue); see also Ladoff v. Ladoff, 496 So. 2d 989, 990 (Fla. 4th DCA 1986) (same); see also Matson v. Wilco Office Supply & Equip., Co., 541 So. 2d 767, 768-79 (Fla. 1st DCA 1989) (appellate court cannot consider deposition testimony if deposition not properly introduced into evidence).

continued, next page
4. Objections

General objections are not sufficient to preserve an error for appellate review. See Hodges v. State, 885 So. 2d 338, 358 (Fla. 2004) (“To preserve an issue for review, counsel must timely raise an objection that is sufficiently precise that it fairly apprised the trial court of the relief sought an the grounds therefor.”).

Make short concise contemporaneous objections, and state the specific legal basis for your objection. The rationale for the contemporaneous objection rule is to offer the trial court an opportunity to correct any mistake and to prevent a litigant from allowing an error to go unchallenged so it may later be used for a tactical advantage.” Williams v. Lowe’s Home Centers, Inc., 973 So. 2d 1180 (Fla. 5th DCA 2008).

“Objection to form” is not a proper objection. You must state precisely what is wrong with the form – compound, lack of predicate, etc. Do not ask for continuing objections unless you are absolutely sure it is a concrete area of testimony that can be isolated.

Make sure the court reporter gets everything recorded. Sometimes testimony and objections are happening simultaneously.

5. Questioning the Witnesses – The Appellate Court Cannot See – It Can Only Read What the Court Reporter Records on the Transcript

Do not ask compound questions or lengthy speaking questions which make it difficult to figure out which question the witness is answering. Questions on direct should be short and concise.

Do not have people demonstrate things without describing on the record what they are demonstrating.

Do not have people point to things without describing what they are pointing to. If they describe a distance from the stand to a table, estimate it for them ensure that they clarify the precise distance for the record so the court reporter can capture the testimony on the written record. For instance, “Is that four feet?”

Do not let witnesses refer to “him” or “her” without clarifying who the “him” or “her” is.

It is essential to obtain a ruling from the court on objections. See Matisko v. Matisko, 834 So. 2d 405 (Fla. 5th DCA 2003).

6. Proffers are Required

If a trial court does not allow you to admit testimony, you must make proffer to preserve the issue on appeal. See Fullerton v. Fullerton, 709 So. 2d 162 (Fla. 5th DCA 1998). The proffer should be made before the close of evidence. See Johnson v. State, 494 So. 2d 311 (Fla. 1st DCA 1986). However, if you fail to do so before the close of evidence, it makes sense to attempt to salvage the preservation problem by making a post-trial proffer.

Do not accept a trial court’s refusal to allow you to make a proffer. You must explain to the trial court that a proffer is required to preserve the appellate issue, and generally, the trial court’s refusal to permit you to proffer the testimony is reversible error. By that same token, if you are successful in excluding testimony, make certain the trial judge permits your opponent to make a proffer. If the trial court declines to permit the proffer, the appellate court will generally assume that the proffer could have contained any reasonable testimony suggested by the appellant.

7. Motions for Rehearing May Be Required to Preserve Issues on Appeal.

If the trial court fails to make required findings, you must bring this to the trial court attention through a timely motion for rehearing or the
issue is waived. See Helling v. Bartok, 987 So. 2d 713, 715 (Fla. 1st DCA 2008); Owens v. Owens, 973 So. 2d 1169 (Fla. 1st DCA 2007); Mathieu v. Mathieu, 877 So. 2d 740 (Fla. 5th DCA 2004); Broadfoot v. Broadfoot, 791 So. 2d 584, 585 (Fla. 3d DCA 2001).

8. Watch Appellate Deadlines When Filing Motions for Reconsideration From Non-Final, Appealable Orders

Most appellate deadlines run from the “rendition” of an order in the lower court. See, e.g., Fla. R. App. P. 9.110(b). A notice of appeal must be filed with the lower tribunal within 30 days of rendition of the order sought to be appealed. So, when is an order rendered? An order is rendered when “a signed, written order is filed with the clerk of the lower tribunal.” Fla. R. App. P. 9.020(h). However, a final order is not deemed rendered until a timely and authorized motion for rehearing directed to that order is disposed of.

If a notice of appeal is filed before final judgment is rendered, the appellate court may dismiss the appeal. See Fla. R. App. P. 9.110(l). However, the court may also permit the lower court to render a final order. See Fla. R. App. P. 9.110(l).

If the notice of appeal is filed after a party files a motion authorized by 9.020(h) but before the trial court rules on the motion, Rule 9.020(i) provides the appeal shall be held in abeyance until disposition of the post-judgment motion.

If the motion authorized by 9.020(h) is untimely, the 30 days for filing the notice of appeal runs from the date of the final judgment, not the date of the order disposing of the motion.

Importantly, rehearing of non-final orders is not “authorized” for purposes of delaying rendition. Therefore, if a motion for reconsideration/rehearing is filed directed to a non-final order that is normally appealable, but the appealing party waits until the motion for reconsideration/rehearing is ruled upon to appeal and that date is beyond the 30 day deadline, the appeal will be dismissed for lack of jurisdiction because it is untimely.

9. Extraordinary Writs - Certiorari and Prohibition

Petitions for Writ of Certiorari

Petitions for Writ of Certiorari may sometimes be used to seek review of non-final orders in the family law context, including orders requiring a party to a paternity action to submit to DNA testing, without a showing of good cause, State, Dep’t. of Revenue v. Travis, 971 So. 2d 157 (Fla. 1st DCA 2007), and discovery orders seeking financial information of parties and nonparties. The challenged order must: 1) depart from the essential requirements of law; and 2) cause a material injury; that 3) cannot be rectified on appeal. State Farm Florida Ins. Co. v. Bonham, 886 So. 2d 1072 (Fla. 5th DCA 2004).

A petition for a writ of certiorari must be filed within 30 days of rendition of the order sought to be reviewed. See Padovano, Florida Appellate Practice, s. 30.5, p. 782 (2016 Ed.).

Petitions for Writ of Prohibition

Motions to disqualify the trial court may arise where the facts reflect a reasonably prudent person is in fear of not receiving a fair and impartial trial. Pilkington v. Pilkington, 182 So. 3d 776 (Fla. 5th DCA 2015). A motion to disqualify must be filed within the trial court within 10 days of the act giving rise to the basis for the motion to disqualify. See Florida Rule of Judicial Administration 2.330(e). A petition for writ of prohibition directed to an order denying disqualification must be filed with the appellate court within a reasonable time. See Padovano, at § 30.4, p. 769.

10. Co-Counsel with an Appellate Specialist for Trial Support Purposes

Keep in mind that bringing on an appellate specialist at the trial level where your case lends itself to a potential appeal can save your client significant expense in the long run. Not only will you have someone there to laser focus on preserving potential appellate issues (thus increasing your chance of a clean record), the appellate lawyer can assist with research, motions, memoranda of law, proposed final judgments, and motions for rehearing. These efforts will pay off if your case ends up on appeal because, not only will there be better work product in the appellate record, but the appellate lawyer can utilize that work in drafting the appellate briefs.

Shannon McLin Carlyle, B.C.S. is the founding partner of The Carlyle Appellate Law Firm where she practices family law appeals throughout Florida. She is board certified by The Florida Bar in appellate practice and is AV rated by Martindale Hubbell. She is also a Certified Circuit and Appellate Mediator. Ms. Carlyle has consistently been named by Florida Trend magazine to the lists of Florida Legal Elite in appellate practice, Florida Super Lawyers and Florida’s Top 50 Women Lawyers. Ms. Carlyle currently co-chairs the Family Law Section’s Amicus Curiae Committee and is the guest editor of this edition of the Commentator.

John N. Bogdanoff, B.C.S. of The Carlyle Appellate Law Firm is board certified by The Florida Bar in appellate practice. During his more than 25 year career as a senior attorney at Florida’s Fifth District Court of Appeal, he served numerous appellate court judges as well as represented the Fifth District Court of Appeal at the National Judicial College’s program on Media and the Courts. In addition to a prolific family law appellate practice, Mr. Bogdanoff also prosecutes administrative appeals on behalf of veterans. Mr. Bogdanoff has successfully argued appeals in the Florida district courts of appeal as well as in the United States Court of Appeals for the Eleventh Circuit. Mr. Bogdanoff speaks regularly on appellate topics of interest to family lawyers.
NEW: Semi-Annual Section Sponsorships

Take advantage of the Family Law Section's new, half year sponsorship opportunities to showcase your firm or business!

Sponsorship includes listings on our section's website; logos, links and ads in our publications; signage at events; and exhibit space at key events. The section has active Facebook and Twitter profiles where we regularly post sponsor features. We also offer of event-based sponsorship opportunities for companies interested in connecting with our near 4,000 attorney members.

Please contact the Family Law Section's Sponsorship Committee co-chairs for more information: Matt Lundy at Matt@MLundyLaw.com or Beth Luna at Beth@TheLunaLawFirm.com.

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Five Ways Lawyers Can Use Social Media Effectively

Lisa M. Tipton, APR, Searcy, AR

If you’re one of those lawyers who still thinks that social media is “just a fad,” think again. Social media is a reliable tool for nurturing and solidifying relationships with clients, potential clients and referral sources. Facebook just celebrated its 13th anniversary, LinkedIn has more than 106 million monthly users, and Twitter—with 313 million monthly users—has become a popular information exchange platform for many small businesses.

People turn to online social networks for recommendations on all sorts of things, including lawyers. Lawyers even seek recommendations for lawyers from other lawyers on social networks. Social media now is an integral part of our culture and its impact grows more powerful every day.

So how can you turn social media into a mainstream component of your marketing plan? Here are five key guidelines that can help make your social media content meaningful, relevant and engaging.

1. Use social media to validate your firm and create great first impressions.

If you’re one of those lawyers who still thinks that social media is “just a fad,” think again. Social media is a reliable tool for nurturing and solidifying relationships with clients, potential clients and referral sources. Facebook just celebrated its 13th anniversary, LinkedIn has more than 106 million monthly users, and Twitter—with 313 million monthly users—has become a popular information exchange platform for many small businesses.

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So how can you turn social media into a mainstream component of your marketing plan? Here are five key guidelines that can help make your social media content meaningful, relevant and engaging.

1. Use social media to validate your firm and create great first impressions.

When was the last time you Googled yourself? No matter how people hear about you, at some point they probably will look you up online. Most of these people will search Google, Facebook and LinkedIn. Due to their authority and relevance, active social profiles tend to appear prominently for searches on lawyer names and firm names. This makes it very easy for searchers to find information about you and your practice.

Chances are, you’ve spent some time and money on development of an attractive website. Even if you don’t actively use social media, take the time to claim and develop—at a minimum—your Facebook, Google My Business and Google Maps pages and your LinkedIn personal profile. Incorporate graphics that replicate the look of your website: Add a cover photo that looks like your website home page; use your logo or your professional head shot for the profile image; and complete the about and services sections with as much detail as possible such as a description of services, office hours, credit card information, languages spoken, etc.

When potential clients or referral sources search for you online, they not only will find you but they will read the same information about you across multiple online sources, validating your business and legitimizing your online presence.

2. Use social media to engage, inform and support.

Social media should not be a billboard advertisement for your firm, filled with lots of #familylaw and #divorce hashtags. Constantly posting commercials, ads and “Contact us for a free consultation” to your social media profiles is narcissistic, one-way communication and will quickly turn people off. Egoists post on social media when something happens to them. Savvier users post when something happens in the world—especially in their communities—that provides opportunity for conversation.

For instance, one firm spent a considerable amount of time identifying online sources of information about Hurricane Irma-related assistance and posted or reposted that information on Facebook and Twitter. No mention of, “If you or a loved one has been injured by negligence of others during Hurricane Irma, please contact our caring pro-
essionals.” Instead, the firm became an information resource for those who care about the storm victims.

Listen to what others are discussing online and take the time to like, share or comment. Likewise, when someone takes the time to share or comment on one of your posts, don’t ignore it. Best-case scenario you’ll give the impression that no one is monitoring your social media and therefore truly doesn’t care about online engagement. Worst-case scenario you’ll come across as arrogant or rude—unable to take the time to dignify a comment that someone shared with you. Think of social media as a perpetual networking event: If you are present but you don’t speak with anyone you’ve completely wasted your time.

3 Use social media to connect with your local community. Your messages on social media should engage, inform and support. This information should not always be about your professional capabilities. It should be connected to community activities, events, problems or milestones. Provide information that is valuable, interesting or funny, and share others’ posts when they are relevant to your target audiences. Take off your “I’m here to sell myself” hat and put on your “I’m interested in my community” hat.

For example, Barrett, Fasig & Brooks recently tweeted about the anniversary of a midtown restaurant that had a huge impact on revitalization and a city commission vote to ban overnight towing. The firm also poked fun at itself by posting bloopers from its recent commercial shoot.

Lucy Lloyd is the firm’s digital marketing manager.

“Social media is an integral part of how we engage with clients, future clients and the community. It gives us the platform to stand out among the crowded world of personal injury lawyers,” said Lloyd. “Most importantly, we want everyone who interacts with us on social media to see us as a friend and a neighbor; as a law firm you can trust. We have truly dedicated—and funny!—attorneys and staff here and social media lets us show you that every day, not just on a billboard or tv spot.”

4 Use social media to develop a reputation as an authority figure. “Influencers” are entities within your sphere of communication who can sway opinions. You can become one or you can connect with them online from numerous sources and share their helpful information. Ideally, it is a combination of both.

Take some time to identify the key contacts who relate directly to your practice areas. Identify other family, trial, and appellate firms who are (or should be) your referral sources. Make a list of child services agencies, area school counselors, parenting-class providers, counselors, accountants, forensic data specialists, domestic violence support groups, social service agencies, Boys & Girls Clubs, etc.—any business or entity that is connected to the practice of family law in your geographic area. Cultivate one or more contacts at each agency or business and ask the entities to add you to their news and announcement dissemination lists. Next, search Facebook and Twitter to see if the entities have profiles. Follow or “like” them, if appropriate. If the source is extremely important and very active on social media, set up alerts so you will know when they are posting. Look at who each entity is following and who follows the entity, and connect with any that would be relevant to your information stream.

Set up Google news alerts for your practice area. Share those stories on your social media profiles as educational tools about what’s happening in your practice area.

Remember: It isn’t about you. It’s about becoming a community resource for people and businesses who would truly value your ability to care about—and share—their information.

5 Use social media to humanize, personalize and gain trust. Your potential clients and referral sources need to see your true colors.

Are you or is someone in your office a dog lover? Breast cancer survivor? Spaghetti fanatic? Do you have a relative who is a veteran? No matter what, let your personality shine through in your social media posts. Share information about firm milestones, post photos of your activity on behalf of local philanthropies, let your followers know when you’re going to be out of the office: Communicate any information that might be personally relevant to your followers ... or to your mom.

Former NFL player Don Pumphrey Jr.—no surprise—posts regularly about football, which obviously has no connection to criminal defense. But personal and engaging posts serve to keep his practice top of mind with those who follow him.

continued, next page
In closing, if you haven’t taken the social media plunge, it’s time. The ABA’s Law Practice Division social media page for lawyers sums it up: “Taking control of your online presence is a necessity, and there are few better ways to do so than social media. Used carefully, social media can give your firm a voice, amplify your professional reputation and help drive new business.”

Read The Florida Bar Guidelines for Social Networking Sites. Pages of individual lawyers on social networking sites that are used solely for social purposes, to maintain social contact with family and close friends, are not subject to the lawyer advertising rules. Pages appearing on networking sites that are used to promote the lawyer or law firm’s practice are subject to the lawyer advertising rules. These pages must therefore comply with all of the general regulations set forth in Rules 4-7.11 through 4-7.18 and 4-7.21.

Lisa McKnight Tipton is a nationally accredited PR professional who implements communications and marketing strategies for legal associations, law firms, nonprofits and corporate clients. Her more than 30 years of public relations experience includes 13 years as a consultant to The Florida Bar, promoting its board certification program, its Solo & Small Firm and Family Law sections and numerous special events. PR Florida Inc. is her communications consulting company. Connect with her at lisa@prflorida.com or on LinkedIn.
When Miracles Become Mundane: The Magic Of Collaborative Divorce

By Joryn Jenkins, Tampa

If you know me at all, you know that for the first 29 years I was in practice, trial work was my obsession; “making new law” at least once a year was my prize; and when I opened my own practice, my sign out front promoted our firm as “Trial Lawyers.” Then, I represented a client in a collaborative divorce. What happened in that case caused me to change my entire approach to the dissolution of marriage services that we offer. What could possibly have happened to cause such a dramatic shift in my perspective? What has happened in one of every two of my collaborative matters since that time would be nothing short of miracle. The magical event was unique every time. The clients were different; the professionals were different; the circumstances were different—the only common element in each of these divorces was the process.

When such phenomena become commonplace, are they still “miraculous”? I will share what took place in three of these matters, and then you can tell me. Were they miracles? Was it magic? Or do you see such phenomena occur in your courtroom cases, too?

The Secret

The spouses had been separated for years. Wife lived with their two kids and her female lover; Husband had had a series of relationships resulting in four additional children with four different mothers. Over the years, Husband consistently had paid child support for all six of his kids, despite at one point being laid off for over a year. What precipitated the divorce was his refusal to help Wife pay for their daughter’s Sweet Sixteen party. While assuring me that he was a great dad, Wife explained that he had always been willing to provide her with extra cash when she needed it, but not in the last few years. So she was finally done.

Early in our first team meeting, we discussed the couple’s personal goals in their divorce. Derek Lucas represented Husband and asked if he was ready to share his “secret.” His client’s responsive body language was loud and clear; though it made him uncomfortable, he would. Husband explained that he had been arrested for breaking the law of unemployment compensation, which he had not understood. The cost of paying back that money—as well as his attorney’s fees and his ongoing child support—had made funds tight, rendering it impossible since then for him to come up with any extra. He hadn’t shared his secret before because he didn’t want his wife or their kids to think ill of him. But in the safety of the collaborative setting, he did. I tell the full story in “War or Peace, Avoid the Destruction of Divorce Court,” but suffice it to say that when we were leaving the courthouse after their final hearing, Derek and I witnessed Wife throw her arms around her former husband, exclaiming, “I hope you know that I will always love you!”

The Apology

The couple had married young, investing 20 years in their marriage by the time Husband finally moved out. For months, he asked Wife to consult with a collaborative lawyer, but she ignored his requests. He kept putting his paycheck in their joint account, she paid all the bills at their home and he managed to scrape together enough to pay his food and rent for a modest one-bedroom apartment. I wrote to her requesting that she retain collaborative counsel, but she disregarded me, as well. Finally, after ten months, Wife retained Adam Cordover.

During our first team meeting, Wife’s tears flowed non-stop and my client whispered to me loudly, “She’s trying to convince everyone that I’m the bad guy!” Our facilitator suggested that Husband and I step into the hallway for a quick tête-à-tête.

“No professional in that room will judge you, so stop worrying,” I said. “That’s not what we’re there for.” He visibly relaxed.

Wife had reproached him for empowering their joint account.

“Did you?” I continued gently, without judgment, although I had told him not to do that. “I did,” he admitted, averring, “I had to; it was the only way to get her to go to an attorney!”

“How much was in there?”

“$20,000.”

“Can you put it back?”

The question floored him, as though I was being stupid. “Of course I can! I’m sorry I hurt her feelings but I had to; it was the only way to get her to go to a lawyer.”

“Can you tell her you’re sorry?”

Again, the answer was obvious to him. “Of course, I can.”

“Let’s do that and see what happens.”

When we walked back in just moments after we’d left, everyone looked startled to see us so soon. Without even retaking his seat, Husband grabbed the back of the chair with both hands and leaned across the table. “Bella, I’m so sorry I hurt you...”
but I had to convince you to see a lawyer. I’ll put the money back.” Despite his surprise, without hesitating Adam inquired, “When can you get that done?”

“By 5 p.m. today.”

At 4:07 that afternoon, our team’s financial neutral sent out a full-team e-mail, notifying us that Husband had replaced the funds. Although it took us more than four months to finalize this divorce, Wife never teared up again.

The Testimonials

I was totally unnerved when my client, Jessica, ran sobbing from the conference room. I chased her and found her in my parking lot crumpled against the outside wall, crying. “This is what he always does!” she sobbed. “He never listens to me! He can’t hear what I’m trying to tell him! He can’t hear me!” I wrapped my arms around this wounded woman and suggested, “Come back inside and try again. He wants to understand, and we’re here to help you explain it to him.” She followed me back into the conference room.

This was not an easy divorce. The collaborative process is not all sunshine and butterflies; it’s hard work. When we were finished, opposing counsel Tanya O’Connor and I separately debriefed our clients, asking each the same questions.

Jessica reported: “When I came into the process, I wasn’t talking to my husband—just texting or e-mailing—because I didn’t want my son thinking we were getting back together. What I learned was that it was more important for my son to see that we do get along, especially so that he didn’t try to play us off against each other as he has in the past. I learned how to communicate with him, to wait it out, to calm down and to think about the words I would say that could make our discussion better instead of worse.

“I was surprised that we were able to listen to each other as well as we did. This was because the professionals were so active in helping us hear each other’s points of view. It certainly sounds different when someone else says it, even when it’s the same thing your husband just said. The most amazing thing was how we were all on the same team, all of the neutrals and our lawyers, mine and his, and both of us just trying to get this resolved.

“It was a surprise that I got what I wanted and he got what he wanted. But I think what I wanted changed during the process, and we ended up compromising in the end.”

Husband explained: “I felt that I had a voice and that I would be heard. It wasn’t a lopsided process, I liked that. I also liked that it was timely. I liked working with the team . . . I felt like they gave Jessica and me the helping hand we needed to get through it. [We] were able to explain to one another (and hear each other) on how our son felt. It allowed us to share what he was saying in a neutral and safe setting without involving him in the process and potentially exposing him to conflict.

“I feel that the process gave me insight into a lot of things between Jessica and me and our son. The team was there to clear up any questions we had; I felt I could have an exchange with any of the team members and that shortened the process. I liked that the process was goal-centered and common ground was easy to find. No downside. Finishing in such a timely manner . . . from beginning to end it was less than 90 days! It was easy, well plotted out and not at all nerve-wracking.

“All of these stories, along with many of my tales of going to trial, are fleshed out more thoroughly in “War or Peace,” but you get the gist of these three. What’s so amazing is that collaborative lawyers can actually hear how positively the process has impacted our clients in their own words.

Long story short? My passion is no longer “making new law.” I like to think that I’ve grown as time has passed and that my clients, both courtroom and collaborative, have taught me a few things. Not the least of which is that there is magic in collaboration. But you tell me. Were these miracles? Was it magic? Or do you see such phenomena occur in your courtroom cases, too?

Joryn Jenkins, Esq. – Joryn’s clients say, “She helps people divorce each other without destroying their families.” She is a trial attorney with 37 years of courtroom experience, now in private practice at Open Palm in Tampa, where she concentrates on the courtless practice of family law. In her spare time, she teaches marketing to lawyers and to collaborative professionals. While practicing law, Joryn also served for ten years as the editor-in-chief of two national magazines. She is the author of Florida Civil Practice Motions (Lexis Law Publishing) and five books on the collaborative divorce process.
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How to Up Your Game in Family Mediation

By A. Michelle Jernigan, Maitland

All lawyers possess some level of competitiveness. Every zealous advocate wants to “win” on behalf of his/her client. Since mediation involves compromise, what constitutes a “win” in mediation? I suggest that a “win” in mediation includes participation in a fair process, being heard, accomplishing one’s main objectives and negotiating the best deal possible given the facts, the law and the circumstances of the parties. This article will address some of the ways you can increase your odds of success in mediation.

Preparation

Prior to writing this article, I sought input from a number of very capable family lawyers on what they and their colleagues need to hear about increasing their likelihood of success at mediation. Every one of them mentioned lawyer preparation. After 30 years of mediation experience, I can attest that those lawyers who are better prepared for mediation achieve better outcomes for their clients.

In order to be fully prepared for mediation, each lawyer has to know her case. Each must have a thorough understanding of the pertinent facts, an understanding of the legal issues in the case, and be in a position to analyze the strengths and weaknesses of her legal position and her opponent’s legal position. A lawyer should examine the best case scenario, worst case scenario, and most likely scenario if the case proceeds forward to a judicial resolution. Mediators refer to these barometers as the Best Alternative to a Negotiated Agreement (BATNA), the Most Likely Alternative to a Negotiated Agreement (MLATNA), and the Worst Alternative to a Negotiated Agreement (WATNA).

There are two aspects to preparing for mediation: your own preparation for mediation and the preparation of your client for mediation. Both are of equal importance. Once you have thoroughly analyzed your case and explored your client’s interests, you need to develop a negotiation strategy. You should explain to your client that mediation is a settlement process and that you will advocate for her interests, but that you will do so in a way that is not offensive to the opposing party or counsel. As the old saying goes, “You draw more bees with honey than you do with vinegar.”

One of the wonderful aspects of being a family law practitioner is that you will be resolving multiple issues. That fact alone allows you to deal with multiple options. The more issues you have for resolution, the greater the possibility you will resolve at least some of them. It also gives you the opportunity to make concessions on issues that are less important to your client in exchange for concessions made by the other party on issues that may be of greater importance to your client. This is the “win-win” aspect of mediation.

It is also critical that you know your opposing lawyer. If you have never interacted with that lawyer in the past, ask other colleagues about him. How does he litigate? How does he negotiate? What is his reputation in the legal community? Do judges like him? Is he capable, competent, and prepared? Is he reasonable or is he unnecessarily contentious? Does he settle most of his cases, or does he litigate them? Is he cognizant of the need to preserve the family unit and take into account the emotional well-being of the parties and their children? All of these factors will influence how you prepare for mediation. After all, to ac-

Mediation Preparation Checklist

- Lawyer’s preparation
  - Child support Guidelines worksheet
  - Parenting Plan
  - Equitable Distribution chart
  - Draft Marital Settlement Agreement (He who drafts, wins!)
  - List of Client’s interests and objectives (rated in priority)
  - List of Other Party’s interests
  - Issues agreed upon
  - Issues in Dispute
  - Legal authority
- Client preparation
  - Education about the mediation process and the mediator
  - Discuss with the client what can and cannot be said in joint session
  - Development of Negotiation Strategy
  - Education about Opposing Counsel
  - Education about the Law
  - Option Development
  - Education about the Judge
  - Education about BATNA, WATNA and MLATNA
Joint Sessions and Private Sessions

Most mediators in Florida are proponents of the use of opening statements and joint sessions. They create opportunities for parties and lawyers to build rapport with the other side, to establish credibility and to share why each party believes in the strength of its position. The joint session is the only time an attorney for one party may speak directly to the opposing party. However, nothing does more damage in a mediation than attorneys using a joint session for the purpose of threats, intimidation, and tearing down the opposing party.

Some mediators work exclusively in private sessions, where parties often feel safer and are in a position to be more transparent. The mediator is better able to ascertain the parties’ interests and to conduct option development. Option development then leads to the mediator’s communication of proposals to the other party. Communication of proposals through a neutral person removes some of the emotional sting and allows the mediator to reframe information in a way that it can be better received by an opposing party.

The disadvantage of working exclusively in private sessions is that the parties do not have the opportunity to work through issues together. The back and forth of private sessions increases the time involved in mediation and does not allow parties to experience the success of achieving resolution of issues independent of professionals. Particularly in situations where parties are co-parenting, being able to work through parenting issues on their own is crucial to the long term well-being of the children. After all, “practice makes perfect,” and these parents are going to have a lifelong relationship.

As you plan for your mediation, consider whether you should work in private or joint sessions. Discuss with opposing counsel and the mediator the advantages and disadvantages of joint and private sessions in your particular case. The goal should be to structure a process that has the greatest opportunity for success.

Breaking Impasse

There comes a time in most mediations when parties get “stuck.” We call this an impasse. One of the first steps in dealing with an impasse is to determine why it occurred. While the road to resolution is always a rocky path, once the negotiations stall or break down, the need for that professional neutral becomes even more important. As an attorney representing a client in mediation there are a few things you should consider before declaring an impasse.

Because mediators have the opportunity to meet privately with both parties and their legal counsel, they are in a unique position to know and understand the parties’ interests, the vulnerabilities of their legal positions and the areas where they have some flexibility. Even so, mediators do encounter situations in the negotiation process where the movement stalls or the process comes to a complete standstill. In these instances the mediator must employ the skills of the trade and draw on their experience to

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<th>Structuring the Mediation</th>
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<td><strong>Option One: Traditional Format</strong></td>
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<tr>
<td>- Pre-Mediation mediation</td>
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<tr>
<td>- Phone call between mediator and lawyers</td>
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<tr>
<td>- Joint Session</td>
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<tr>
<td>- Multiple private sessions</td>
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<tr>
<td>- Drafting agreement – joint or private sessions</td>
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<tr>
<td><strong>Option Two</strong></td>
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<tr>
<td>- Joint session for mediator’s opening only</td>
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<tr>
<td>- Multiple private sessions</td>
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<tr>
<td>- Drafting agreement – private sessions</td>
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<td><strong>Option Three</strong></td>
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<tr>
<td>- Multiple private sessions only</td>
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<tr>
<td>- Drafting agreement – joint session or private session</td>
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<tr>
<td><strong>Other Variables</strong></td>
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<tr>
<td>- Separate meeting with mediator and lawyers</td>
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<tr>
<td>- Separate meeting with mediator and parties</td>
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<tr>
<td>- Separate meeting with parties only</td>
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Lawyer’s Impasse Evaluation

- **The Basics** – Have people had adequate food, hydration and breaks?
- **The Mediator** – Have you solicited the Mediator’s input?
- **Your Client** – Are they ready to make the hard decisions? Are they being unreasonable? Do you need the mediator’s help in talking them down off the cliff?
- **The Emotion** – Is there just too much emotion in the room?
- **The Timing** – Does anyone need a break? Is it just too early in the process to resolve issues? Is there more discovery that needs to be done?
- **The Technique** – Is the style or pace of your negotiation technique not working?
- **The Other Lawyer** – Are you letting their style or aggressiveness interfere with your goals?

continued, next page
attempt to break the impasse. In the section below, some of the techniques commonly utilized by mediators to break impasse are described.

**Conclusion**

While not all family law matters are settled in mediation, most can be and often are resolved to the parties’ satisfaction. Preparation, structuring the mediation process for success and breaking impasse are just a few of the techniques that are required to achieve a “win” for your client in mediation. A keen knowledge of negotiation strategies, an awareness of negotiation tactics to be wary of, training in emotional intelligence, perseverance and patience are all critical components in a successful mediation. When all of these components converge, there is a substantial likelihood of a successful mediation outcome.

**Ms. Jernigan** had a commercial and family law practice from 1985 to 1988, when she began her mediation career. She was one of the first mediators to become Florida Supreme Court Certified in Family and Circuit Civil in 1988. She mediated as a solo practitioner until 1992 when she joined the firm of Upchurch Watson White & Max Mediation Group. She is a shareholder with the firm and has mediated thousands of cases throughout her career, involving complex financial issues with highly emotional parties. She has mediated multi-million dollar divorces and family business disputes to successful conclusion. She also serves as an arbitrator and is a recognized speaker and author in the field of ADR. Michelle currently serves as Treasurer for The Florida Bar ADR Section Executive Council.

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**Mediator’s Impasse Techniques**

- Take a break
- Explore Alternative Proposals
- Single Text Negotiation – working off one Marital Settlement Agreement
- Get the clients together
- Get the lawyers together
- Explore Third Party Adjudication – Can we let the judge resolve this issue?
- Mediator’s Proposal
- Suggesting a trial period – good possibility for contact and access issues
- Continue the mediation
Hooker v. Hooker: A Riddle, Inside a Mystery, Surrounded by an Enigma

By David Manz, Marathon

In Hooker v. Hooker, 220 So. 3d 397 (Fla. 2017), the Supreme Court of Florida addressed the seemingly innocuous issue of the proper standard of review in a dissolution action as to the issue of whether a spouse had donative intent to make an interspousal gift. The Supreme Court determined that the proper standard of review on that issue is "competent, substantial evidence," and concluded that competent, substantial evidence existed to support the trial court's conclusion that two properties owned by the husband became marital assets under section 61.075, Florida Statutes, because the properties were deemed an interspousal gift to the wife.

The question of whether a transfer of property from one spouse to another during a dissolution action constitutes an interspousal transfer would appear relatively straightforward and a matter of applying clear case law and statutory principles to the facts. That arguably did not occur in Hooker. It can in fact be argued that the Supreme Court's decision is in derogation of case law and statutory principles, that the Supreme Court misapplied the gift standard of "complete surrender of dominion and control," that the opinion ignores the statute of frauds regarding transfer of real property, and further gave no import to critical provisions of the prenuptial agreement executed by the parties prior to the marriage.

This article will analyze the decision in detail and will offer support for the argument that the decision by the Supreme Court misapplies case law and statutory principles, and may create significant uncertainty in dissolution actions as to the analysis of whether real property may be characterized as marital in a dissolution of marriage action.

In Hooker, the parties were married for 23 years at the time of the petition. The parties had a net worth of $4.8 million at the petition for dissolution. Neither party had significant employment outside the marriage. Both parties had independent income from family inheritances. Both parties maintained independent finances during the marriage. The parties entered into a prenuptial agreement. The validity of the agreement was not disputed. The agreement stated that the parties' nonmarital assets were each party's separate property and stated that any and all appreciation, substitution, improvements, of the assets were exempt. The agreement did not preclude gifts, and stated that the parties were not precluded from making inter vivos or testamentary provisions for the benefit of the other.

Two parcels of residential real property were relevant to the case, including a property called Hickstead, in Wellington, Florida, and a property called the Lake George property in Lake George, New York.

Hickstead was never titled in the wife's name. Hickstead was purchased by the husband in 1989, two years after the parties' married, and was titled in the name of the husband's mother for the benefit of the husband as grantee. The husband's father purchased a lottery band's father purchased a lottery band's mother's trust for the benefit of the other. The husband purchased Hickstead for $4.5 million. The husband paid for and built out Hickstead, the husband purchased it for $490,000 was completely used for the Lake George expenses. The wife signed closing documents/sale documents and signed the deed to the property, she never had legal title to the property, and apparently signed the closing documents solely to transfer any homestead rights that she had to Hickstead. Also in 1997, the husband sold a one half interest in Hooker Hollow to Trelawny Farm for one million dollars. The Raether family was the principle of Trelawny Farm. Just after the wife filed for dissolution in 2010, the Raethers purchased Hickstead for $4.5 million.

The Lake George property was the family's summer residence for the vast majority of the marriage. Like Hickstead, the husband purchased it prior to the marriage. The purchase price of $490,000 was completely traced to the husband's nonmarital assets. The wife never was a signatory on the account nor did she have access to the account that the husband used for the Lake George expenses. In April, 2012, the fair market value of Lake George was approximately $2.5 million.

The trial court found that the Hickstead and Lake George properties should be considered joint assets because of the way the parties treated the properties during the marriage. The trial court found that the conduct of the parties gave rise to the presumption that the parties intended to continue, next page
The trial court found the wife could and did treat Hickstead as her own, that the wife was not restricted from incurring costs and expenses on the property, that she had unfettered use of the farm and stables, that she could pursue her lifelong passion for horses on the property, and that the husband and wife centered their social and personal life around their love of horses. The trial court found that the husband never told the wife “one way or another” whether she owned the residences. As to the Lake George property, the wife testified that the husband sent her a card with a picture of the property on their tenth anniversary. The wife purchased some furniture and incidentals for the property. The wife obtained keys to the Lake George home and used the property as her summer home. The court found that both the Hickstead and Lake George properties were considered joint assets as they lived and raised a family in the properties. The trial court thus found that competent, substantial evidence existed to support the conclusion that both properties were interspousal gifts to the wife and thus became marital.

The husband sought rehearing on the trial court’s final judgment. On the husband’s motion for rehearing, the trial court determined that an unequal distribution was warranted because of the substantial financial contribution of the husband and gave a 67% interest in the Hickstead property to the husband and the remaining 34% to the wife, and 75% of the Lake George property to the husband and 25% to the wife. The husband appealed the trial court’s amended final judgment to the Fourth District Court of Appeal. The Fourth District reviewed the trial court’s decisions de novo, and stated it accepted the trial court’s factual determination absent an abusive discretion. The Fourth District affirmed as to the Lake George property, but concluded the trial court erred as to the finding that the wife had an interest in the Hickstead property based upon the preponderance of the credible evidence standard. The Fourth District affirmed the trial court’s findings in the amended final judgment except the determination that Hickstead was an interspousal gift.

The Supreme Court of Florida accepted jurisdiction of the case. On review, the Supreme Court concluded that the proper standard in determining whether the husband had donative intent with regard to Hickstead and Lake George, rendering those properties as marital assets, was whether the trial court’s findings were supported by “competent, substantial evidence.” The Supreme Court ruled the Fourth District used the improper standard and improperly reevaluated the trial court’s factual findings and failed to determine whether they were supported by the record. The Supreme Court stated that the Fourth District should have deferred to the trial court and simply examined whether there was record support for the trial court’s findings.

The Supreme Court determined that competent, substantial evidence existed to support the finding that the husband had the requisite donative intent to render Hickstead and Lake George an interspousal gift and therefore, marital property. The Supreme Court determined as to Hickstead, that the husband told the wife it was in their best interest to convey Hickstead to an LLC during the marriage, that the property was delivered to the wife, that the wife signed the mortgage, and that the parties continued to use Hickstead as their marital home for another decade after the transfer. The Supreme Court also pointed out that the wife signed the warranty deed, was listing on the construction mortgage, and had unfettered access to the property. The Supreme Court ruled that the transfer of Hickstead into an LLC during the marriage was the most significant indicator of donative intent, and that because it was used for marital property for another decade after transfer, that the husband’s actions supported that Hickstead was an interspousal gift, of which husband intended to divest himself of complete dominion and control. The Supreme Court further determined that the Lake George property was the subject of interspousal gift, supported by the fact that the husband sent a picture of the Lake George property on a tenth anniversary card to the wife.

This author submits that the Supreme Court opinion should be analyzed in the context of four operative questions:

1. Did the pleadings sufficiently raise the issue of gift?
2. Did the trial court correctly apply the proper gift standard in its analysis of whether there was competent, substantial evidence of interspousal gift?
3. Did the Supreme Court properly raise the issue of interspousal gift of real property in accord with the statute of frauds?
4. Did the subject properties remain non-marital under the prenuptial agreement?

It is respectfully offered by this writer that the answer is no as to all four questions. First, the wife failed to specifically plead that the properties became marital as a result of the gift. Arguably, the wife’s failure to plead gift constitutes a due process violation. As a general rule, a violation of due process occurs when a court determines matters not noticed for hearing and not the subject of appropriate pleadings. Kanter v. Kanter, 850 So.2d 862 (Fla. 4th DCA 2003); Fuchs v. Fuchs, 840 So.2d 449 (Fla. 4th DCA 2003).

Second, the Supreme Court failed to correctly apply the correct gift standard to the facts. To make a valid gift, three elements must be shown: donative intent, delivery and possession, and an intent of the donor to divest himself of all dominion and control. Mills v. Mills, 845 So.2d 230 (Fla. 3d DCA 2003); Bowen v. Taylor Christensen, 98 So.3d 136 (Fla. 5th DCA 2012). In Mills, for example, involving a gift of 500 shares of stock,
the donor relinquished complete control. The stock gift was recorded in the records at the annual meetings. The certified public accountant who prepared the company’s tax returns testified the gift was a stock from the donor. The court determined that complete relinquishment of the stock constituted an interspousal gift. In Eulette v. Lynch, 101 So.2d 603 (Fla. 3d DCA 1958), the court pointed out that the burden is upon the donee to make a clear showing of donative intent, delivery of possession and surrender of dominion and control of the subject gift, and that where the donor failed to make a complete and irrevocable surrender of dominion and control of the stock certificates, that the transfer was not sufficient. In cases involving a deed, the deed must pass beyond the dominion and control of the donor and come within the power and control of the donee. Winner v. Winner, 370 So.2d 845 (Fla. 3d DCA 1979). In Bowen v. Taylor Christensen, supra, the only evidence of gift was the documents surrounding the acquisition of a vehicle from the dealer. The documents evidenced only the intent by the owner to gift a co-ownership in the vehicle. Where the alleged donor expressly and purposively retained an ownership interest, the alleged gift failed because of a failure to transfer all interest and control in the vehicle. Accordingly, in the context of the cited cases, where real property is not transferred by deed relinquishing complete ownership of the subject property, it cannot be deemed that the donor has transferred “all control and dominion and ownership.”

Analyzing the correct gift standard to the facts in Hooker, it cannot reasonably be argued that the husband surrendered all dominion and control of either property to the Wife. The husband retained possession of both properties. The husband retained ownership of both properties by the operative deeds. The husband never transferred so much as a fractional interest in either property to the wife by deed. As a matter of law, execution of mortgages of the properties by the wife did not effect a transfer of ownership. Sharing possession of real property cannot constitute a “complete relinquishment of ownership and possession.” The trial court and Supreme Court did not apply the correct standard. The conclusion of the trial court, affirmed by the Supreme Court, that the husband intended to divest himself of complete control to the Hickstead and Lake George is simply not supported by the law or facts.

Analysis of the Statute of Frauds doctrine in the context of this case is equally compelling. Florida Statute section 725.01 provides that no action be brought upon any contract for the sale of land unless it is in writing and signed by the party to be charged. No real property may be transferred other than in writing and signed in the presence of two subscribing witnesses. Fla. Stat. 689.01. It is equally well-established that interest in real property cannot be conveyed other than by deed and cannot be conveyed by mortgage. Southern Colonial Mortg. Co., Inc. v. Medeiros, 347 So. 2d 736 (Fla. 4th DCA 1977). In re West Lakeland Co. Ltd. Partnership, Bkrtcy.M.D.Fla. 1998, 2016 B.R. 892, oral gifts are impermissible. In Hooker, none of the purported transfers were by proper deed in accordance with the statutory section. It cannot be reasonably argued that the conveyance was in accordance with the Statute of Frauds. Failure to comply with the statute renders the gift ineffective.

In the context of the prenuptial agreement, the Supreme Court’s opinion in Hooker is subject to equal criticism. The agreement provided specifically that any pre-marital property or substituted property remains nonmarital. There is simply no evidence that the Lake George or Hickstead properties were not substituted properties. Every dollar of the purchase price, acquisition costs, and costs of repair, maintenance, and improvements of both properties was solely contributed by the Husband. Of note, a prenuptial agreement could certainly prevent the problems created by the Hooker opinion, by providing that interspousal gifts must be ratified and acknowledged by a separate writing clearly evidencing the intent of the donor to effect an interspousal gift.

In the final analysis, the Supreme Court’s opinion in Hooker fails to properly apply the prenuptial agreement as to the concept of substituted property, fails to correctly apply the gift standard, and fails to apply the statute of frauds to the facts. The argument that the Supreme Court’s opinion could dramatically open the door to findings of interspousal gifts in dissolution cases following Hooker is hardly an exaggeration.

Endnotes
1. The husband’s annual income average between $170,000-$200,000; the wife’s income was approximately $306,996 per year. During the marriage, the parties maintained separate bank accounts.
2. The Hickstead deed listed “Alice I. Hooker Trust FBO (the AIH Trust”), for the benefit of, “Timothy I. Hooker” as the grantee.
3. The Supreme Court noted that under section 601.075, Florida Statutes there are several ways property can become marital. See § 61.075(6)(a)(1), and that most relevant to this case is the concept of interspousal gift. The court notes that “a gift is made, when the donor, intending to make a gift, delivers the gift to the donee.” Mills v. Mills, 845 So. 2d 230 (Fla. 3d DCA 2003).
4. The trial court noted that the Lake George and Hickstead property was solely acquired and improved by the husband. That fact, in conjunction with the fact that the parties kept their accounts segregated, dispels any contention that the properties were not substituted.

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