INSIDE THIS ISSUE:

Chair’s Message ........................................................................................................... 3
Comments from the Co-Chairs of the Publications Committee ......................... 4
Message from the Co-Chairs of the Commentator .................................................. 5
Guest Editor’s Corner .................................................................................................. 6
Happy 25th Anniversary Privette: Commemorating a Quarter-Century of the Application of Privette’s Marital Bar ..... 9
‘Til Death Do Us Part?’ Not in Business! ................................................................. 13
Family Law Arbitration: A Winning Resolution ................................................... 15
DIY Ways to Jumpstart Your 2018 Marketing Efforts .......................................... 17
Photos of AAML Florida and Family Law Section Annual Review Course and Section Midyear Meetings .......... 18
A Judge’s Dilemma: A Worldwide Concern .......................................................... 20
Joint Return vs. Separate Return: The Importance of Avoiding Tax Headaches for Divorcing Spouses ............................................................... 23
I’m a Family Lawyer ... Why Should I Care About Florida’s Stand Your Ground Law? .......................................................... 25
An Unexpected Way for Law Firms to Improved Their Marketing Strategies .......... 32

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

Articles and cover photos to be considered for publication may be submitted to Belinda Lazzara (blazzara@mslb-law.com), or Tenesia Hall (tchall@legalaidocba.org), Co-Chairs of the Commentator. MS Word format is preferred for documents, and jpeg images for photos.
With the 2017-2018 bar year now well underway, this is my first chair’s message for the Commentator. To start, I have to say that I am honored to serve this year as chair of the section along with the other truly talented members of the Family Law Section Executive Committee: Chair-Elect Abigail Beebe, Treasurer Amy Hamlin, Secretary Douglas Greenbaum and Immediate Past-Chair Laura Davis Smith. We are also blessed with active, dedicated and passionate trustees who never miss an opportunity to assist the section, as well as hardworking and organized executive council members, committee members and committee leadership who dedicate countless hours to the section’s cause and who truly make this organization great. Thank you!

Many of you who were able to attend the Annual Installation Luncheon in June know that my theme this year is appropriate advocacy. In identifying this theme, it was with the intent and purpose to continue to aggressively promote not only the substantive and procedural mastery of family law, but the ethical and professional restraints inherent and unique to our practice area, while at the same time promoting access to justice for not just the fortunate few. Of course, much of what is encompassed in this year’s theme is embedded in our organization’s bylaws. In fact, the section’s mission statement, “To promote the highest standards of professionalism and legal advocacy in the delivery of a wide array of services to Florida families as we seek the consistent, fair, and expeditious administration of justice,” is an expression of the concept of appropriate advocacy. Why then make this year’s theme one that simply repeats in part what we already stand for and what we strive to do? Because the Family Law Section’s fundamental goals should be highlighted, they should be repeated, and they should be promoted, not only by the members who regularly volunteer their time to the section but by each family law attorney in the state. While of all our active members are committed to the section’s objectives, and we work hard to accomplish our mission each and every year, not every practitioner endeavors to strive be an appropriate advocate. We know that directly, we know it anecdotally and we unfortunately know it statistically. As a section, we need to remember that we are working to reach and educate everyone who touches a family law case. Finally, in identifying the theme, I hoped to encourage all of us to think of the concept of appropriate advocacy as one that also requires us to work to enhance the public’s perception of family law attorneys because we know that sometimes the perception of justice is as equally important as justice being served. So, this year, we will work to promote appropriate advocacy to not only to our section volunteers, but to our members, and to every practitioner handling a family law case, and we will promote appropriate advocacy through education, service and outreach.

Just a brief recap of what we have done during the first portion of this bar year. For those of you who missed it, we started this year with the help of more than 60 volunteers at the biannual Trial Advocacy Course. Trial Advocacy is a signature event of the section that is offered every two years and that is provided as a section service (meaning we do not promote it with the intention of making money, but as a benefit to our members). It not only provides attendees a trial for purposes of board certification, but it provides lawyers of all skill levels a chance to hone their trial skills in a small group setting with both formal instruction and feedback from experienced attorneys, board certified in marital and family law. The program is taught by board certified lawyers for the purpose of highlighting the benefits of board certification, and to ensure the students receive quality instruction while receiving continuing legal education and trial credit. Next, with the help of event program chairs Carin Porras and Amy Hamlin, we spent time at our annual out-of-state retreat where we relaxed and received continuing legal education at a luxury guest ranch in the foothills of the Rocky Mountains, outside of the Rocky Mountain National Park. We had our fall meetings at a new location – in Southwest Florida, an area hard hit by Hurricane Irma – at the Hyatt Coconut Point in Bonita Springs. During those meetings, we heard from our hardworking substantive, organizational and ad hoc committees in terms of what they continued, next page
Comments from the Co-Chairs of the Publications Committee

Happy New Year!! This is the time of year when we are especially thankful for all those who contribute so much to the Family Law Section. As co-chairs of the Publications Committee, we are keenly aware that many people make significant behind the scenes contributions to serve our section members and Florida families. We are grateful for their efforts. It truly takes a village to produce the Commentator and other section publications. We are also thankful for the leadership of the Executive Committee. Section Chair Nicole Goetz has provided ongoing support and direction as we strive to produce quality publications. Secretary Amy Hamlin as past chair of Publications, is a wealth of knowledge and is always there to call upon when needed. Of course, the two individuals that we rely upon the most to produce the Commentator are Co-Vice Chairs of Publications Tenesia Hall and Belinda Lazzara. We thank all of them for their hard work. We hope to see you at the section meetings and retreats this year. Please consider writing something for one of the section publications: FAMSEG (monthly email newsletter), Commentator (quarterly magazine style publication), and The Florida Bar Journal (scholarly writings). You can e-mail either of us directly at: cdw@thewelchlawfirm.com or lco@infocusfamilylaw.com. We look forward to the future and wish everyone a happy, healthy and prosperous 2018!

Lori Caldwell-Carr  C. Debra Welch

Nicole L. Goetz, Esq.
Message from the Co-Chairs of the Commentator

We hope that everyone is off to a terrific 2018. It was great to see so many of you at Cert. Review and good luck to all of those who recently took the board certification exam. We welcome any photos you have from the event as well as articles, announcements and advertisements for our upcoming editions. Please forward for consideration to tchall@legalaidocba.org and blazzara@mslbb-law.com. A special thanks to our Guest Editor, Anya Cintron Stern, and all of our guest authors, who worked tirelessly through the holidays to finalize this edition of the Commentator. Enjoy!

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I am grateful for the opportunity to work alongside talented and dedicated individuals on this winter edition. I am especially thankful for the guiding hands of Belinda Lazzara, Tenesia C. Hall and The Honorable General Magistrate Susan Keith who helped immensely in the editing of the article celebrating the 25th anniversary of Privette. It is truly motivating to work with other professionals with the zeal for issues affecting marital and family law, and with professionals who provide new perspectives which may very well shape your future practice. I hope that you enjoy the articles in this edition of the Commentator, and leave you with a favorite quote:

“The more that you read, the more things you will know. The more that you learn, the more places you’ll go.”

– Dr. Seuss, I Can Read With My Eyes Shut!

By Anya Cintron Stern
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familylawfla.org/event/2018-in-state-retreat/
Happy 25th Anniversary Privette: Commemorating a Quarter-Century of the Application of Privette’s Marital Bar

By Anya Cintron Stern, Miami

Twenty-five years ago, on April 8, 1993, the Florida Supreme Court decided Privette to establish a framework for handling cases in which a child is born into wedlock, but whose biological father may be an individual who is not the mother’s husband.1

It all began with money. Unsurprisingly, the government sought reimbursement for the money expended on behalf of a child.2 The mother of the child alleged that Privette was the father of her child.3 By sworn complaint, the mother alleged that she was unmarried at the time of the child's birth.4 Based solely on the mother's sworn complaint, the court ordered Privette to undergo blood testing.5 The court later determined that the mother was actually married to another man at the time of the child's birth, and that the husband, not Privette, was listed on the child's birth certificate.6 Privette petitioned for a writ of certiorari, which was granted.7 The Florida Supreme Court accepted the case to address a direct conflict with another ruling.8

The Privette court held that in cases where there is a question as to whether a child born into wedlock is the biological child of another man, the legal father (husband) is entitled to be heard by the court and a guardian ad litem must be appointed to represent the child.9 The court must determine whether a petition for a blood test be brought in good faith, supported by reliable evidence, and that it is in the child’s best interests for the blood test be performed.10

The moving party must affirmatively make such showing of best interests of the child by clear and convincing evidence before a blood test can be ordered.11 Sometimes the moving party may be the government requesting a finding of who will be financially responsible for reimbursing funds expended on behalf of the child.12 Sometimes the moving party may be the biological father attempting to assert parental rights.13 Sometimes it is the legal father attempting to keep his relationship with the child intact.14 Whoever it may be, the “overriding concern” is the child’s best interests.15

Although decided 25 years ago, thanks to the ingenuity of tireless attorneys and involved parents, the concept provided within Privette continues to shape matrimonial and family law. For instance, the Florida Supreme Court cited Privette when it held that in relocation cases, the best interest of the child is the primary consideration.16 In the relocation case, there was no issue as to the paternity of the child,17 but the depth of importance Privette placed on the best interests of the child solidified this fundamental tenant of family law: The child’s best interests govern. The concept of the “marital bar” was born from this fundamental tenant.

The Marital Bar

Generally, a biological father does not have standing to seek to establish paternity of a child where the child was born into an intact marriage and where the married woman and her husband object to the paternity action.18 This is based on Florida’s public policy, expressed in Privette, that the child’s legally recognized father has an unmistakable interest in maintaining the relationship with his child without impugnment.19 Once a child is born legitimate, the child has the right to maintain that status both factually and legally if doing so is in its best interests.20 This right is otherwise known as the “presumption of legitimacy,” or otherwise described as the “marital bar.” A legal father, i.e., a man married to the child’s mother at the time of birth, otherwise known as her husband, is an indispensable party in an action to determine paternity.21 Even if the legal father is proven not to be the child’s biological father, there still must be a clear and compelling reason why it is in the child’s best interests to overcome the presumption of legitimacy.22

The “marital bar” is to be applied neutrally and across the board in all cases where paternity becomes an issue as to child born during a marriage.23 In fact, the Privette court described it:

[w]hile there may be some cases where the child has had little contact with the legal father, other cases will be quite the contrary. It is conceivable that a man who has established a loving, caring relationship of some years’ duration with his legal child later will prove not to be the biological father. Where this is so, it seldom will be in the children’s best interests to wrench them away from their legal fathers and judicially declare that they now must regard strangers as their

continued, next page
fathers. The law does not require such cruelty toward children. \(^{24}\)

As a result of the “marital bar,” many biological fathers from the early 1990s to today have lost the opportunity to become the recognized fathers of their children. \(^{25}\) The marital bar applies even when there is a stipulation that the natural and biological father is not the mother’s husband. \(^{26}\) In Twigg, decided in 1994, the legal father (the mother’s husband) raised the child since birth. \(^{27}\) The legal father was the only father that the child had ever known. \(^{28}\) Nonetheless, the parties all stipulated that if the putative father was the biological father as determined by the agreed-upon blood test, the putative father would obtain visitation. \(^{29}\) The putative father was determined to be the biological father. \(^{30}\) However, after a determination of the minor child’s best interests, the court found that it would be detrimental to declare the putative father as the legal father. \(^{31}\)

Another example of the marital bar overcoming stipulations by the parties is C.G. v. J.R. and J.R. \(^{32}\) In this case decided in 2014, it was undisputed that the biological father of the child was not the mother’s husband. The biological father entered into a time-sharing agreement with the mother. \(^{33}\) The mother’s husband (legal father) also signed off on the agreement. \(^{34}\) The agreement indicated that the legal father’s rights to the child would not be terminated, but that the biological father would be entitled to equal time sharing and would pay child support. \(^{35}\) The agreement was ratified and adopted by the trial court. \(^{36}\) Despite this executed agreement, the order adopting and ratifying the agreement was subsequently vacated as contrary to state law and public policy thereby rendering the agreement unenforceable. \(^{37}\) Following Privette, the court appointed a guardian ad litem on behalf of the minor child, and a Privette hearing was held. \(^{38}\) Despite the biological father having developed a relationship with the minor child from the previously agreed-upon time sharing schedule, the child was returned to the legal father. \(^{39}\) The Privette guardian recommended that the presumption of legitimacy (marital bar) remain intact, resulting in the biological father having no standing to proceed with a paternity action. \(^{40}\)

What Twigg and C.G. v. J.R. and J.R. demonstrate is that the marital bar is a “neutral rule.” \(^{41}\) For the past 25 years, it has applied equally, across the board, to all parties. The child’s best interest is the only concern.

Non-Access Rule

Although the marital bar has been strictly applied to preclude parental rights of biological fathers, some courts have applied “exceptions” to Privette as mechanisms with which to adjudicate biological fathers as legal fathers. The non-access rule is one of the few circumstances capable of overcoming the marital bar. \(^{42}\) Even when both the mother and the husband object to a biological father’s attempt to seek establishment of paternity, a biological father may be deemed the legal father if “common sense and reason are outraged” by applying the marital presumption to bar such action. \(^{43}\) The non-access rule conquers the presumption of legitimacy (the marital bar) by showing that the husband “lacked access to his wife at the time of conception.” \(^{44}\)

In Landers, the mother and husband were separated when the biological father and mother engaged in sexual relations resulting in the birth of the minor child. \(^{45}\) In fact, for the period of 16 months when the mother and biological father were engaged in their relationship, the mother and the husband resided in separate states. \(^{46}\) After the birth of the child, the biological father bonded with the minor child while the husband was absent as both a husband and a father. \(^{47}\) In adjudicating the biological father as the legal father, the Landers court cited Privette when it stood on the premise that “the presumption of legitimacy is based on the policy of protecting the welfare of the child, i.e., the policy of advancing the best interests of the child.” \(^{48}\) This policy is a guiding principle that must inform every action of the courts in this sensitive legal area. \(^{49}\) The husband simply had no access to the mother at the time of conception.

More recently, on Oct. 4, 2017, the Fourth District of Florida decided Perkins v. Simmonds. \(^{50}\) In Perkins, the minor child had been given the biological father’s last name, despite the mother having been married to another. \(^{51}\) The court found that the mother had represented to the biological father that she was getting a divorce or was divorced when she had the child. \(^{52}\) The biological father financially supported the child and was committed to continuing a relationship with the child. \(^{53}\) Despite these facts, the trial court dismissed the biological father’s paternity petition on the basis that he had no standing. \(^{54}\) Citing Landers, the appellate court held that it was not in the minor child’s best interests to apply the marital bar. Id.

Mother and Husband Terminating Parental Rights

The marital bar has been lowered in cases of paternity where “both the mother and the legal father have surrendered their rights to the child.” \(^{55}\) In J.T.J., the minor child tested positive for marijuana and cocaine at birth. The child was placed in the custody of DCF. The mother and her husband signed a surrender of their parental rights to the child. A case plan for the minor child was filed by DCF. The minor child was placed in a pre-adoptive foster home. The biological father filed a paternity petition in which he alleged that he had met with the team overseeing the child’s welfare including the social workers, guardian ad litem, and that he had
been working on preparing his home and establishing a relationship with the minor child. In finding the biological father as the legal father of the minor child, the court cited Privette in holding that the marital bar is overcome with "clear and compelling reason based primarily in the child's best interests." 59

Marital Bar “Statute of Limitations”

Is there a time limit as to when the marital bar applies? Since Privette, case law supporting the concept of an informal statute of limitations of paternity has been formulated. 57 “[W]hile a biological father who is a stranger to an existing marriage into which a child is born is not wholly without rights, he must demonstrate an enduring commitment to being a full-time parent, and do so expeditiously in order to avail himself of those rights. 58 Where he fails to act with such expediency, and displays only a casual interest in fatherhood, a trial court does not abuse its discretion by denying a potential biological father's motion to intervene in the legal parent's termination proceedings.” 59 In M.L., a case decided in May 2017, a year-an-a-half delay in attempting to establish paternity was far too long. 60 In that case, foster parents had been caring for the minor child and the court determined it was in the best interests of the child to remain with the foster parents. 61

Endnotes

1 Dept of H.R.S. v. Privette, 617 So.2d 305 (Fla. 1993).  
2 Privette at 306.  
3 Id.  
4 Id.  
5 Id. at 307.  
6 Id.  
7 Id.  
8 Id. at 306.  
9 Id. at 308.  
10 Id.  
11 Id. See also Hebner v. Barry, 834 So.2d 305 (Fla. 4th DCA 2003).  
12 Gingobar v. HRS, 634 So. 2d 1110 (2d DCA 1994); see also DOR v. Iglesias, 77 So.3d 878 (Fla. 4th DCA 2012).  
14 Ownby v. Ownby, 639 So.2d 135 (Fla. 5th DCA 1994); Van Weelde v. Van Weelde, 110 So.3d 918 (Fla. 2d DCA 2013).  
15 Privette at 309.  
16 Mize v. Mize, 621 So.2d 417 (Fla. 1993).  
17 Id.  
18 Tijerino v. Estrella, 843 So. 2d 984 (Fla. 3d DCA 2005); Johnson v. Ruby, 771 So.2d 1275 (Fla. 4th DCA 2000).  
19 Dep’t of H.R.S. v. Privette, 617 So.2d 305 (Fla.1993).  
20 Department of HRS v. Privette, 617 So.2d 305 (Fla. 1993).  
21 D.O.R. v. Cummings, 930 So.2d 604 (Fla.2006).  
22 See Ownby v. Ownby, 639 So.2d 135 (Fla. 5th DCA 1994). See also C.G. v. J.R. and J.R., 130 So.3d 776 (Fla. 2d DCA 2014).  
23 Privette at 309.  
24 Id. at 309.  
26 Twigg 1993 WL 330624; C.G. at 776.  
27 Id.  
28 Id.  
29 Id.  
30 Id.  
31 Id.  
32 Id.  
33 Id.  
34 Id.  
35 Id.  
36 Id.  
37 Id.  
38 Id.  
39 Id.  
40 Id.  
41 Id.  
42 Id.  
43 Landers v. Smith, 906 So.2d 1130 (Fla. 4th DCA 2005).  
44 Landers at 1133 (Fla. 4th DCA 2005) (quoting Dept of H.R.S. v. Privette, 617 So.2d 305 (Fla.1993).  
45 Id.  
46 Id.  
47 Id.  
48 Id.  
49 Id.  
50 Id.  
51 Id.  
52 Id.  
53 Id.  
54 Id.  
55 Id.  
56 Id.  
57 J.T. v. N.H., 84 So.3d 1176, 1180 (Fla. 4th DCA 2012).  
58 Privette at 309.  
60 Id.  
61 Id.  
62 Id.  
63 Id.
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Divorce can be a time of stress and emotional turmoil in the lives of those involved. When one spouse owns a business, or a family business is co-owned by the couple, this can be an additional stressor to the already toiling divorce process. Different areas of law often overlap with one another. Although many may not think so, business law and family law are prime examples of different areas of law that have strong synergy. In fact, there are many common themes in both of these areas.

As in any relationship, whether romantic or professional, individuals see contracts as taboo. Couples engulfed in the romantic elation of getting married dread bringing up prenuptial agreements. Similarly, entrepreneurs are so overrun by the excitement of starting up their businesses that they overlook the importance of having written agreements with their partners, and will typically say, “Why ruin a good thing by outlining all the bad things that may or may not happen? Things are great! I trust my partner. We are friends!” Fast forward a few years in either of these scenarios and those individuals may be wishing that they had handled these issues beforehand.

Entering into a marriage and entering into a business are never easy steps to take, but combine a business with marriage and the dynamics are tricky at best. This article will express the importance of choosing the right type of entity for your business and the importance of having a written agreement with your business partner, even when that partner is your spouse.

I. Type of Entity

When advising a client on the choice of entity, divorce should always be a consideration because how a company’s property will be divided in the event of a divorce depends on the type of entity.4

A. Partnerships

A partnership can be formed regardless of whether the partners intend to form a partnership. For instance, if you have a couple carrying on a business and sharing the profits and losses of the business, they have formed a partnership regardless of whether or not they have signed any documents stating the same. When a partnership is formed, a partnership’s property belongs to the partnership as an entity and not to a particular partner individually.5 Therefore, in the event of a divorce between married partners, “[t]he only transferrable interest of a partner is the partner’s share of the profits and losses of the partnership and the partner’s rights to receive distributions.”6

B. Limited Liability Company (LLC)

A limited liability company is similar to that of a partnership in the sense that any property of the LLC is owned by the company and not by the members individually. In situations where spouses are not co-owners of LLCs, it goes to follow that the spouse of a member does not have a direct ownership in the LLC’s property upon divorce. In a divorce proceeding, the spouse of a member does not and cannot become a member of the LLC simply because of the divorce. This is a common misconception between couples when they assume that either party will “take over” the company in the event of a divorce. While the membership interest is divisible, the non-owner spouse is simply an assignee of the owner-spouse’s membership interest; he or she will not become a member.5 Therefore, in the event of a divorce, the non-owner spouse may be entitled to receive any allocation of the owner-spouse’s income, profits, loss and credit, and may also be entitled to distributions to the extent the distribution is assigned, but will not have voting rights in the company.

C. Corporations

If the assets of the marital estate to be divided on a dissolution of marriage include shares of stock in a privately held corporation, meaning its stock is not publicly traded on a securities exchange, those shares must be valued and distributed like any other asset.5 Generally speaking, while a family-owned business is considered a marital asset subject to equitable distribution, a trial court does not have the power to order the transfer of corporate property or assets without joining the corporation as a third party. Nevertheless, a trial court has the power to value and distribute corporate stock determined to be a marital asset, and may preclude a spouse’s disposal of assets over which he or she exercises exclusive control without the necessity of joining the corporation as a party.7

II. Contractual Considerations

While the type of business entity chosen matters, having a contract between co-owners delineating what

continued, next page
would occur in the case of a significant event such as divorce is essential. Each entity has default rules that govern a given situation, but having a contract can prevent a statute from governing the situation provided that the provisions in the contract are legal. It is also important to realize that while Florida, for instance, has default rules for each type of entity, it is not guaranteed that the statutes will provide the favorable outcome the business owners would prefer. This is the main reason why business attorneys in particular stress the importance of written agreements between partners, members or shareholders, whether they are family or not.

Unfortunately, nearly half of all marriages end in divorce, and because of that fact, it should be common practice to include the prospect of divorce in any business relationship. Carefully planning for worst-case scenarios can facilitate both a dissolution of marriage and a dissolution of partnership. It is often in the best interest of married couples and business partners to have written agreements. It is better to be prepared for the worst, while hoping for the best.

**III. Conclusion**

So long as individuals continue to enter into businesses and marriages, courts will continue to play active roles in adjudicating disputes among family members, whether they are typical partnership disputes or dissolutions of marriage. It is often in the best interest of married couples and business partners to have written agreements. It is better to be prepared for the worst, while hoping for the best.

**Lizbell R. Lucero and Jessica C. Portalatin** are the founding partners of LP Business Law. Jessica and Lizbell pride themselves on their professionalism, honesty, and high quality work product. As business lawyers, they recognize and understand the significance of each stage of a business, and through hands-on experience, have catered to clients’ needs in each distinct stage.

**Endnotes**

1. Lizbell R. Lucero and Jessica C. Portalatin are business law attorneys and partners at LP Business Law located in Miami and Hollywood, Florida.


3. See FLA. STAT. § 620.0851 (2017) (“A partner has no interest that can be transferred, either voluntarily or involuntarily, in specific property.”).


5. See supra note 1, at 19. See also FLA. STAT. §605.041(3)(c) (2017) (“ . . . [A] member becomes a member with the consent of all the members.”).


7. See Austin v. Austin, 120 So. 3d 669 (Fla. 1st DCA 2013).


9. Id.

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**Cover Photos Needed!**

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If you would like to submit a large format photo for consideration, please email it to Belinda Lazzara (blazzara@mslbb-law.com) or Tenesia Hall (tchall@legalaidocba.org), Co-Chairs of the Commentator.
Family Law Arbitration; A Winning Resolution

By Amy L. Cosentino, Esq., West Palm Beach

It’s late. You’re tired. Your client is tired. Everyone is hungry, worn down and trying to resolve a twenty-year marriage in a day’s time. Emotions are high. If one person says the wrong thing, everything unravels. The deal-making is over. What if there is a better alternative to resolving family law matters that most likely guarantees a resolution?

Arbitration in family law matters is an underutilized tool by Florida family law practitioners in Florida and nationwide. Only Hawaii and Arizona have enacted laws adopting the Family Law Arbitration Act. This act is intended to create a uniform system among the United States. It mirrors the Revised Uniform Arbitration Act (RUAA), yet it departs from the commercial arbitration provisions of the RUAA and addresses child custody, support, qualifications for arbitrators and protections for victims of domestic violence. Arbitration awards are subject to limited judicial review and provide a potential faster, less adversarial resolution to family law matters.

The concept of family law arbitration commenced in the 1960s. Almost 50 years later, few states have enacted family law arbitration laws and family law practitioners rely on commercial arbitration statutes. Family law arbitration began to increasingly appear in clauses in premarital and marital settlement agreements due to flooded court dockets and delays in obtaining resolution through litigation. The American Academy of Matrimonial Lawyers adopted rules for arbitrating financial issues in family law matters in 1990 and conducts training and certification or family law arbitrators.

Most courts have upheld the parties’ ability to arbitrate property settlement agreements and alimony matters in the family law context. However, there is some conflict among the states as to whether the parties can arbitrate child custody/time-sharing matters and child support. The rationale being that allowing the parents to arbitrate child custody matters interferes with the court’s traditional role as parens patrie. In addition, since child custody matters can be modified until the child reaches age of majority, they are never final.

Fla. Stat. §682.02 outlines that agreements to arbitrate matters are binding and enforceable in the State of Florida. Fla. Stats. §44.103 and 44.104 outline provisions for court ordered non-binding arbitration and voluntary binding arbitration. Fla. Stat. § 44.104 (14) specifically states that, “This section shall not apply to any dispute involving child custody, visitation, or child support...” Florida Rule of Civil Procedure 1.820 sets out hearing procedures in non-binding arbitration proceedings, and Fla. R. Civ. P. 1.700 establishes rules common to mediation and arbitration.

In Florida, in order to qualify as an arbitrator, one must be a member of The Florida Bar, unless the parties agree otherwise. See Fla. R. Ct. App’ted Arb. 11.010 The chief arbitrator must be a member of the bar for at least five years, and non-lawyer arbitrators can only be on panels upon written agreement of the parties. Id. Pursuant to Fla. R. Ct. App’ted Arb. 11.020, Arbitrators must attend four hours of training unless the parties agree to use the arbitrators, but former trial judges are exempt from the rule. Fla. R. Ct. App’ted Arb. 11.040 outlines the general standards and qualifications of an arbitrator and emphasizes that they must have integrity, impartiality and competence.

As a family law litigator who has served as a selected family law arbitrator, arbitration is a streamlined procedure to resolve family law disputes. In many cases, large court dockets result in months-long waiting periods to appear in front of the judge, and with court-mandated mediation, one can spend countless hours working toward a resolution with no success. Family law arbitration can be a much more effective tool for family law practitioners to use in their cases. 

Amy L. Cosentino, Esq.

Attorney Amy Cosentino was born in Elk Grove, Illinois and primarily raised in Tampa, Florida. Amy received a B.A. in Dance Performance from the University of South Florida in 1998. After 21 years studying and performing in various areas of the arts, Amy started attending Nova Southeastern University Law in the summer of 2001.

Amy was awarded a Public Service Fellowship from Nova Law in 2002 for her pro bono work for the City of Hollywood. Amy worked for the Florida Attorney General’s Office, the Palm Beach County State Attorney’s Office as a CLI prosecuting in the domestic violence division, and practices family law in the West Palm Beach area since 2005. Amy won leadership awards in 2009, 2010, 2011, and 2013 for her work in the domestic violence committee of the Family Law Section.
Family Law Arbitration
from preceding page

of The Florida Bar. She currently co-chairs this committee. Amy proudly received the 2012 Palm Beach Legal Aid Society’s Child Advocacy Award. Amy is a member of The Florida Bar in good standing. She is also a member of the Palm Beach County Bar Association, and the Family Law Section of The Florida Bar. Amy also participated in the Lawyers for Literacy Program for the Palm Beach County Bar Association, is past president of the Palm Beach Nova Law Alumni Chapter, and currently mentors for Women of Tomorrow. Amy is a published secondary legal authority for lawyers in Florida, as she co-authored an article for the December 2007 and solely authored for the September 2013 Florida Bar Journal. Amy is also published in “The Commentator,” a source for Florida family law attorneys and has spoken on domestic violence at CLEs and other venues. Amy prides herself as a leader and speaker in domestic violence and a court appointed Attorney Ad Litem.

Legislation Committee experience: New member on the committee in 2013, attended all live meetings and majority of weekly phone meeting, worked to assist the committee with potential amendments to the retirement portion of the proposed alimony bill.

Domestic Violence Committee experience: In 2013, assisted in all aspects of the first, all day Seminar on Domestic Violence with the committee. Watched legislation with Co-Chair Robin Scher, Co-Chair and assisted in proposals to E.C. on potential recommendations of the section.

Endnotes

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DIY Ways to Jumpstart Your 2018 Marketing Efforts

Lisa McKnight Tipton APR, PR Florida Inc., Family Law Section Communications Consultant

If your new year’s resolutions include “better” or “more” marketing for your firm, but you haven’t defined your activities or put them on a calendar, choose some items from this list and add them to your 2018 marketing mix. Varying your marketing tasks will keep them fresh and allow you to reach more and different audiences.

• **Network with current and potential referral sources.** Make lists of your current referral sources and others who potentially could become referral sources. Create a schedule for connecting with one or more of them every week through emails, handwritten notes, lunches, workouts, cocktails, etc. Thank them for their referrals in 2017; let them know how much you appreciate them thinking of you and offer to reciprocate if possible.

• **Network with organizational contacts.** Attend Florida Bar and section committee meetings, local bar association and legal-community events and regular meetings of civic and community groups. Hand out and collect business cards. As soon as you return to your office, email each person who gave you a business card to provide your contact information and say how much you enjoyed visiting. Seek networking, speaking and publishing opportunities through each organization. Evaluate the return on your investment each quarter.

• **Write articles.** Publish at least two articles per year in an industry periodical, legal journal, association magazine or section newsletter. Consider collaborating with co-authors and quoting target audience members. Post the article links on your website, social media and blog, and include them in your newsletter. If you don’t have a newsletter, email each article to your key referral sources with a short “thought you might be interested” message.

• **Volunteer to speak.** Seek out opportunities to make presentations to legal-community, civic, non-profit and industry groups. Sign up for The Florida Bar Speakers Bureau. Contact relevant Florida Bar section CLE chairs and offer several topics for their consideration for upcoming courses. Plan to make at least four presentations per year.

• **Communicate with current and past clients.** This is your best potential for referrals. Connect with clients at least four times each year through a firm newsletter, client alerts on key legislative issues or industry topics, free white papers, direct mail letters or similar substantive communication. Be sure to thank them for their business. Include a brief bio and summary of your practice areas, a photo and links to your website and online profile page.

• **Publicize everything.** When you join a committee, receive an award, make a presentation, write an article, hire an associate or participate in a community or sports event, it’s newsworthy. News and Notes is one of the most-read sections of The Florida Bar News. Your local newspaper, city magazine, weekly newspapers, section publications, association and civic group newsletters, undergraduate and law school alumni magazines are avenues for publicity. Update your list of editors on a regular basis and follow up with phone calls to ensure that your news lands in the correct hands.

Remember, for a do-it-yourself (DIY) law firm marketer, the most important marketing campaign component is a schedule. Map out daily, weekly and monthly tasks and set reminders for yourself and your staff. Keep a list of who is responsible for tasks and note the frequency with which each is implemented. If you get behind, prioritize the remaining items and establish a new schedule.

At the end of the year, track your progress and evaluate each activity’s return on investment. If you have been attending local Rotary Club meetings for two years but have not had a single referral, that time and money might be better invested in another organization. When preparing the next year’s marketing calendar, jettison the activities that had little or no return on investment, build in more frequency for the ones that were productive – and don’t forget to add fresh, new tasks to the mix.

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.
AAML Florida and Family Law Section Annual Review Course and Section Midyear Meetings

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A Judge’s Dilemma: A Worldwide Concern

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

I was in a courtroom the other day waiting to testify in a family law matter that included total rejection of a parent by the children. The new judge, who recently inherited the case of ongoing litigation, listened to the family therapist’s failure in reuniting the children with the rejected parent. This is a typical outcome and, as in this case, the situation got worse (Evans & Bone, 2011). The judge uttered, “I’m only a judge, what am I supposed to do?”

This frustrated judge was faced with what is becoming more common, not only in the United States but across the globe. This includes the countries that are represented in “The International Handbook of Parental Alienation Syndrome” (Gardner, et al, 2006): The United Kingdom, Israel, Germany, Australia and The Czech Republic. To demonstrate the magnitude of this global issue, The First International Conference of Parental Alienation Study Group was held in Washington, D.C., in October 2017 and included representatives from The European Association of Parental Alienation Practitioners.

Family law cases in which children reject a parent are appearing with greater frequency. While there may be some situations where a child may be hesitant to be with a parent, the higher-conflict family law cases typically include outright rejection and severe expressions of hatred for a parent without genuine justifications. These phenomena are variously described as pathological enmeshment, pathogenic parenting, attachment-based parental alienation, hostage taking, cross-generational coalition and brainwashing. More commonly, it is collectively referred to as parental alienation. Regardless of what it’s called, the courts have been frustrated and stymied by it for more than two hundred years!

Parental alienation is a psychological condition in which a child demonstrates strong attachment to one parent (the favored parent) and unjustified rejection for the other (the target parent). The child frequently refuses to see the target parent and is usually accompanied by strong language of dislike or hatred. The child’s adamant protests, without rational justification when investigated, are commonly consistent with the favored parent’s negative attitudes. Judges, parenting coordinators, counselors/therapists and others commonly report being frustrated and stymied by the child’s resistant behavior that often is in total disregard of court orders.

Frequently heard in courtrooms is that “Diagnostic and Statistical Manual of Mental Disorders (DSM-5)” does not mention the words “parental alienation,” therefore, it is only a theory, pseudo-science, not real, etc. and should not be given weight in a case. But the DSM-5 does include a number of diagnoses that describe the essence of parental alienation. These include: parent-child relational problem, child psychological abuse, child affected by parental relationship distress, factitious disorder imposed on another, and delusional symptoms in parent of individual with delusional disorder. Each of these DSM-5 conditions covers various aspects or the essence of parental alienation and therefore warrant serious consideration by a court.

Very conservative estimates of the incidence of alienated children are between 2 and 4 percent of those whose parents divorce. More than one million U.S. children experience their parents’ divorces each year; which does not include children whose parents were never married. This means each year at least 20,000-40,000 children reject their parents. This often includes grandparents and other relatives, who join the ranks of those who suffer from this problem.

In 2013, the American Bar Association published a book “Children Held Hostage,” authored by S. Clawar and B. Rivlin. In analyzing 1,000 cases, the authors concluded that many mental health and social problems of older children of divorced parents may be related to programming and brainwashing during earlier periods of their social development. This conclusion relates to the findings of research known as Adverse Childhood Experiences (ACEs).

Alienated children have polarized views of their parents. They often rewrite the history of their relationships and fabricate negative events including allegations of physical and sexual abuse. They come to believe that they experienced ACEs. Alienated children will frequently come to believe that they have been abused both physically and sexually and can be led to convincingly report such occurrences. The favored parent will often pursue therapy for abuse, which inadvertently reinforces the belief that abuse has actually occurred. They can also be led to believe that one of their parents is a substance abuser and neglected them in their formative years, often before the child can even remember details of any
such events. Frequently, an alienated child witnesses a parent being arrested, taken away by law enforcement and incarcerated. A favored parent convinces the children to believe that the other parent has a mental illness.

The fabricated experiences of alienated children often resemble the types of ACEs that were identified in a study conducted by Dr. Vincent Felitti. Dr. Felitti researched the connection between childhood experiences and lifelong health. In the study, a questionnaire administered to more than 17,000 participants asked about certain negative childhood experiences. Respondents indicated that either they experienced an event or didn’t. The ACE questionnaire asked about emotional, physical, or sexual abuse, drug abuse, alcohol or mental illness in their homes or was someone in prison, etc.? The researchers were stunned when they calculated their findings. Respondents indicated that 21 percent were sexually abused as children, 19 percent grew up with someone with mental illness and 28 percent were physically abused.

What’s even more amazing is the findings showed the greater the ACE score the higher the likelihood of chronic physical or mental health problems, social dysfunction, involvement with the criminal justice system, drug and alcohol abuse and death. An ACE score of four had twice the risk of cancer and heart disease. Someone with an ACE score of five had eight times the risk of becoming an alcoholic than someone with an ACE score of zero. An ACE score of six or more had a 20-year lower life expectancy.

As attorney Barbara Goiran, a child support hearing officer in the 6th Judicial Circuit, wrote in the spring issue of The Florida Bar Family Law Section Commentator, high ACE scores “are also more likely to practice the same poor parenting techniques on their own children, often necessitating the intervention of the juvenile justice system or child welfare authorities. They are more likely to have multiple marriages, thereby impacting the family courts…. Children with four or more ACEs were 32 times more likely to have learning or behavior problems in school than those with no ACEs. Failure to thrive in school leads to a lack of learning, frustration and acting out, which often leads kids into the juvenile and ultimately criminal justice system. A lack of learning results in a low socioeconomic class.”

Considering parental alienation as an adverse childhood experience with its actual cognitive, physical, and emotional consequences, it is important for all professionals involved in child custody cases to be more aware of the potentially negative and long-term effects of a child rejecting a parent.

To assist with a judge’s dilemma, a family law practitioner should consider the following:

• Learn as much as you can about parental alienation and ACEs.
• When appointing a GAL and child representative, choose someone who is familiar with the literature on parental alienation and has had experience with such cases.
• Children can be very convincing. When speaking with children, be cautious, as their presentations may be convincing, yet not always truthful.
• If addressing children, let them know that the court is the decision maker, and that it is in their best interest to be raised by both parents.
• Tell parents you expect court orders to be obeyed, and that they’ll have to deal with the consequences for noncompliance with court orders.
• Communicate to children that failure in reestablishing a relationship with a rejected parent is not an option.
• Traditional counseling/psychotherapy with alienation cases typically reinforces the alienation because the therapist doesn’t have the knowledge of parental alienation and accepts what they are told.
• Be prepared to hear testimony from therapists and “experts” that predict great psychological trauma, harmful consequences and destructive behavior when you consider removing children from alienating parents. Often such predictions have no reliable basis and are made by professionals who lack adequate experience and are unfamiliar with the relevant family dynamics in the case.
• Consider how “no contact” with a favored parent, at least on a temporary basis, can benefit a child’s successful reunification with the rejected parent.
• If custody is reversed, order that the child receive appropriate therapeutic support.
• Enforce your orders swiftly and unequivocally. When parents and children learn that the court does not enforce its own orders, they lose respect for the court and the law.

Conclusion

Severe cases of parental alienation where children lose their relationships with parents present unique challenges. These cases have long frustrated professionals who try to assist these families with this difficult and tragic problem. Fortunately, there are educational materials for professionals (see NAOPAS.com) and specially designed interventions that provide antidotes.

As Dr. Richard Warshak (2015) says, “Early identification of children at risk for alienation, and appreciation that divorce poison works swiftly to transform expressions of love into claims of fear and hatred, will help the legal system respond rapidly to protect children from the intensification of alienation. Severely alienated children plead with custody evaluators, therapists, attorneys, and judges to allow them to excise from their lives one of the two people on the face of the planet responsible for their care. Despite weathering cruel treatment and untampered hatred continued, next page
that would drive most people away, many rejected parents maintain a steadfast commitment to their children’s welfare and invest considerable resources trying to restore positive relationships.”

The outcome of cases with severely alienated children spells the difference between each child potentially living a normal happy, healthy life or one of potential despair and disease. If they don’t find their way back to their rejected parents, when these children grow up and have their own children the next generation is deprived of a legacy.

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Robert A. Evans, Ph.D. has testified as an expert witness throughout the U.S. on the issue of parental alienation, co-authored a book, and developed continued education on this topic for both attorneys as approved by state bar associations in the U.S. as well as for mental health professionals. He can be reached at drevans@drbobevans.com. Also, visit www.NAOPAS.com for information on CLEs on this topic.
Joint Return vs. Separate Return: The Importance of Avoiding Tax Headaches for Divorcing Spouses

By Robert Steinberg, Palmetto Bay

One of the most frequently litigated tax disputes involves whether a tax return between spouses should be treated as a joint return or a separate return. The filing of a joint return imposes joint and several liability unless one spouse qualifies as an innocent spouse. The general rule is that both spouses must elect to file jointly. It is commonly considered that both spouses have elected to file jointly when a return is signed by each spouse. However, the failure of one spouse to sign does not preclude the finding that a joint return has been filed.

The tax court decision in Edwards v. Commissioner of Internal Revenue is an example of the litigation that ensues when a final judgment and/or agreement fails to state what occurs with spouses’ taxes. Although a summary opinion that may not be cited as precedent, this case is instructive and helpful to the family law practitioner.

As delineated in Edwards, the following factors are considered by the tax court when deciding whether a filed return will be treated as a joint or separate return:

- Was the return prepared in accordance with an established practice of preparing and filing a joint return?
- Did the non-signing spouse fail to object to filing of the purported joint return?
- Did the non-signing spouse perform an affirmative act indicating an intention to file a joint return?
- Was only one spouse historically relied upon to prepare and see to the filing of the return and, if so, did that spouse handled the filing in question?
- Did the non-signing spouse examine the return before it was filed?
- Did the non-signing spouse file a separate return?
- Did the return include the income and deductions of the non-signing spouse?
- Was the non-signing spouse aware of the content of the purported joint return?
- Was an IRS Notice of Deficiency issued? Generally, the IRS Notice of Deficiency is presumed correct and the taxpayer carries the burden of proving that it is incorrect. Tax Court Rule 142.

In Edwards, the court found that the wife had not intended to file jointly with her husband and that no joint return had been filed for the following reasons:

- There was no credible testimony from either party, and thus, the husband retained the burden of proof on the issue.
- The preparer interfaced only with the husband and never met or spoke to the wife in earlier years or before e-filing the purported joint return.
- Normal practice was not followed as the wife did not sign the e-file authorization form.
- The wife did not review the return prior to filing.
- The wife continued to message the husband about the possibility of filing a joint return after the husband had already submitted the purported joint return.
- The wife requested her own extension of time to file.
- After the divorce was final, the Wife filed her own married filing separately return.

In conclusion, it is important for the family law practitioner to address how divorcing spouses will file when finalizing the divorce. In addition, spouses should be mindful that filing a joint return is a double-edged sword. While some tax may be saved, the non-income producing spouse is subjecting his or her separate assets (even non-marital assets) to possible adverse collection procedures by IRS in the event that tax due on the joint return is not paid or a later audit produces a deficiency. Relying on the innocent spouse escape hatch can be an expensive mistake. Remember, when you are divorcing from your spouse, why in the world would you trust a soon-to-be former spouse to file a return for you? Be cautious and do not sign a joint return without having the matter reviewed by a divorce and tax attorney who will know how to protect you. To prevent the possibility of being found to have filed a joint return, an unwilling spouse should file a married filing separately return as early as possible. Filing a separate return before the other spouse files a joint return is usually conclusive evidence that the non-signing spouse did not intend to file jointly.

Robert S. Steinberg is admitted to the bars of New York (1972), Florida (1975), the U.S. Tax Court and other federal courts. He is a licensed CPA in New York and Florida, practices as an attorney and limits his practice to taxation.

Endnotes

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I’m a Family Lawyer … Why Should I Care About Florida’s ‘Stand Your Ground’ Law?

Jennifer Miller-Morse, Esq., Delray Beach

You are familiar with Chapter 61 of the Florida Statutes. You understand the nuances of dissolution and paternity actions. You can analyze the issues in each of your cases according to the familiar P.E.A.C.E acronym. One type of case you may not handle is a criminal case. So why do you need to know anything about Florida’s Justifiable Use of Force Law, Chapter 776, Florida Statutes, commonly known as Florida’s “Stand Your Ground” law? Because this law could mean the difference between a lengthy jail sentence for your client and a complete dismissal and expungement of criminal charges of the type frequently encountered in the midst of family proceedings.

Domestic violence is one area of family law in which parallel civil and criminal proceedings are common. Florida victims of domestic violence can petition the family court to issue civil injunctions for protection against domestic violence pursuant to Chapter 741, Florida Statutes, while local state attorneys will often bring criminal charges against the assailants for assault and/or battery pursuant to Chapter 784, Florida Statutes. Even when a civil case is not pursued, a prosecution of the criminal case is encouraged.

Recent changes to the “Stand Your Ground” statute and case law developments regarding the procedures for implementation of that statute have increased the likelihood that SYG defenses will be raised more frequently. As a family practitioner, you need to be aware of these new developments. Your client’s freedom from incarceration and/or a criminal record may depend on it.

I. Florida’s ‘Stand Your Ground’ Law

“Stand Your Ground” laws allow individuals to use non-lethal and lethal force to defend themselves without any imposed duty to retreat. Prior to “Stand Your Ground” laws, the “no duty to retreat” standard was only applied when an individual was protecting his or her home under the “castle doctrine.” In this regard, “Stand Your Ground” laws are considered to be extensions of the castle doctrine. Consistent with this premise, Florida’s “Stand Your Ground” law does not require an individual to retreat prior to using force in self-defense and does not require an individual who has a right to be somewhere (either through title, contract or invitation) to first retreat before using non-lethal or lethal force against an assailant who is unlawfully entering the property with the intent to commit a felony or violent crime. A trier of fact is not legally permitted to weigh an individual’s failure to retreat as evidence of unreasonable or unnecessary use of non-lethal or lethal force against the assailant.

Specifically, Florida’s “Stand Your Ground” law provides that (1) individuals may use force including lethal force to protect themselves in any places that they have a right to be, even when instances of retreat may be possible; (2) an individual may use lethal force to prevent or cease the commission of forcible entry into a private space (dwelling, business, occupied vehicle) and/or the forcible removal of a person from a private space, even if the individual using lethal force does not own or occupy the property where the forcible entry occurred; (3) while law enforcement is permitted to use standard investigative procedures for claims of self-defense, any individual claiming self-defense cannot be arrested unless law enforcement finds probable cause that the individual acted unlawfully; (4) individuals who claim self-defense within the parameters of the state’s “Stand Your Ground” law are immune from criminal prosecution, i.e., if an individual is charged with a misdemeanor or felony crime, he or she is entitled to have a pretrial immunity hearing where the judge determines whether the case will be dismissed or proceed to trial; and (5) individuals who use force and are found to have acted in accordance with the law are immune from civil prosecution.

II. A New Burden of Proof is Born

Effective July 9, 2017, Florida’s “Stand Your Ground” statute was amended to shift the burden of proof from the defendant to the prosecutor to prove that SYG immunity does not apply once the defendant has raised a prima facie claim of self-defense immunity. The legislature then went a step further—elevating the prosecution’s burden of proof to “clear and convincing evidence.” The amended provision is below (2017 revision is italicized):
“Stand Your Ground” Law from preceding page

776.032 Immunity from criminal prosecution and civil action for justifiable use or threatened use of force.

(1) A person who uses or threatens to use force as permitted in s. 776.012, s. 776.013, or s. 776.031 is justified in such conduct and is immune from criminal prosecution and civil action for the use or threatened use of such force by the person, personal representative, or heirs of the person against whom the force was used or threatened, unless the person against whom force was used or threatened is a law enforcement officer, as defined in s. 943.10(14), who was acting in the performance of his or her official duties and the officer identified himself or herself in accordance with any applicable law or the person using or threatening to use force knew or reasonably should have known that the person was a law enforcement officer. As used in this subsection, the term “criminal prosecution” includes arresting, detaining in custody, and charging or prosecuting the defendant.

(2) A law enforcement agency may use standard procedures for investigating the use or threatened use of force as described in subsection (1), but the agency may not arrest the person for using or threatening to use force unless it determines that there is probable cause that the force that was used or threatened was unlawful.

(3) The court shall award reasonable attorney’s fees, court costs, compensation for loss of income, and all expenses incurred by the defendant in defense of any civil action brought by a plaintiff if the court finds that the defendant is immune from prosecution as provided in subsection (1).

(4) In a criminal prosecution, once a prima facie claim of self-defense immunity from criminal prosecution has been raised by the defendant at a pretrial immunity hearing, the burden of proof by clear and convincing evidence is on the party seeking to overcome the immunity from criminal prosecution provided in subsection (1).

This new provision has been the subject of challenges on constitutional grounds. In Miami-Dade, two trial court judges have found the new provision unconstitutional. No appellate court has addressed the issue yet.

A prima facie claim of SYG immunity is often implicated in domestic violence cases. The perpetrator frequently claims to have been acting in self-defense. The location of the violence is often in one of the protected areas described in the statute, such as the homes or cars of the parties who are defending themselves.

Yet Florida courts applying the statute in domestic violence cases have reached widely varying results.

III. Prior Application of Florida’s SYG Law in Domestic Violence Cases

Florida was the first state to adopt a “Stand Your Ground” law through formal statute in 2005. Since then, 22 other states have adopted SYG statutes. Florida is considered to have one of the most expansive laws because they eliminate the duty to retreat in private and public places; presume that the use of deadly force is lawful; and grant immunity from arrest, criminal prosecution, and civil prosecution.

As a group, however, the Florida cases reveal a lack of predictability for defendants, lawyers and judges as to which cases will likely fall within the protection of the “Stand Your Ground” rule and which will not. A database of Florida SYG cases published by the Tampa Bay Times in 2013 shows 33 “domestic” cases between 2005-2012. Nine of those cases involved a woman claiming SYG immunity against a man. Two of the women were found to be immune, four were found guilty, two took pleas and the charges were dismissed in the ninth case.

One of the women found guilty was Marissa Alexander. Alexander’s SYG defense was dismissed and she was sentenced to 20 years for firing a warning shot at her husband after he allegedly threatened to kill her following years of abuse. Alexander’s case was overturned on appeal and remanded. She subsequently accepted a plea that capped her sentence at three years time served. In 2014, the SYG statute was amended to provide immunity for “warning shots.”

Another SYG defense was rejected in the case of Anita Smithey, who shot her estranged husband while he was allegedly trying to rape her. Smithey had moved out of the house and filed for divorce. She was found beaten and stabbed. She had called 911 to report the shooting. Despite the fact that evidence showed that Smithey sustained physical trauma from being sexually assaulted prior to the shooting, her claim of self-defense was rejected by a jury, she was convicted of second-degree murder and she was sentenced to 40 years in prison.

One of the two cases in which immunity was granted to a female defendant (Sonya Maret) involved only minor injuries to the husband (scratches) and no weapon.

The other case in which a court granted immunity to a female defendant (Rotesia Bryant) involved a defendant who stabbed her boyfriend with scissors while he was beating her. There were seven domestic vio-
IV. Future Application of SYG in Florida DV Cases

Assuming the new statutory provision is found to be constitutional, it is unclear how the new burden-shifting provision will be applied. Shifting the burden of proof to the prosecution is expected to encourage more defendants to raise SYG immunity. Whether this new development will prove helpful or harmful for victims of domestic violence will depend on how the Florida courts interpret and apply this provision going forward.

The SYG statute is unusual in that it does not simply create an affirmative defense. It creates a protective “immunity” that purports to prohibit criminal and civil prosecution of the perpetrator in the first place. The meaning and practical application of this provision has been the subject of quite a bit of confusion among the courts.

Some of the confusion about how to apply these provisions in practice was recently clarified by the Florida Supreme Court in an opinion issued on Sept. 28, 2017.

V. The Florida Supreme Court Clarifies the Effect of Criminal Immunity on Civil Actions

In Kumar, Mr. Kumar had attacked Mr. Patel in a Tampa bar. Patel, who was holding a cocktail glass at the time, struck Kumar in the face with the glass, causing Kumar to permanently lose sight in one eye. Patel was charged with felony battery. He moved to dismiss the charge, claiming immunity from prosecution under the SYG law. A hearing was held and the circuit court granted Patel’s motion to dismiss the criminal case on the grounds that Patel was immune under SYG.20

Kumar then filed a civil complaint for battery and negligence. Patel moved for summary judgment claiming that the finding of immunity in the criminal proceeding should be dispositive of the civil case since the SYG statute provides immunity from all criminal and civil prosecution. The circuit court did not agree that the immunity determination in the criminal proceeding, where the victim was not even a party to the case, should be automatically extended to a civil proceeding filed by that victim. The circuit court denied the summary judgment and ordered an evidentiary hearing to determine Patel’s immunity in the civil case. Before that hearing could be held, the Second District Court of Appeal reversed, holding that SYG guarantees a single immunity determination for both criminal and civil actions. The Second DCA certified direct conflict with a prior decision from the Third DCA.

The Florida Supreme Court reversed, holding that the SYG law does not confer civil liability immunity to a criminal defendant who is found to be immune from prosecution in the criminal case. In reaching its decision, the court observed that the legislature did not establish procedural mechanisms for invoking and determining SYG immunity. As a result, the courts have been trying to develop these procedures. In many cases, both criminal and civil, the determination of immunity has been made at pretrial evidentiary hearings where the defendant had to prove he was entitled to immunity by a preponderance of the evidence. The court relied, in part, on the new burden of proof inserted into the statute earlier this year for criminal cases to find that criminal immunity does not automatically confer civil immunity.

VI. What Constitutes a Civil Action Under SYG?

Presumably, the burden of proof at such pretrial hearings will now shift to the prosecution in criminal cases. But the procedures for determining immunity in civil cases are unclear. The Third DCA found that when a claim of statutory immunity is raised for the first time in a civil action, the issue is properly determined at a pretrial evidentiary hearing at which the defendant must prove by a preponderance of the evidence that his or her use of force was lawful under sections 776.012, 776.013, or 776.031 of the SYG law.

The recent amendment to the SYG statute does not appear to alter this burden. But does this apply in a civil domestic violence case? Are restraining order actions for protection against domestic violence a “civil prosecution” for which SYG immunity can attach?

This is an unresolved question that raises serious issues for the courts (and perhaps the legislature) to resolve. The ramifications for Florida victims of domestic violence are problematic and disturbing.

For example, what if an altercation breaks out between ex-spouses during a time-sharing exchange and one of the spouses sustains a broken arm? Assume these parties have a history of domestic violence. Mom jumps in front of the child when dad reaches for him because dad is agitated and shouting. Mom is holding a sharp umbrella. Dad strikes mom when he tries to push the umbrella out of his way so he can pick up the child. He breaks mom’s arm. The neighbors call the police. Dad is arrested. Mom files for a restraining order in family court. A temporary order is issued and a hearing is set for two weeks later in the family court to determine if a permanent injunction should issue. Following the hearing, the family court issues a permanent injunction to mitigate the risk of future violence.

In the criminal case, the father’s charges are dismissed. The criminal court finds the prosecution did not meet its burden to prove by clear and convincing evidence that dad was not entitled to immunity under SYG.

Now what happens in the family case? Does dad get another bite at the apple? Does the criminal dismissal constitute “changed circumstances” continued, next page
“Stand Your Ground” Law from preceding page

justifying dismissal of the DV injunction? Does it merit a new hearing in the family court? Is SYG immunity even relevant in a proceeding under Chapter 741 for an injunction for protection against domestic violence?

Florida’s SYG law does not address this issue.

VII. SYG Statutory Reference to DV

Florida’s SYG law does not talk about its application to “family” members or other domestically related persons. It includes only one reference to domestic violence in Section 776.013, Fla. Stat., regarding “home protection.” Section 776.013(2), Fla. Stat. That provision specifies that when a person forcefully enters a dwelling, residence or vehicle, the occupant is presumed to have a reasonable fear of imminent peril of death or great bodily harm, but goes on to provide that this presumption does not apply if both parties have a right to be in a particular dwelling, residence or vehicle such as a co-owner, unless there is an injunction for protection from domestic violence or a written no contact order.

Confusion regarding the scope and meaning of this provision has contributed to some victims of domestic violence being excluded from SYG protection. Some courts have interpreted this provision as requiring a DV injunction or no contact order to be in place for a family member to use the SYG law against another family member. Without such an order in place, a victim of DV is not entitled to “stand her ground” or to “meet force with force,” according to this interpretation. Such a victim must run away. But a domestic abuse victim’s ability to leave or retreat is often limited by fear of retaliation or more severe violence if they try to leave, concern that their children or family may be harmed if they attempt to leave and other factors such as lack of transportation and money.

This has enormously narrowed the scope of protection afforded by the SYG law in domestic situations. In a recent study of the application of SYG laws in domestic violence situations, the author found 57 cases across 18 states in which a defendant attempted to use a SYG law as a defense in a domestic violence incident. Only two defendants out of 57 had active injunctions against their abusers during the time that the violent incidents occurred. This should come as no surprise as commentators who have studied these trends have repeatedly found that most victims do not obtain injunctions because doing so would significantly increase their risk of severe abuse or death.

VIII. Chapter 741

Injunction Proceedings are Very Different from other Civil Actions

Apart from the one reference to DV injunctions in Section 776.013(3), Florida’s SYG statute is not part of the Florida family laws and makes no other mention of domestic violence. Its legislative history indicates just the opposite – it was designed to provide a more expansive self-defense justification for Florida citizens to protect themselves against unknown would-be assailants attempting to rob or assault them.

Chapter 741 domestic violence injunction actions, by contrast, are family law matters governed by the Family Law Rules of Procedure. Recognizing important differences between family law cases and other civil matters, the Florida Supreme Court created separate family law divisions in all but a few rural circuits in 1991. Shortly thereafter, the Supreme Court authorized the establishment of separate family law rules of procedure.

In 2000, the Florida Supreme Court reinforced the key role that the family courts play in protecting victims of domestic violence. As found by the Florida Legislature, “the incidence of domestic violence in Florida is disturbingly high, and despite efforts of many to curb this violence, ... one person dies at the hands of a spouse, ex-spouse, or cohabitant approximately every 3 days.” § 741.32(1), Fla. Stat. (1999) (“Certification of Batters’ Intervention Programs”); see also Weiand v. State, 732 So.2d 1044, 1053 (Fla.1999) (“It is now widely recognized that domestic violence ‘attacks are often repeated over time, and escape from the home is rarely possible without the threat of great personal violence or death.’”). With so much at stake, simplicity in seeking, obtaining, and understanding the relief granted in domestic violence injunction cases is absolutely essential, especially in cases involving pro se litigants. We have in the past recognized that “domestic and repeat violence injunctions are an important and significant responsibility of family courts,” In re Family Law, 663 So.2d at 1049, and that it is extremely important to have “domestic violence issues addressed in an expeditious, efficient, and deliberative manner.”

The Florida SYG law directly conflicts with the statutory language and purpose of chapter 741 injunctions. A person seeking immunity under the SYG law does not claim that the violence did not occur, but instead that the violence was justified. There is no such justification defense in the Chapter 741 injunction statute. If the petitioner provides sufficient evidence at the hearing that she/he is a victim of domestic violence, then the court may issue the injunction. One of the primary purposes of Chapter 741 domestic violence injunctions is
to mitigate the risk of future violence to create a greater level of personal security for survivors of domestic violence independent of a criminal action.32

In other contexts, Florida courts have found that the existence of a pending criminal case does not abrogate a victim’s right to the protections afforded by the domestic violence statute. In 2014, the Fifth DCA found that the existence of a pending criminal case with bond conditions that prohibit contact does not abrogate a petitioner’s right to the protections afforded by Section 741.30, Fla. Stat., if she meets her burden of proof at the injunction hearing.33 The Fourth DCA followed the same logic in finding that a probation condition of no contact would not abrogate the victim’s right to obtain a sexual violence injunction under Section 784.046, Fla. Stat.34

To make matters worse, there is another troubling conflict between the SYG statute and Chapter 741 – the SYG attorney’s fees provision. Section 776.032(3), Fla. Stat. provides:

(3) The court shall award reasonable attorney’s fees, court costs, compensation for loss of income, and all expenses incurred by the defendant in defense of any civil action brought by a plaintiff if the court finds that the defendant is immune from prosecution as provided in subsection (1).

An award of attorney’s fees is not authorized in the Chapter 741 injunction statute. In order to ensure that obtaining injunctions for protection are not cost prohibitive and available to all survivors, Chapter 741.30(2) prohibits filing fees for the petition, and prohibits the imposition of a bond for entry of the injunction.35

There is also no statutory authority for awarding attorney’s fees to either party in an injunction for protection proceeding.36

Attempting to apply the SYG fee shifting provision to civil injunctions for protection from domestic violence directly conflicts with chapter 741. Such an extension of the SYG statute is unprecedented, dangerous, and likely to have a chilling effect on survivors seeking injunctions.

IX. What Does this Mean for your Family Practice?

It is not clear how the new developments in SYG law will intersect with family practice in Florida. It is anticipated that SYG will be raised in many more cases. You must be prepared to assert SYG immunity on behalf of your clients. And you must be prepared to defend against SYG claims of immunity.

This will not be easy. The law is evolving.

SYG law has evolved into a confusing patchwork of rules on when, and against whom, one may assume the privilege of non-retreat.37 Some judges have interpreted the language of this law to include the use of force between intimate partners, others have not.

Florida is at an important juncture. The SYG law can be a powerful tool in combating the stubborn problem of domestic violence if it is predictably and sensibly applied. There should be no need for a victim of intimate partner violence to have an active injunction to prove reasonable fear of an abuser. Furthermore, the abuser’s violation of an injunction should not be the standard for a victim to demonstrate an imminent threat. Having an injunction as a requirement to prove reasonable fear and imminence places the victim in a more dangerous situation, and one that may be injurious or lethal even before an injunction is granted.38 Requiring a victim of domestic violence to attempt to flee an abuser is also dangerous and flies in the face of the whole purpose of SYG, i.e., to eliminate the duty to retreat when you are in your home, car or another place where you have the right to be.

On the other hand, domestic abusers should not be able to use the law to avoid prosecution when they harm or kill their intimate partners. The new burden of proof could be used in this way if prosecutors are not vigilant in investigating prior incidents of domestic violence and abuse, and judges are not informed of these relevant circumstances. Florida’s SYG law is a potent weapon. By taking into account the complicating factors in domestic violence cases, the Florida bench and bar can employ the law more effectively and more predictably to protect Florida victims of domestic violence.

Jennifer Miller-Morse, Esq. received her law degree from Harvard Law School in 1991, where her classmates included Barack Obama and Neil Gorsuch. Jennifer remained in the Boston area where she practiced for many years before relocating to Florida. She opened her own practice in Boca Raton in 2012, concentrating on family law. Jennifer serves on the Family Law Section Domestic Violence Committee where she Chairs the “Stand Your Ground” Subcommittee. She has also served on the Family Law Section Continuing Legal Education Committee since 2015, where she has co-chaired several CLE presentations including the Judicial Roundtable Discussion on Parenting Plans presented October 19, 2017. She has been active in the Craig S. Barnard American Inn of Court in West Palm Beach since 2013, where she currently serves as co-secretary of the Board. She has also served on the Advisory Council of the Florida Women’s Business Center since 2016, a U.S. Small Business Administration grantee program dedicated to helping women entrepreneurs in Florida start and build successful businesses.

Endnotes

1 The statute, enacted in 2005, expanded common-law principles of self-defense. The law does several things: it expands the circumstances in which the use of deadly force is permitted; it abrogates the duty to retreat from another’s imminent use of unlawful force; it creates criminal and civil immunity for people who act in self-defense; and it shifts fees for all expenses incurred in defending a civil action.
“Stand Your Ground” Law from preceding page

where the defendant is found to be immune under the statute. Fla. Stat. Section 776.012 et seq.
2 “It is the intent of the Legislature that domestic violence be treated as a criminal act rather than a private matter. ... The state attorney in each circuit shall adopt a pro-prosecution policy for acts of domestic violence...” Section 741.2901(2), Fla. Stat.
3 Crisafi, Denise, “No Ground to Stand Upon: Exploring the Legal, Gender and Racial Implications of Stand Your Ground Laws in Cases of Intimate Partner Violence” (2016), Electronic Theses and Dissertations Paper 4938, University of Central Florida STARS.
5 2017 Fl. ALS 72, 2017 Fla. Laws ch. 72, 2017 Fla. SB 128.
7 Crisafi at 99.
11 Laurie Bartlett (convicted of manslaughter 2006); Tamra Leasure (convicted of second-degree murder 2009); Marissa Alexander (convicted of aggravated assault with a deadly weapon 2010); Anita Smity (convicted of second-degree murder 2015); Cindy Gilliland (plead guilty to manslaughter in 2010); Deshana Goss (plead guilty to manslaughter in 2010); Rotesia Bryant (granted immunity in 2011); Sonya Maret (granted immunity in 2012); and Lillian Furrer (not charged 2009).
12 State v. Alexander, 151 So.3d 23 (4th DCA 2014).
13 Alexander v. State, 121 So. 3d 1185 (1st DCA 2013).
15 State v. Smithey (2014, Case No: 592010CF001851A, Seminole County Clerk of Court).
17 Tampa Bay Times Database (2013).
18 Crisafi, at 200-205.
20 Patel v. Kumar, 196 So. 3d 468 (2nd DCA 2016).
21 Professional Roofing & Sales, Inc. v. Flemming, 138 So.3d 524 (Fla. 3rd DCA 2014).
22 Pages v. Seliman-Tapia, 134 So. 3d 536, 538 (Fla. 3d DCA 2014).
26 Crisafi, at 116.
31 In re Report of the Comm’n on Family Courts, 646 So.2d 178, 182 (Fla.1994).
34 Smith v. Manno, 139 So. 3d 1143, 1144 (5th DCA 2014). See also Curtis v. Curtis, 113 So.3d 993, 994 (Fla. 5th DCA 2013)(trial court erred in concluding husband’s bond conditions were sufficient to fully protect the wife from domestic violence where bond conditions were not the same as the conditions which can be imposed under the domestic violence injunction statute, and the wife was not a party to the criminal proceeding.)
37 Fernandez v. Wright, 111 So. 3d 229 (2d DCA 2013) (The statute creating a cause of action for an injunction for protection against domestic violence, § 741.30, Fla. Stat. (2011), does not provide for an award of attorney’s fees.”); Geiger v. Schrader, 926 So. 2d 432 (1st DCA 2006) (holding there is no provision for an award of attorney’s fees in a section 741.30 proceeding). See also Bane v. Bane, 775 So.2d 938, 942 n. 4 (Fla.2000) (citing Belmont v. Belmont, 761 So.2d 406 (Fla. 2d DCA 2000), Abraham v. Abraham, 700 So.2d 421 (Fla. 3d DCA 1997), Lewis v. Lewis, 689 So.2d 1271 (Fla. 1st DCA 1997), and Baumgartner v. Baumgartner, 693 So.2d 84 (Fla. 2d DCA 1997)).
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An Unexpected Way for Law Firms to Improve Their Marketing Strategies

By Carlos Vazquez, Miami

The world continues to move toward a more integrated age with the far-reaching accessibility of social media platforms. Social media has gotten into the hands of everyone, including businesses and consumers. Its potential as a shared information platform has been a boon to business efforts across all verticals—from mom and pop shops to international corporations and nonprofits.

Facebook in particular has become a tool for tremendous market growth and outreach through targeted advertising campaigns. However, certain professions—including family law—continue to underestimate its potential, and typically consider Facebook to be unprofessional and informal. This misperception hinders firms that struggle to market themselves to clients and make their services known. I have observed that Florida law firms continue to spend their marketing budgets on other forms of advertisement that provide very little in terms of leads and return on investment, overlooking the fact that Facebook actually could help.

Facebook is a platform for family, friends and peers. Aren’t those the clients family law firms are trying to reach out to the most?

Facebook Actually is the Perfect Advertising Medium for Family Law

Why Facebook is a perfect medium for family law firms to advertise their services:

- There are billions of daily users on Facebook.
- Almost 1.5 million people use Facebook in the state of Florida alone.
- About three-quarters of all U.S. adults log into Facebook at least once a month.
- Americans in total spend 22 percent of their time on Facebook compared to other major online platforms and websites.
- Typical users spend almost an hour each day on Facebook.

Placing high investment marketing campaigns into only TV advertisements, billboards and law-related websites relies heavily on your target audience finding and consuming that information. It requires significant market research into target demographics and potential interest in those areas and offers little security in a firm’s investment. Not to mention that there is little to draw traffic to these standard advertising mediums.

On the other hand, Facebook has all of these different consumers in one place through a single social platform. Driving traffic to Facebook is unnecessary due to its widespread consumption and use. It already has the advantage of marketing more intentionally to clients while giving increased visibility to a firm’s brand and services. And this is before taking into consideration the direct marketing services that Facebook integrates into its system for the advertiser’s benefit.

Facebook Makes Direct Marketing Easy

Not only does Facebook corral the ideal target audience into one platform, it lets firms manage, track and target their marketing efforts through Facebook’s Audience Insights. This tool allows businesses to evaluate specific demographic information about users on their own pages. It provides metrics about age, gender, lifestyle, interests and other data that marketers could use to create targeted ads, create leads and understand the best ways to reach their ideal client bases. This includes finding target audiences as specific as husbands, wives, moms, dads, prenuptials and others relevant to family law.

This tool is particularly useful in measuring traffic to a firm’s page and seeing where it needs to adjust its marketing efforts. For example, if a family law firm notices a growth in prenuptial couples visiting its page and responding to leads, then the firm may want to shift its ad campaigns slightly to bring in more married couples and families. The audience insights tool allows for this level of research into target interest and client demographic data.

Facebook Gives an Advantage to Your Marketing Efforts

The audience insights tool is only one of many that allow businesses and nonprofits to step up their marketing efforts and produce real leads. Facebook’s ad creator lets marketers create and experiment with different ad designs and techniques to deliver powerful ad campaigns. Facebook’s analytics tool lets users measure how well their ads reach their audiences and who are current leads versus new ones. And with Facebook’s incentive to share and network with others, every user that comes across and clicks on an ad has a chance of sharing it again on their newsfeed for all their friends and families to see as well.
And as an additional tip, Facebook is especially powerful in retargeting campaigns. First, it’s best to create an ad for a cold call audience that’s specific to a certain target interest. Then create another ad that retargets people who respond to the first one and have them opt-in to a lead magnet, i.e., a workbook, guide or checklist. Those new leads then can be used to bring in others networked with them.

**Facebook Is Definitely Not a Fad.**

It wasn’t too long ago that brilliant individuals thought that the internet itself would be “just a fad.” It’s obvious how that turned out. So shouldn’t it also be obvious when it comes to Facebook? There’s too much for family law firms to gain from it to continue putting forward this belief that it’s just a fad.

If you’re still uncertain about how to best use Facebook for your firm’s advertising efforts, that’s understandable. There are various resources that can help you get started. And in appreciation for your time, I’d like to supply your firm with a list of commonly-used keywords and questions that clients are currently using to search online. Feel free to use it to help establish a foundation for your future marketing campaign efforts on Facebook.

You can find the list here at [www.fbadsforfamilylaw.com](http://www.fbadsforfamilylaw.com).

Carlos is a Miami native and Marine Corps veteran and whose digital marketing career took off with a prank call to Fidel Castro. He has developed successful marketing campaigns for businesses worldwide of different sizes to include Coca-Cola, Universal Studios, Disney, Carnival Cruise Lines and others in over 14 years.
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