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

As we head into spring, I am happy to report that we have just finished what has proven to be a very busy and productive legislative session in Tallahassee. Our Legislation Committee, through its Co-chairs Bonnie Sockel-Stone and Aimee Gross, as well as its general members and other volunteers, worked tirelessly to successfully promote legislation to end underage marriage. Additionally, with the help of former Chair David Manz, this year’s Visionary Award winner, the committee members ensured that HB 639/SB 676, otherwise known as the “Kaaa fix” bill, became law.

While our Legislation Committee worked to address law changes, our Continuing Legal Education Committee has furthered this year’s mandate of education. With the guidance of our ultra-organized CLE Chair Sarah Kay, the Continuing Legal Education Committee has produced courses for our members on a range of topics including parenting plans, domestic violence, tax, and enforcement of equitable distribution. Notably, the April 19 Family Law Legislative Update audio webcast is available purchase from The Florida Bar. The CLE details the outcome of this legislative session; you don’t want to miss it!

As we near the end of the 2017-2018 bar year, I hope that you will join us at our annual in-state retreat. This year on Memorial Day weekend we will be at the beautiful and newly renovated JW Marriott Marco Island Beach Resort, the only JW on the beach. For more information and to register today, visit our website, www.familylawfla.org. We hope that you have seen the continual improvements in the content of our website and the increase in our social media presence. We are working to make our website the go-to source for updates on CLE offerings and section events.

Finally, a special thank you to our Publications Committee along with our guest editor for what you will see is an interesting Commentator edition!

Nicole L. Goetz, Esq.

Visit FAMSEG and see what’s new!

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

www.familylawfla.org
Welcome to the Spring Edition of the Commentator! This edition has several interesting articles on parenting from alienation to technology in parenting plans. This is the time of year when many of you are making plans to attend the Section’s Spring Retreat which is being held at the JW Marriott Marco Island Beach from May 25th to May 28th. Many fun activities are planned for this retreat. Also, don’t forget the Florida Bar Annual Meetings will be held at the Orlando Bonnet Creek Resort. The Family Law Section Committee Meetings will be held on June 13th. Mark your calendars! We are asking that our members who attend the retreat and/or section meetings send us pictures for publication in future Commentators. A big thank you goes out to our guest editor, Alicia de la O. This is the second time Alicia has been the guest editor of one of the Commentator Editions. We are always looking for guest editors, articles and photos for The Commentator, FAMSEG and The Florida Bar Journal. If you have any interest in being a guest editor for The Commentator or writing articles for any of our publications (The Commentator, FAMSEG or The Florida Bar Journal) please contact us Lori Caldwell-Carr (LCC@infocusfamilylaw.com) or Deb Welch (cdw@thewelchlawfirm.com). Happy Spring everyone!

Comments from the Co-Chairs of the Publications Committee

LORI CALDWELL-CARR  C. DEBRA WELCH

We would like to thank Guest Editor Alicia de la O, Section Administrator Gabrielle Tollok, consultant Lisa Tipton and our authors for putting together this third edition of the 2017-2018 year. You are truly appreciated.

Spring has arrived and there is plenty of time for you to get involved in the Family Law Section. Just as the Publications Committee accepts Florida Bar Journal, Commentator and FAMSEG e-newsletter submissions on a rotating basis, our section continues to look for individuals like you. Please join us at our next live meeting or contact any of our committee chairs for additional information. A list of our committees can be found on our website: www.familylawfla.org. We look forward to seeing you in June!

As always, we welcome any photos you have from our section events, as well as articles, announcements, sponsorships and advertisements for our upcoming editions. Please email them to us at tchall@legalaidocba.org and blazzara@mslbb-law.com.

Message from the Co-Chairs of the Commentator

BELINDA LAZZARA  TENESIA HALL
By Alicia de la O, Miami

“The deep roots never doubt spring will come.”
– Marty Rubin

Spring is here and this edition could not be more appropriate for the season. This edition of The Commentator is like a “spring cleaning,” if you will, and includes numerous notable articles on the changing legal landscape in Florida.

Peter Cushing, a Florida Bar board certified marital and family law attorney and retired U.S. Navy Reserve JAG Corps captain, has authored an article about the significant legal changes to military pension division in Florida. Lisa Tipton, a savvy public relations professional, informs us on how law firms can get started on social media. Michelle Klinger Smith, an involved member of the section, enlightens us on the intricacies of parenting time plans in Title IV-D Administrative Proceedings. Heather M. Kolinsky and Melisa Medina have co-authored an article on imputed income and incarceration. Ron Kauffman, an executive council member of the section, has authored an interesting and well-timed article about emoji and emoticon use in communications, and how they can be interpreted in court. Cindy Vova, a practitioner concentrating on cases involving significant assets, discusses alternative dispute resolution methods to reach an expeditious and efficient resolution. Ryan Tarnow examines another relevant issue dealing with technology, tracking devices and applications in the realm of family law. Laura Davis Smith, immediate past chair of the section, considers the importance of a healthy work-life balance. John Foster and Alessandra Manes have co-authored an article detailing the summary judgment process in domestic violence cases. Lastly, Elisha Roy, also a former chair of the section, looks back to the rewrite of F.S. §61.13 on its 10th anniversary.

Finally, and as always, we truly appreciate our sponsors, who you may find helpful to your practice.

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Options on the schedule include a 10,000-island wave runner tour, a trolley trip to Naples, a dolphin watch and shelling tour, and a day at the beach. Additional registration is required for some of the outings.

Register online and book your hotel room today. See you there!

familylawfla.org/event/2018-in-state-retreat/
Significant Legal Changes to Military Pension Division in Florida

By Peter Cushing, Esq.
Winter Park

Recent amendments to the Uniformed Services Former Spouses Protection Act (USFSPA) and a seminal U.S. Supreme Court decision affecting military disability pay have upended the last twenty years of “settled” law in many states. Florida got it right in the area of valuation of military pensions and wrong with respect to how to deal with military disability pay in the context of dissolution of marriage.

Military Pension Division in the Early Years

In 1981, Congress passed the Uniformed Services Former Spouses Protection Act, 10 U.S.C. §1408, allowing state courts to treat military pensions as either property solely of the member or as property of both the member and his or her spouse in a dissolution of marriage action. Federal action was required, since before USFSPA, the area of military pension division was considered pre-empted by federal law and a military pension was not divisible by state courts. McCarty v. McCarty, 453 U.S. 210 (1981).

Since at least 1988, by statute and as permitted by USFSPA, Florida has recognized that military pensions are marital property subject to equitable distribution. Fla. Stat. §§61.075, 61.076 (2017). Even prior to the passage of the equitable distribution statute, case law in Florida recognized that military pensions were marital property subject to division between spouses upon dissolution of marriage.

Early Valuation Issues

Although state courts recognized that military and other pensions were marital property of great value, what was less clear was how to value a non-military spouse’s interest in the military pension, particularly when said pension was not yet vested or not yet in pay status. Should the value of the non-member spouse’s interest in the military pension be based on its value as of the date of filing of the petition for dissolution of marriage, the date of the final judgment of dissolution, or the date that the member actually retired?

The liberally construed “foundation of marital effort” theory held to the idea that the final value of the pension was based on earlier marital efforts and, therefore, it was fair for the non-military spouse to share in the enhanced value of the military pension that resulted from longevity or time in service, promotions and the like. Using a strict coverage fraction with the numerator being the months of marital service and the denominator being the total months of creditable military service resulted in the non-member spouse receiving a “smaller piece of a bigger pie,” but included value enhancements in the pension and was generally to the economic advantage of the non-military spouse. On this basis, the Deloach fraction was an acceptable method of dividing the military pension and had the advantage of permitting the computation to be done at the time of entry of final judgment, leaving open the denominator of the fraction (total months of active duty) in cases. It was the final number of months of creditable service and the final rank of the member that were used to compute retired pay, and this generally larger amount allowed the non-military spouse to enjoy these enhancements and receive a larger retirement benefit based on the idea that the later years and rank were somehow the product or culmination of the earlier years of military marital service. Deloach v. Deloach 590 So.2d 956 (Fla. 1st DCA 1991).

Florida Rejects Foundation of Marital Effort Theory in Boyett v. Boyett, 703 So.2d 451 (Fla. 1997) (3)

Florida is not a community property state, rather Florida is an equitable distribution state. On this basis, the advocates of military members and those employees who have earned government or private retirements argued that it was unfair to allow the non-military spouse to receive the benefits of time in service and promotions that occurred after the date of the divorce or filing of the case. They argued that these enhancements occurred because of non-marital labor and should be segregated and set aside to the benefit of the employee. The method of accomplishing the necessary computations has been to indulge in the fiction that the employee retired at the appropriate valuation date and figure the present dollar value of the monthly benefit that would be paid at that date as if the employee had actually retired, but without any “early retirement penalty.” This dollar amount of the monthly benefit is then divided by two, if the parties were married as of the date of initial service or employment or if there is pre-marital service or employment, continued, next page
Changes to Military Pension Division in Florida
from preceding page

the correct percentage of the fictional retirement is calculated as marital and then divided by two. The result of this computation determined the share of the non-military spouse as of that date. Cost-of-living adjustments are added to this figure up until the date of actual retirement, in accordance with the federal or private plan provisions. See Fritz v. Fritz, 161 So.3d 425 (Fla. 2d DCA 2014).

The Deloach theory of the foundation of marital effort that justified the sharing of post-dissolution enhancement in pension benefits has been flatly rejected as unfairly compensating the non-military spouse for efforts and labor of the member spouse after the dissolution of marriage. Boyett at 452.

With the appropriate computation, the member spouse has set aside to him or her all benefits earned after the date of dissolution and the non-military spouse receives cost-of-living adjustment, so that his or her share of the retirement is not reduced by inflation or other market factors. Such has been the general state of the law since Boyett in 1997, and due diligence has required that the practitioner be cautious not to ignore its mandate.

Recent Federal Legislation Affecting Valuation Of The Military Pension

In 2017, Congress amended the Uniformed Services Former Spouses Protection Act, 10 U.S.C. §1408 (a)(4), to change the definition of retired pay that can be equitably distributed by state courts. Since military pension benefits are governed by federal laws that are generally inconsistent with state’s laws, the state’s laws are preempted by the federal limitations and requirements due to the Supremacy Clause of the U.S. Constitution. Here is the essential language of the new statute wherein subparagraph [A] refers to that retired pay subject to equitable distribution:

1. The fixed amount, the percentage, the formula or the hypothetical award that the former spouse is granted;
2. The member’s pay grade at the time of divorce; and
3. The member’s years or creditable service on the date of divorce (the actual dollar figure); and
4. The member’s retired pay base (high-3) amount at the time of divorce (the actual dollar figure).

Clarification

If the award language in the court order is missing any of these listed necessary variables in paragraph 280803 of the above quoted amended DoD Financial Management Regulation, then the court will have to clarify the award.

What Does the Amended USFSPA Do?

First, the date of valuation of the military pension is changed from the filing date of the petition for dissolution of marriage to the date of the court order that divides the military pension, as a matter of federal law.

Second, consistent with Boyett, the disposable retired pay that is subject to division is the amount of basic pay measured by the member’s pay grade and years of service, again at the time of the court order, which in most cases will be the date of the final judgment of dissolution of marriage.

Third, the non-member spouse is entitled to cost-of-living adjustments that occur between the time of the court order and the member’s retirement. Congress has thus rejected the “foundation of marital effort” theory and the Deloach fraction as a matter of federal law, thus pre-empting inconsistent laws in any state or federal territory. The end result of the amended federal law is to the financial advantage of the military member and will be implemented by the Defense Finance and Accounting Service as they review orders submit-
in marital settlement agreements to “indemnification” meaning that although the member spouse had a right to apply for disability benefits, such application and perhaps granting of the application to the benefit of the member could not serve to reduce or diminish the non-military spouse’s monthly pension benefit. Some cases even directed indemnification in the absence of a contractual agreement as a matter of general equity. (5)

As this scenario played out nationwide, the Howell case reach the U.S. Supreme Court. In Howell, the non-military wife was awarded 50 percent of the husband’s retirement pay. About 13 years after the divorce, the husband applied for and received a 20 percent disability, reducing his “disposable retired pay” by about $250 per month because of the required waiver of regular retired pay. This reduced the wife’s share of the retirement by $125 per month. Was the wife entitled to indemnification? The Arizona court said yes, she had a vested right. The U.S. Supreme Court, however, unanimously said no, the husband had a federal right to apply for and receive disability, and a state’s court cannot “vest” that which they have no right to give in the first place. The non-military spouse’s rights were, at best, contingent upon the member spouse’s right to apply for and receive disability pay at any time. Pre-emption applies and there are important federal interests at stake: interests in attracting and retaining military personnel. (Howell at 8). State courts remain free to take into account that disposable retired pay might be waived, and take into account such possible reduction in value when it assesses family support. For the practitioner, the importance of a reservation of jurisdiction over alimony must be evaluated in each case. (6)

**Conclusion**

Military family law cases involve an interplay between federal statutes and regulations, federal court decisions and state laws. This discussion shows how all three branches of the federal government have the final word and can significantly alter the rights and responsibilities of military members and their families after years of debate, seemingly quickly, efficiently and with clarity.

**Peter Cushing** is a Florida Bar board certified marital and family law attorney and a retired Captain, Judge Advocate General’s Corps, U.S. Navy Reserve. He has written and lectured extensively on issues of military family law for The Florida Bar since 1995. He is a member of the Florida, New York and Hawaii bars. He practices law and does consulting work throughout the State of Florida and various states on military family law matters.

**Endnotes**

5. Abernethy v. Fishkin, 699 So.2d 235 (Fla. 1997), Janovic v. Janovic, 814 So.2d 1096 (Fla. 1st DCA 1992), Longanecker v. Longanecker, 782 So.2d 406, (2d DCA 2001) which allowed indemnification even without a specific contractual provision. Same, Blann v. Blann, 971 So. 2d 135, (Fla. 1st DCA 2008). To these sorts of decisions, Justice Roberts of the U.S. Supreme Court had an interesting comment. If you have a law that bars courts from dividing up disability pay, but allows them to award money from another source to compensate for the inability to divide disability pay, he concluded, “that’s the sort of thing that gives law a bad name.”

Recommended Citation: Amy Howe, Argument analysis: Quiet bench means few signals on military divorce case, SCOTUSblog (Mar. 20, 2017, 9:36 PM), http://www.scotusblog.com/2017/03/argument-analysis-quiet-bench-means-signals-military-divorce-case/

7. In cases of “concurrent receipt” where the disability is 50 percent or more, there is no “dollar for dollar” waiver of disposable retired pay and thus no reduction in the non-military spouse’s share of the regular retirement. See 10 U.S.C. §1414 (2004).
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Don’t Miss Out on the ‘Social’

By Lisa Mc Knight Tipton APR
Consultant to The Florida Bar Family Law Section
Florida/Arkansas

If you’ve been thinking about establishing a presence for your firm on social media, use these ideas to create your profile(s) and learn the basics of effective social media posts. Remember, Florida Bar advertising rules regulate lawyers’ use of social media, so follow the Bar’s social media guidelines if you are using social media for your firm or business. Individual lawyers’ social media pages used solely for social purposes to maintain social contact with family and close friends are not subject to the lawyer advertising rules.

What social media platforms are best for your firm? LinkedIn, Facebook and Twitter are at the top of many “most popular” social media networking site lists and might be good places to start.

LinkedIn’s social context is business. Your profile is like an online resume. You can find and join groups that relate specifically to your interests and practice areas. This social media platform has become so commonplace for professionals that you should at a minimum complete your personal profile so that potential clients and referral sources can find you.

Facebook’s social context can be more personal. Facebook allows you to humanize your firm and show its members’ personal sides through photos, videos, announcements and news. Potential clients can visit your Facebook page to find out the types of causes you support and see pictures of your volunteer involvement. Include links in your Facebook posts that encourage your audience to engage by clicking, “liking” and sharing.

Twitter’s social context is information-based. It’s generally more real-time and immediate than Facebook and LinkedIn. Twitter allows you to share quick pieces of information, photos and videos and build relationships with followers by engaging with them in conversations about mutual interests.

How do you set up social media profiles? When you are creating or editing your social media accounts, choose names that are the same or close to the same as your website and use them in all your profiles. For example, the Family Law Section’s names are familylawfla.org (website) and @FamilyLawFla (Facebook and Twitter). Once your accounts are set up, populate each profile with the same content. They don’t have to match exactly, but your social media pages should look like your firm website, newsletter, business cards, etc., because your social media profiles extend your law firm brand. Hint: Use a cheat sheet that lists dimensions for cover photos and profile pictures to avoid frustration when setting up your profiles. Include your firm logo, the same photos and “about” text in each social media profile, if possible.

Who should you follow and how do you connect with others on social media? Keep in mind that Florida Bar advertising rules govern lawyer and law firm social media interaction unless the sites are used solely for social purposes. In Florida, a lawyer’s invita-continued, next page
tion or friend request sent directly from a social media platform to another user is considered a solicitation in violation of Rule 4-7.18(a) unless it is sent to a current client, former client, relative or someone with whom he or she has established a prior professional relationship. LinkedIn, Facebook and Twitter all have features that suggest who to follow or “friend.” In general, proceed cautiously when adding users on social media platforms or simply wait for others to connect with or “friend” you. Joining a group on Facebook or LinkedIn is not a solicitation. Following another user on Twitter is not a direct invitation to connect.

How do you find content? It’s easy to find content by setting up Google alerts for keywords that you would like to monitor. Google will pull interesting content containing those keywords and send daily email alerts to your inbox. You also can monitor industry publications, The Florida Bar News and sites like Yahoo! News to find relevant content.

What are some quick tips for posting content to social media? Once you’ve found an article you want to share, copy the article URL, the long web address that starts with http:// or https://. Sharing your article using the URL you’ve copied works basically the same for LinkedIn and Facebook – and a little differently at times for Twitter.

- **Delete the long link.** When you paste an article link into the share box, LinkedIn and Facebook automatically pull the article's title, an image if available and a summary or the first paragraph. After this information appears in your post below the URL, *delete the link* before adding commentary and sharing your post. Deleting the link after the article information populates won’t delete the article, it just lets you share without a long, ugly link. In a Twitter post, the URL sometimes generates an image and article summary and sometimes it doesn’t. Type your post – Twitter now allows 280 characters – and include the URL at the end. You’ll have to hit “Tweet” to see if the URL generates an image and article link correctly. If not, simply delete the tweet and start again. This time, upload an image from the article first, type your post and include the link. Twitter will automatically shorten the long URL.

- **Use “@” to tag people and places.** On LinkedIn and Facebook, using “@” works similarly. To mention a person, organization or place in a post, type @ and then, without a space, start typing the name. If you are tagging the Family Law Section on Facebook, for example, type @familylawsection of the florida bar (you probably won’t have to type the whole name) and Facebook will give you a drop-down menu of matching options. Click on the correct entity and Facebook inserts a link into your post that allows others to click through to that Facebook page. The person or place can only be tagged if it has a profile on the social media platform you are using. On Facebook, you also can generate the tag by typing the person or entity’s user name: @FamilyLawFla will generate “Family Law Section of The Florida Bar.”

The @ works differently on Twitter. To generate the drop-down menu, you need to know the entity’s Twitter name. You would type @familylawfla (again, you probably won’t have to type the whole name) and you’ll generate the menu from which you select the correct entity to create the link in your post. One quick Twitter tip: If you start your Twitter post with @___ any entity name, only the person you “@’d” and your followers who also follow that person will see your tweet. To avoid that and have your tweet populate on your timeline for everyone to see, the most common workaround is to place a period in front of the tweet: .@familylawfla, for example. It might be easier to avoid starting a tweet with “@.”

One final pointer: When you're on social media, it's easy to get in a hurry and accidentally post typos and grammatical errors. Grammarly is a free app that automatically detects typos, double words, missing apostrophes, etc., and offers suggested fixes. Add Grammarly to your phone, browser and desktop before you get started on social media and you'll be posting like a pro in no time.
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Parenting Time Plans in Department of Revenue, Title IV-D Administrative Proceedings

By Michelle Klinger Smith, Esq. Marathon

Effective January 1, 2018, F.S. §409.2563 allows parties to enter into a parenting time plan in administrative actions to establish or modify child support or to determine paternity, thereby allowing parenting time to be agreed upon in non-judicial actions. Due to the non-judicial nature of parenting time plans, the inapplicability of Chapter 61 and the failure of the statute to address several issues involving parenting time plans, there are many unknowns. This article will provide a general overview of the administrative process in paternity and child support matters, address parenting time plans in administrative actions, and explain the significant uncertainties involving Title IV-D Parenting Time Plans.

For an individual to be eligible to receive Title IV-D services, a child may be receiving public assistance in the form Temporary Assistance for Needy Families (TANF), temporary cash assistance, foster care, Medicaid or food assistance benefits. It is necessary for the parent with the child or children to cooperate with the State of Florida in paternity and child support proceedings in order to obtain said benefits. Other means of eligibility are if an individual applies for services through the Department of Revenue, if an individual formerly received public assistance or if another state or local government requests the State of Florida’s assistance.

A Title IV-D case may be brought judicially or administratively. If the case proceeds administratively, an administrative order may order genetic testing, establish paternity, establish child support and modify administrative support orders. As of January 1, 2018, an agreed upon parenting time plan must be incorporated into an administrative support order. Parenting issues, dissolution of marriage, separation, alimony or spousal support, termination of parental rights, dependency or a change in time-sharing can never be determined by the Department of Revenue or administratively.

Parenting time plans in administrative actions are intended to provide the Department of Revenue with an alternative procedure for establishing child support obligations and establishing a parenting time plan only if the parents are in agreement. It is intended to be a fair and expeditious process when there are no prior support orders. Fla. Stat. §409.2563. The intent of the statute is not to limit the circuit courts’ jurisdiction to hear and determine issues regarding child support or parenting time. Id.

A Title IV-D Standard Parenting Time Plan shall be presented to the parents in any administrative action taken by the Title IV-D program to establish or modify child support or to determine paternity. Fla. Stat. §409.25633(1)(emphasis added). F.S. §409.256 addresses administrative proceedings to establish paternity or paternity and child support and to issue orders to appear for genetic testing. The statute does not require that the parties receive a copy of the Title IV-D Standard Parenting Time Plan with the notice and it does not reference the parenting time plan in the notice requirements. Furthermore, it does not state that it must be incorporated into a paternity order. There appears to be a requirement that in order to obtain a parenting time plan in a paternity action, support must be ordered.

F.S. §409.2563 addresses the administrative establishment of child support obligations. The statute provides that if there is no support order for a child in a Title IV-D case whose paternity has been established or is presumed by law, or whose paternity is the subject of a proceeding under s. 409.256, the Department of Revenue may establish a parent’s child support obligation pursuant to this section, F.S. §61.30, and other relevant provisions of state law.

In initiating administrative proceedings, the Department of Revenue generates a Notice of Proceeding to Establish Administrative Order, a blank financial affidavit, a copy of the Title IV-D Standard Parenting Time Plan and Parenting Information Form Administrative Support Proceeding. The Title IV-D Standard Parenting Time Plan will not be sent in any case where Florida is not the child’s home state, if one parent does not reside in Florida, if either parent has requested nondisclosure for fear of harm from the other parent or when the parent who owes support is incarcerated. The notice and forms are sent to the parent owing support via certified mail, restricted delivery or return receipt requested. Service is complete when the certified mail is received or refused. If some-
one else in the household signs the return receipt, the department calls the intended recipient and verifies receipt. If there is no response to the notice and the department is unable to confirm receipt, there has been no service and personal service will be attempted. However, personal service can be effectuated by any means permitted for service of process in a civil action or by an authorized employee of the department. The person who is owed support is sent the notice and forms by regular mail to his or her last known address.

F.S. §409.25633 provides that the best interest of the child is the primary consideration when entering into a parenting time plan. However, since parenting time plans are only a creation between parties by agreement, there are no best interest factors for a court to consider. If this provision was intended for the parents to consider the best interest of the child, there are no factors provided or referenced to that end (i.e., Fla. Stat. §61.13 best interest factors). The statute also requires that special consideration be given to the age and needs of the child. But, again, the statute provides no guidance on how to consider the age and the needs of the child.

The statute states that the parent who owes support is entitled to parenting time with the child. This means that any parent — whether the parent has abandoned the child, abused the child or has neglected the child — is entitled to spend time with the child, as long as he or she is ordered to pay support. This seems to contradict the best interest standard.

Although the statute states that there is no presumption for any time-sharing schedule, the statute also provides a very detailed schedule for a Title IV-D Standard Parenting Time Plan. The schedule is as follows:

1. Every other weekend — the second and fourth full weekend of the month from 6 p.m. on Friday through 6 p.m. on Sunday. The weekends may begin upon the child(ren)’s release from school on Friday and end on Sunday at 6 p.m., or when the child(ren) return(s) to school on Monday morning. The weekend time may be extended by holidays that fall on Friday or Monday.

2. One evening per week — one weekday beginning at 6 p.m. and ending at 8 p.m. or, if both parents agree, from when the child(ren) is or are released from school until 8 p.m.

3. Thanksgiving break — in even-numbered years, the Thanksgiving break from 6 p.m. on the Wednesday before Thanksgiving until 6 p.m. on the Sunday following Thanksgiving. If both parents agree, the Thanksgiving break parenting time may begin upon the child(ren)’s release from school, and end upon the child(ren)’s return to school the following Monday.

4. Winter break — in odd-numbered years, the first half of winter break, from the child(ren)’s release from school, beginning at 6 p.m. or, if both parents agree, upon the child(ren)’s release from school, until noon on December 26. In even-numbered years, the second half of winter break from noon December 26 until 6 p.m. on the day before school resumes or, if both parents agree, upon the child(ren)’s return to school.

5. Spring break — in even-numbered years, the week of spring break from 6 p.m. the day the child(ren) is released from school until 6 p.m. the night before school resumes. If both parents agree, the spring break parenting time may begin upon the child(ren)’s release from school and end upon the child(ren)’s return to school the following Monday; and

continued, next page
Parenting Time Plans
from preceding page

6. Summer break — for two weeks in the summer beginning at 6 p.m. the first Sunday following the last day of school.

The Title IV-D Standard Parenting Time Plan form is sent to the parties by the department. The parents are unable to select certain provisions or otherwise specify their agreement in terms of when the time-sharing ends (Sunday evening or Monday morning), or if there is an agreement to extend the weekend parenting time if there is holiday on a Friday or Monday. This is a form that is issued statewide. Therefore, there is no consideration for the fact that some schools may be closed for the entire week of Thanksgiving and some schools may only close on Thanksgiving Day and the Friday following Thanksgiving. This, of course, affects the overnights the parents receive. It is therefore difficult to determine the number of overnights to use in the child support calculation. For instance, if the parties were to follow the school calendar for the Miami-Dade School District, and if the parties agreed to exchange the child on Sunday evening and agree that the Thanksgiving holiday begins on the Wednesday before Thanksgiving, the parent paying support will receive an average of 69 overnights per year. If the parties decide to exchange the child on Monday morning, and the holidays begin on the release of the child from school on the Friday prior to Thanksgiving, the parent paying support will receive an average of 87 overnights per year. Since the threshold to determine a substantial amount of time in terms of calculating the gross up of child support pursuant to F.S. §61.30 is 20 percent or 73 overnights per year, the issue lies with which number of overnights to use when calculating support. Considering that a parenting time plan provides that weekends may begin on Friday and end on Sunday at 6 p.m., or when the child(ren) return(s) to school on Monday morning, the parties are free to choose a Sunday or Monday return of the child. If the parties abide by a Monday exchange, the payor will receive additional overnights. In view of the fact that the department is unable to inquire into the specifics of the plan, the department or Division of Administrative Hearings may default to a Sunday return in calculating support, thereby not using the correct number of overnights in doing so.

Another concern is that the Title IV-D Parenting Time Plan form does not inform the parties that they are free to enter into a parenting time plan of their choosing. Although the statutes allow for the parties to enter into “another” parenting time plan, the form they receive does not specify their ability to do so. The parties may therefore feel restricted to agree to only the terms of the Title IV-D Parenting Time Plan form provided.

An initial administrative order will not include a plan if the parties do not have an existing time-sharing schedule or parenting plan, and do not agree to a plan. However, the order must include a statement explaining its absence. Either party may at any time file a civil action in a circuit court having jurisdiction and proper venue for a determination of child custody and rights of parental contact.

If the parties have a judicially established parenting plan, the plan may not be included in the administrative order or initial judicial order. However, the support order must still take time-sharing actually exercised into consideration pursuant to F.S. §61.30(11)(a) when calculating child support.

The Department of Revenue shall terminate the administrative proceeding and proceed in circuit court if within 20 days after receipt of the initial notice the parent from whom support is being sought requests in writing that the department proceed in circuit court and if within 10 days after receipt returns the waiver of service form to the department. A parent may also opt out if the respondent files an action in circuit court and serves the department with a copy of the petition within 20 days after being served the notice. The administrative process will end without prejudice and the proceedings must proceed in circuit court.

If the parent owing support does not opt out within 20 days, the administrative action will proceed concurrently with any judicial action and will only terminate if a support order is issued in the judicial action prior to a support order being issued in the administrative action. A support order obtained judicially after the entry of an administrative support order may be a superseding order. Judicial enforcement does not supersede an administrative order. Circuit court orders that refer back to the administrative order for support or that do not prospectively change any obligation do not supersede. A superseding order can only modify the support obligation prospectively, meaning any retroactive child support or child support arrears owed under the administrative order cannot be modified judicially, except as provided by F.S. §61.14(1)(a). Any unpaid support must be included in the superseding order as an arrearage. Any judicial proceedings concerning the support of the same child must plead the existence of an existing administrative order and the obligor must provide the department a copy of the initial pleading.

If the matter proceeds administratively, the department will calculate support using all information available and will incorporate the obligation into a proposed order. The proposed order is sent by regular mail to the parties, along with the child support guidelines worksheet and any financial affidavits submitted. If the parties sign and return a parenting time plan, the parenting time plan is incorporated into the proposed order. If only one parent signs and returns
a parenting time plan, then the form is sent again with the proposed order. If there is no signed, agreed upon plan, the proposed and final orders will not incorporate any plan, but the support calculations will use any time-sharing information received from the parties. If there is no agreement, the department must refer the parties to the court of appropriate jurisdiction to establish a parenting time plan. The department must note on the referral that an administrative support order has been entered. The department must provide information to the parents on the process to establish a plan. The department has created a blank Petition to Establish a Parenting Time Plan that will be sent to both parties with the final administrative order. The parents can use the petition to file to establish a parenting time plan at the time of the child support hearing. The parents may not be required to pay a fee to file the petition to establish a parenting plan. The department shall be a party only with respect to those issues of support allowed and reimbursable under Title IV-D of the Social Security Act. It is the responsibility of the parents to take the necessary steps to present other issues for the court to consider. The department cannot file a petition for time-sharing or represent either parent at the hearing.

If there is an objection to the proposed support order, the parent owing support must file a request for a hearing within 20 days after the date of mailing of the proposed administrative support order or a hearing is waived. If a hearing is not timely requested, the department will issue an administrative support order that incorporates the findings of the proposed order and any agreed-upon parenting time plan. After a support order is rendered incorporating any agreed-upon parenting time plan, the department will file it with the clerk of the circuit court. When it is filed with the clerk, a local case number will be assigned. However, this is not a judicial case number but simply a depository number through which the child support will flow.

If a hearing is timely requested, it is heard by an administrative law judge of the Division of Administrative Hearings. The parties can provide the agreed-upon plan prior to the hearing or they can bring the agreement to the hearing. The department does not represent either party or inquire into the plan. The parents cannot contest the agreed upon parenting plan at the administrative hearing.

At the time of the hearing, the parties are advised that the proposed amount may increase or decrease. The administrative judge will hear evidence regarding the ongoing support (current income of parties, deductions, daycare costs, health insurance costs and number of overnights), retroactive support (income and deductions during retroactive period, daycare costs, health insurance costs and number of overnights), and any credits owed to the payor towards the retroactive support obligation. The administrative law judge calculates the child support, retroactive child support with repayment and percentages of unreimbursed medical expenses. The administrative law judge will issue the administrative support order and will include a parenting time plan or Title IV-D Standard Parenting Time Plan agreed to and signed by both parties. The order is filed with the clerk of the circuit court in order to obtain a depository number, to act as the official record-keeper for payments, and to establish and maintain payment accounts.

There appears to be an inconsistency in the statutes regarding the incorporation of the agreed parenting time plan into an administrative order. F.S. §409.2563(4)(m) provides that the Department of Revenue or the Division of Administrative Hearings may incorporate, if agreed to and signed by both parents, a parenting time plan or Title IV-D Standard Parenting Time Plan when the administrative support order is established. However, F.S. §409.2563(2)(e) provides that if both parents have agreed to and signed a parenting time plan before the establishment of the administrative support order, the department or the Division of Administrative Hearings shall incorporate the agreed-upon parenting time plan into the administrative support order. F.S. §409.2563(2)(f) states that the administrative support order must include a parenting time plan or Title IV-D Standard Parenting Time Plan as agreed to and signed by both parents. Furthermore, F.S. §409.25635 provides that if the parents agree to the Title IV-D Standard Parenting Time Plan or to another parenting time plan, the plan must be signed by the parents and incorporated into the administrative order. Given the use of the term “must” and the fact that the department and administrative law judges have absolutely no discretion in incorporating agreed upon parenting time plans, it appears that there is a requirement to incorporate the agreement into an administrative order.

After an administrative support order is rendered, the department may modify and enforce the administrative support order. Administratively support orders may only be modified administratively, unless judicially superseded. To have the administrative support order enforced judicially, the department must file a petition to recognize and enforce the administrative support order and must request that the administrative order be recognized judicially prior to finding an obligor in contempt. When an enforcement action is initiated judicially, and if a parenting time plan has not been previously entered into, the parties can enter into a parenting time plan at that time. This does not modify or supersede the administrative order. The department is able to seek enforcement of the administrative order by other lawful means if the administrative order is not
superseded (i.e., license suspension, income deduction orders, IRS tax intercepts).

The department does not have jurisdiction to enforce a parenting time plan that is incorporated into an administrative support order. It is unknown if the circuit court must first recognize the parenting time plan and if so, determines whether or not the parenting time plan is in the best interests of the minor child in accordance with Chapter 61.

Regarding a modification of the parenting time plan, neither the department nor Division of Administrative Hearings has jurisdiction to change child custody or rights of parental contact or time-sharing, and these issues may be addressed only in circuit court. Fla. Stat. §409.2563. F.S. §409.25633 provides that after the incorporation of an agreed-upon parenting time plan into an administrative order, a modification or enforcement of the parenting time plan may be sought through a court of appropriate jurisdiction. Neither statute addresses the method of modification, except, if after the incorporation of an agreed-upon parenting time plan in an administrative support order a parent becomes concerned about the safety of the child during the child’s time with the other parent, a modification of the parenting time plan may be sought through a court of appropriate jurisdiction. Neither statute addresses the method of modification, except, if after the incorporation of an agreed-upon parenting time plan in an administrative support order a parent becomes concerned about the safety of the child during the child’s time with the other parent, a modification of the parenting time plan may be sought through a court of appropriate jurisdiction. There are uncertainties regarding the burden of proof necessary to modify a parenting time plan. Pursuant to Chapter 61 proceedings, a modification of a parenting plan and time-sharing schedule requires a showing of a substantial, material and unanticipated change of circumstances that are in the best interests of the child. However, a parenting time plan is not a Chapter 61 parenting plan or time-sharing schedule since a Chapter 61 parenting plan or time-sharing schedule must be approved by the circuit court after the court makes a best interest determination.

F.S. §61.13 specifically provides that “the court shall determine all matters relating to parenting and time-sharing of each minor child of the parties in accordance with the best interests of the child and in accordance with the Uniform Child Custody Jurisdiction and Enforcement Act.” In that case, time-sharing must be agreed to by the parties and approved by the court, or if the parties do not agree, then established by the court. If the court does not approve the parenting plan, then the court will establish one for the parties.

A Chapter 61 parenting plan must include parental responsibility (decision-making authority); must contain a time-sharing schedule for the parents and child; must address jurisdictional issues, including the UCCJEA, International Child Abduction Remedies Act, the Parental Kidnapping Prevention Act and the Convention on the Civil Aspects of International Child Abduction enacted at the Hague; must describe in adequate detail how the parents will share and be responsible for the daily tasks associated with the upbringing of the child; must designate who will be responsible for any and all forms of health care, school related matters, and other activities; and must address the methods and technologies that the parents will use to communicate with the child.

A Title IV-D Parenting Time Plan must contain a time-sharing schedule and be agreed upon and signed by each party. It may be a Title IV-D Standard Parenting Time Plan or another parenting time plan. A parenting time plan does not provide for parental responsibility, exchanges of the child, transportation, travel, communication, school issues, activities and other details regarding the child. If the parents are unmarried, it is presumed that the mother has sole parental responsibility as per F.S. §742.031.

If there is a disagreement as to the terms of the parenting time plan or if the plan needs to be changed, the department is unable to modify or enforce the terms of the parenting time plan. It is unknown what the burden is to modify the parenting time plan judicially or whether the circuit court can enforce it without a finding that the parenting time plan is in the best interest of the minor child. Since there are so many uncertainties involving parenting time plans, it is a matter of allowing the courts to interpret F.S. §409.2563 and §409.25633.

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Endnotes

1 Title IV-D refers to the Social Security Act, Title IV, Grants to State for Aid and Services to Needy Families with Child and for Child-Welfare Services, Part D—Child Support and Establishment of Paternity.

2 The Parenting Information Form must be completed and returned within 20 days and requires the parents or non-parent caretaker to provide information such as addresses, employment, dates of when parents resided together and ceased residing together, any support provided and any time-sharing arrangements or parenting plans.
2018 Florida Bar President’s Pro Bono Service Awards Ceremony

Five Family Law Section members were among the 21 lawyers who were recognized for their pro bono service at a Jan. 25 ceremony at the Florida Supreme Court. Florida Bar President Michael J. Higer presented 2018 Pro Bono Service Awards to Pamela Masters, Robert L. Young, Hilary A. Creary, Timothy A. Moran and Jeffrey Paul Battista. In the most recent 12 months reported, Florida lawyers provided more than 1.5 million hours of pro bono services to those in need and more than $5.5 million to legal aid organizations.

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“Parents have a legal duty to support their children.” *Dept. of Revenue v. Jackson*, 846 So. 2d 486, 492 (Fla. 2003). In Florida, a parent’s duty to support a child does not abate when a parent is voluntarily unemployed or underemployed. F.S. §61.30 allows for imputation of income if the evidence demonstrates that the obligor’s unemployment or underemployment is voluntary absent a finding of fact by the court of physical or mental incapacity or other circumstances over which the parent has no control.

A parent who becomes incarcerated is deemed to have voluntarily behaved in a way that will almost always preclude the ability to pay child support based on that incarceration. But when a parent is incarcerated, the child’s need for support does not cease to exist, even if the parent’s ability to provide child support does. If an incarcerated parent is not required to support his or her children, then the only party that benefits from that circumstance is the incarcerated parent.

Florida courts recognize a legal duty in the first instance, and will impute income to the voluntarily unemployed or underemployed parent, even where no child support award has been made previously. However, it is less clear whether an incarcerated parent can be required to pay child support through the imputation of income when it is highly unlikely the imprisoned parent will have the present ability to pay child support. Courts face this issue in two distinct circumstances: when a parent becomes incarcerated after an initial child support award has been made and the incarcerated parent seeks abatement or modification and when a parent becomes incarcerated prior to an initial child support award.

While the courts have come to a general consensus on how to treat the first problem, post-award incarceration, they have struggled to address the second problem, pre-award incarceration, which has produced conflicting opinions in the District Courts of Appeal.

Most recently, the Fifth District Court of Appeal addressed the issue of whether parents who are already incarcerated at the time child support is initially set can be required to pay support. *Wilkerson v. Wilkerson*, 220 So. 3d 476 (Fla. 5th DCA 2017). In that case, the father, who was incarcerated at the time of the final hearing, challenged a child support order that imputed income of $300 a week to him based on his previous income.

The case illustrates the difficulties in determining a parent’s obligation to provide child support when that parent has no present ability to pay child support due to the incarceration. The case also highlights an inequality of treatment among children whose parents are incarcerated based on whether the incarceration occurs before or after an initial child support award has been made. The Fifth District Court of Appeal found that such an award was appropriate, agreeing with the Fourth District Court of Appeal and certifying conflict with the First District Court of Appeal.

A Parent’s Child Support Obligation During Incarceration

When the Second District Court of Appeal initially addressed this issue in 1996, the court chose to focus on the reality of the situation. Regardless of whether the court imputed income at any amount, the father could not earn the amount of income imputed to him while he was in prison. *Waugh v. Waugh*, 679 So. 2d 1, 2 (Fla. 2d DCA 1996). In that case, the father, who was incarcerated at the time of the final hearing, challenged a child support order that imputed income of $300 a week to him based on his previous income.

Waugh served as the basis for the Fifth District Court of Appeal’s decision in *Pickett v. Pickett*, 709 So. 2d 182, 182 (Fla. 5th DCA 1998). That case addressed a request to modify child support based on the subsequent incarceration of the payor-parent after an initial award of child support had been made. The Court relied on Waugh and found that the modification had to be granted based on the incarceration unless there was evidence that the obligor parent could actually earn the amount awarded while incarcerated.

The Fourth District Court of Appeal took a different approach in *Mascola v. Luskin*, 727 So. 2d 332 (Fla. 4th DCA 1999), and found that modification

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was not required and the only thing unavailable during a parent’s incarceration was a remedy for breach of the duty to pay child support.

In Mascola, the father was convicted of soliciting the murder of his girlfriend and his unborn twin children. The court imputed income prior to his conviction and sentence and the father sought to modify or eliminate the support while he was serving a fourteen-year sentence.11 The Fourth District Court of Appeal noted that its decision conflicted with the decisions in Waugh and Pickett. In Department of Revenue v. Jackson, 780 So. 2d 342, 343 (Fla. 5th DCA 2001), the Fifth District Court of Appeal certified conflict with Mascola in two cases where incarcerated payor-parents sought to abate their child support payments during their incarceration, essentially modifying their child support obligations, relying on the Fifth District’s earlier decision in Pickett. Judge Griffin reflected that while the panel might have decided this issue differently than the panel in Pickett, it chose to adhere to that panel’s decision and certify the conflict instead.13

Upon review, the Florida Supreme Court quashed the Fifth District Court of Appeal’s decision in Jackson and fashioned a remedy adopting the premise in Mascola that modification should not automatically be granted based on incarceration.14 Instead, the court determined that a petition should be filed to modify child support. Child support would then be held in abeyance during the term of the petitioning parent’s incarceration.15

In addressing the realities of the situation, the court focused on policy considerations that impacted the courts’ decisions under these circumstances, and left the focus squarely on the best interests of the minor children affected:

Undeniably, the child’s interests are not served where the obligor parent is unable to fulfill his or her support obligations because there is no income while in prison. Under such circumstances, the child faces the hardship of simply not receiving the money he or she needs, regardless of whether the trial court modifies the incarcerated parent’s obligations. After the parent is released, however, the child is in a much better position if there is at least the possibility that not only will current support payments resume, but payment for an accumulated amount will be met—even if under a restructured payment plan. To the contrary, if we permit trial courts to suspend an incarcerated parent’s obligation to pay child support, the supported child will never receive the benefit of the support payments to which the child was entitled. Therefore, the child’s interests are certainly best served when courts do not modify an obligor parent’s child support payments simply because of the parent’s incarceration.16

The court also observed that “any abatement or waiver of support payments owed to the child would certainly harm the interests of the child.”17 The only person to benefit if support is suspended is the incarcerated parent.18

Instead, in creating a reasonable method by which to address the reality of a parent’s incarceration and the continuing need to support his children, the court noted that the “primary concern is that the child receives the support to which he or she is entitled. Of secondary concern are the parent’s difficulties—largely self-inflicted—resulting from incarceration due to criminal conduct unrelated to the support obligations.”19

The court explained that the “key is to find that structure that will most benefit the child entitled to support through a plan designed for realistic payments.”20 To that end, “[i]t is quite possible that the obligor’s payments toward the amounts accumulated after the petition to modify was filed will continue beyond the time that the child support obligations would otherwise naturally terminate, for instance when the child reaches the age of majority.”21 Ultimately, rather than abating or abandoning child support obligations for incarcerated parents, the Florida Supreme Court envisioned a realistic method to address support payments with an extended payment plan for an incarcerated parent so that the parent could realistically provide support, even beyond the age of majority if that is what was required to protect the child’s best interests.22

While the Florida Supreme Court did not directly address initial child support awards against currently incarcerated parents, three district courts of appeal have addressed the issue since the court’s decision in Jackson: the Fourth District Court of Appeal in McCall v. Martin, 34 So. 3d 121(Fla. 4th DCA 2010), the Fifth District Court of Appeal in Wilkerson, and the First District Court of Appeal in Department of Revenue v. Llamas, 196 So. 3d 1267(Fla. 1st DCA 2016).

After the Florida Supreme Court’s decision in Jackson, the Fourth District Court of Appeal issued its opinion in McCall. In that case, the court held that “a child’s best interest is certainly not served by refusing to set an initial amount of support based on imputed income for a parent about to be imprisoned.”23 The court relied on its earlier holding in Mascola that was approved by the court in Jackson.24 The court directed that income should be imputed to the father so that arrearages could accumulate until he was able to earn an income, then when he was released the trial court should establish a payment plan to reduce the arrearages according to his earning ability.25

The First District Court of Appeal certified conflict with McCall in Llamas.26 In Llamas, an administrative law judge declined to award current child support because the father was going to prison and, thus, lacked a present ability to pay child support.27
The First District found that the Florida Supreme Court “neither approved nor rejected” Waugh when it decided Jackson, finding that Justice Pariente’s concurrence indicated the holding in Jackson did not apply to initial support orders when a parent is already incarcerated.28

The court found that the “McCall court’s solution [was] not necessarily inconsistent with the rationale of Jackson,” but found that it was not supported by Jackson either.29 The court ultimately found that Jackson did not require imputation of income and that the Administrative Law Judge in Llamas did not abuse his discretion in declining to impute income.30 Justice Ray concurred with the result, but indicated that if he were writing on a clean slate, he would adopt the holding and rationale of McCall as a logical extension of Jackson.31

The Fifth District Court of Appeal then addressed the issue in Wilkerson. Again, the Fifth District took a realistic, balanced approach to a real world problem. The court noted the disconnect between the application of the current law to the distinct issues presented by pre-award incarceration and post-award incarceration. As the court observed, “[i]t would be inconsistent to allow an incarcerated parent’s child support obligation, which was set before incarceration, to continue to accrue until the parent’s release from prison, and yet not allow the trial court to initially set a minimum amount of child support for an individual who is already incarcerated.”32 The court, like the Supreme Court in Jackson, chose to focus on the child’s right to support.33 Judge Palmer dissented, finding that the court did not have the authority to make an initial award based on the reasoning in Llamas and the general rules regarding imputation of income where a parent does not have a present ability to pay.34

The trial court faced a situation where Mr. Wilkerson would likely be incarcerated until his youngest child reached the age of majority and if no initial child support award was made, then there would be no ability to set child support upon his release. But if an initial award of child support was made, a payment plan to reduce the arrearages according to Wilkerson’s earning ability could be established when he was released and no remedies to enforce the award would be contemplated while he was incarcerated.

Creating Consistency in Initial Awards for Children of Incarcerated Parents

As the Fifth District Court of Appeal acknowledged, part of the problem is that to read the existing case law other than McCall in a limiting continued, next page
manner would provide more rights to a child whose parent is incarcerated after an initial child support award than a child whose parent was incarcerated before an initial award. It also creates the same inequality in treatment for the parents involved.

The other practical problem is one of timing. For example, the children in Wilkerson will no longer be minors when their father is released. Obtaining an initial child support award regardless of the incarceration status of the obligor parent may be the only way a child’s entitlement to child support can be established during his or her minority, even if it is only enforced after the obligor parent is released from prison and the child is already an adult.

While the reality may be that a child may receive little to no support or payments from a parent who is incarcerated, an initial award ensures that should the payor-parent acquire employment post-incarceration, or any other sort of income stream, the parent will not be the only beneficiary of that employment and the child will have an immediate ability to enforce the support award.

Ultimately, counsel should always consider seeking an initial award of child support regardless of whether a parent is currently incarcerated, but with the understanding that such an award will necessarily be for a nominal amount (usually minimum wage) and will not likely be paid while the parent is incarcerated. However, that initial award will provide later relief to a child and his or her custodial parent, allowing the parties to address the child support at a later date if appropriate.

Endnotes
1 Heather M. Kolinsky is an appellate attorney with the Law Office of Chad A. Barr, P.A. in Altamonte Springs, Florida. She frequently writes on family law topics and issues of parentage. Melisa Medina practices family law exclusively and is a partner at Cortes & Medina, PLLC in Altamonte Springs, Florida.
2 Jackson, 846 So. 2d at 492.
3 Id. at 491.
4 Id.
5 Wilkerson, 220 So. 3d at 481.
6 Id. (Palmer, J., dissenting).
7 Id. at 481.
8 Id. at 483.
9 Id.
10 Pickett, 709 So. 2d at 183.
11 727 So. 2d at 329.
12 Id.
13 Id. at 333.
14 Jackson, 780 So. 2d at 342.
15 The precise issue before the Supreme Court in Jackson was “whether a court should permit a parent to have a preexisting support obligation modified or suspended based upon an inability to fulfill the financial support obligation during a period of imprisonment.” 846 So. 2d at 488.
16 Id. at 491-92.
17 Id. at 493.
18 Id.
19 Id.
20 Id.
21 Id.
22 Id. at 492, 494.
23 Id. at 494.
24 McCall, 34 So. 3d at 123.
25 Id. at 122-23.
26 Id.
27 196 So. 3d at 1268.
28 Id.
29 Id. at 1270.
30 Id.
31 Id. at 1270-71.
32 Id. at 1271.
33 Wilkerson, 220 So. 3d at 483.
34 Id. “To preclude an initial award of child support that would accrue during the period of a parent’s incarceration would deprive a child of the support to which he or she is entitled.” Id.
35 Id. at 484.
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If it looks like a duck: Emojis, Emoticons and Ambiguity

By Ronald H. Kauffman, Esq.
Miami

“I got an email once from an ex-girlfriend. It was completely innocuous, but she signed it with a “wink.” A semicolon and a right parenthesis. ;) I got into a six-hour argument [with my wife] over this semicolon. Had it been a regular colon, two eyes open ; there’s no argument there. Wink? ;) All of a sudden: ‘you’re sleeping with her, aren’t you?’”

Emojis and emoticons are popping up in courts everywhere, and people are landing in hot water.2 They can’t simply be overlooked by courts, because emojis and emoticons say a lot about the sender’s intent. Ignoring them in a document would be like calling a witness to the stand and ignoring his or her facial expressions and body language.3

While judges have always had to interpret ambiguous language, emojis offer something new. Emojis fail the “duck test”: If it looks like a duck, and quacks like a duck, then it is probably a duck.4 Emoji meanings can be so puzzling that a “duck” emoji may mean anything but a duck. This article is a primer on emojis, emoticons and ambiguity.

Emojis and Emoticons

Originating in Japan in 1998, emojis are small digital images used to express an idea or an emotion in electronic communications.5 The term emoji is Japanese for “picture character.” Picture (pronounced “eh”), and character (pronounced moh-je).6 The most popular emoji today is “Face With Tears of Joy” 😭. The least popular is the aptly named “Squared CJK Unified Ideograph-6709” 📝.8

Emojis should not be confused with the much older emoticons.9 “Emoticons,” a blend of the words “emotion” and “icon,” are facial expressions made from keyboard characters allowing us to write and interpret meanings beyond the actual words written.10

Contract Interpretation and Ambiguity

Emojis may revive the old saying “a picture is worth a thousand words,” but understanding them can be tricky. Because disputes can be won or lost deciphering terms in an agreement, it is helpful to review the basic rules governing contract interpretation.

Marital agreements are interpreted like any other contract.19 Basic interpretation begins with the plain language of the contract, because the contract language is the best evidence of the parties’ intent at the time they signed the contract.20

Courts are not supposed to rewrite terms that are “clear and unambiguous.”21 As a general rule, evidence outside the contract language, which is known as parol evidence, is only allowed to be considered when the contract language contains an ambiguity.22

Ironically, the “parol evidence rule” is itself ambiguous. The parol evidence rule is not a rule, or found in the Evidence Code, but is substantive law. The parol evidence rule states that evidence of a prior or contemporaneous oral agreement is inadmissible to vary or contradict the unambiguous language of a valid contract.23

Anyone seeking to introduce extrinsic evidence, which is any evidence
outside a fully integrated contract, must first establish that a contract is ambiguous. A contract is ambiguous when its language is reasonably susceptible to more than one interpretation. Florida courts distinguish between latent and patent ambiguities. A latent ambiguity is when the language in a contract is clear, but some extrinsic fact creates a need for interpretation between two possible meanings. In other words, a latent ambiguity is when an agreement is clear, but does not specify the rights or duties of the parties.

Since the inherent ambiguity of emoticons is why they are difficult to interpret, rendering them hard to interpret.

Ross Ulbricht was charged with running an online, black market website that traded in drugs and murder. His pseudonym was: The Dread Pirate Roberts.

During the Silk Road trial, a New York federal judge had to rule on how to publish emoticons in evidence to a jury. Ulbricht’s attorney argued that chats, posts and emails in evidence should be shown to jurors, instead of merely read, because emoticons changed the messages’ meaning. The judge agreed, ruling: “The jury should note the punctuation and emoticons.”

A Montana federal court found that a “Smiley” emoticon :) converted an email into a joke, and the email meant the opposite of what it said. A defendant claimed his attorney violated the attorney-client privilege and the Sixth Amendment by sending the prosecutor an email joking “stipulate that my client is guilty.” The court found the email frivolous because of the “Smiley” emoticon.

A New Jersey court also had to interpret the “Smiley” emoticon. An employee, terminated after an extended medical leave, claimed she was wrongfully fired. Videos showed the employee carrying boxes while on leave. The employer argued the claim should fail because the employer thought the employee was abusing her leave. The court rejected the argument, noting in part, the employer’s emails used “Smiley” emoticons when discussing the firing.

A Michigan federal court had to rule on the impact of the “Face with Stuck-out Tongue” emoticon :P. A law student investigated for online stalking and harassing sued after prosecutors dropped the charges. He claimed the investigation was without cause, arguing his messages shouldn’t have been taken seriously because of the :P emoticon. The judge held the emoticon did not “materially alter the meaning of the text message.”

Is that a smile or something else? 😊

There are unique issues with emojis, rendering them hard to interpret. For one thing, there’s no definitive source as to what emojis mean. The Unicode Consortium is a non-profit trying to standardize emojis so they work across various operating systems. However, Unicode is limited, and may not consider slang, cultural and geographic differences.

Emojis are also small, making them hard to read. Within each emoji are subtle distinctions, making them easy to confuse. There are also a lot of the same type of emojis. For example, Unicode lists hundreds of “Smiley & People” emojis.

The confusion is not limited to their size and variety though. Interpreting an emoji can depend on what kind of device on which it is viewed. For example, a 24-inch computer monitor displays things differently than a four-inch phone screen.

Emojis are created so quickly, people may not know what they are sending and receiving. Apple recently

Petitioner’s Exhibit A: 😊

The inherent ambiguity of emojis and emoticons is why they are increasingly showing up in court. At the high-tech “Silk Road” trial,
Emojis, Emoticons and Ambiguity

from preceding page

announced the release of hundreds of new emojis.\textsuperscript{43} As new emojis are introduced, it takes time to learn their meanings. There are also regional, cultural, platform and slang differences that can change over time.\textsuperscript{44}

In the Israeli case, the prospective tenant used a sequence of emojis. A string of emojis requires the reader to identify each emoji and then decipher the sentence as a whole. There are no grammatical rules such as: “before” except after
\textsuperscript{4} to explain whether a “Chippmunk” emoji gets placed before a “Comet” emoji in sentences starting with a “Ballerina” emoji.

A few other examples show how the meanings of seemingly obvious emojis can have more than one interpretation for various reasons, rendering them ambiguous:

The “Thumbs Up Sign” emoji is a positive gesture in the United States, and an accepted way to signal approval. But, in many countries, the “Thumbs Up Sign” emoji is considered obscene.\textsuperscript{45}

The “Open Hands” emoji is a way of saying “stop” and “back off” in the United States. However, the “Open Hands” emoji, originally from Japan, represents openness in Japan.

The “Folded Hands” emoji was originally designed to symbolize “please” and “thank you,” and it still does in Asia. However, in the United States it means: “I’m praying,” and is frequently and mistakenly used as a congratulatory “high-five.”\textsuperscript{46}

The “Pile of Poo” emoji is a pun on the Japanese word for excrement (unko), which starts with the same “oon” sound as the word for “luck.” The emoji is complimentary in Japan.\textsuperscript{47} In the United States though, the emoji is definitely not complimentary. Strangely, Canadians use the emoji the most.

The “Eggplant” emoji is based on a species of Japanese eggplant that is longer and thinner than the American variety.\textsuperscript{49} Unlike pizza, you will not be able to order one at Food Fair using the “Eggplant” emoji anytime soon. That’s because the “Eggplant” emoji is a phallic reference in the United States.\textsuperscript{50} The emoji is banned on some forums.\textsuperscript{51}

Owners of iPhones use the “Peach” emoji as a euphemism for the buttocks because of how it appears on their phones. Samsung, Google and other companies vary the design of their “Peach” emojis. While emojis are standardized by Unicode, variations exist.\textsuperscript{52} Since “Peach” emojis vary slightly on different types of phones and applications, users may not see or know of other associations.\textsuperscript{53}

Conclusion

The “duck test” doesn’t work for emojis because you can’t understand their meaning just by looking at them. People use emojis in ways that have nothing to do with the physical objects they represent, or even what typographers intended. It’s okay, you’re not the only one who can’t figure this one out: 🐣.\textsuperscript{54} After all, emojis’ inherent ambiguity is one reason why they’re increasingly becoming evidence in court.

Open your 🤔. Emojis are taking over the 🌍. Grab a 🍜 and 🍲 this down, or ☁️ this article. To ☕️ effective advocates for our 🥤, and make our law practices 🍴, we can’t 🍹 from, or 🥿 away from these 🥡 hieroglyphs. It’s ☕️ to ☑️ up on emojis, or you will be ☑️.

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Endnotes

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3 For the witness comparison, see Benjamin Weisser, At Silk Road Trial, Lawyers Fight to Include Evidence They Call Vital: Emoji, New York Times, (Jan. 28, 2015).
5 Yuri Kageyama, Shigetaka Kurita: The man who invented the emoji, Toronto Star (Sep. 21, 2017) (Kurita designed the original set of emojis in 1998 for a Japanese phone carrier whose mobile internet service limited messages to 250 characters, requiring some kind of shorthand.)
8 The ancient Hittites used smiley emoticons on their pottery at least 4,000 years ago. See Amanda Borschel-Dan, History’s oldest smile found on 4,000-year-old pot in Turkey, The Times of Israel, (Jul. 19, 2017).
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10 See Eric Goldman, Surveying the Law of Emojis, Santa Clara University School of Law, Legal Studies Research Papers Series, No. 8-17, (May 1, 2017).
12 Pew Research Center, Internet and Technology, Social Media Fact Sheet, (Jan. 12, 2017).
16 Id.
18 See Reilly v. Reilly, 94 So.3d 693, 696 (Fla. 4th DCA 2012).
DCA 1995)(holding parol evidence should be admissible “irrespective of any technical classification of the type of ambiguity present.”).


40 The Unicode Consortium is a non-profit founded to develop, extend and promote use of standards which specify the representation of text in modern software products and other standards, including emojis and emotions. See http://www.unicode.org/consortium/consortium.html


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54 “Person Gesturing OK” Emoji.
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Alternative Methods to Winning the 2018 Race to Final Divorce Judgment Before Losing the Alimony Tax Deduction

Cindy S. Vova, Esq.
Plantation

In case you needed another reason to use the alternative dispute resolution process, you need look no further than the Tax Cut and Jobs Act of 2017. Yes, the new and purportedly improved tax bill that was enacted by Congress at the end of 2017. Section 1105(a) of that act specifically repealed Internal Revenue Code §215, which permitted alimony deductions by the payor. The new law unequivocally eliminates the ability of an alimony payor to deduct from the payor’s income the alimony paid to the recipient former spouse effective as to any final judgment entered January 1, 2019, or thereafter. In actuality, the provision applies to any separation agreement. However, since Florida does not provide for legal separation, a divorce pending in 2018 must be finalized by the entry of a final judgment no later than December 31, 2018, or, irrespective of what a marital settlement agreement might state, the alimony will not be deductible to the payor or taxable to the recipient.

At first blush, this might seem attractive to a client who will receive alimony and detrimental to the client who will pay alimony. After all, tax-free income always seems better than sharing one’s money with Uncle Sam. It is difficult enough to give your client the reality check that he or she will, in all probability, have to pay alimony to their ex, but delivering the news that he or she is also going to have to pay tax for that is a tough message.

Upon closer examination, however, the numbers do not necessarily confirm that the recipient of alimony will receive a windfall after the tax reform kicks in. In fact, under several models (assuming that the alimony a court would now award would be less, since the need and ability model requires an after tax analysis, and the tax aspect is removed) it appears that both the alimony payor and the alimony recipient end up in a less favorable economic situation once the 2019 law kicks in. In other words, if you have clients who are likely to be alimony recipients, you may be doing them a disservice to wait to finalize the case until after the New Year.

So what does that mean for the family law practitioner? Let’s just say that 2018 should be a very busy year, and, by the way, you may have to forget about any vacations in December if you want to get your clients’ cases completed before the New Year. It is common knowledge that our family law judiciary is already overloaded, particularly in the more populated counties of the state. Therefore, even if a case is ready for trial before the last quarter of 2018, it is problematic whether an actual trial date will be set before the year’s end. Let’s not even get started on continuance motions and emergencies and the lengthy list of reasons trials may not go forward even when a date is set on the docket.

Since it is still relatively early in 2018, and since, based on the analysis above, the elimination of the tax deductibility of alimony may economically damage both the payor and recipient of alimony, there are several alternatives to waiting for a judge to decide the case, and now is the time to discuss these alternatives with your clients and opposing counsel so the looming and dooming alimony tax bill does not catch anyone off guard.

Mediation

With very limited exceptions, virtually all family cases are ordered to mediation prior to trial. It proves to be a very effective method to resolving many cases. All practitioners are familiar with the process, but why wait for the court to order mediation? This year is not the time to drag one’s feet in discovery. Get it done and go! Remember, however, that although there are many Supreme Court certified family law mediators, those mediators that settle cases tend to get booked up. Don’t wait until December to schedule mediation. Set it up early.

Collaborative Law

Collaborative law gives both attorneys and clients a more innovative and holistic, non-adversarial way to resolve family law cases. Although the collaborative law process started to take in Florida within the last decade, it was never part of the statutes continued, next page
governing family law until this past year. After a long and well fought out and thought out battle by tenacious members of the Family Law Section, the Florida Legislature finally enacted the Collaborative Law Process Act, encompassed in F.S. §61.55 through §61.58 (2017)

The act’s purpose is set forth in F.S. §61.55, which states:

61.55 Purpose.—The purpose of this part is to create a uniform system of practice for the collaborative law process in this state. It is the policy of this state to encourage the peaceful resolution of disputes and the early resolution of pending litigation through a voluntary settlement process. The collaborative law process is a unique nonadversarial process that preserves a working relationship between the parties and reduces the emotional and financial toll of litigation.

However, the collaborative process has not been widely used because it does have some elements that the family law practitioner, who has been trained in and continually employs the adversarial process, may find unattractive. For example, because the goal is to avoid conflict, parties agree to utilize one expert in various disciplines that may be needed in a case. For example, they select one therapist or mental health professional, one appraiser, one forensic accountant and one business valuator. During the collaborative process nobody goes to court. In other words, motions are not filed and hearings are not set. The parties simply work together to resolve the issues in the case.

There is one exception where the parties may proceed to court even during the collaborative process. F.S. §61.57(8) provides if the parties consent that a party may “request(s) a tribunal to approve a resolution of a collaborative matter or any part thereof as evidenced by a signed record.”

Other aspects of a collaborative case that are unique involve both the beginning and the end of the case. A collaborative case typically commences prior to either party filing a petition for dissolution or other family law action, but may begin even after an action is filed. Fla. Stat. §61.57(1). The collaborative case commences once the parties and counsel enter into a collaborative law participation agreement, which spells out the terms of the collaborative process.

Similarly, the statute also spells out when the collaborative process concludes. Fla. Stat. §61.57(3)(a-c). Obviously, the desired results are that it ends, as defined in the statute, when the matter is resolved.

Nonetheless, the collaborative process does not waive a party’s right to proceed in circuit court. The process can also terminate when either party chooses to do so, subject to compliance with the statutory requirements set forth in F.S. §61.57(4)(a-f). At that juncture, the parties would have to return to the more traditional methods of resolution, and both attorneys are required to cease representing their clients and clients must look to obtaining other attorneys. Although this seems to be detrimental to both the clients as well as their counsel, if everyone goes into the process with the understanding that they want to avoid the time, acrimony and expense that is devoted to the adversarial process, this additional requirement of the collaborative process provides even more motivation to resolve the case. Given that the clock is ticking to preserve the alimony tax deduction, think about employing the collaborative process in the next case you begin, or even converting a pending case to the collaborative process.

Keep in mind that F.S. §61.58 provides that the collaborative process is confidential. The confidentiality aspect may be an appealing alternative to those with high profile clients or simply those who value their privacy. This is just one more benefit to consider in using the collaborative process.

**Arbitration/Voluntary Trial**

Another out-of-court option that still follows the traditional adversarial model and one that is less frequently employed is the arbitration process.

F.S. §44.104 (2017), provides for voluntary binding arbitration and voluntary trial resolution. Like the collaborative process, a court cannot order arbitration or voluntary trial of a family law matter. Further, arbitration cannot be used in matters involving child custody, visitation or child support. Fla. Stat. §44.104(14).

However, in those dissolution actions where the year-end deadline is looming and it is unlikely that a trial date would occur before that deadline the arbitration or voluntary trial process may present an expedited alternative. For those who embrace the adversarial process in resolving a case, or for those whose clients want their proverbial “day in court” but would have to wait until next year to get it, the arbitration or voluntary trial still provides a vehicle for this process.

Use of arbitration or voluntary trial also requires a written agreement between opposing parties. Again, as with the collaborative process, the agreement may be entered into either before litigation commences or after. Utilizing this process even permits the parties to determine a method to select the arbitrator (provided the qualifications of the arbitrator comply with F.S. §44.106) as well as the method to select the trial resolution judge. The only qualification for selection as a trial resolution judge is that the attorney must be a member of The Florida Bar in good standing for more than five years. Fla. Stat. §44.104(2) (2017). Compensation for the arbitrators and voluntary trial judges is based on the agreement of the parties and the arbitrator/voluntary judge.
Fla. Stat. §44.104(3).

The discovery process is conducted through the chief arbitrator or the voluntary resolution judge, who, at either party's request, is empowered to issue subpoenas for the production of documents and the attendance of witnesses. Upon failure of the parties or witnesses subpoenaed or upon the failure of documents to be produced, the arbitrator or trial resolution judge may also enforce the subpoenas as they would be enforced by a circuit judge. Further, the proceedings are conducted in accordance with the rule of court. Fla. Stat. §44.104(7). The Florida Rules of Evidence also apply to these proceedings. Fla. Stat. §44.104(9).

Participants in an arbitration or voluntary trial resolution do not waive all appellate rights, but these rights are certainly more restrictive than a traditional trial proceeding. Once an arbitrator's decision is rendered, a party may appeal a voluntary binding arbitration, but this appeal is not de novo and is limited to:

(a) Any alleged failure of the arbitrators to comply with the applicable rules of procedure or evidence.

(b) Any alleged partiality or misconduct by an arbitrator prejudicing the rights of any party.

(c) Whether the decision reaches a result contrary to the Constitution of the United States or of the State of Florida.

Fla. Stat. §44.104(10).

Further, either party may file a petition for entry of a final judgment to enforce the voluntary trial judge’s decision. After the final judgment is entered a party may file an appeal, but the factual findings, as determined by a voluntary trial judge, may not be appealed.

Fla. Stat. §44.104(11).

Conclusion

As the calendar moves forward, and as family law attorneys look for a way to resolve cases before the tax break on alimony fades into the shadows, the alternatives to traditional court proceedings become even more appealing. With the options outlined in this article, there is likely one method that will fill the needs of a variety of clients and cases. It is just a matter of attorneys going outside their routines and comfort zones to find a method that best serves particular clients. These alternatives are worth exploring even once 2019 rolls around and beyond as the courts continue with backlogged dockets and attorneys look for more effective and efficient ways to serve clients.

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Tracking Devices and Applications: A New Frontier in Family Law

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Your client’s spouse comes home late, seems distracted and is acting in a strange and secretive manner. Maybe there are unexplained late-night calls or text messages. Your client may even suspect that his or her spouse is having an extra-marital affair or hiding assets. Or, your client, in the middle of a highly-contested divorce, is told by her 7-year-old child that the other parent knew where they went over the weekend even though that parent was not with your client or the child.

There are probably countless times when a client expresses sincere concern that he or she is being followed by the other party. It is not the first time this author has heard a client cry “How does he know? Is he following me? You need to stop this!”

If the client comes to you with this problem, it automatically becomes your concern! While it may seem to be an extreme response, it is critical to appreciate how technology has made it very simple for one party or parent to spy on or track the other.

Prior to the advances we currently see with mobile technology, it was not uncommon for parties to hire private investigators to follow or collect information on the other spouse. Today, a simple application can allow a party to track and monitor another party’s Facebook account, Instagram, e-mails and text messages, or obtain information from one party’s cell phone or computer. You should even be concerned that key logging software may have been installed on your client’s computer, which tracks every keystroke made.

The sad truth is, even children may be used by the other spouse as a means of tracking. Innocently or not, every parent has the ability to use and access their minor child’s technology, either through the child’s phone, the car the child is driving or even a small everyday device that was given to the child to track the child and the other party to see what they are doing.

Fortunately, the Florida Legislature made great strides in attempting to curtail the use of tracking technology and tracking applications, making the use of such devices and applications potentially criminal.

Most of the criminal statutes involving electronic and telephonic tracking as they are used for investigative or monitoring procedures involve, or only apply to, law enforcement entities. The Florida Legislature showed great concern that individuals themselves are easily able to download software on another individual’s device to monitor activity on the phone, including “messages, emails, websites visited and saved contacts, in addition to tracking a device’s location.”

F.S. §934.425 was created to “prohibit a private individual from installing a tracking device or tracking application on another person’s property without the other person’s consent.” F.S. §934.425 addresses when the use of a tracking device or application is criminal. There is also a specific direction with respect to the use of tracking devices or applications on minor children’s property. This statute, enacted on October 1, 2015, is underutilized by practitioners in family law as evidenced by the lack of any published decisions. It is truly a new frontier.

The statute contains very clear language and prohibits the use of tracking devices or applications on an individual’s device or minor children’s property. If a party is unaware that there is a tracking device or application on his or her own property or that of his or her minor child, then the individual who installed the device or application has violated the statute.

If there was consent between the parties to use the installed tracking device or application, then the use of said device or application was not in violation of the statute. If a party violates this statute, then the individual can be convicted of a second-degree misdemeanor punishable by up to 60 days in county jail and a $500 fine.

For family law practitioners, it is important to understand the specific application of this statute in divorce or domestic violence proceedings. If the parties/parents consented to and installed a tracking device or application prior to the filing of a petition for dissolution of marriage or petition for an injunction for protection pursuant to the various statutes, then that consent is deemed revoked upon the initiation of either proceeding, and the tracking device or application may not be used by either party on the other’s property or the minor child’s property unless the consent is reestablished.

The Florida Legislature went so far as to delineate four situations in which a parent has not violated the statute for installing a tracking device or application on a minor child’s property. They are as follows:

1. The parents or legal guardians are lawfully married to each other
and are not separated or otherwise living apart, and either parent or legal guardian consents to the installation of the tracking device or tracking application;

2. The parent or legal guardian is the sole surviving parent or legal guardian of the minor child;

3. The parent or legal guardian has sole custody of the minor child;

or

4. The parents or legal guardians are divorced, separated, or otherwise living apart and both consent to the installation of the tracking device or tracking application.6

It should be noted that no exemption exists that would allow an owner or lessee of a motor vehicle to attach or use a tracking device or application when a third party uses the vehicle. Therefore, if your child is driving your car, that is not an excuse to permit the installation of tracking device or application on your own car.7

While this statute provides significant barriers to the improper use of a tracking device or application, there is still some room for improvement. The first concern is the lack of a definition of what is a minor child’s property. While this may seem somewhat self-explanatory, who actually owns the phone that the child uses? It can be argued that the phone primarily used by the minor child is the minor child’s property, however, it would not be a surprise to see this issue addressed in future case law.

A second concern involves preinstalled tracking applications. It is not so much a concern of the individual’s property, but rather, the minor child’s. F.S. §934.425 addresses the specific act of installing tracking devices and tracking applications rather than activating the device or tracking program. Therefore, there is an argument that the activation and use of such applications such as Find My iPhone, Android Device Manager, Find Friends and the like would not be a violation of the statute. Again, this is an issue that most likely will be addressed in future case law.

At the present time, the Florida family law statutes and rules do not reflect reciprocal language. Parenting plans need to contain language to overcome whether there is actual consent to use tracking devices and applications, as well as allow the courts to use civil sanctions against the parties. There are efforts underway, through The Florida Family Bar Law Section, to have this accomplished and help further navigate this new frontier.

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Endnotes

1 Fla. H.R. Comm. on Judiciary, HB 197 (2015), Staff Bill Analysis 3 (final June, 15, 2015)

2 Id. at 1.

3 Fla. Stat. § 934.425(2)

4 Fla. Stat. § 934.425(5); See also Fla. H.R. Comm. on Judiciary, HB 197 (2015), Staff Bill Analysis 1 (final June, 15, 2015)

5 Fla. Stat. § 934.425(3)(a)-(b)

6 Fla. Stat. § 934.425(4)(b)(1)-(4)

7 Fla. Stat. § 934.425(4)(e)
Health and Wellness and Parenting

Laura Davis Smith, Esq.
Coral Gables

It is a Saturday, just about one o’clock in the afternoon, and I am taking a break from cooking and decluttering. My husband, Mark, and sons, Connor (15) and Brady (12), are away for the day at Boy Scout Merit Badge College, and I have the house all to myself! The house is quiet but for the Essential Michael Jackson playing from my laptop, and the occasional barking frenzy of my Yorkie-mix rescue. I have been tasked to write a piece on “Health and Wellness and Parenting.” Since being appointed by Section Chair Nicole Goetz, as chair of the section’s Ad Hoc Health and Wellness Committee, I have been trying very hard to take charge of my own health and wellness. It is far more than a juggling act.

For my self-care, it is critical that I exercise. I have seen a distinct positive difference in my mood when I exercise versus when I do not. I have a familial tendency toward diabetes, with my mother in end-stage renal dialysis; I have hypothyroidism; and I have struggled throughout my life with depression and anxiety; so it is critical that I incorporate regular exercise into my life. It makes me less anxious, it enhances my positive thinking, and it has kept my physical health in good shape. I have found a fantastic women’s only gym that offers an hour long full-body workout, with amazing coaches. In order to fit the exercise into my day, I wake up at 4:30 in the morning so I can make it to my 5:30 a.m. class several times a week, and I rarely miss the 7:30 a.m. classes on both Saturday and Sunday each week. It has become an essential part of my self-care, and I encourage you to make sure that you are taking time to care for your physical health through exercise. It is truly the best gift we can give ourselves.

In fact, Dr. Bess Marcus, professor of psychiatry and human behavior and the director of the Centers for Behavioral and Preventive Medicine at the Miriam Hospital and Brown Medical School in Providence, Rhode Island, suggests that if a person wants to work exercise into her day there are some steps she needs to take: “Keep track of what you are doing. Make plans and a commitment. Set reasonable short-term goals and set the bar low. Exceeding your goal will boost your confidence….The more specific the goals, the better. Social support also helps (particularly for women). A workout buddy, someone to support you or make it so you can exercise, can be extremely useful.” I know that my “gym ladies” make my getting to the gym more hit than miss. My friend Mercy texts both me and our friend Julie at about 4:45 in the morning to ensure that we get up and go. We call ourselves “the three bears” and, when one of us is missing, things just aren’t quite right. The accountability is a huge motivator for me, and also for them.

I also try to make sure that I get the right amount of sleep. Sleep is not a luxury! It is required for us to recharge our bodies. “Regularly sleeping [fewer than seven hours a night can result in ‘adverse health outcomes, including weight gain and obesity, diabetes, hypertension, heart disease and stroke, depression and increased risk of death.” I used to think sleeping as little as possible was the sign of strength; it is really just plain stupid. If we do not honor our need to rest, we will end up sacrificing our health. I had a lot of difficulty trying to get back to a normal sleeping schedule. I consulted with my doctor who suggested I stop exercising at night, and try mornings instead, hence the 5:30 a.m. classes. It worked! I was never a morning exercis-er, and certainly not THAT early, but when I made the commitment to rise early and sweat out my stress at the gym, it became far easier to fall and stay asleep. On those occasions when I can-not easily drift off, supplementing with magnesium works well for me, and, there is always a Law and Order episode on television somewhere.

It is also really important to my self-care that I surround myself with people who love me, and who really and truly care about my wellbeing. My psychologist-husband, Mark, and our kind and smart and challenging sons together form the center of my world. After I get home from the gym at 6:30, it is time to shower, get dressed and ready to drive Brady to the bus stop (his bassoon case is HUGE!), wish Connor a wonderful day as he heads across the street to catch a ride to school with his friend, Andy, and pass Mark on his way to the office to meet an early client. By 8 a.m., I have already received endorphins from exercise, may have already gotten a bunch of high-fives and sweaty hugs from my “gym ladies” and the trainers at the gym, and, have for sure smooched my three guys’ sweet faces. I kiss the two doggies goodbye and head to my office 1.4 miles away where I get to spend my workday with my law partner-sister from another mister, Sonja, and with Arnold, one of my dearest friends of all time. The three of us have created a space of peace and warmth, not only to provide comfort to the clients who come through our door, but also for us. It is a safe and supportive place to be, and I think we are all
more productive when we are calm and relaxed.

On Wednesdays and Sundays, I meet up with my church family — Coral Gables Congregational Church (CGCC) is my second home. We share a meal and fellowship on Wednesday evenings, and the boys play in the bell choir while I may knit with other members of the church’s Prayer Shawl Ministry, or catch up on work, or just chat with those I love. Then, on Sundays, I get my spiritual food for the week ahead, and lots and lots of hugs are exchanged. (Any of you who know me know that hugs are a necessary part of my life!) I find peace at CGCC. While stationed in a pew between people whom I love and who love me, I am grateful and centered and calm.

As I get older, my circle gets smaller and tighter. It turns out that the act of selectively shrinking my circle to create a social support network that includes those people who really and truly care about me is an important skill that helps with stress management. One’s social support network is an important psychosocial resource. Psychosocial resources include self-esteem, optimism, a sense of mastery and active coping skills. If a person lacks strong psychosocial resources, stress can take a significant toll on psychological well-being, stress responses, and physical health. On the other hand, where a person has a good set of psychosocial resources she will also likely have lower biological responses to stress like lower blood pressure and cortisol levels. In short, it is good to have friends.

In order to protect our health and wellbeing, I highly recommend that we all incorporate regular exercise, sufficient sleep and a solid set of true friends into our busy lawyer-lives. We each individually benefit from the endorphin release, the rest for our weary minds and bodies and the presence of a strong social support system within which we can be our true selves. For me as a parent, it feeds my soul to know that my sons see me doing the best that I can in the self-care department, and I know they are proud of me.

Laura Davis Smith, managing partner of the Coral Gables marital and family law firm of Davis Smith & Jean, LLC, is the Immediate Past Chair of The Family Law Section of The Florida Bar. Admitted to the Massachusetts, Florida and Georgia bar associations, she is Florida Bar board certified in marital and family law and is a Fellow of the American Academy of Matrimonial Lawyers, Florida Chapter.

Endnotes

3 Brafford, Anne, Attorney Well-Being Committee, Law Practice Division, American Bar Association (2016).
The Summary Judgment Process In Domestic Violence Cases

John W. Foster, Esq., and Alessandra B. Manes, Esq.

Orlando

Introduction. Under F.S. §741.30(1)(a), a person who is either a victim of domestic violence or who has reasonable cause to believe that he or she is in imminent danger of becoming a victim of any act of domestic violence may file a sworn petition for an injunction for protection against domestic violence. For many domestic violence cases, particularly those in which an ex parte temporary injunction is issued, the final hearing may occur within 15 days. See Fla. Stat. §741.30(5)(c). The relevant rule for summary judgment requires that the movant must serve his or her motion for summary judgment at least 20 days before the time fixed for the hearing on said motion and must also serve at that time any summary judgment evidence on which the movant relies that has not already been filed with the court. Fla. Fam. Law R. P. 12.510(c). Thus, the summary judgment process is not available for many domestic violence cases due to the time constraints of such cases; however, for some domestic violence cases in which extensions or continuances are granted, there may be sufficient time to file and serve a motion for summary judgment. For these cases the question becomes, “Is the summary judgment procedure appropriate in domestic violence cases?”

Discussion. The Florida Family Law Rules of Procedure expressly apply to all actions concerning family law matters, including injunctions for protection against domestic violence. Fla. Fam. Law R. P. 12.010(a)(1). Rule 12.510 specifically governs summary judgment proceedings in family law matters. Rule 12.510(c) states, in pertinent part: “The judgment sought shall be rendered immediately if the pleadings and summary judgment evidence on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Thus, under the relevant rules, it would appear that for domestic violence cases in which extensions or continuances are allowed and a motion and summary judgment evidence are timely filed and served, the summary judgment procedure is an appropriate method for resolving the case.

Some may argue that the parties of a domestic violence case must be accorded an evidentiary hearing and that therefore summary judgment in a domestic violence case fails to comport with due process. There are a number of cases that address the issue of due process within the context of domestic violence cases. See e.g., Johns v. Johns, 101 So.3d 377 (Fla. 1st DCA 2012); Furry v. Von Arb Rickles, 68 So.3d 389 (Fla. 1st DCA 2011); Semple v. Semple, 763 So.2d 484 (Fla. 4th DCA 2000). Such cases, however, are inapposite. More specifically, these cases do not involve the summary judgment process. Instead, they typically involve evidentiary hearings that were conducted by the lower courts in a deficient manner. See Johns, 101 So.3d at 378 (“[the appellee] was allowed to testify and present witnesses, but [the appellant] was not provided the opportunity to testify about the allegations in the petition or present witnesses.”); Furry, 68 So.3d at 390 (“…the court began the hearing by informing the parties that they had a limited amount of time to present their cases. The court then conducted all questioning of the parties and virtually all questioning of the other witnesses that testified.” Also, the court did not allow the parties’ counsel to present relevant evidence or to conduct relevant direct/cross examinations.); Semple, 763 So.2d at 486 (“…the trial court rendered its decision…before appellant’s counsel ever had the opportunity to cross-examine appellee.” And, then, after the lower court gave appellant an opportunity to cross-examine appellee, the court cut said examination short.).

In cases in which a party moves for summary judgment, the movant must timely file and serve any summary judgment evidence that the movant relies upon that has not already been filed with the court. The adverse party then has the opportunity to timely file and serve any summary judgment evidence on which he or she relies to oppose the issuance of summary judgment. Fla. Fam. Law R. P. 12.510(c). As articulated by the Florida Supreme Court:

A movant for summary judgment has the initial burden of demonstrating the nonexistence of any genuine issue of material fact. But once he tenders competent evidence to support his motion, the opposing party must come forward with counterevidence sufficient to reveal a genuine issue. It is not enough for the opposing party
merely to assert that an issue does exist.  

Id.

After the parties have timely filed their respective summary judgment evidence, the domestic violence court should then hold a hearing, during which the arguments of the parties will be heard and the court will determine whether the movant demonstrated the nonexistence of any genuine issue of material fact or whether the adverse party has sustained his or her burden of producing counterevidence sufficient to reveal a genuine issue.

This procedure comports with due process. Carmona v. Wal-Mart Stores, East, LP, 81 So.3d 461 (Fla. 2d DCA 2011). In Carmona, the lower court issued a summary judgment against the appellants. On appeal, the appellants asserted that they were denied due process at the summary judgment hearing. The appellate court affirmed the lower court’s summary judgment, finding that the appellants’ right to procedural due process had not been violated because the appellants had been given notice of the summary judgment hearing and had a full and fair chance to argue their case. Id. at 462. The Second DCA in Carmona specifically explained:

Here, the [appellants] were afforded both proper notice and a meaningful opportunity to be heard….

***

…the hearing was conducted in a fair manner appropriate to the nature of the proceeding. Each party spoke for a comparable amount of time during the thirty-minute hearing. Each party was allowed more than one opportunity to argue its position, and both did so. The judge asked [the appellant] questions to help guide his argument and even explained the procedural and legal aspects of the case to him. …

Id. at 464.

Generally, in civil actions, each party is entitled to his or her day in court. As Carmona reflects, that “day in court” may appropriately be a summary judgment hearing rather than a trial where the summary judgment procedural rule is followed, and both parties are afforded proper notice and a meaningful opportunity to be heard. There is no good reason to create an exception for domestic violence actions where proper notice can be and is given and the parties are given a reasonable opportunity to be heard. And, where the pleadings and summary judgment evidence on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law, then summary judgment must be entered under Fla. Fam. Law R. P. 12.510.

John Foster has been a Florida attorney since 1981. John is active in the Family Law Section, currently serves on the Executive Council and the Legislation Committee, and currently co-chairs the Parentage Committee and the Health & Wellness Committee. He has been named as one of America’s Best Lawyers, as Florida Legal Elite for Marital and Family law by Florida Trend, as a Florida “Super Lawyer,” as one of Orlando’s Best Lawyers by Orlando Magazine and as a top Orlando lawyer by the Orlando Home and Leisure Magazine.

Alessandra Manes was admitted to The Florida Bar in 2015 and became trained in collaborative law in 2017. She is an active member of the Family Law Section and the OCBA Young Lawyers Section. Alessandra focuses her practice primarily on family law matters and also handles immigration matters. As a native of Brazil she is fluent in Portuguese.

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The Parenting Statute

Elisha D. Roy, Esq.
West Palm Beach

I sat down to write this article more times than I really care to mention. Twice it was written and my computer crashed (two times!), and I lost the articles. I then dictated the article on a fancy app and it literally did not take any of the 15 minute dictation. I was really beginning to believe that I was not meant to write this article. I appreciate it, do not get me wrong. Writing an article about the 10th anniversary of the rewrite of F.S. §61.13 (hereinafter “the parenting statute”) is an honor, but it was also incredibly difficult.

By way of background, the rewrite of the parenting statute came from an equal time-sharing committee established when Evan Marks was chair of the Family Law Section. A cross section of members, other lawyers and mental health practitioners alike spent countless hours investigating time-sharing around the state and the country and psychological studies on child development and case studies to determine that Florida has it right, specifically: There should be no presumption for any time-sharing schedule. Instead, each family should be handled individually and time-sharing should be appropriately based on that family.

However, it was abundantly clear there were unwritten presumptions across the state. Presumptions that dads only get weekends, presumptions that kids should be with moms notwithstanding the abolishment of the tender years doctrine, presumptions that Thursday is the appropriate overnight, etc. These presumptions came in the form of model time-sharing schedules, different ones across the state, and sometimes dependent on the judge in certain counties. These findings, coupled with a clear societal shift to more two-working parent households, made it clear that our parenting statute could use a little revamp, which we did. After failed attempts in 2006 and 2007, the new parenting statute finally became law in 2008.

I feel like I should be elated. I was one of many who worked countless hours to see that happen, and I was fortunate enough to be in the legislature every week for about three years fighting for it to happen. I am, however, not elated. In my discussions with practitioners around the state, it would seem that sentiment is not mine alone. But why? I have thought about this a lot, and I see it as a combination of things, things I am not sure can be fixed with any level of legislation.

If we take parenting issues at their most basic, the ideal would be that we look at each family and determine what schedule is best for the child based on that family’s life. That sounds fantastic. It would mean there is no baseline. It would literally mean, as the statute currently provides, there is no presumption in favor of either parent or any particular time-sharing schedule. As such, if you have a household where both parents work “regular” full time-jobs, can communicate with one another and live relatively close, equal time-sharing could likely work so long as the children can function with the transitions. That is not, however, always the case. Instead, one parent may work long hours, nights or irregular schedules and the other parent may work limited hours or from home. Does that mean it is in the child’s best interests to be with the stay at home working parent more of the time? When does the irregular scheduled parent see the child now? When there are two households, how will that parent see the child? And, as I start to ask these questions and consider the questions discussed in consults, and even review the factors ... what it really seems we are seeking out is what works best for the parents of this family, not necessarily what is in the children's best interests, which is supposed to be our guiding beacon.

I believe we have created a system, in an effort to avoid unnecessary litigation or any litigation if feasible in dealing with kid issues, that relies on the models, that requires us to have a baseline. So that we can have an efficient system for our clients, compromises are made and unwritten presumptions naturally occur. I cannot say I believe this was intentional; no one person or group set out to create this process, but I believe it is the natural evolution of dealing with parenting issues in the context of a break up. Sitting here, ten years after the rewrite, new presumptions have come, different across the state and often across counties, equal time-sharing, at least 40 percent of the overnights, often regardless of the distance between the parties, the relationship between the parties or what may actually work best for each family.

I now find that I am telling most clients in consults that somewhere between 40-60 percent of the overnights is what they should expect absent egregious circumstances. The case law does not provide much in the way of egregious circumstances that warrant limited time-sharing, other than those things we know, significant alcohol/drug/mental health issues that require treatment and effect parenting. Even then though,
there must be a plan in place to allow the parent to work back to a normal, unrestricted time-sharing plan.

So, as I sit here ten years later, trying for what I hope is the last time to write this article, I do believe we are similarly situated to where we were in 2004 when this process started. The unwritten presumptions may be different, but we are faced with them nonetheless. It seems that in order to avoid litigating every family law case, it is necessary to have some type of baseline, so we can guide our clients on what to expect and so we can properly counsel them on the law. It may be necessary for the outliers to be litigated, which is unfortunate, but this concept of a baseline may just be the nature of how to effectively and efficiently deal with parenting issues in the court system.

**Elisha D. Roy** is a Florida Bar board certified marital & family law attorney and a fellow of both the American Academy of Matrimonial Lawyers and International Academy of Family Lawyers. She operates her boutique family law firm as a partner in the prestigious West Palm Beach law firm Ciklin, Lubitz & O'Connell, specializing in complex financial and child related case work.
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