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Statements of opinion or comments appearing herein are those of the authors and
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MS Word format is preferred for documents, and jpeg images for photos.
It is hard to believe how fast the year has passed, but at the time that I am writing this message, my term is almost over. I have appreciated the opportunity to serve as Chair of the Family Law Section of The Florida Bar for the 2017-2018 Bar year, the 44th year of its existence, and I am proud of the Section and its accomplishments this year. As a Section, we continued to aggressively promote not only the substantive and procedural mastery of family law, but the ethical and professional restraints inherent and unique to our practice area. At the same time, we promoted access to justice and appropriate advocacy through education, outreach, and service. In addition, we worked to promote appropriate advocacy to our Section volunteers, to our members and to every practitioner handling a family law case.

One of our biggest achievements was the full-scale revision of the “Bounds of Advocacy" publication by our ad hoc Bounds of Advocacy Committee. The Committee, comprised of some of the most experienced family lawyers and professionals throughout the state, including active and retired judiciary members, revised the Section’s 2004 publication to reflect changes in the law, ethics, and technology. This publication is an important one that highlights and discusses ethical issues unique to the practice of family law. It is a critically important document that will assist any lawyer and judge handling a family law matter. A copy of the Bounds is now available on our website www.familylawfla.org in electronic format, and it was mailed in hard copy to our Section members free of charge.

We did not stop there with our educational efforts. Our Publications Committee has worked to continue to produce timely and informative articles on key or emerging issues for The Florida Bar Journal, and they and our valued guest editors have worked tirelessly to produce great content for this quarterly publication, the Commentator. While our Publications Committee worked to address our educational efforts in print, our Continuing Legal Education Committee in conjunction with our substantive committees and other volunteers produced courses throughout the year for our members on a range of topics including parenting plans, domestic violence, tax, enforcement of equitable distribution and recent legislation. Our retreats had cutting edge educational components, including presentations on the impact of medical marijuana on parenting plans and the role of cognitive bias in case resolution. We put together our biannual not for profit trial advocacy program with the help of over 60 volunteers, including law students from the St. Petersburg area. This biannual program is an educational opportunity second to none as it not only provides attendees a trial for purposes of board certification, but it provides lawyers of all skill levels a chance to hone their trial skills in a small group setting with both formal instruction and feedback from experienced attorneys who are board certified in marital and family law. We had an incredible event this year, and we are already in the planning stages for our 2019 program! This year, as in every other, we produced our Marital and Family Law Review Course, a comprehensive survey review course that is co-presented with the AAML, Florida Chapter. The course sold out this year with over 1,600 attendees, and we had an unforgettable event with the help of our many talented speakers. This event is one of the largest family law CLE presentations in the nation, and to further its reach, the Section generously offered 12 scholarships for selected individuals to attend the program. As a Section, we voted to pay for and to provide these scholarships not only to assist attorneys who without financial assistance could not attend, but to pay for scholarships for hearing officers and magistrates, who actively decide cases for Florida’s families. With the continued goal to reach more family law practitioners, to encourage service within the Section and to otherwise educate our members, we continued the monthly publication of our section newsletter FAMSEG. Similarly, in the hopes of extending information and encouraging participation, we also sponsored the FLAFCC organization, as well as participated in the Kozia Mentoring Picnic. Finally, we served Florida’s families through educating our members and practitioners both new and old, educating ourselves as a group, and by being a platinum-level sponsor for The Florida Bar Diversity & Inclusion Committee's Path to Inclusion Symposium.

In addition to serving our members through education, we served our communities and Florida’s families. As an organization, we committed extensive time and resources to successfully promote legislation to end underage marriage, to pass the equitable distribution bill, and to defeat bills that would harm Florida’s families. Finally, and significantly, the Section was once again able to...
This is the last edition of the *Commentator* during Nicole Goetz’s year as Chair of the Family Law Section. Nicole’s theme of appropriate advocacy with a focus on promoting the mastery of substantive, procedural and ethical rules that are unique to marital and family law has been a guide for all our publications this year. This edition of the *Commentator* is no exception and includes articles that address unique, substantive issues in the areas of bankruptcy, enterprise/personal goodwill in business valuations, attorney’s fees and military pensions. As this fiscal year comes to a close, we want to thank everyone who made each of the Family Law Section’s publications materialize in fine form. In particular, we want to thank Heather Apicella and David Hirschberg as Co-chairs of *The Florida Bar Journal*, Ronald Kaufman and Eddie Stephens as Co-chairs of FAMSEG, the Section’s monthly digital newsletter, and Belinda Lazzara and Tenesia Hall as Co-chairs and Editors of the *Commentator*. In addition, this year we have been very fortunate to have a wonderful Guest Editor for each edition of *The Commentator*, namely Anya Stern, Shannon Carlyle, Alicia M. de la O, and Catherine Rodriguez. These folks have done yeoman’s work with the utmost professionalism.

A big thank you goes out to our Florida Bar Administrator, Gabrielle Tollok, and layout designer, Donna Richardson. In addition, we also extend heartfelt thanks to the Family Law Section’s Marketing Consultant, Lisa Tipton, for all her assistance with sponsorship, social media and editing. There is no doubt that the heart of every publication resides in its authors so last, but certainly not least, we thank all the authors for staring down a blank piece of paper (or monitor screen) and helping to educate us all and stimulate our sense of curiosity in the process.

We simply could not have asked for a better team of people with whom to work and we are very grateful to have had the opportunity to contribute to the Family Law Section through its publications. As we pass the baton to the next chairs of the Publications Committee, we know they will continue the tradition of producing quality publications for the members of the Family Law Section.

We enjoyed seeing many of you during the Family Law Section Meetings at the 2018 Florida Bar Annual Convention in Orlando and we wish everyone a happy summer!

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

It’s hard to believe that another Bar year is nearing an end and the Family Law Section is already beginning the transition to next year’s leadership. Co-chairing the Commentator was challenging, yet rewarding. I underestimated the volume of work that goes into four editions per year. This publication would not be possible without all our authors and guest editors, my veteran co-chair, Tenesia Hall, our PR/Marketing Consultant, Lisa Tipton, and our Publications Co-Chairs, Lori Caldwell Carr and Debra Welch. We want to especially thank our Summer Guest Editor, Catherine Rodriguez, who took on this edition while was simultaneously studying for and taking the board certification exam. She did a fantastic job! If you are interested in getting more involved with The Commentator, we encourage you to contact next year's Chair, Anya Cintron Stern.

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
By Catherine M. Rodriguez, Esq., Miami Beach

What would you do if you knew you could not fail?
— Robert Schuller

I have always been amazed at lawyers who can juggle the practice of law, family and Florida Bar activities—and do all three things well. In addition to thanking Commentator Co-editors Tenesia Hall and Belinda Lazzara for their guidance and support, I want to recognize them as examples of lawyers who juggle all three areas well. Other lawyers who demonstrate the ability to balance work, family and Bar participation include Chair Nicole Goetz and Publication Committee Co-chairs Lori Caldwell-Carr and C. Debra Welch.

As guest editor, one of my responsibilities was to find volunteers to write articles. I want to thank the lawyers and PR specialist who volunteered to take the time from their busy practices and families to write articles for this issue: Matthew Lundy, Paul Orshan, Sarah Kay, Josh Bickman, Michael Sack Elmaleh, Lisa Tipton, Howard Rudolph, Ashley Blalock and David Manz and Florida Bar liaison Gabrielle Tollok for her help in getting this issue to print.

Participating in the Family Law Section as guest editor has been a rewarding experience. I have enjoyed working with and learning from my colleagues as they share their expertise. I learned substantive legal, technical and marketing information from the authors as well as connecting with family law lawyers across the state. Thank you for the opportunity and I encourage others who are interested in getting involved to write articles and/or serve as guest editor of the Commentator.
Family Law Section Publishes New ‘Bounds of Advocacy’ Professional and Ethical Practice Guidelines

If you are a member of the Family Law Section, you should have received a copy of the recently published “Bounds of Advocacy.” This guide is intended to lead Florida lawyers through the quagmire of professional and ethical dilemmas that are unique to the practice of family law. The “Bounds of Advocacy” offers goals for professional cooperation, competence and advice, conflict of interest, fees and children. It suggests a higher level of practice than the minimum baseline of conduct required by The Florida Bar rules and spells out guidelines for situations that often arise in family law where the rules don't provide sufficient guidance.


2017-2018 Family Law Section Chair Nicole L. Goetz created the Family Law Section Ad Hoc Bounds of Advocacy Committee to update the guide to reflect recent and significant changes that impact the practice of Florida family law. The committee—active and retired members of the judiciary and some of Florida's most experienced family lawyers and professionals—revised the guide to capture not only changes in marital and family law, but in ethics, professionalism, social media and technology.

If you did not receive your copy of the “Bounds of Advocacy,” please contact Section Administrator Gabrielle Tollok at GTollok@floridabar.org.
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The New Equitable Distribution Statute: A Better Solution to a Thorny Dilemma

By David L. Manz, Marathon

On March 21, 2018 at 5:59 p.m., Governor Rick Scott signed HB 639, effectively abrogating Kaaa v. Kaaa, 58 So. 3d 867 (Fla. 2010) and creating a new methodology to measure the marital share of the passive appreciation of real property when a mortgage has been paid down during the marriage with marital funds.

HB 639, effective July 1, 2018, partially codifies the Kaaa decision by expressly including the passive appreciation of non-marital real property that may be distributed between the spouses if marital funds are used to pay down the property’s mortgage principal. However, the bill partially overrules the Kaaa decision in three important ways. First, the bill provides that a non-owner spouse does not also have to actively contribute to the appreciation of the home in order to be entitled to passive appreciation. Rather, it is sufficient that marital funds are used to pay down the mortgage. Second, the bill replaces the calculation method set out in Kaaa with a three-step calculation method incorporating a “coverture fraction” designed to measure the parties’ actual marital contributions in paying down the mortgage. Third, the bill does not require a finding of both active and passive appreciation in order for the court to distribute passive appreciation as a marital asset between the parties.

Additionally, if a party shows that application of the coverture formula would be inequitable under the circumstances, a court may decide to allocate the passive appreciation differently. Finally, with respect to any marital property that is equitably distributed, the bill authorizes the courts to recognize the time value of money in determining the amount of installment payments to be paid by one party to another. This may include requiring the party responsible for payments to provide security and a reasonable rate of interest or something similar.

The New Statute
F.S. §61.075(6)(a) 1 (c)

Paragraph (a)1 of F.S. §61.075(6)
Equitable distribution of marital assets is amended to read:

The New Statute
F.S. §61.075(6)(a) 1 (c)

Paragraph (a)1 of F.S. §61.075(6)
Equitable distribution of marital assets is amended to read:

V) The court shall apply the formula specified in this subparagraph unless a party shows circumstances sufficient to establish that application of the formula would be inequitable under the facts presented.

Applying the New Statute

While the statute is in accord with the holding in Kaaa that a non-owner spouse should be entitled to some portion of the passive appreciation on non-marital real property when the mortgage on a real property is paid down with marital funds, the new statute replaces the coverture formula set out in Kaaa. The new statute works as follows:

1. Determine that a parcel of non-marital real property is secured by a mortgage that was paid down during the marriage with marital funds;
2. Measure the mortgage principal paydown during the marriage,
riage. The mortgage principal paydown is itself a marital asset and is subject to equitable division (regardless of whether there has been any passive appreciation on the subject property);

3. Determine whether the subject real property has passively appreciated during the marriage;

4. Value the passive appreciation during the marriage of the subject real property by subtracting the value of the property on the date of the marriage or the date of acquisition of the property, whichever is later, from the value of the property on the valuation date in the dissolution action, less any active appreciation of the property during the marriage, and less any additional encumbrances secured by the property during the marriage in excess of the first note and mortgage on which principal is paid from marital funds;

5. Create a coverture fraction and multiply the passive appreciation by the coverture formula to determine the marital portion of the passive appreciation. The coverture formula is the core of the statute. The coverture formula is a numerator, defined as the total payment of principal from marital funds of all notes and mortgages secured by the property during the marriage, and a denominator, defined as the value of the subject real property on the date of the marriage, the date of acquisition of the property, or the date the property was encumbered by the first note and mortgage on which principal was paid from marital funds, whichever is later;

6. Determine the total marital portion of the property. The total marital portion of the property consists of the marital portion of the passive appreciation, the mortgage principal paid during the marriage from marital funds, and any active appreciation of the property during the marriage, not to exceed the total net equity in the property at the date of valuation.

7. The court shall apply the subject formula specified in this subparagraph unless a party shows circumstances sufficient to establish that application of the formula would be inequitable under the facts presented.

**Charting the New Statute**

Perhaps the most efficient application of the statute to a set of facts is to, as this writer would put it, to “chart it out.” As the *Kaaa* decision underlies the new statute, we will examine the facts there. In *Kaaa*, the parties were married for 27 years. They lived in a home purchased only six months prior to the marriage by the husband. During those 27 years, the home passively increased in value from its original purchase price of $36,500 in 1980, to $225,000 in 2007. When he purchased the home, the husband made a $2,000 down payment and secured a mortgage to finance the rest of the purchase price. The mortgage was paid by marital funds throughout the marriage, and at the time of divorce, the mortgage principal had been reduced by $22,279, leaving a $12,871 balance. Additionally, marital funds were used to add a carport, which increased the value of the home by $14,400. The home was refinanced several times during the marriage. Because the home was purchased prior to the marriage in the husband’s name alone, the home was determined to be his separate, non-marital property. Application of the facts in *Kaaa* to our chart would thus appear as follows:
The Kaaa Critique and the New Statute

Kaaa was problematic for three compelling reasons. First, the formula adopted in Kaaa, crafted by the Second District in Stevens v. Stevens, 651 So. 2d 1306 (Fla. 1st DCA 1995), used the mortgage at the time of the marriage in the numerator of the coverture fraction. That decision disregards the statutory requirements of F.S. §61.075(6)(a)(1)(b) that only the enhancement or appreciation created by marital labor or funds creates a marital asset subject to division. The Stevens coverture formula bears no relationship to the amount of the mortgage paid during the marriage, that is, “the work or efforts of the parties,” as required by statute. The impropriety of the formula is notable when a heavily mortgaged property is marginally repaid during the marriage. Under Kaaa, virtually all of the appreciation will be marital, simply because of the Stevens fraction, and not because of the parties’ efforts. Such a result is contrary to the philosophy in the cited statutory section, which is predicated on the requirement that the trial court find that there were “efforts or contributions of either party” before determining that the appreciation of non-marital property is marital. Second, the Supreme Court’s decision is internally inconsistent. In one section of the opinion, the Court concluded that passive appreciation “is properly considered a marital asset where marital funds or the efforts of either party contributed to the appreciation.” The Court then proceeded to contradict its own conclusion twice, by specifically mandating that a trial court must determine that the non-owner spouse made contributions to the property, and that “the trial court must determine to what extent the contributions of the non-owner spouse affected the appreciation of the property.” It was not clear in the Supreme Court decision that the efforts of either party were sufficient, or that a trial court was required to determine that the non-owner spouse directly made efforts or contributions affecting the value of the property. The opinion can arguably be read either way, as the Supreme Court specifically made both pronouncements; however, both cannot be true, as they are internally inconsistent. The statute is clear: F.S. §61.075(6)(a)(1)(b) states that marital assets include the “enhancement in value and appreciation of non-marital assets resulting either from the efforts of either party during the marriage or from the contribution to or expenditure thereon of marital funds or other forms of marital assets or both.” The case law from every district is in accord. To the extent that the Florida Supreme Court, in fact, meant to state that there needed to be a showing of the non-owner spouse’s efforts in improving the value of the property, that pronouncement is directly inconsistent with case law. There is a lack of record evidence of the wife’s efforts in Kaaa. The parties put in a carport. The case history does not indicate that she built the carport herself, but rather, generally states that the parties installed a carport. What if the wife in Kaaa did not contribute to the active improvement of the subject real property? Under the court’s decision in Kaaa, she is out in the cold.

Third, as we have noted, the Kaaa court mandated that in order to find a portion of the passive appreciation of non-marital property marital, two requirements must be met: 1) the mortgage was paid down during the marriage, and 2) there was active appreciation as well as passive appreciation. The latter requirement contravenes the intent of the statute and case law. Simply put, there is no support for the proposition that there needs to be a requirement that active appreciation be present for passive appreciation to be deemed marital, so long as there is a finding that a mortgage on non-marital property has been paid down.

The Result of the New Statute

Application of the new statute will result in an equitable allocation of the marital and non-marital components of the passive appreciation of the subject non-marital real property. It is based on fairness, as measured by the coverture fraction defined as the percentage of non-marital mortgage paid down during the marriage, compared to the fair market value of the subject property. This measure is the litmus test of fairness as it quantifies the “marital effort” during the marriage and applies that effort to parse out the marital portion of the total passive appreciation in the property. Critically, the new statute is in accord with existing statutory and case law principles that a non-owner spouse should not have to actively contribute to the appreciation of the home to be entitled to passive appreciation. Rather, it is sufficient that marital funds are used to pay down the mortgage. Additionally, the new statute does not require a finding of both active and passive appreciation for the court to distribute passive appreciation as a marital asset between the parties.

To conclude, then, Kaaa conflicted with long standing case law and statutory principles of fairness and equity and created an arbitrary coverture formula that led to inequitable results. The new statute fixes those inequities and is in evidence of the continuing evolution of equitable distribution in Florida.

David L. Manz is owner of The Manz Law Firm. David has been a member of The Florida Bar since 1988 and a member of the Alabama State Bar since 1985. He is Board Certified in Marital and Family Law by The Florida Bar and is a former Chair of The Florida Bar Marital and Family Law Board Certification Committee. David was Chair of The Family Law Section of the Florida Bar (2011-2012) and is a former President of the Florida Chapter of the American Academy of Matrimonial Lawyers (2010-2011). David regularly lectures statewide lectures and publishes frequently. David was the recipient of The Florida Bar Family Law Section’s Visionary award for 2018 and has been heavily involved in the Family Law Section’s equitable distribution agenda over the past decade.
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The Interplay Between Family Law and Bankruptcy: Practical Considerations and Practice Pointers for the Family Lawyer

By Paul L. Orshan, Esq., Miami

In some marital dissolution situations, financial difficulties or insolvency issues can lead to bankruptcy filings by one or both parties. It is vital for family lawyers to understand the issues that will arise in bankruptcy cases to ensure that proper representation can be provided to their clients, and to protect the lawyer’s rights to be paid attorneys’ fees that may be awarded. This article will provide a general overview of typical issues surrounding family law cases and what happens when bankruptcy cases are filed.

The Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA)

The Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) became effective on Oct. 20, 2005. BAPCPA made substantial changes to the existing bankruptcy code, particularly to those code sections that affect family law. The intent of the changes was protection for recipients of child support, alimony and maintenance. The most significant change was the creation of the Domestic Support Obligation (DSO). Before 2005, bankruptcy law made a distinction between property settlements (which may have been dischargeable under certain circumstances) and debts for support payments (which were, as now, non-dischargeable). With the enactment of BAPCPA, Congress eliminated certain affirmative defenses and expanded non-dischargeability to most property settlement and other debts incurred through divorce. In short, a marital dissolution obligation that is not in the nature of support and is incurred through a divorce judgment or separation agreement is non-dischargeable.

There are a number of reasons that these changes were made: Bankruptcy should not interfere, if possible, with the establishment and collection of ongoing obligations for spousal and child support; the Bankruptcy Code should define a DSO and all claims for DSOs should receive equal and favored treatment in the bankruptcy process; the continued payment of ongoing spousal and child support and family support arrearages should not really be affected when one spouse files for bankruptcy with minimal need for participation by support creditors in bankruptcy proceedings; and a debtor should be able to liquidate non-dischargeable debts to the greatest extent possible within the bankruptcy case and emerge from bankruptcy with the freshest start possible.

What is a Domestic Support Obligation (DSO)?

11 U.S.C. § 101(14A) of the Bankruptcy Code (the Code) states as follows: The term “domestic support obligation” means a debt that accrues before, on or after the date of the order for relief in a case under title 11, by reason of applicable provisions of—(i) a separation agreement, divorce decree or property settlement agreement; (ii) an order of a court of record; or (iii) a determination made in accordance with applicable non-bankruptcy law by a governmental unit; and (D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor or such child’s parent, legal guardian or responsible relative for the purpose of collecting the debt.

Priority of a Domestic Support Obligation - 11 U.S.C § 507(a)(1) and What to Do

The DSO has an elevated priority among creditors. A DSO must be paid before all other creditors (including the IRS) except for the trustee’s administrative expenses and claimants with security. If a lawyer believes that a client has a DSO, there are four important questions for the lawyer to ask: (1) What type of bankruptcy has been filed? (2) Does the automatic stay apply? (3) What is property of the estate? (4) Is it dischargeable?

continued, next page
The Bankruptcy Chapters (Individual)

An individual can file for bankruptcy protection under Chapters 7, 11, 12 or 13. A Chapter 7 is a liquidation by and entity or an individual, where a trustee is automatically appointed. A debtor with primarily consumer debts must pass a “means test” and the debtor gives up all nonexempt assets. A Chapter 11 is a reorganization, filed by an entity or an (usually formerly wealthy) individual. The debtor usually proposes a plan to continue operations and pay creditors over time. A Chapter 12 is for the family farmer or family fisherman. The debtor is an entity or Individual with regular annual income and a trustee is automatically appointed. The debtor proposes a 3-5 year plan to pay debts over time. A Chapter 13 involves the adjustment of debts which can be only filed by an individual with regular income and there is a limitation on the amount of debt that the debtor can have. A trustee is automatically appointed and the debtor may keep property and pay debts over time through a 3-5 year plan.

Filing a Proof of Claim

A proof of claim is the creditor’s evidence of a debt owed by the debtor to the creditor. A proof of claim must be filed if the creditor wishes to be paid from the debtor’s bankruptcy estate (except in a Chapter 11 case where the creditor is scheduled as undisputed, unliquidated and noncontingent). The deadline for nongovernmental creditors to file a proof of claim is 90 days after the first date set for the first meeting of creditors, unless the trustee gives notice that there are insufficient assets to pay creditors. The information for this first meeting of creditors will be included in the Notice of Filing Bankruptcy issued by the bankruptcy court. The effect of not filing a proof of claim is that the claim will not be allowed in Chapter 7 and Chapter 13 cases and only in a Chapter 11 if listed by the debtor and not scheduled as disputed, contingent or unliquidated. The filing of a proof of claim has no effect upon whether an obligation owed to a spouse, former spouse or child is a DSO and therefore not dischargeable. A creditor who is not listed or scheduled by the debtor and did not have notice or actual knowledge of the case in time to file a proof of claim is excepted from a debtor’s discharge. 11 U.S.C. § 523(a)(3).

The Automatic Stay

The automatic stay is an injunction triggered by the filing of a bankruptcy petition. Debtors should file a “suggestion of bankruptcy” in state court proceedings to alert creditors to stop all collection efforts. The automatic stay is in effect, however, even if the debtor does not give notice in the state court proceeding. This is important, since many family law lawyers hold an incorrect belief that if there has been no formal notice of the bankruptcy, they can proceed in state court. Before proceeding, a family law lawyer should contact a bankruptcy knowledgeable lawyer regarding this and other issues.

Bankruptcy operates as a stay of: the commencement or continuation of an action against the debtor that was or could have been commenced before the bankruptcy; the enforcement against the debtor or against property of the estate of a judgment.
obtained before the commencement of the bankruptcy; any act to obtain possession of property of the estate or to exercise control over property of the estate; any act to create, perfect or enforce any lien against property of the estate; any act to create, perfect or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title; any act to collect, assess or recover a claim that arose before the commencement of the case under this title; or the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor.

There are some exceptions to the automatic stay. With regard to matters related to family cases, bankruptcy does not operate as a stay: of the commencement or continuation of a criminal action or proceeding against the debtor; of the commencement or continuation of an action or proceeding for the establishment of paternity; for the establishment or modification of an order for domestic support obligation; concerning child custody or visitation, for the dissolution of a marriage, except to the extent that such proceeding seeks to determine the division of property that is of the estate; regarding domestic violence; of the collection of a domestic support obligation from property that is not property of the estate; and with respect to the withholding of income that is property of the estate or property of the debtor for payment of a domestic support obligation under a judicial or administrative order or a statute (e.g., income withholding order).

Lawyers need to be aware that collection efforts such as contempt proceedings may not proceed against property of the estate, but may proceed against exempt property like individual retirement account, pension and homestead (after time has passed to object to exemptions), but stay relief from the bankruptcy court

is necessary before proceeding.

Actions taken in violation of the automatic stay are either void or voidable as to any action taken while the automatic stay is in place and those actions can be set aside. The bankruptcy court and the state court have concurrent jurisdiction to determine if the automatic stay applies to a given action or proceeding. A creditor who has willfully violated the automatic stay may be subject to contempt proceedings in bankruptcy court and any individual injured may recover actual damages (including costs, attorney’s fees and even punitive damages). 11 U.S.C. § 362(k) of the Code. Only the bankruptcy court can provide relief from the stay, although other courts have the power to determine whether the stay applies to their actions. When in doubt, a family law practitioner should contact a bankruptcy knowledgeable lawyer and file a motion for relief from stay in the bankruptcy court.

As to property of the estate, the automatic stay terminates when the property is no longer property of the estate, which occurs as follows: when it has been abandoned by trustee (e.g., in a situation where the trustee determines the property has no value); when it is exempt (after the time has run to object to exemptions or the court has determined it is exempt); or when the bankruptcy case is dismissed. As to any other act against the debtor, the automatic stay terminates on the earlier of when: the case is closed, the case is dismissed, or in a Chapter 7 case when a discharge is granted or denied.


Property of a debtor's estate includes all legal and equitable interests of the debtor in property as of the commencement of the case, including: property recoverable by the trustee (avoidance actions like preferences or fraudulent transfers); property that would have been property of the estate if it had been an interest of the debtor, in property, as of the petition date that was acquired within 180 days after filing bankruptcy by bequest, devise or inheritance, or as a result of a property settlement agreement with the debtor's spouse or a divorce decree, or as a benefit of a life insurance policy or of a death benefit plan; and post-petition income from property of the estate earned before but received after the bankruptcy filing. In Chapters 11, 12 and 13, earnings and property acquired after the filing of the petition are included in property of the estate.

Not included in property of the estate is: property in which the debtor holds only legal title but no equitable interest; funds held in certain retirement and education savings account; funds withheld by employer or contributed by an employee to an employee benefit plan; lessee interest in a lease that has terminated or will terminate during the pendency of the case; and property held under a tenancy by the entireties.

Property of the debtor includes all property NOT property of the estate, including: property owned by the debtor before bankruptcy case; property acquired by the debtor after bankruptcy; property that the debtor claims as exempt; and property that has been abandoned by the trustee (i.e., the trustee has decided that the value of the property is not worth administering in bankruptcy).


Property that is exempt from a bankruptcy estate is such property as is exempt under Florida law. If no timely objection is filed, claimed exemptions are deemed allowed. Creditors can proceed against exempt property even if the property is exempt from such claims under state law. Exemptions under Florida law include, but are not limited to, the homestead exemption under the Florida Constitution and certain personal
property exemptions under Chapter 222, Florida Statutes. If the debtor does not claim exempt property, a dependent of the debtor may do so.

**Bankruptcy Discharge and Dischargeability under 11 U.S.C. § 523(a)(5) of the Code**

There are exceptions to discharge which apply directly to family situations. A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of Title 11 does not discharge an individual from any debt: for a domestic support obligation (11 U.S.C. § 523(a)(5)); or to a spouse, former spouse, or child of the debtor and not of the kind described or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with state or territorial law by a governmental unit (11 U.S.C. § 523(a)(15)).

This sub-section provides for the non-dischargeability of property divisions/equitable distribution under all chapters except Chapter 13. Is the obligation a DSO or property settlement? In Chapter 13 cases, property settlement debts will be discharged only if debtor makes all payments required under a Chapter 13 plan. The property division is treated as an ordinary unsecured debt and does not have the priority that a DSO does. Consequently, the debtor might owe a lump sum equalizing payment of $25,000 and the debtor places this debt in a plan payable over five (5) years paying all unsecured creditors 20 cents on the dollar. If the plan is approved by the Chapter 13 trustee and the court, and the debtor completes the plan, the debt will be discharged. The question in Chapter 13 cases will be whether the debtor’s obligation is a DSO (which is not dischargeable) or a property settlement (which is dischargeable under the plan).

State courts have concurrent jurisdiction with bankruptcy courts to determine whether a particular debt is a DSO and is excepted from discharge. This critical piece of information can save the lawyer, and his or her clients, unnecessary litigation and frustration. A debtor or creditor can file an adversary complaint to determine discharge in bankruptcy court. If a debtor lists a DSO, but never files a dischargeability action in bankruptcy court, and the creditor spouse files to collect or for contempt in state court, the issue of dischargeability is before the state court to decide.

The bankruptcy court’s determination as to whether an obligation is a DSO is dependent upon a number of factors. First, whether a particular obligation is a DSO (and thus entitled to priority of distribution and excepted from discharge) is a question of federal bankruptcy law. It is critical that state court judges and parties to marital dissolution agreements spell out their intentions with respect to marital debts. This is particularly true with respect to indemnification agreements and any other third-party obligation such as attorney fees. Factors to be considered by a bankruptcy court include: whether payments terminate upon death or remarriage of the spouse receiving them; whether payments terminate when a minor reaches a certain age; whether payments are contingent on future earning abilities; whether payments are to be periodic over a long period of time rather than paid in a lump sum; and whether the payments are designated as being for purposes such as medical care, housing or other needs of the spouse or children.

**Practice Pointers to Protect Your Client**

Issues come up when a client tells the family lawyer that his or her ex-spouse, or soon to be ex-spouse, is seeking bankruptcy relief. It is important to immediately work with your client to identify and understand all jointly held debts with the client’s spouse. Those debts can be verified by running a credit report and/or getting a copy of the filing spouse’s bankruptcy petition. Your client needs to be aware that if there are debts that your client holds jointly with the filing spouse, the bankruptcy filing will not stop creditors from enforcing those debts or any judgments the creditors have obtained against your client if he or she is a co-debtor. This occurs often with credit debt for which both parties are liable.

Practice pointers for a lawyer involved in a case where the client’s spouse has filed (or may be filing) a bankruptcy case include the following: It is important to compare bankruptcy schedules (which include a list of debts, assets, and schedules of income and expenses) with the family law financial affidavit—especially in connection with contempt proceedings. Since a DSO recoverable by a spouse, former spouse, child or such child’s parent, legal guardian or responsible adult, in the nature of alimony, maintenance or support is non-dischargeable in bankruptcy, it is important to identify clearly the nature of the debt, to describe its purpose and to provide for enforcement by the spouse when drafting separation agreements. Make sure that when you draft agreements you make it very clear that any transfer of money to the non-filing spouse is in the nature of alimony, maintenance or support, or similar language. The mere label will not be binding on a bankruptcy judge, but it is still the better practice to utilize those terms. If it is not a DSO and it is not secured by a lien, any award can be avoided or limited as a general unsecured claim. For example, if you monetize an interest in the marital home, make sure the obligation is secured either by an equitable lien or an actual recorded mortgage. You might also consider securing your own attorney’s
fees with your client. Collection efforts, such as contempt, may not proceed against property of the estate.

**When in doubt, file a motion for stay relief.** Collection efforts for DSOs can proceed against exempt assets. Make sure that the property is truly exempt under Florida Statutes, or that the time for an objection to a debtor’s claimed exemption has passed (usually 30 days after the initial meeting of creditors in the bankruptcy case). When ordered by the court, maintenance and child support payments are exempt from property of the estate. Similarly, payments of maintenance and child support and payments on arrears are deductible in the determination of disposable income, if court-ordered. Clear distinctions must be made between maintenance and support obligations and payments on debt and for the division of property, although the bankruptcy court is not bound to follow such a distinction made by the state court.

**Practice Pointers to Protect the Attorney’s Interests**

Knowing how the bankruptcy process works is vital to protecting not only clients, but also a lawyer’s financial interests, in the event that a client or a client’s ex-spouse files for bankruptcy. If your client files for bankruptcy, the fees that client may owe you are likely dischargeable similar to other unsecured debts. The reason for this is that fees owed to you by your client do not qualify as a DSO under § 523(a)(5) of the Code or as a debt owed “to a spouse, former spouse or child of the debtor, and not of the kind described in paragraph (5) of § 523(a)(15) of the Code.

As an initial matter, you should try to carefully word the retainer agreement with your clients to minimize losses for the services you provide. There are three general categories of retainers: classic retainer, security retainer and an advance payment or flat-fee retainer. The classic retainer is paid by the client to secure a lawyer’s services for a specific period of time or for a specific matter. The security retainer, the one most often used by family law attorneys, secures payment for future services that the lawyer is expected to perform for the client. Unlike the classic retainer, the funds are not earned when paid, and belong to the client until the lawyer applies the security retainer to charges for services performed. Any unearned portion of the retainer must be given back to the client when

**continued, next page**

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the representation is concluded. The advance payment retainer, the use of which may be helpful to family lawyers in divorce cases, involves the present payment to the attorney of a retainer in exchange for the promise to provide future legal services, and the retainer belongs to the attorney upon payment. The advance payment retainer is deposited into the lawyer’s operating account, not the trust account. Any unused portion is returned to the client at the conclusion of the representation. All of this should be clearly spelled out in the retainer agreement.

It may be appropriate in certain cases to include a provision in the written retainer agreement that specifically provides for a charging lien in the event of non-payment. This allows a lawyer to secure payment of fees in a matter by satisfying it from the proceeds of a lawsuit, or the amount that the lawyer has actually recovered on the client’s behalf. You might consider using a fee-shifting provision in court-entered orders that shift the responsibility for the payment of uncollected fees owed from the client to the client’s ex-spouse. Attorney’s fees awarded to a spouse and incorporated into a decree or order may be non-dischargeable. When your client’s ex-spouse is partially or entirely responsible for the payment of fees, the lawyer who has been awarded fees may be entitled to a judgment from the bankruptcy court declaring the debt non-dischargeable. If a spouse is required to pay the other spouses attorney’s fees arising from a divorce, and the requirement to pay is based on need, those fees are usually considered support and are non-dischargeable. Early cases which focused on the fact whether the order is to pay the attorney or the former spouse are no longer valid, and the majority rule is that the obligation to pay the spouse’s attorney’s fees is directly tied to the support obligation so as to be in the nature of support or alimony, and is excepted from discharge.

Summary: Questions a Family Lawyer Should be Asking

Is the bankruptcy a Chapter 7, 11, 12 or 13? Do I need to file a Proof of Claim? Who is the actual debtor in the bankruptcy? Is the debt a DSO? Does the automatic stay apply? If so, has a motion for stay relief been filed? Has the exempt property been determined? Is the debt dischargeable or has the debt been discharged? Have any payments been made to the Chapter 13 trustee on account of past due support obligations? Which party is responsible for the payment of attorney’s fees? Should I call a bankruptcy lawyer?

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- Florida Super Lawyer
- Best Lawyer in America
- Florida Trend’s Legal Elite
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- Receiver in Florida State Court
- Regularly represents Assignees and Assignors in Assignments for the Benefit of Creditors in Florida State Courts
- Provides bankruptcy mediation services
- Author of the memoir Just Say Hello published in 2018
Military Pensions in a Divorce: Practitioners Beware
A Closer Look at Howell v. Howell

By Matthew L. Lundy, Esq., Coral Springs and Tampa, Florida

On May 15, 2017, the U.S. Supreme Court issued a unanimous, 8-0 decision in Howell v. Howell, 137 S. Ct. 1400 (2017), holding that a state court does not have discretion to indemnify the former spouse of a military member against disability waivers (an election to receive disability benefits) reducing pension benefits, resulting in a reduction of the marital estate. So what does this mean? Here is an example:

Military member (MM) has a retirement pension through the army and was married to former spouse (FS) for 12 years during which time MM was serving on active duty. The parties agree to divide the marital portion of MM’s military pension 50/50. The marital portion is valued at $1,200 per month, payable at retirement (with each party to receive $600 per month). Eight years after the divorce, when MM receives his 20-year eligibility for the pension, he simultaneously applies for Veterans Administration (VA) disability and is determined to be 20 percent disabled. So, instead of receiving $2,000 per month as retirement pension, MM will receive $1,600 per month as a retirement pension and $400 a month as VA disability—therefore MM’s disposable retirement pay has been reduced by 20 percent. (In order to receive disability benefits, MM must give up the equivalent amount of pension benefits in order to avoid increasing the total benefits payable to MM). How does this affect FS’s benefit? According to the ruling in Howell, it results in a proportionate reduction to FS’s benefit, even if MM and FS never agreed to any such reduction, and even if the parties agreed that MM would indemnify FS against any such conversion. Therefore, the total marital portion of the pension benefits ($1,200) will be reduced by 20 percent and the FS’s pension benefits (their 50 percent) will be reduced from $600 per month to $480 per month.

Howell makes it quite clear that the Supreme Court interprets the risk associated with conversion as a fact that must be dealt with in the family law cases and should not be overlooked. Justice Breyer, in delivering the opinion of the court, repeatedly acknowledges the contingencies associated with a defined benefit pension plan, and the court is most certainly correct on this point. However, like all other laws limiting assignment of retirement benefits, this case could have some potentially negative consequences for military members. For example, a decision like this could strengthen an alimony claim or strengthen a claim for offset (present value with lump sum payout), depending on the particular facts of a case. It definitely is too early to project how this case will impact military divorces, but there can be no question that this decision reduces the power of the parties and the court in a particular case to arrive at results that are mutually beneficial for both parties.

Unfortunately, this opinion probably created a windfall for military members, and exemplifies the U.S. Supreme Court’s lack of familiarity with state-based family law. Obviously, we need to protect our veterans first and foremost. However, as the military pension is traditionally the largest asset, if not the only asset, in a military divorce, it is equally important in a family law case to recognize the likelihood of abuse of the disability pay system, and the frequency with which a military member makes disability claims to avoid divisibility of this asset. It would have been prudent for the court to give the family courts at least some discretion to determine if there was any wrongdoing in the claim, but the court did not do this. Therefore, it is now incumbent upon practitioners to reserve jurisdiction to address the issue of conversion, including reversing any waivers of alimony.

Matthew L. Lundy, Esq. is the managing member of Matthew Lundy Law - QDRO Law, a multi-jurisdictional QDRO law firm. He is licensed to practice law in Florida, Georgia, New Jersey and Wisconsin. Mr. Lundy also has lectured on the subject of retirement account division to judges, family law practitioners, employment lawyers corporate compliance specialists, and other professionals throughout the country. He earned his B.A. degree from Duke University; and his J.D. degree, with honors, from the University of Florida, Levin College of Law.
Domestic Violence Claims are Now Subject to F.S. §57.105 Sanctions

Attorneys Beware!

By Joshua Bickman, Esq. and Catherine Rodriguez, Esq., Miami Beach

In January of 2018, the Florida Supreme Court in Lopez v. Hall, 233 So. 3d 451 (Fla. 2018) held that the “statute on sanctions [F.S. §57.105] for raising an unsupported claim in a civil action may be applied in actions for protective injunctions against repeat and dating violence” cases. The Lopez court reasoned that since F.S. §57.105 may be sought in all civil actions, and because F.S. §748.046 is a civil cause of action that does not specifically prohibit an award of attorney’s fees and sanctions, an award under F.S. §57.105 may be appropriate.

While many still refer to the standard under F.S. §57.105 as “frivolous” that is not accurate. The standard for the imposition of attorney’s fees under F.S. §57.105 is that the claim was not supported by the material facts necessary to establish the claim or defense. The relevant portion of F.S. §57.105 provides:

57.105 Attorney’s fee; sanctions for raising unsupported claims or defenses; exceptions; service of motions; damages for delay of litigation. —

(1) Upon the court’s initiative or motion of any party, the court shall award a reasonable attorney’s fee, including prejudgment interest, to be paid to the prevailing party in equal amounts by the losing party and the losing party’s attorney on any claim or defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing party’s attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial:

(a) Was not supported by the material facts necessary to establish the claim or defense; or

(b) Would not be supported by the application of then-existing law to those material facts.

A claim is supported by the material facts within the meaning of the statute when “the party possesses admissible evidence sufficient to establish the fact if accepted by the finder of fact.” Siegel v. Rowe, 71 So. 3d 205 (Fla. 2nd DCA 2011) citing, Albrighton v. Ferrera, 913 So. 2d 5, 8 n. 1 (Fla. 1st DCA 2005).

In Lopez, Justice Pariente’s dissent highlights the numerous problems raised by the majority’s decision. First, Justice Pariente’s dissent focuses on the majority’s characterization of a F.S. §748.046 action as a civil action created and prosecuted like all other civil actions (as opposed to a criminal action). Those who practice in the realm of domestic violence would attest to the reality that these actions are not firmly rooted in the realm of civil courts but are more accurately described as quasi-criminal/civil proceedings. By way of example, in Miami-Dade County, F.S. §748.046 proceedings are predominately presided over by criminal court judges. Injunctions for protection against domestic violence may only be served by the county sheriff. Violations of injunctions for protection against domestic violence are investigated and prosecuted by the state attorney and are classified as first-degree misdemeanors. Defendants found guilty of violations of injunctions for protection against domestic violence face jail time and other criminal penalties. Therefore, a finding that F.S. §748.046 actions are purely civil actions does not address the critical differences in procedures between classic civil actions and domestic violence injunctions.

Second, Justice Pariente provides a detailed analysis on how impractical the application of F.S. §57.015 is to F.S. §748.046. F.S. §57.105 (4) contains a 21-day safe harbor requirement (advance written notice) while F.S. §748.046 mandates a final hearing shall be held within 15 days. Pariente maintains that this clear incompatibility demonstrates that the legislature never intended F.S. §57.105 to apply to F.S. §748.046.

There may be some disturbing repercussions to the application of F.S. §57.105 attorney’s fees sanctions. For example, a victim of domestic violence is often the only witness to the abuse. If the respondent’s attorney sends a F.S. §57.105 letter, and the injunction is not granted then the victim and her lawyer (both) run the risk of being sanctioned equally with the imposition of the other side’s attorney’s fees and prejudgment interest. Notwithstanding that F.S. §57.105 is not a prevailing party attorney fee provision, the use of the word “shall” in context of F.S. §57.105 establish-
ing attorney fees to be paid in equal amounts by the losing party and the losing party’s attorney, evidences the legislative intention to impose a mandatory penalty against the losing party regardless of the equities of the situation. Morton v. Heathcock, 913 So. 2d 662 (Fla. 3d DCA 2005).

Simply because there was not enough evidence to sustain the injunction does not mean the victim did not sustain abuse. However, the standard for the mandatory imposition of attorney’s fees is that there were not material facts necessary to establish the claim. It is possible that some judges will come to different conclusions based on similar factual scenarios-assessing sanctions in some cases and not others.

Domestic violence law in the State of Florida is an area of the law with a long, brave history of protecting victims. The Lopez decision runs the risk of creating a chilling effect and could be used to further intimidate a petitioner into withdrawing a request for protection for fear of pecuniary loss not to mention the lawyers who could also be sanctioned along with their clients. No longer are requests to the court for protection allowed to be evaluated on the merits alone.

Now victims and their lawyers must first ask themselves if they will win and if there is chance they do not have enough evidence to win will they both be facing attorney’s fees? Therefore, the Lopez decision could also prevent victims of domestic violence from securing adequate counsel.

On the other side of the coin, petitioners also have the right to demand F.S. §57.105 sanctions, which could result in potentially preventing an otherwise meritorious defense to a domestic violence claim.

In conclusion, practitioners will now need to counsel their clients about the potential for sanctions should the court deem their evidence as lacking material facts to establish their claims and the same applies for defenses to domestic violence. When seeking or defending an injunction in cases where it’s one person’s word against the other’s, practitioners should consider not continuing the F.S. §748.046 15-day time frame to prevent either party from complying with 21-day safe harbor notice obligations. However, a court can impose F.S. §57.105 sanctions on its own initiative without complying with the safe harbor notice. See, Koch v. Koch, 47 So. 3d 320 (Fla. 2d DCA 2010) (wherein the Second District Court of Appeals affirmed trial court’s imposition of sanctions pursuant to F.S. §57.105 upon the court’s own initiative.)

Practitioners need to consider their own liability in these cases. The area is fraught with potential pitfalls for the unwary. It would be wise for the legislature to provide a solution for the problem posed by the Lopez decision.

Joshua Bickman earned a Bachelor of Environmental Science and Geology from The University of Tennessee in Knoxville, TN, and received his Juris Doctorate from St. Thomas University School of Law in Miami, FL. While in law school, Mr. Bickman received the Best Student in Evidence Award and was Vice President in Evidence Award and was Vice President of the Environmental Law Society.

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Endnotes

1 In Lopez, the Florida Supreme Court upheld the First District Court of Appeal and disapproved the Third District Court of Appeal’s decisions in Ratigan v. Stone, 947 So. 2d 607 (Fla. 3d DCA 2007) and Cisneros v. Cisneros, 831 So. 2d 257 (Fla. 3d DCA 2002) and Fifth District Court of Appeal’s decision in Dudley v. Schmidt, 963 So. 2d 297 (Fla. 5th DCA 2007).
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Simple Ways for Lawyers to Create Once, Publish Everywhere (COPE)

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

If you’ve heard about content marketing but really don’t think you have the time to tackle it, you’re not alone. Creating and sharing quality content can help demonstrate your experience, solidify your niches and build relationships. Law firms can use quality website content to build trust with clients, potential clients, referral sources and search engines. All are looking for quality, educational information. Potential clients want answers to questions about their cases while search engines want to provide the best answers. Blog posts, podcasts, webinars, e-books, email newsletters, client alerts, emails and social media are all good ways to share your thoughts and expertise and boost your online presence. But how many solo and small-firm practitioners have time to churn out weekly content on the latest in family law trends?

Content marketing is a strategic marketing approach focused on creating and distributing valuable, relevant and consistent content to attract and retain a clearly defined audience — and ultimately to drive profitable customer action.

Maybe COPE—create once, publish everywhere—is the content marketing strategy for you. Generally thought to have been popularized by National Public Radio, the COPE concept can empower law firms to create useful information and then repurpose it, saving time and energy. Create one, really great blog post or article monthly or quarterly and share it across multiple communications platforms without expending a great deal of time or effort.

**Step 1 – Identify Topics.** Great content is all around you every day; you just need to pay attention. Think about your responses to questions from clients, potential clients and LinkedIn groups; posts you see on social media; reactions to new case law, etc. Keep a list handy and jot down potential content subjects.

**Step 2 – Plan Your Editorial Calendar.** What is a realistic schedule for you to create content? Weekly, monthly, quarterly? An editorial calendar keeps you on track with your content plans. Create a Google Calendar called “Content Calendar” and use it to calendar your content-related tasks and deadlines.

**Step 3 – Create Content.** Your blog should be the center of your content strategy. It can be part of your website or on a separate domain. If you haven’t yet entered the blog arena, no worries. Start with a simple article on a timely and relevant topic. It doesn’t have to be written like a legal publication with cites and footnotes. Just create an easy-to-read article that shares your insights or reactions to a subject that you think will be of interest to clients or potential clients who read it. Post the article on your website or publish it on your blog. Better yet, write an e-book. You can turn each chapter into an article or blog post with a link back to the book. This strategy also can help you gather email addresses for your newsletter.

**Step 4 – Publish Everywhere.** The sky’s the limit for how to repurpose and share content. Here are some basic ideas to get you started:

- Turn the article into a blog post or vice versa.
- Create an infographic and post it to Facebook with a link to the article. Use Canva or another free design program to create colorful, creative graphics.
Hubspot reports that Facebook posts with images get 2.3 times more engagement than posts without images, and Tweets with images receive 150 percent more retweets than tweets without images.

- Turn the article into a PowerPoint presentation, adding graphics and background music. Include a short introductory video clip of yourself or just add your publicity photo and a voiceover. Turn the PowerPoint into video and upload it to YouTube or Vimeo, then post the link on your website.

- If your PowerPoint slides contain good visuals, each one can become its own graphic for posting on social media. In every post, drive traffic back to your website by including the link to the original article or the video.

- Turn the content into a podcast. Use Anchor or Audacity to record and edit your audio. You can break the article down into smaller episodes. Add a podcasts page to your website so your collection will be easy to find.

- Share content in your email newsletter or in an email client alert. A monthly or quarterly newsletter keeps clients, potential clients, referral sources and colleagues up-to-date on the content you’ve created and allows them to share it on social media or forward it via email.

Obviously, hiring a family law attorney is a highly personal decision that is likely to have huge consequences for a client and his or her family. When potential clients access content on your website, they want to find answers to their questions and concerns and become more educated about what steps they should take to address them. Your content can help potential clients better understand why they need to hire an experienced attorney whom they can trust.

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Lisa McKnight Tipton is a nationally accredited PR professional who implements communications and marketing strategies for legal associations, law firms, nonprofits and corporate clients. Her more than 30 years of public relations experience includes 14 years as a consultant to The Florida Bar, promoting its board certification program; its Family Law, Solo & Small Firm and Alternative Dispute Resolution sections; and numerous special events. PR Florida Inc. is her communications consulting company. Connect with her at lisa@prflorida.com or on LinkedIn.
Tips and Tricks for Microsoft Word in Legal Document Preparation

By Sarah E. Kay, Esq., Tampa

A. Technical Competency: Templates, Macros and Add-Ins, Oh My!

Florida Rules of Professional Conduct require lawyers to provide “competent representation to a client.” While the rule generally defines competent representation as “legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation,” the official comment further details, in relevant part:

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education, including an understanding of the benefits and risks associated with the use of technology, and comply with all continuing education requirements to which the lawyer is subject.

Simply put, technical competency has become a crucial ingredient to competent client representation in today’s legal industry.

While it may not appear so, developing and maintaining technical competency is not beyond the reach of anyone – including seasoned professionals who did not have the benefit of access to personal computing and online legal research in law school. A simple way to begin developing technical competence is through familiarization of features available to tools already in use. To help jump-start the technical competence journey, this article will explore four often over-looked features within a common technical tool – Microsoft Word.

B. Word Templates

1. What are Templates and Why Use Them?

Templates are documents with pre-set formatting and text to be personalized each time it is opened and saved. A user will know when he/she is working with a template based on the file extension showing as .dot or .dotm.

Using templates instead of simply cutting and pasting information from one document to the other or using the “find and replace” feature offers users several benefits. Most saliently, it reduces the accidental inclusion of confidential or privileged information when “recycling” an old document for a new client. Sometimes there is a typographical error in the spelling of someone’s name so the “find and replace” feature does not catch all instances someone’s name appears. Occasionally, the user is short on time and his/her eyes simply skip over information that should have been deleted. Other times there is information that should have been inserted in the new document that was not included in the old one. Using a template will reduce, if not eliminate, these common user errors.

Another benefit to template use is that they can save time. While there is an up-front time investment to creating the templates; the return on the time investment can be huge. Microsoft has pre-made templates available that Microsoft and Microsoft users have made that could be personalized. Or, the user can make his/her own templates to be used. Either way, once made, templates can be used limitless times.

2. How Are Templates Created?

Pre-made and custom-made templates start in the same place – through the “File” tab and choosing “New.” A screen will pop up with a search bar at the top for searching for pre-made templates on-line or allowing the user to make a “blank document”. Templates that have been previously made, just below the online search bar, two options will appear – FEATURED, which shows featured templates, or PERSONAL which shows a list of all user-made templates.

A large portion of a family law practitioner’s day is spent drafting documents including petitions, motions, notices, agreements, letters, memos and briefs. To save time, many practitioners “recycle” previously drafted documents, swapping out client names and information through copying, cutting and pasting information or the “find and replace” feature. While these are simple measures to take, Word offers two options that have increased benefits to users: templates and macros. Also, there are two Word “add-in” programs that users may find helpful: SnapNumbers and TheFormTool. This article will explore each in turn.
is as simple as choosing “save as” and, after selecting the save location, choosing “Word Template” or “Word Macro-Enabled Template” from the drop-down option for the file type.

Once a template has been created, whether it was pre-made or user-made, the user can find it under the “File” tab by choosing “New” and then selecting the PERSONAL link right under the search bar. When done customizing the document, Word should prompt the user to “save as” with a new document name and a regular Word file extension (.docx) so that the underlying template itself is not changed.

3. More Advanced Features for Creating Templates

For more advanced users, Microsoft offers a series of features that allow users to save text for future re-use. This wealth of features is often overlooked because Microsoft’s default setting is to hide them from the ribbon up top. The user can find them through revealing the “Developer Tab” in the ribbon. The Developer Tab is revealed by going to the “File” tab, choosing “Options” and then “Customize Ribbon.” Look at the second column, which shows a list of checkboxes, and ensure that “show Developer Tab” is selected, then hit “OK.” The Developer Tab will appear on the ribbon.

There are a number of features in the Developer Tab not available in other tabs. Most are activated through the “Design Mode” including: insert text control, insert picture control, insert building block control, insert content to choose from, and insert date picker. The advanced template functionality that the Developer Tab offers is beyond the scope of this introductory article. Users interested in details are encouraged to start their inquiry by reading more on the Word “Help” feature (press F1).

C. Word Macros

1. What are Macros and Why Use Them?

Macros are commands recorded inside Word to automate frequently employed tasks. In short, a macro is a recorded series of commands that can be later accessed through a button or shortcut key. Macros can be time-savers because the user can have repetitive tasks automatically performed through the click of a button.

Some ideas to jump-start a lawyer’s creation of macros may be: a macro that automatically fixes formatting for downloaded documents (for example, if the lawyer does not like the formatting for cases or articles downloaded from a source); a macro that converts Word documents into raw text for later customization of formatting or later use in other documents; a macro that holds chunks of text (i.e. boilerplate language); a macro to correct citation formats; or a macro to update years, dates or names in re-used documents.

2. How are Macros Created?

Microsoft offers step-by-step instructions on creating macros in the “Help” feature (press F1). However, here is a quick list of starter instructions:

(i) Look far right on the “View” tab and you will see an option called “Macros.”

(ii) Previously recorded macros can be found under “View Macros” (this will be blank if none exists).

(iii) Select “Record Macros” and Word will prompt for basic information including the name, the shortcut key, the save location for the macro (i.e. should it be accessible for that specific document or for any document opened), and a brief description of the macro (what does it do?). Note that Word offers the option of creating a button for the Macro or a shortcut key.

(iv) Record your macro and save.

3. More Advanced Features for Creating Macros

Creation of macros is limited to the creativity of the user. Advanced macro creation is beyond the scope of this introductory article. Users interested in more advanced instructions are encouraged to read more through the Word “Help” feature (press F1).

D. Two Word Add-Ins–Snapnumbers and TheFormTool

Add-ins are third-party software designed to directly interface with Word by creating a new “tab” in the ribbon at the top with additional features not automatically included in the Word program. Some add-ins are free or included in the installation of other software. Other add-ins are purchased and paid for separately. Snapnumbers and TheFormTool are stand-alone add-ins available for purchase and download from third-party TheFormTool LLC company.

A word of caution: As with any new technology, users should familiarize themselves with the privacy and terms of use with each new software and add-in they use to ensure compliance with ethical rules including client confidentiality.

1. Snapnumbers Add-In for Word

Whether to use Word’s auto-numbering feature is a bit of a polarizing discussion. The author’s office’s policy is to use it with every document; though an office policy against its use is understandable as it is easy to lose control of the behind-the-scenes numbering coding, particularly in “recycled” documents. The company TheFormTool LLC created the add-in Snapnumbers in an attempt to address these common Word user frustrations.

(i) Snapnumbers – A Brief Description

Snapnumbers is a Word add-in created by TheFormTool LLC, which advertises it as a “flexible, stable alternative to Word’s built-in paragraph numbering feature.” At one point a trial version was available for free download; however, it may now only be available for purchase.
(ii) Basic Snapnumber Usage
Once installed, the Snapnumbers add-in creates a new tab in the Word ribbon with additional features, which looks like this:

The first two ribbon sections titled “Insert Snapnumber” and “Numbering” are intended to simplify Word numbering formats which are found in the “Home” tab. These two Snapnumber sections allow the user to select the numbering level by simply clicking on the desired level.

The user can create his/her own Snapnumber schemes for each desired numbering level:

Once the Snapnumber levels are created, the user can select the level he/she wishes to use, and the proper numbering formatting should appear.

(iii) Advanced Snapnumber Usage
Snapnumbers allows more advanced usage that is beyond the scope of this introductory article. The advanced features include simplified formatting for use of the Word table of contents feature, insertion of common symbols, and compatibility tools. More on these features is available on TheFormTool LLC’s website.\(^{14}\)

(iv) Pros and Cons to Snapnumbers
Snapnumbers allows more versatility in the formatting of numbering within documents. With a simple click of a button, the proper numbering level formatting is applied regardless of any other formatting within the document. The setup and use of Snapnumbers is intuitive and the user guide provides ample visuals to help guide users. Snapnumbers is intended to save users the frustration and time from having to wrangle with behind-the-scenes formatting and document styles to ensure the proper list number appears.

However, use of Snapnumbers is not without its downsides. Where it is not native to Word, users who prefer the auto-numbering feature may not prefer its use. If a supervising attorney prefers the Word autonumbering formats, the associate attorneys, staff, and paralegals cannot use Snapnumbers for that attorney’s documents. Also, it is a new software that users will have to learn and master, which may increase new hire training time.

Also, when weighing the pros and costs, users should consider its cost and licensing practices. As each office has its own unique setup, whether these are pros or cons will depend on the office.

E. TheFormTool Add-In for Windows
TheFormTool is a Word add-in like Snapnumbers. It is the most basic option in a line of software that is advertised as an alternative to Word templates allowing users to “easily and create intelligent documents.” TheFormTool, in its most basic format, is designed to allow users to create “fill-in-the-blank” templates for repeated use. TheFormTool advertises for a free trial version as well as for full-version software licenses depending on the number of intended use and number of users.\(^ {15}\)

(1) TheFormTool – A Brief Description
Once downloaded, TheFormTool creates a new tab in the Word ribbon, which looks like this:

As with Snapnumbers, the basic features are on the left and more advanced options that are available with a paid license are on the right.
(ii) An Example of Basic Usage of TheFormTool

Providing an example of creating a lease with TheFormTool will be the best way to describe how this add-in can be used.

By clicking on the “Table” button, TheFormTool prompts the user to create a table of data entry points and corresponding questions to answer to fill those data entry points. For the lease example, common data entry points would be the number of lease months and the tenant names. The “Table,” then, would look like this:

<table>
<thead>
<tr>
<th>Label</th>
<th>Question</th>
<th>Answer</th>
</tr>
</thead>
<tbody>
<tr>
<td>Months</td>
<td>How many months is the lease?</td>
<td></td>
</tr>
<tr>
<td>Tenant 1</td>
<td>What is Tenant 1’s Name?</td>
<td></td>
</tr>
<tr>
<td>Tenant 2</td>
<td>What is Tenant 2’s Name?</td>
<td></td>
</tr>
<tr>
<td>Tenant 3</td>
<td>What is Tenant 3’s Name?</td>
<td></td>
</tr>
</tbody>
</table>

Once all data labels and questions are created, the user must insert them into the document. To continue with the lease example, if the lease is pre-existing, then the user can simply highlight the insertion points for the data entry. If it is a new document, then the user can create the lease and simply insert the data points as he/she writes. For simplicity’s sake, this example will presume that the lease was already made. Insertion of the data fields would be two steps:

(a) Highlight the text where the data field should be inserted; and

(b) Click on the rabbit button in TheFormTool ribbon. This will bring up a pop-up asking which field should be inserted. As a side note, the user can edit the fields by using the radio buttons on the menu that appear once a data field has been inserted:

The user should continue inserting data fields until all of the desired fields are in the form. Once done, the fields should appear something like this:

Best practice is to always save work along the way. If this is the first time trying out TheFormTool, the user should change the file name to something unique so he/she can differentiate the experimental file from the original one the user is attempting to convert into a form.

Once the data fields have all been inserted and the test file has been saved, the user should try to fill out the form by typing the questions in the Q&A table at the bottom. It should look something like this:

<table>
<thead>
<tr>
<th>Label</th>
<th>Question</th>
<th>Answer</th>
</tr>
</thead>
<tbody>
<tr>
<td>Months</td>
<td>How many months is the lease?</td>
<td>12</td>
</tr>
<tr>
<td>Tenant 1</td>
<td>What is Tenant 1’s Name?</td>
<td>Mickey Mouse</td>
</tr>
<tr>
<td>Tenant 2</td>
<td>What is Tenant 2’s Name?</td>
<td>Minnie Mouse</td>
</tr>
<tr>
<td>Tenant 3</td>
<td>What is Tenant 3’s Name?</td>
<td>Pluto</td>
</tr>
</tbody>
</table>

After the Q&A has been completed, the form can be filled with the data by clicking the “Fill” button on TheFormTool ribbon. A pop-up window should briefly appear as TheFormTool fills in the answers. Then, the answers to the questions should appear in the text:

Formatting may need to be tweaked a few times when first using TheFormTool. Normally trial and error will produce the best results. Once formatting and edits are the way the user desires, he/she should save his/her work with a name of the document that clearly notes that it is the final form to be used.

(iii) Pros and Cons to using TheFormTool

A few benefits to using TheFormTool come to mind. First, once a form is created, completing a form is as simple as filling in the Q&A section at the bottom. Second, the set-up and buttons are intuitive to use. Third, the user guide has ample visual examples to help guide the user through creation and use. The ability to download a free trial version will help the user determine if TheFormTool can be of use.

As with anything, employing TheFormTool is not without its downsides. Where it is an add-in separate from standard Word features, it must be learned and mastered by new users, which may increase on new hire training time. Also, as with any third-party software, the user is reliant on the third party to update its software with any updates Microsoft may make to Word.

As with Snapnumbers, users should investigate and consider cost and licensing for TheFormTool prior to purchase.

continued, next page
F. Conclusion

Like it or not, technology is here to stay, and it is constantly evolving. Consequently, attorneys must develop and maintain an understanding of technology to provide their clients with competent representation. If the idea of cultivating technical competence is daunting, the best way to start is to learn a feature of a tool you are already using. For more advanced users, branching out to third-party add-ins to expand features for already existing tools may be something to explore. Hopefully, a small investment of time digging deeper into commonly used technological tools like Word will create bountiful long-term rewards for practitioners of all skill levels.

While devoting her practice exclusively to the area of family law, Sarah is an Executive Council Member of the Family Law Section of The Florida Bar and 2017-2018 President of the Hillsborough Association for Women Lawyers. She is an accomplished author and speaker on numerous Florida family law topics. Sarah holds a J.D. magna cum laude from Stetson University College of Law, an MBA with academic honors from Stetson University, an M.Ed. from Worcester State University, and a B.S. summa cum laude from Gordon College.

Endnotes

1 This article was inspired, in part, by the detailed materials the author prepared for her portions of the August 2017 NBI, Inc. seminar Unleashing the Power of Microsoft Office and Adobe for Lawyers.
2 Fla. R. C. 4-1.1 Competence.
3 Id.
4 Fla. R. C. 4-1.1, Cmt. Maintaining competence (emphasis added).
5 For the sake of simplicity, this article will refer to Microsoft Word as simply “Word.” There are many versions of Word available. The author currently uses Word 365. The location of features varies depending on the version. When in doubt as to a feature’s location, the reader can use F1 (“Help” button), Alt+Q (“Tell Me” feature), or the search bar at the top of the ribbon (a picture of a lightbulb next to the word “Search”). Also, a lot of times a simple internet search will reveal helpful videos or articles other users have posted to explain how to do things using the reader’s specific Word version.
6 The keystroke shortcut for copying is through holding down following key combinations: CTRL and C = Copy; CTRL and X = Cut; and CTRL and V = Paste.
7 The keystroke shortcut for “find and replace” is through the following key combination: CTRL and H. A simple “find” without the “replace” is CTRL and F.
8 The keystroke shortcut for “find and replace” is through the following key combination: CTRL and H. A simple “find” without the “replace” is CTRL and F.
9 File extensions are the letters that appear after the file name and period. Word 365 documents have .docx extensions. Prior versions of Word used .doc file extensions.
10 The difference between the two extensions is .dot is a regular template with no macros and .dotm allows the user to enable macros in the file.
11 Shortcut key is the sequence of keys the user wants to press to use the Macro. Commonly used shortcut keys are CTRL+Z to undo a change.
12 A common add-in acquired with the installation of other software is through an Adobe Acrobat program.
13 Examples of ethics opinions which reflect the lawyer’s responsibility to ensure client confidentiality when employing new technology include: Fla B. Ethics Op. 06-2 (a lawyer sending electronic documents should take care to ensure the confidentiality of all information included in the document including metadata) (Sept. 15, 2006); Fla. B. Ethics Op. 10-2 (a lawyer must take reasonable steps to maintain client confidentiality when using storage media devices) (Sept. 24, 2010); Fla. B. Ethics Op. 12-3 (A “[l]awyer may use cloud computing if they take reasonable precautions to ensure that confidentiality of client information is maintained,...”) (Jan. 25, 2013).
15 As of the time of this article, a lifetime license was available for $39.75. TheFormTool LLC, Snapnumbers, https://shop.theformtool.com/products/productdetail/3 (accessed May 1, 2018).
17 TheFormTool LLC, About TheFormTool, https://www.theformtool.com/tft-home/abouttft/ (accessed May 1, 2018). The website also advertises a 30-day “test drive” of the more advanced Doxsera program for $1.

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The Florida Courts’ Errors on Professional Goodwill: Non-Compete Agreements and the Myth of Personal Goodwill

By Michael Sack Elmaleh, CPA, CVA, Coral Gables, Florida

“The cemeteries are filled with indispensable people.”

~ Charles De Gaulle

This article critiques current Florida case law related to the proper valuation of professional goodwill in marital dissolutions. Florida and other jurisdictions have accepted a distinction between personal and enterprise goodwill. Enterprise goodwill is considered divisible marital property while personal goodwill is not. In making this distinction, Florida courts have confused client, patient, and customer attachment to a professional with the professional’s ability to transfer those clients, patients, and customers to another professional in the sale of their practice. The courts’ confusion on this issue is particularly underscored by the misinterpretation of the economic significance of covenants not to compete. Current case law in Florida implies that a strong attachment and preference to a professional impedes transferability. I will demonstrate that the Second and Fourth Districts have it exactly backwards. Strong attachment actually enhances the transferability of customers, clients, patients, or referral sources and thus increases the value of divisible enterprise goodwill.

Enterprise vs. Personal Goodwill: Florida Case Law

The Florida Supreme Court case of Thompson v. Thompson, 576 So. 2d 267 (Fla. 1991), is the seminal case concerning goodwill of a business as a marital asset. The Florida Supreme Court held that “if it exists and if it was developed during the marriage, professional goodwill is a marital asset which should be included in the marital estate upon dissolution.” Id. at 268.

The court adopted the Supreme Court of Missouri’s definition of goodwill:

“It is property which attaches to and is dependent upon an existing business entity; the reputation and skill of an individual entrepreneur – be he a professional or a traditional businessman – is not a component of the intangible asset we identify generally as goodwill.” Id. at 269 (citing Hanson v. Hanson, 738 S.W. 2d 429, 434 (Mo. 1987)). The Hanson court defined enterprise goodwill to mean the value of the practice which exceeds its tangible assets and which is the tendency of clients/patients to return to and recommend the practice irrespective of the reputation of the individual practitioner.

In carving out “reputation and skill of an individual entrepreneur” as goodwill, the Florida Supreme Court identified two forms of goodwill: per-
personal and enterprise goodwill. Enterprise goodwill is separate and apart from the reputation or continued presence of the marital litigant. Id. at 270. On the other hand, personal goodwill (often referred to as “professional goodwill”) consists of the relationships, skill, reputation and the continued presence of a particular individual. Only enterprise goodwill may be included in an equitable distribution scheme in dissolution cases. Held v. Held, 912 So. 2d 637, 639 (Fla. 4th DCA 2005). Personal goodwill may not be considered or included in an equitable distribution scheme.

The Second District has held that the most telling evidence of a lack of enterprise goodwill is testimony and/or evidence that no one would buy the practice without a non-compete clause. Walton v. Walton, 657 So. 2d at 1214, 1216 (Fla. 4th DCA 1995). As stated by the Walton court, “[i]f the business only has value over and above its assets if the husband refrains from competing within the area that he has traditionally worked, then it is clear that the value is attributable to the personal reputation of the husband.” Id.; see also Held, 912 So. 2d at 640; Williams v. Williams, 667 So. 2d 915, 916 (Fla. 2d DCA 1996). Thus, generally the court has held that where a non-compete agreement is required to sell the business at a certain price, that would be a good indicator that the goodwill is personal. The Fourth District in Schmidt v. Schmidt 120 So. 3d 31(Fla. 4th DCA 2013), cited the Second District’s reasoning in Walton as grounds for overturning a trial court’s acceptance of an appraisal of the enterprise goodwill of a retail optical business.

**Getting the Definition of Goodwill Right**

The Florida Supreme Court correctly understands that repeat patronization of a professional practice is a key characteristic of enterprise goodwill. However, repetitive patronization is a necessary but not sufficient condition for a professional practice to possess enterprise goodwill. There is another critical condition required that involves competitive advantage. From an economic standpoint, a firm possesses enterprise goodwill with a positive value only if the seller of the practice can confer a competitive advantage to a new owner. The conveyed competitive advantage lies in the fact that the buyer of a professional practice will gain immediate access to customers, clients or patients for whom he or she would otherwise have to compete. If the seller can convince his or her clients, patients, customers or referral sources to patronize the successor/buyer of the practice, then the seller has enterprise goodwill. The Florida courts have confused one of the causes of enterprise goodwill.

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Errors on Professional Goodwill from preceding page

will, namely attachment based on skill and reputation, with the effect, namely the existence of a transferable customer, client or patient base. The Second and Fourth Districts assume that a strong client or patient attachment to a particular professional impedes the ability of that professional to transfer their clients or patients in a sale of their practice. In point of fact, a strong attachment usually improves the chances of transferability.

Customer Attachment and Competitive Advantage

Every firm in a competitive market offers potential and existing customers a unique combination of quality, convenience and price. Firms offering the best combination of these factors will be more successful than firms that offer inferior combinations. The combination of price, convenience and quality explain why customers become attached to certain firms and not others. These are factors of attachment. Customers’ decision weightings of price, convenience and quality very much depend on the nature of the products and services that the firm provides. In sectors where quality is very critical, larger changes in price are needed to shift customer allegiance, as compared to sectors where quality is less critical and convenience is more important. A similar point applies to convenience. For example, a small improvement in the location of a convenience store may suffice to draw significant numbers of customers from other convenience stores in a particular neighborhood. However, we would expect that more significant decreases in price or increased convenience would be required to draw significant customers from one well-established hair stylist or dentist to one of his or her competitors.

Generally, service firms—particularly those of a personal professional nature such as grooming, financial or medical services—have more exclusive relationships with their clients and patients than do firms that sell products. As a consumer I may patronize more than one grocery store, gas station or restaurant, but it is unlikely that I utilize the services of more than one dentist, tax preparer or barber. These types of service firms require a degree of specialized skill in order to assure quality performance. Once I have found a service provider that I believe provides the degree of quality I require at a price and location that meets my monetary and time budget, I am likely to continue to patronize the same firm over and over again. Once I am satisfied with my skilled professional service provider, I become more attached to that person than to my local grocery store or gas station.

But here we need to ask a critical question. Do I choose to use the same barber, accountant or dentist because I believe that professional is the absolute best accountant, barber or dentist in the area or region? Do I believe that my accountant, dentist or barber are irreplaceable? No, I choose to repatronize these professionals because I have, based on past experience, found that my barber, accountant or dentist has done a good enough job at a fair price in a convenient location. Often it goes beyond that. Personal familiarity also reinforces attachment. My barber will learn how I like to wear my hair. My dentist will have records of past dental work and my accountant may understand whether I like to take aggressive vs. cautious tax positions. All of these factors can lead to a strong loyalty to individual professional service providers. But does such loyalty impact the transferability of the service provider’s client or patient base? The answer is no.

Conditions of Transfer: Strong Attachment Does Not Impede Transferability

Are there attachments that are so strong between customer, patient, client and service provider such that their customers, patients and clients would refuse under any circumstances to consider patronizing a different service provider? The answer is of course no. There are practically speaking no such attachments. Imagine going to your favored dentist and learning that she has been tragically killed in an auto accident. You are understandably upset and saddened. But will you be so grief stricken that you will never seek out the services of another dentist again? Of course not. You may even believe that your dentist, barber or accountant was the very best in the world, but that does not mean that you will never again utilize the services of another dentist, barber or accountant given that your first preference is no longer available. What applies to the sudden death of a trusted service provider applies to the disability or retirement of that provider as well. Again, as a customer, patient or client you would be disappointed but not so disappointed that you would never get another haircut, another dental exam or file another tax return again. Now faced with the loss of a trusted service provider, where and how would you look for a replacement?

What are the Transfer Options?

Many professional service providers have practice continuation agreements with a key employee, a partner or another unrelated professional. What these practice continuation agreements state is that in the event of the sudden death or disability of the service provider, the provider’s customers, client or patients will be referred to a different service provider. Usually that substitute referred provider will agree to pay the estate of the deceased or disabled professional a certain percentage of the billing for a limited period of time. This payment is in recognition of the fact that the recommended service provider is receiving something of
value: access to a customer base for which he or she would otherwise have to compete.

Now suppose if instead of death or disability, your favorite barber, dentist or accountant decides to retire or relocate. Again, you will be disappointed. Assume that your preferred professional has arranged to sell his or her practice to a designated successor. This successor is most likely a partner, key employee or another local professional service provider. Most of the retiring or relocating service provider’s clients, customers and patients will give the recommended successor at least one chance to prove that they will receive a comparable level of quality service at comparable levels of convenience and price.

Just as in the cases of practice continuation agreements, in a sale of a professional practice the buyer will pay some remuneration to the departing professional. This remuneration will reflect the value of the enterprise goodwill. The buyer is obtaining a competitive advantage by gaining immediate access to customers, clients and patients for whom they would otherwise have to compete. In the case of retirement or relocation, the succession or sales agreement will almost certainly include a covenant not to compete. Why is a non-compete covenant needed?

The Economic Substance of a Covenant Not to Compete

When a service provider sells the equity in a firm with repeat customers, and those customers will continue to patronize the firm after the service provider leaves the competitive market, that service provider has sold a valuable asset. The transferred customer, client or patient base will generate revenue in the future much in the way a physical machine produces parts that can generate revenue in the future or a commercial building can generate rents. Qualified and motivated buyers are willing to pay something for this intangible asset if they deem it to be to their competitive advantage and their return on the asset is sufficient to assume the burdens of servicing the customer, client or patient base.

No rational buyer would ever pay to acquire any asset, tangible or intangible (including a customer base), if they thought there was a risk that the seller might steal that asset back. How might the seller of the customer, client or patient base steal this asset back? Quite simply they could continue to compete for their old clients, patients and customers despite their stated intent to retire or relocate. The covenant not to compete provides an assurance to the buyer that the seller will not steal back what they just sold.

The Devil You Know

The Florida cases cited above argue that the need for a covenant not to compete demonstrates that the seller has a special unique non-transferable relationship with his or her customers, patients or clients. Nothing could be further from the truth. All that the required non-compete covenant demonstrates is that given the current competitive options available to the service provider’s customers, clients or patients at the time of the equity transfer the seller is the preferred service provider. All other things being equal, satisfied clients, patients and customers would prefer utilizing their current provider rather than some new provider. The devil they know is preferred to the devil they don’t know. The covenant does not demonstrate any special or unique relationship that the seller has with his or her clients, patients or customers.

Varying Degrees of Transferability and the Value of Goodwill

In the real world, no professional service provider, no matter how talented or esteemed, is absolutely unique or irreplaceable. This is the meaning of De Gaulle’s quote in the epigram of this article. As long as there is a demand for a particular service, the removal of one professional service provider (due to death, disability or retirement) will be followed by the selection of a new service provider. That there will be a replacement for a particular service provider is beyond question. What is subject to question is the degree to which the retiring professional can influence his or her customers, clients and patients decision on a successor. The degree of influence directly impacts the value of goodwill.

Since the value of goodwill to the buyer is immediate access to customers, clients or patients for whom he or she would otherwise have to compete, the more customers, clients or patients that are immediately available to the buyer the more future revenue they will generate and the higher the amount the buyer will be willing to pay the seller. In order to capitalize fully on the value of professional goodwill, a seller has to maximize the chances that his or her customers, clients or patients will transfer to the designated successor. Signing a non-compete agreement is one way of doing this. Often sales of professional service practices have transition agreements specifying a period of time when the buyer and seller work together. In this transition period, the seller’s clients can become familiar with the buyer and thus insure greater transferability.

Repeat Referral Sources and the Prahinski Error

Many service professionals rely on referral sources as their primary and ultimate source of revenue. A classic example of this is illustrated in the landmark Maryland case Prahinski v. Prahinski (321 Md. 227, 241, 581 A.2d 784, 791 Md. (1990). Prahinski, an attorney, operated a law firm that did almost exclusively title work. The court found that there was no separate enterprise goodwill on the grounds that there was no repeat business and that only the attorney’s

continued, next page
personal reputation accounted for the firm’s continuing revenue stream. But the court and appraisal experts got the economics wrong. The key driver of repeat business for Prahinski was not the parties exchanging real estate even though these parties paid the firm’s fees. Rather the driver of revenue was the referrals from real estate brokers who referred buyers and sellers even though these brokers paid no fees to the title company. Presumably the brokers referred real estate closings to the title company because the closings were efficiently run. However, the efficiency of the closing process did not rely upon the special unique expertise of Prahinski. Another attorney could easily step in without any loss of efficiency in the closings. Prahinski’s referring brokers may very well continue to make referrals in the event of an ownership transfer as long as the new owner maintained the old owner’s standard of efficiency. The intermediary referring brokers and not the paying customers were the source of goodwill, but all parties involved in this case seemed to miss this fundamental economic fact.

There are always going to be factual questions that need to be addressed in these types of cases. The key question does not involve the distinction between personal and enterprise goodwill, but rather the degree of transferability of a professional’s customer and referral sources. If a professional relies heavily on just a handful of referral sources, can that professional convince those referral sources to continue making referrals to a designated successor? If the answer is yes, then that professional has enterprise goodwill. If the answer is no, then that professional does not have goodwill. But note, if the referral sources would not heed the advice of the selling professional for a successful exit strategy involving a recom-mended successor combined with a non-compete covenant will lead to a significant percentage of the customer base being transferable. On the other hand, if the professional relies on only a few referral sources for most business, the situation may be more difficult to assess. If, as in Prahinski, the practice relies exclusively on referral sources, then the question is whether or not the retiring professional can influence the referral sources to continue referring to the designated successor. If so, then there is a competitive advantage to a buyer, who will have access to referral sources for whom he or she would otherwise have to compete.

Who Should Have the Burden of Proof?

If the professional practice is in a sector where equity exchanges are common place (such as accounting, dental and chiropractic), then this should tell the courts that most such practices have transferrable client and patient bases. The equity owning spouses should have to show why their practices do not have transferrable client or patient bases. The equity owning spouses should have to show why their practices do not have transferrable client or patient bases. The equity owning spouses should have to show why their practices do not have transferrable client or patient bases. The equity owning spouses should have to show why their practices do not have transferrable client or patient bases.

The Impossible and Inequitable Hurdle: Distinguishing Between Horses and Unicorns

The Florida Second and Fourth Districts have placed an impossible burden on non-equity owning spouses in divorce cases. In these districts, such spouses must demonstrate that a professional's practice would have value even if that professional were unwilling to sign a covenant not to compete. Since no rational buyer would ever pay for another living, active professional’s practice absent a non-compete agreement, this effectively eliminates the assignment of enterprise goodwill to professional practices. This is an egregious inequity as many, if not most, professionals will, post-divorce, be able to sell their practices subject to a covenant not to compete for significant multiples above the value of the practice’s tangible assets. The non-equity spouse will be cheated out of a fair share of a marital asset due to the appellate court’s failure to understand the underlying economic significance of such covenants.

While there have been attempts to methodologically parse goodwill value into personal versus enterprise, in the end, there is no systematic way to do so. All appraisers can and ought to do is assess the probabilities of transferability of a professional’s client, patient, customer base and/or referral sources. This is a more tractable exercise. It is also a cornerstone of goodwill value. Most of the methods that vainly attempt to parse the sources of goodwill miss this point. The facts and circumstances usually tell a clear story. If the professional has many repeat patients, clients, or customers, usually a well-planned exit strategy involving a recommended successor combined with a non-compete covenant will lead to a significant percentage of the customer base being transferable.

A surgeon has perfected a “cutting edge” new surgical procedure. Her new techniques have generated attention in academic and professional journals as well as the mainstream media. For a number of years after
her breakthrough, she gets referrals and calls from all over the world to perform this specialized new surgery. She is quickly backlogged with surgical requests. She is performing many surgeries but can’t handle the volume of requests. What will she do? This depends upon whether she is entrepreneurial or not. If she is entrepreneurial she will hire other surgeons and train them to perform the specialized surgery. She will expand her surgical practice to include other surgeons. If she is not entrepreneurial, her receptionist will answer requests by saying that due to the high demand she is no longer taking new patients. The receptionist will no doubt be asked about other surgeons who can perform the surgery and perhaps the innovative surgeon has provided the receptionist with a list of such surgeons. Now note that these referrals can have significant economic value to the referred surgeons, but, due to anti-kickback laws the referring surgeon cannot collect a fee for the referral. So, given these facts, does she possess goodwill or not? If she sets up a firm with her name on it and trains other surgeons to perform the surgery as she does, and referrals will continue even if she retires from active surgery, then she has enterprise goodwill. The question of value turns not on the surgeon’s reputation or past innovation or skill. The question of value turns on the future response of her existing referral sources. Will they or will they not continue referring patients to her surgical firm once she retires from active practice? But note also that no other surgeons would rationally invest in such a surgical practice if the founding surgeon was allowed to continue performing the surgeries because those referral sources would continue to refer to her and not the new owners of the surgical center.

**Some Empirical Research**

As part of my development of a new model for appraising goodwill for small service firms I conducted survey research that directly bears on the question of transferability. I utilized Survey Monkey Audience to obtain appraisal relevant answers from customers of “male only” barber shops. One of the questions I sought to answer was what percentage of customers would typically follow their current barber’s recommendation for a replacement in the event of an equity transfer.

I asked respondents who patronized non-chain barbers to indicate the likelihood they would accept their current barber’s recommendation for a successor. I found that in aggregate nearly 50 percent of the non-chain customers indicated that they would accept their barber’s recommendation.

I drilled down into the data on respondents’ willingness to accept a recommendation for a successor to see if there are statistically significant relationships that would allow for refined predictions of transfer rates. One variable I considered was the relationship between the frequency of patronization and the willingness to accept the old owner’s recommendation for a successor. Here are the responses broken down by five categories of patronization frequency:

| Transfer Recommendation By Frequency of Patronization |
|-----------------------------|-------------|-------------|-------------|-------------|-------------|
|                             | Weekly      | Semi-Monthly| Monthly     | Every 6 weeks| > 6 Weeks   |
| Yes                         | 78.6%       | 61.7%       | 52.4%       | 45.2%        | 39.4%       |
| No and Unsure               | 21.4%       | 38.3%       | 47.6%       | 54.8%        | 60.6%       |

Utilizing these categories, the relationship between frequency of patronization and willingness to accept the old owner’s recommendation is highly significant (p = .0155). Here are the upper and lower bound “yes” percentage responses broken down by frequency of patronization:

| Transfer Recommendation By Frequency of Patronization |
|-----------------------------|-------------|-------------|
|                             | %           | Lower Bound | Upper Bound |
| Weekly                      | 78.6%       | 74.2%       | 82.9%       |
| Semi-Monthly                | 61.7%       | 56.6%       | 66.8%       |
| Monthly                     | 52.4%       | 47.1%       | 57.7%       |
| Every 6 weeks               | 45.2%       | 39.9%       | 50.4%       |
| > 6 Weeks                   | 39.4%       | 34.2%       | 44.5%       |

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Errors on Professional Goodwill
from preceding page

It makes intuitive sense that the more frequent customers would form closer bonds with their barber, and hence be more willing to accept their recommendation for a replacement buyer. This result underscores an important point. The closer the attachment a patient, client or customer has to their professional the more likely they are to listen to their recommendation for a replacement. This is the reverse of the interpretation that the Second and Fourth Districts applied to the covenant not to compete. For the appellate courts, close attachment implies an absence of transferability. To the contrary, close attachment enhances transferability, and hence the value of enterprise goodwill.

Fixing the Appellate Courts Errors

In summary, the distinction between personal and enterprise goodwill rests on a misunderstanding of a key element of divisible goodwill: the transferability of the professional’s customer, patient, client, or referral sources to a designated successor buyer. Personal goodwill is largely a myth. There are no irreplaceable professionals. No matter how esteemed the professional, when they are no longer able or willing to practice their repeat customers, clients, patients or referral sources will seek out a replacement. If that professional can influence their patients, customers, clients or referral sources’ decision on a designated successor. This remuneration is divisible enterprise goodwill. There is no other kind. The Second and Fourth Districts’ error is particularly egregious because they misinterpret the economic significance of seller covenants not to compete. The court interprets these covenants as evidence of non-divisible personal goodwill. The economic reality is the opposite. There are two avenues to fix the Florida appellate courts’ error on the interpretation of covenants not to compete: legislative action or the Florida Supreme Court overturning the Second District’s original standard. At first look, a legislative remedy would appear unlikely as the standard affects very few people. On the other hand, the broader use of covenants not to compete for other economic reasons has begun to receive some legislative attention. Some companies have demanded that lower level employees sign non-compete agreements. The Illinois legislature enacted a prohibition of this practice in 2016. If the Florida Legislature were to consider a similar bill, it is possible that a provision overturning the Second and Fourth Districts’ standard could be included. Barring this, an appeal of a Second or Fourth District case to the Florida Supreme Court in the only other remedy.

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Endnotes

1. Usually the seller’s covenant is limited to a fixed period of time and/or a geographic location.
2. A widely used method is the Multi-Attribute Utility Model developed by David Wood. See “Goodwill Attributes: Assessing Utility” in The Value Examiner, pp. 21-29 January/February 2007. The method focuses on the attributes of the professional to achieve an allocation between enterprise and personal goodwill. As I have argued here the only attribute of any professional that has any economic relevance is the professional’s ability to influence their patients’, clients’, customers’ or referral sources’ decision on a designated replacement.
3. The Stark Anti-Kickback legislation (Title 42, Section 1395nn, “Limitation on certain physician referrals”) prohibits most forms of fee splitting arrangements which would make it difficult for the hypothetical surgeon in this example to collect fees for referrals.
5. “P” values are measures of statistical significance. “P” represents the probability of obtaining the sample result under an explicit assumption that there is no relationship between the variables of interest. A low “p” values indicates that the relationship between the variable is non-random. Survey question results were evaluated using “Chi Squared” tests. By convention we do not say that a relationship is statistically significant unless the “p” value is .05 (5%) or less.
6. Statisticians recognize that when attempting to determine a population statistic based on sampling from that population error is inevitable. Such error is referred to as sampling error. Sampling error arises because no matter how carefully a sample is drawn, it is unlikely to represent the population precisely. The lower bound and upper bounds are based on confidence intervals assuming that the true mean is between plus or minus two standard deviation units from the sample mean.
Factors to Consider When Drafting a Prevailing Party Provision

By Ashley M. Blalock, Esq. and Howard M. Rudolph, Esq., West Palm Beach

A few months have passed, but suddenly a familiar name appears in your inbox. The client you spent countless months talking, emailing and meeting with to finalize his or her divorce has emailed only three months after dissolution. This time though, it is not about settlement negotiations or who gets the vintage stamp collection. The inevitable has occurred and the ex-spouses are disagreeing about an obligation in the marital settlement agreement.

After review of the provision in dispute, your legal opinion is that your client’s interpretation is clearly correct. After failed attempts to settle the issue, opposing counsel seems adamant on proceeding to litigation. Then, it all begins all over again: attending mediation, writing motions, preparing for the hearing, writing a proposed order, attending the hearing and waiting for the ruling by the judge.

Thankfully, your client prevails. However, both you and your client know that while this battle was well-chosen and well-fought, it was still expensive. Therefore, you want to recover your client’s fees and suit costs: either statutorily, as per F.S. §61.16 (2018), or contractually. Brite v. Orange Belt Securities Co., 133 Fla. 266 (Fla. 1938). This article pertains mainly to proceeding on a contractual basis to recover attorney's fees and suit costs.

Since your client prevailed, the court finds entitlement to reasonable attorney’s fees and suit costs pursuant to the prevailing party provision in the parties’ marital settlement agreement. However, the battle is not yet won. Opposing counsel continues to be adversarial and refuses to come to an agreement regarding what amount of attorney's fees and suit costs are reasonable. Therefore, once again you have to prepare for and attend another hearing regarding the reasonable amount of attorney’s fees and suit costs.

For a hearing to determine a reasonable amount of attorney’s fees and suit costs, bills from the attorney requesting fees and suit costs have to be provided to the court. Then, be prepared to defend the bills that are provided to the court. It is common for the attorney seeking attorney’s fees and suit costs to be cross-examined on the content of the bills and the method of billing. To aid you in this process, it is advantageous to request the billing records of opposing counsel. In Paton, the Supreme Court of Florida held that “billing records of opposing counsel are relevant to the issue of reasonableness of time expended in claim for attorney’s fees.” Paton v. Geico Gen. Ins. Co., 190 So. 3d 1047, 1052 (Fla. 2016).

Not only will the attorney seeking attorney’s fees and suit costs need to testify, but an expert is usually required to testify to the reasonable-tracking of the bills as well. Roshkind v. Machiela, 45 So. 3d 489, 481-82 (Fla. 4th DCA 2010); see also Schneider v. Schneider, 32 So. 3d 151, 155 (Fla. 4th DCA 2010). The courts rely on the expert testimony to help establish what a reasonable rate is for the requesting attorney and his or her associates along with a reasonable amount of time that should have been spent on the issue. Franklin & Marbin, P.A. v. Mascola, 711 So. 2d 46, 48-49 (Fla. 4th DCA 1998). The courts have questioned this requirement. Roshkind, 45 So. 3d at 480-82; see also Island Hoppers, Ltd. v. Keith, 820 So. 2d 967, 972 (Fla. 4th DCA 2002) reversed on other grounds by Sarkis v. Allstate Ins. Co., 863 So. 2d 210 (Fla. 2003). However, it still is usually required to have an expert validate the reasonableness of attorney’s fees and costs when litigating the amount of fees. Id.

After all these steps are taken, additional attorney’s fees and suit costs are incurred. Sometimes the dispute over what constitutes reasonable fees can be so highly contested that attorney’s fees and suit costs for litigating the amount of fees can surpass the amount of fees for the original issue.

Despite this fact, prevailing parties often do not recover all the fees for litigating the amount of fees. This can happen in two instances. First, this occurs when the prevailing party is using a statutory basis under F.S. §61.16 to seek attorney’s fees and suits costs. Since this statute does not specifically prohibit the court from awarding fees for fees, it is left within the court’s discretion to award same. Schneider v. Schneider, 32 So. 3d 151, 156 (Fla. 4th DCA 2010); State Farm continued, next page
Drafting a Prevailing Party Provision
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Prior to devoting her career to the practice of marital and family law, Ashley served as a Judicial Intern at the Fourth District Court of Appeal, where during her service she reviewed appellate briefs and wrote bench memoranda. Also, during law school, Ashley edited for the Journal of Law and Public Policy, held an executive board position in the Entertainment and Sports Law Society, and served as a teacher’s assistant for Legal Writing, Appellate Advocacy, and Trial Practice.

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Noteworthy Decisions
• Resnick v. Resnick, 19 So.3d 1176 (Fla. 4th DCA 2009);
• Karam v. Karam, 6 So.3d 87 (Fla. 3d DCA 2009);
• Vandermeer v. Vandermeer, 995 So.2d 979 (Fla. 4th DCA 2008);
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Fire & Cas. Co. v. Palma, 629 So. 2d 830, 833 (Fla. 1993). This means that the prevailing party could recoup fees or end up with zero fees for litigating the amount of fees; it is solely within the court’s discretion.

Second, a prevailing party that is using a contractual basis to seek attorney’s fees and suit costs will not get fees for fees unless the prevailing party provision specifically states that the prevailing party is entitled to attorney’s fees and suit costs for litigating the amount of fees. Trial Practices, Inc., v. Hahn Loeser & Parks, LLP, 228 So. 3d 1184, 1188 (Fla. 2d DCA 2017). The prevailing party provision must be specific. See id. If the prevailing party provision does not specifically state that the prevailing party is entitled to attorney’s fees and suit costs for litigating the amount of fees, the court will not have a basis to award same. See id. The prevailing party provision should even specifically reference that the prevailing party is entitled to suit costs for litigating the amount of fees and should list such costs, such as the fee for an expert witness.

In conclusion, the only way to avoid economic loss to the prevailing party is to include specific language in a prevailing party provision regarding fees for litigating the amount of fees. By simply adding a sentence to a prevailing party provision you can protect your client’s interests as well as your own.

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