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

Articles and cover photos to be considered for publication may be submitted to Anastasia Garcia (agarcia@anastasiaweb.com), or Anya Cintron Stern (anya@anyacintronstern.legal), Co-Chairs of the Commentator. MS Word format is preferred for documents, and jpeg images for photos.
As Chair of the Family Law Section of The Florida Bar for 2018-2019, I am very excited to kick off this New Bar Year by letting you know what has been happening and what’s in store for the Section this year!

As many of you know, we had a very productive and exciting year under Nicole Goetz’s noteworthy leadership. At our Annual Luncheon held during The Florida Bar Annual Convention in June, Nicole recognized those individuals who really helped make her year great. Just to hit a few of the highlights:

Nicole Goetz honored the following members for their “Above and Beyond Service,” for exceeding all expectations with their tireless dedication and hard work to benefit the Section in 2017-18: Aimee Gross, Diane M. Kirigin, Carin Porras and Bonnie Sockel-Stone.

In each year, the Chair acknowledges a few “Rising Stars” for recognition of their enthusiasm, initiative and outstanding service to the Family Law Section and its goals. This year, Nicole selected Trisha Armstrong, Stephanie Matalon, Ryan Tarnow and Anya Cintron Stern.

The following members and officers of the Section were also awarded for their invaluable contributions and time spent protecting Florida’s families during the 2018 Legislative Session: John Foster, Aimee Gross, Amy Hickman, Kristin Kirkner, Kristi Beth Luna, Bonnie Sockel-Stone, David Manz, Shannon Novey, Michelle Klinger Smith and Phil Wartenberg.

Our Section was lucky enough to have the support of Senator Lizabeth Benacquisto. Thank you all for your unwavering support of the Family Law Section’s mission and goal in ensuring the laws of our state and Florida’s families are best served and legally protected. Thank you to our wonderful team at Southern Strategies—Nelson Diaz, Edgar Castro and Kevin Cabrera—for your hard work, dedication and assistance in this legislative session.

The Chair’s Award of Extraordinary Service was given to the Section’s very own, well-deserving member Sarah E. Kay. The Chair’s Award of Special Merit was given to Sheena Benjamin-Wise, Ronald Bornstein, Belinda Lazzara, Matthew Lundy, Michelle Klinger Smith, Phil Wartenberg and C. Deb Welch.

Nicole recognized Sarah R. Sullivan with The Alberto Romero “Making a Difference” Award at the annual luncheon for her tireless efforts for the benefit of the Section and The Florida Bar.

The Honorable Raymond T. McNeal Professionalism Award was given to Past Section Chair Maria C. Gonzalez for her never-ending, forever and absolute professionalism in all walks of her life, including personally and professionally.

Spotlight Awards were given to the following Section members for their positive impact and outstanding service to the Section: Heather Apicella, John Foster, Tenesia Hall, David Hirschberg, Ronald Kauffman, Christopher Rumbold, Robin Scher and Eddie Stephens, III.

Nicole recognized Lisa Tipton, our Communications Consultant, and Gabrielle Tollok, our Section Administrator, for their tireless support and continued efforts to assist our Section in accomplishing all of our goals.

Under Nicole’s lead, our very own “Bounds of Advocacy” were re-written to bring them more current with our ever-changing world. Championing this effort, our Section was lucky to have Co-chairs Richard West, Past Chair, and Melinda Gamot; along with their Ad Hoc Committee including: the Honorable Scott Bernstein; Dr. Deborah Day; Maria C. Gonzalez; Ky Koch, Past Chair; David Manz, Past Chair; the Honorable Raymond McNeal; and Ashley Myers. The committee was tasked with and accomplished this goal seamlessly. The actual print version was mailed to all members just after the convention and should have been received as of the writing of this message.

We also elected and welcomed the new Executive Committee members, as Chair, myself, Chair-Elect Amy Hamlin, Treasurer Douglas Greenbaum, Secretary Heather Apicella, and of course, Immediate Past Chair Nicole Goetz.

During the luncheon, Lawrence Datz, now immediate past Chair of the Marital & Family Law Standing Committee, recognized those attorneys who have become newly
Chair's Message
from preceding page

board certified by The Florida Bar in the area of Marital & Family Law: Jordan Abramowitz, Christopher Russell Bruce, Matthew Paul Irwin, Catherine Magdalena Rodriguez, Katherine Cooper Scott, Michelle Klinger Smith and John Stephen Thacker. Congratulations! Former Section Chairs Thomas Sasser and Jorge Cestero administered the oath as we swore in our newest Executive Council members: Lauren Alperstein, Shannon McLin Carlyle, Reuben Doupé, Anastasia Garcia, Andrea Reid, Kimberly Rommel-Enright, Robin Scher, C. Debra Welch and Maxine Williams.

This year we already have begun our exciting line up of events, CLE’s and retreats. First, our bi-annual Leadership Retreat was held August 23-26 at the Colony Hotel in Palm Beach, which was held in conjunction with the Section’s Fall Meetings. The Leadership Retreat was a HUGE success and I encourage all members to participate in future years.

The goal, for this Leadership Retreat, was to give both Executive Council members and all members of the Section an opportunity to not only learn about the Section, our legislative process and leadership within the Section, but also to bring back the camaraderie of Section involvement. Another focus was to let all participants loosen up, lighten up and have FUN! We definitely did just that!!!

In October, Section members will put on their cowboy boots, cowboy hats and head to Nashville, Tennessee, for our Out-of-State Retreat. In Nashville, we will stay at the Thompson Hotel, and the renowned Chris Mercer of Mercer Capital will bring us up to speed on the leading issues in the world of Business Valuations.

In January, partnering with the American Academy of Matrimonial Lawyers, Florida Chapter, for our Annual Certification & Review Course, which will take place at the Gaylord Palms in Orlando, Florida. This year the speakers are stellar and the lineup is not to be missed. As in years past, our Section’s Mid-Year Meetings will occur the day before the seminar, with the Executive Council meeting scheduled for just after the seminar.

In April, our Section is lucky enough to host our In-State Retreat at the private, exclusive and absolutely beautiful Ocean Reef Club in Key Largo. This is sure to be one amazing experience for all.

Our Legislation Committee, along with the Executive Council and the entire section, are gearing up for what seems to be a busy legislative session ahead. We are teeing up to persevere through a busy legislative agenda. This year is also a Constitutional Revision year, which occurs only every twenty (20) years. We want to educate our members, and the citizens of Florida, to vote with as much knowledge and information as we can possibly provide.

It is a privilege and honor to be named Chair of this Section. At the Section’s Awards & Installation Luncheon held on June 13, 2018, I was able to speak about my goals, “my theme,” and gave some of my thoughts about leadership within the Family Law Section.

For me, what this organization and volunteer work is all about, as well as my goal since I began this journey, was to try and help those involved recall why they became involved. It is our hard work and tireless efforts to ensure the families in this state are best served in every way.

In that process, I found, for me it was and is the dedication and devotion to a cause that has always and will continue to have an impact. It is the hard work and tireless efforts of this Section to ensure the families in this state are best served, in every way.

In the Section, as a group, we talk about equality, marriage, equal rights, children’s voices and simply about people. Those people are Florida’s families. What hit me in preparing to become Chair was how grateful I am to have the opportunity to work for the Section, be a part of the process in making the laws of this state better for Florida’s families, and educating the Bench and Bar in family law. I am proud to be at the forefront of the legal issues facing the citizens of Florida.

Since my first Family Law Section meeting in 2007, I knew my heart was in this. I knew I was in the right place. I have always been driven by my never-ending desire to make a difference, which is what kept me coming back, meeting after meeting and year after year. And just as I did at the luncheon, I challenge you, the members of this Section, to decide why you are here, what brought you to the table, and specifically to this Section of The Florida Bar. I ask you to think hard and recall.

If I could go back and tell my younger self one thing it would be this: “Abby, your efforts can make a difference. You are unstoppable when you want to be. Even if that difference is a small one. Change one child’s life, help one family, represent one child pro bono or one hundred. Change the world ... If it’s helping one person, it’s having an impact.”

So, to all of you: If I never get to personally tell you, your hard work is not unnoticed. You are doing amazing things. You are making a difference. Your impact will be remembered for years to come.

Each Chair before me has announced his or her “theme.” For me, I decided that the most important thing for me to say to each of you is this: “Let’s remember what it was that brought us here. Don’t lose sight of that. Go back there. Recall it. Talk about it. What is YOUR purpose?”

In a world that is overrun with archaic ways of thinking about women, those who may not marry someone of the opposite sex, married versus unmarried biological parents, (which the Florida Supreme Court recently
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decided in *Perkins v. Simmonds*), the “others,” the rich, the poor, the powerful and the powerless—it’s this way of thinking that is destroying all of us.

So, I give you a few “rules” to guide you in your endeavors in life. Although, I try to abide by these rules, sometimes successfully and most of the time basically learning as I go.

Rule One: **Make failure your fuel.**

*Lesson*: Fail with your head up, blow it, and then WIN.

Rule Two: **Lead from the desk or bench.**

The *lesson* here is “you are allowed to be disappointed when it feels like life has benched you.” What you aren’t allowed to do is miss your opportunity to lead from that bench. If you’re not a leader every day no matter what, don’t call yourself a leader at all. Either you are a leader everywhere or nowhere. Wherever you are put, lead from there.

Rule Three: **Champion each other.**

Joy, success, power. These are not pies where a bigger slice for one part means a smaller slice for you. Let’s claim joy, success and power—together.

*Lesson*: “A victory is also your victory. Celebrate it.”

Rule Four: **Demand the floor if you have something to say.** I hope this year you hear this message resonate from the ceiling, wherever you are reading this.

**MAKE A DIFFERENCE.**

In closing, I ask you to close your eyes and go back, if it’s one year, 10 or even 50 years, and remember why you are doing what you do.

Here’s to a great year—2018-19. Let this year be the year where we all make our mark. Have an impact!

Abigail Beebe, Esq.
Family Law Section
Out-of-State Retreat

Thank You to Our Out-of-State Retreat Sponsor!

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October 18 - 21, 2018
Thompson Nashville
Sonja Jean and I, Laura Davis Smith, are so excited to be co-editors of the Publications Committee under esteemed Section Chair Abigail Beebe. We look forward to continuing the Section’s history of producing informative and interesting publications, to entertain and to educate all of our members! We invite each of you reading this issue to get involved in one or more of the many committees the Section has to offer—including, of course, the Publications Committee! We would love to receive submissions for the Commentator, FAMSEG and the Florida Bar Journal. If interested, please reach out to Ms. Jean or to me, at our respective email addresses: lds@dsandjlaw.com and sj@dsandjlaw.com.
F. Scott Fitzgerald said “Life starts all over again when it gets crisp in the fall.” It is a new a season when Summer ends and we focus on taking stock of the goals we set for the year. As we are all gearing up for hard work to end the year, we want to help you with the challenges faced as a family law practitioner. In this issue of the Commentator you will find articles addressing topics which affect many areas of your practice.

We are proud of the impressive authors who have submitted articles about these key issues which affect you in your practice and issues which affect your clients. You will find articles on the following: key immigration concepts, instructions on how to comply with change of name requirements in Florida, tackling the conflict between a Florida Family Law Rule of Procedure and Florida Statute regarding discovery obligations, addressing the issue of the law regarding retroactive application of revocation-upon-divorce beneficiary designations, and critical tax considerations to consider when drafting Marital Settlement Agreements. This edition of the Commentator is sure to amaze.

A special tribute must be paid to Michelle Klinger Smith for contributing her time, intellect and talent as Guest Editor for this Fall 2018 edition. And we would like to give a special thanks to the entire Commentator team including the authors and Co-Chairs of the Publication Committee, Laura Davis Smith and Sonja Jean. Our team’s inspiring engagement, dedication and thoughtful perspectives allow the Commentator to continue providing articles supporting the education and growth of our readers.

We also want to welcome our new Family Law Section Chair Abigail Beebee, who is always a source of inspiration for the Section.

We invite you to email us about topics you would like to see cover in future Commentator articles as we are all here with a similar mission: to help Florida’s families. It is with great enthusiasm that we present the Fall 2018 edition of the Commentator.

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
One of the benefits of being active in the Family Law Section of The Florida Bar is the ability to build relationships with colleagues from around the state.

The practice of family law tends to be locality specific. You are often familiar with opposing counsel. Your practice may take you before the same judiciary. Certain issues may appear over and over again because of your location. Involvement in the Family Law Section expands your circle. You get to know attorneys and judiciary from around the state and become aware of issues others may experience based on their locations. If someone needs a referral for a family law attorney in Tallahassee, Jackson, Tampa, Orlando, Miami, etc., I can easily name a few attorneys from each area just from our mutual participation in the Family Law Section.

This edition of the Commentator expands on the concept of getting to know colleagues from around the state by including articles written by attorneys with different backgrounds that practice not only in Family Law, but in other areas: Wills, Trusts, and Estates: Alfred Stashis and Denise Carabon (both Florida Bar Board Certified in Wills, Trusts & Estates), and Miranda Weiss; Immigration and Nationality: Elizabeth Blandon (Florida Bar Board Certified in Immigration and Nationality); Family Law: Jerry Rumph, who is a Florida Supreme Court Certified mediator, and Carrington “Rusty” Madison Mead, who is a U.S. Navy Veteran. Also, this edition contains articles written by non-attorneys who are involved in the Family Law Section, including Lisa Tipton, who is the Family Law Section’s public relations professional, and Mary Elias, a forensic accountant.

I thank everyone that has contributed to the Fall 2018 Edition of the Commentator and encourage others to become involved in the Family Law Section of The Florida Bar. Ideas, suggestions, and different perspectives on family law issues are always welcome.
Beneficiary Designations in Divorce: Lessons from Sveen v. Melin

By Denise B. Cazobon, Esq. and Alfred J. Stashis, Jr., Esq.

On June 11, 2018, the United States Supreme Court released its opinion in Sveen v. Melin. At issue in Sveen was the constitutionality of the retroactive application of Minnesota’s revocation-upon-divorce statute to a life insurance beneficiary designation that was executed prior to the statute’s enactment. Under the statute, if one spouse named the other as beneficiary of a life insurance policy or other similar asset, the divorce would automatically revoke that designation such that the proceeds would pass to the contingent beneficiary named or as otherwise provided under the contract. Melin challenged the retroactive application of the Minnesota statute, arguing that it violated the Contracts Clause of the U.S. Constitution by substantially impairing a contractual relationship.

In 2012, Florida adopted a similar statute (Fla. Stat. § 732.703). Like the Minnesota statute at issue in Sveen, Florida’s statute also applies retroactively to designations made prior to the statute’s enactment.

In an 8-1 decision, the Supreme Court ruled that Minnesota’s retroactive application of the revocation-upon-divorce statute to a life insurance beneficiary designation does not violate the Contracts Clause of the U.S. Constitution.

Sveen underscores the importance of specifically addressing beneficiary designations in divorce property settlements as well as the importance of advising clients to consult with their estate planning attorneys once the final order of dissolution is entered.

Background information

In 1997, the decedent, Mark A. Sveen, married Kaye L. Melin. The following year, Sveen purchased a life insurance policy and designated Melin as primary beneficiary of the policy and his two adult children from a prior marriage as contingent beneficiaries. In 2002, subsequent to Sveen’s acquiring the policy and executing his beneficiary designation, Minnesota extended the application of its revocation-upon-divorce statute to life insurance beneficiary designations. Sveen and Melin divorced in 2007. Their divorce decree made no mention of the life insurance policy. Sveen then died in 2011, never having updated his beneficiary designation naming Melin.

The insurance company interpleaded and requested a determination as to whether Minnesota’s revocation-upon-divorce statute revoked the Sveen beneficiary designation. Melin argued that the retroactive application of the revocation-upon-divorce statute was unconstitutional as an impermissible impairment of the Contracts Clause. The district court rejected Melin’s argument and granted summary judgment in favor of Sveen’s children.

Ruling from the Eighth Circuit Court of Appeals and a split of authority

The case was appealed to the United States Court of Appeals for the Eighth Circuit.¹ Years prior, the Eighth Circuit had decided Whirlpool Corp. v. Ritter, which involved an Oklahoma revocation-upon-divorce statute enacted after the decedent husband had executed a beneficiary designation naming his then wife as beneficiary.² The parties subsequently divorced, and the husband later died without having updated his beneficiary designation. In Whirlpool, the Eighth Circuit held that the automatic revocation of an ex-spouse’s beneficiary designation made prior to enactment of the statute violated the Contracts Clause. The court reasoned that there was a significant difference between changing the law with regard to yet-to-be-executed designations as opposed to designations already in place. In the former case, the parties can be expected to incorporate changes in law into their planning, whereas in the latter case, the parties expect their bargain to be protected in accordance with the law in effect at the time the designation was signed.³ At the time the decedent husband designated his then wife as beneficiary, Oklahoma law provided that she would remain the beneficiary unless and until he designated someone else. The Oklahoma revocation-upon-divorce statute, by applying retroactively, disrupted that expectation.

The Eighth Circuit determined Whirlpool to be controlling in Sveen and reversed the lower court’s ruling, finding Minnesota’s revocation-upon-death statute unconstitutional when applied retroactively to a life insurance beneficiary designation. The Eighth Circuit found that the Oklahoma and Minnesota statutes have the same effect—“to disrupt the
policyholder’s expectations and rights to ‘rely on the law governing insurance contracts as it existed when the contracts were made.’

In addition to the Eighth Circuit, the Pennsylvania Supreme Court has previously adopted a similar position. Whereas the Ninth Circuit, Tenth Circuit, South Dakota Supreme Court, and Colorado Supreme Court have all held otherwise, finding that such statutes do not violate the Contracts Clause of the U.S. Constitution when applied retroactively. The Supreme Court’s ruling in Sveen resolved this split of authority among the lower courts.

Ruling of the United States Supreme Court

In an 8-1 opinion written by Justice Kagan, the U.S. Supreme Court reversed the decision of the Eighth Circuit.

The Court first recognized the legal system’s historical use of default rules to resolve estate litigation in a manner that conforms to decedents’ presumed intent. The Court further recognized that states have, over time, expanded the application of revocation-upon-death statutes from wills to will substitutes, such as revocable trusts, certain retirement accounts, and life insurance policies. Such expansion is based upon the underlying presumption that the typical decedent would no more want a former spouse to benefit from the decedent’s retirement plan or life insurance policy than to inherit under the decedent’s will. The Court also recognized that divorce courts have always had broad discretion to divide property between divorcing spouses, and in exercising that broad discretion, courts could revoke beneficiary designations or mandate that prior designations remain in place, notwithstanding any revocation-upon-divorce statute that might otherwise apply. Similarly, the court reasoned, the policyholder might also take steps to override any revocation of an existing designation.

Melin argued that applying the later-enacted revocation-upon-divorce statute to the decedent’s pre-existing life insurance policy designation violates the Contracts Clause. In determining whether a law violates the Contracts Clause, the Court applies a two-part test. First, the Court examines whether the state law operates as a “substantial impairment” of a contractual relationship. The Court considers the extent to which the law undermines the contractual bargain, interferes with a party’s reasonable expectations, and prevents a party from safeguarding or reinstating the party’s rights. If the factors show a substantial impairment, the Court then examines the means and ends of the law, asking whether the state law is drawn in an appropriate and reasonable way in order to advance a significant and legitimate public purpose.

Applying the test to the case on hand, the Court found that, taken as a whole, the Minnesota statute does not substantially impair pre-existing contractual arrangements. While the law makes a significant change by revoking an existing beneficiary designation, the Court rejected Melin’s argument that such change substantially impaired the decedent’s contract. In support of its finding, the Court reasoned that:

(1) because an insured’s failure to change a beneficiary designation is more likely the result of neglect than choice, the statute is designed to reflect a likely policyholder’s intent, and the Minnesota statute therefore most likely honors, not undermines, the intent of the only contracting party to care about the beneficiary terms;

(2) the law is unlikely to disturb a policyholder’s expectations at the time of contracting because the statute does no more than a divorce court could have done; such courts have wide discretion to divide property between spouses when a marriage ends, meaning that the Minnesota law is unlikely to upset any expectations a policyholder may have had at the time of contracting; and

(3) the statute puts in place a mere default rule that the policyholder can easily undo by submitting a change of beneficiary form to the insurer or custodian (or by agreeing to continue the ex-spouse’s beneficiary status as part of the divorce settlement), and the Court has held in past cases that laws imposing minimal paperwork burdens such as these do not violate the Contracts Clause.

Impact on Florida residents

Like Minnesota, Florida has enacted a revocation-upon-divorce statute (Fla. Stat. § 732.703) which provides that a designation benefitting the decedent’s former spouse is void as of the time the decedent’s marriage is judicially dissolved or declared invalid by court order, if such designation was made prior to the dissolution or court order. If the statute applies, the decedent’s interest in the asset passes as if the decedent’s former spouse predeceased the decedent.

Fla. Stat. § 732.703 applies to employee benefit plans, individual retirement accounts, payable on death accounts, securities or other accounts registered in a transfer-on-death form, life insurance policies, qualified annuities, and other similar tax-deferred contracts held within an employee benefit plan, and life insurance policies, annuities, and similar contracts not held within an employee benefit plan. The statute also contains certain exceptions to its application, including significantly plans or policies governed by ERISA.

Like the Minnesota statute at issue in Sveen, Fla. Stat. § 732.703 applies retroactively to all designations made by or on behalf of decedents dying
The Supreme Court's ruling in *Sveen v. Melin* confirms that the retroactive application of Fla. Stat. § 732.703 to designations signed before the July 1, 2012 effective date does not violate the Contracts Clause of the U.S. Constitution.

### Advising clients during and after divorce proceedings

Although the Court’s opinion in *Sveen* provides some helpful clarity, disputes relating to beneficiary designations can best be avoided or minimized through careful planning done during the client’s lifetime.

Wherever possible, the property settlement agreement should specifically address ownership and beneficial interest of any assets subject to beneficiary designations, such as life insurance, retirement plans, employee benefit plans, or assets subject to pay-on-death or transfer-on-death designations. As discussed by Justice Gorsuch in his dissent, there are circumstances in which an ex-spouse may want to continue to designate his or her former spouse as a beneficiary, such as where the parties have minor children. For example, Justice Gorsuch points out that Melin had testified that she and the decedent had repeatedly agreed to maintain one another as designated beneficiaries of their respective life insurance policies because the premiums for such policies had been paid with funds derived from their joint bank accounts. However, that testimony alone was insufficient in and of itself, as the property settlement agreement between the parties was silent as to their respective life insurance policies, and Melin was otherwise unable to demonstrate by clear and convincing evidence that the decedent intended to continue to name her as his primary beneficiary.

The best practice would be for the property settlement agreement to specifically identify each asset that is or can be subject to a beneficiary designation, which spouse owns such asset, whether the owner spouse must designate or continue to designate the former spouse as a beneficiary, or whether the owner spouse is free to dispose of such asset as he or she may choose. Once the order of dissolution is entered, the now divorced client should be encouraged to share a copy of the final order, as well as the property settlement agreement, with his or her estate planning attorney so that he or she might consider its implications for the client’s planning.

It is common practice for some family law judges to enjoin both spouses from making any changes to their beneficiary designations while the divorce proceedings are pending; however, once the order of dissolution is entered, the former spouses should be advised to sign new beneficiary designations as soon as possible, even in instances where the client does not wish to change the designated beneficiaries. In addition to reducing the potential for future conflict among family members, by executing new beneficiary designations, clients can entirely avoid the impact of Fla. Stat. § 732.703 and any unintended consequences resulting from its application. This is particularly true in rare cases in which one divorced spouse intends to continue to name his or her former spouse as beneficiary, even though he or she may not be required to do so under the property settlement agreement. In such cases, the revocation-upon-divorce statute would otherwise likely frustrate that decedent’s intent.

For a number of reasons, clients often do not seek the advice of their estate planning attorneys either during or immediately following divorce proceedings. They may feel overwhelmed or emotionally drained by the process, they may not want to deal with any more lawyers for a while, or they may unwilling or unable to incur any further legal fees. It is not uncommon for several years to pass between the time the order of dissolution is entered and the time the client seeks to update his or her estate planning documents and beneficiary designations. Such inattention can be costly however, particularly in cases where the client dies prior to ultimately updating his or her estate plan. Encouraging divorcing clients to consult with their estate planning attorneys throughout the process can help both to better assure that the client’s actual intent is carried out, and to reduce the potential for future litigation between the client’s beneficiaries and his or her former spouse.

### Endnotes

1. 853 F.3d 410 (8th Cir. 2017).
3. Id.
4. Citing Whirlpool, 929 F.2d at 1323.
11. Id. at 1820-21.
12. Id. at 1821-22.
13. Id. at 1822.
14. Id. at 1822-1823.
15. Id.
16. Id. at 8, 10.
18. Id.
All Procedure and No Substance: The Conflict between Section 61.30(14), Florida Statutes, and Rule 12.285, Florida Family Law Rules of Procedure

By Jerry L. Rumph, Jr., Esq.
Tallahassee

Most Florida family law practitioners are probably familiar with the financial affidavit and mandatory financial disclosure requirements of rule 12.285, Florida Family Law Rules of Procedure, including its application to proceedings to establish or modify child support and its time requirements for producing documents in temporary, initial, and supplemental proceedings. The timing requirements of rule 12.285, subparagraph (b) states that any document required under the rule must be served (1) in temporary hearings, with the “notice of temporary financial hearing” by the party seeking relief and by the responding party, “on or before 5:00 p.m., 2 business days before the day of the temporary financial relief hearing if served by delivery or 7 days before the day of the temporary financial relief hearing if served by mail” or (2) within forty-five days of service of the initial pleading on the respondent in initial and supplemental proceedings.

Fewer Florida family law practitioners may be familiar with the requirements of section 61.30(14), Florida Statutes, which states:

Every petition for child support or for modification of child support shall be accompanied by an affidavit which shows the party’s income, allowable deductions, and net income computed in accordance with this section. The affidavit shall be served at the same time that the petition is served. The respondent, whether or not a stipulation is entered, shall make an affidavit which shows the party’s income, allowable deductions, and net income computed in accordance with this section. The respondent shall include his or her affidavit with the answer to the petition or as soon thereafter as is practicable, but in any case at least 72 hours prior to any hearing on the finances of either party.

Based on the above-quoted provisions, a comparison of rule 12.285(b) and section 61.30(14) reveals a potential conflict as to when an affidavit showing gross income, allowable deductions from gross income, and net income must be served in cases involving the establishment or modification of child support. This does not mean cases having child support as their sole issue, but every initial paternity, dissolution of marriage, or modification proceeding in which child support is an issue. I say that a comparison of the rule and the statute reveals a “potential conflict” because the statute and rule do not request the exact same thing. Section 61.30(14) only requires an affidavit showing these three things: gross income, allowable deductions, and net income. Rule 12.285 requires the filing and service of a financial affidavit in “substantial conformity” with Florida Family Law Rules of Procedure Form 12.902(b) or (c). The financial affidavit begins with gross income, allowable deductions from gross income, and net income, but this is only a portion of the entire financial affidavit.

There are many family law attorneys who work with their clients to comply with rule 12.285, but far fewer, at least in my experience, who comply with section 61.30(14), probably because of a lack of knowledge regarding the section’s requirements. Due to this non-compliance, there have been cases in which a petition seeking child support has been attacked with a motion to dismiss for failure to contain the affidavit required by section 61.30(14), but the court should grant leave to amend in such a case. See, e.g., Henderson v. Henderson, 882 So. 2d 499 (Fla. 1st DCA 2004) (holding that this was a technical deficiency with the petition). If there is an actual conflict between the statute and the rule, it should never be an issue for dismissal or striking of a pleading seeking to establish or modify child support because the timing requirements of the rule, not the statute, should govern.

When a rule of procedure conflicts with a statute on a matter of procedure, the statute is unconstitutional, and the rule prevails. Art. V, §2(a), Fla. Const.; Haven Federal Sav. & Loan Ass'n v. Kirian, 579 So. 2d 730, 732 (Fla. 1991). Procedure has been described as “the course, form, manner, means, method, mode, order, process or steps” a party takes in judicial proceedings as well as “the machinery of the judicial process as opposed to the product thereof” as opposed to substantive law, which “creates, defines, and regulates rights, or that part of the law which courts are es-
established to administer.” Haven Federal Sav. & Loan Ass’n, 579 So. 2d at 732. Generally, matters related to the time for filing or serving documents in a proceeding are procedural in nature as they relate to “the machinery of the judicial process.” See, e.g., Ong v Mike Guido Properties, 668 So. 2d 708 (Fla. 5th DCA 1996); Sain Motor Freight Line, Inc v Reid, 930 So. 2d 598 (Fla. 2006); Fla. R. Jud. Admin. 2.514 and 2.516.

Given the potential conflict between section 61.30(14) and rule 12.285, what is the family law practitioner to do? A few options are available. If a petition involving child support has already been filed without the required affidavit and if that petition is attacked by a motion to dismiss for that reason, the petitioner can seek leave to amend to file the required affidavit. The request should be granted, or the petitioner may respond to the motion to dismiss by arguing that the rule trumps the statute, as discussed above. In fact, the Florida Third District Court of Appeal once contemplated this very argument in dicta. See Shou v. Miller, 583 So. 2d 805, 806-07 (Fla. 3d DCA 1991) (decision quashed on other grounds). In Shou, the Third District Court of Appeal stated that if section 61.30(12), now 61.30(14), conflicts with rule 1.611(a), Florida Statutes, which was the prior rule governing financial disclosure in dissolution of marriage actions, such a conflict would “represent an invalid legislative intrusion into the procedural rule making authority of the supreme court.” Id.

If the petition has not yet been filed, the petitioner can file the petition without the affidavit required by section 61.30(14) and risk facing a motion to dismiss for failure to comply with the statute. If the respondent files a motion to dismiss, then the practitioner can choose between amending the pleading or fighting the motion to dismiss. The practitioner can wait until the client has completed his or her financial affidavit prior to filing the petition, but in dissolution of marriage actions, waiting may not be practical, such as when the petitioner in an original dissolution of marriage action wants to establish a cut-off date for identifying marital assets and liabilities under section 61.075(7), Florida Statutes.

Possibly, the best practice is to comply with both the rule and the statute, which should be relatively easy. As section 61.30(14) only requires gross income, allowable deductions, and net income, and not a full financial affidavit, most parties know this information from memory or can readily access it. Just as many practitioners insert their UCCJEA allegations into a petition to establish or modify parenting, they can insert the petitioner’s gross income, allowable deductions, and net income into the affidavit. Most parties know this information from memory or can readily access it. Just as many practitioners insert their UCCJEA allegations into a petition to establish or modify parenting, they can insert the petitioner’s gross income, allowable deductions, and net income into the affidavit. This should only require one additional paragraph to be added to the petition. In the alternative, the practitioner may want to provide a brief, one-page affidavit containing this information and avoid the possible need to amend the petition down the road if it turns out that the information was incorrect. Of course, the practitioner needs to make sure to be as accurate as possible with this income information so that it aligns with the financial affidavit that will be required to be filed and served later in the case. In either scenario, complying with both the rule and the statute should give the practitioner the greatest peace of mind and obviate a challenge from the respondent, at least on these grounds. Such a practice will hopefully demonstrate to the court that the petition’s counsel is taking all disclosure requirements seriously, so the court can trust that practitioner to follow all legal requirements in the case. Finally, if the respondent does not comply with his or her disclosure requirements, it will give the petitioner the greatest possible ammunition to show that he or she has been forthcoming in all aspects of financial disclosure.

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Charting Your Course
What’s in a Name? – Assisting Clients with Name Change Requirements in Florida

By Carrington Madison Mead, Esq.
Jacksonville

Most family law practitioners do not represent clients for name changes since the form issued by the Florida Family Laws of Procedure is straightforward, and pro se litigants can usually handle the matter on their own. However, there are times when litigants need assistance from a legal professional.

Name changes have been more frequently sought due to changes in federal laws relating to attempts to prevent false identification and to obtain more cohesive identification processes throughout each state to prevent terrorism within our borders. The Real ID Act of 2005 (The Act) was passed in May 11, 2005. Specifically Title II was added instructing states to minimally include the following information on any “driver’s license and identification card issued by the state:

1. The person’s full legal name.
2. The person’s date of birth.
3. The person’s gender.
4. The person’s driver’s license or identification card number.
5. A digital photograph of the person.
6. The person’s principal residence.
7. The person’s signature.”
as it concerned the citizenship and residency status of the individual to be issued identification. These requirements call for the individual to produce documents to validate their identity. This means the individual needs to be able to provide a paper trail beginning with their birth certificate continuing to the last document that verifies the name they are currently using, if different than that which is found on their birth certificate. This requirement included a requirement that a state “shall enter into a memorandum of understanding with the Secretary of Homeland Security to routinely utilize the automated System known as Systemic Alien Verification for Entitlements” no later than September 11, 2005. The Act set forth that “[b]eginning 3 years after the date of the enactment of this division, a Federal agency may not accept, for any official purposes, a driver’s license or identification card issued by a state to any person unless the state is meeting the requirements of this section.”

This federalization of identification requirements for identification documents to be issued by the states has understandably caused a myriad of issues for three groups of citizens who often seek assistance of counsel: (1) Senior citizens; (2) Immigrants; and (3) Adults and children transitioning to another gender.

1. Senior Citizens
Senior citizens often need assistance for two reasons. First, females may have been married several times and either cannot locate or obtain documents that evidence their marriage or divorce. They may need assistance in obtaining their documents to keep the name they currently go by or to be able to show the paper trail of how they obtained the name they are currently using. This is especially cumbersome with individuals who have changed their name numerous times.

Secondly, many senior citizens, especially those born in southern states, may lack a birth certificate altogether or possess a birth certificate with a name on it that does not match the one they have on their identity documents (i.e. state driver’s license or identification card and social security card). Those who hobby in genealogy are familiar with this phenomenon, and are often frustrated by it.

Before the necessity of social security numbers which began in 1935 and the issuing of state driver’s licenses, people didn’t have identity documents. Driver’s licenses in the United States were initially issued in 1910 in New York, not for identification but for the licensing of commercial drivers. Although, most states issued driver’s licenses for the purposes of operating a vehicle by 1935, many people had same issued without much necessity to provide verification of identity. As driver’s licenses began to be used commonly as a method of identification, some states began issuing identification cards for residents who ask for state-issued identification for non-driving purposes. There still existed no pattern of requirement to prove who one was outside of presenting a birth certificate.
Those individuals lacking birth certificates could verify identity with an affidavit for someone who was able to state they knew the person all their lives, knew the individual personally, and knew their name. The most likely individuals to lack a birth certificate were those born in rural areas of the South. Often, the parents could not afford the fees required for the issuance of a birth certificate and did find a necessity for doing so, beyond recording the birth in the family bible. This often resulted in the name the child went by changing as they matured, and family members felt another name was more befitting. Under these circumstances many senior citizens possess identification documents that show the name they go by, not the name they were given at birth. These circumstances require assistance at times due to the individual's lack of ability to provide documentation the court desires because of lack of knowledge. Affidavits from family and/or individuals who have known the petitioner all their life are key. Anyone signing an affidavit will be required to produce identification to establish their own identity.

2. Immigrants

Immigrants find a need for a name change for two reasons: 1) Their name is misspelled on immigration documents; and 2) They desire to “Americanize” their name to better blend in with their fellow citizens. Those who have sat around their kitchen table with extended family members recounting stories of the past may have heard immigration stories that include the change of the family surname because of misspelling by a clerk upon entry to the country or an attempt to shirk ethnic identity that may subject the individual to discrimination in their new homeland. Due to the environment as it pertains to identity documents, as described above, those who came in earlier were able to experiment with a myriad of spellings until finding one spelling they were comfortable.

On some occasions, there is no attempt to document the name differently than from that given to them in their country of birth. In these cases, the family socially uses a more Eurocentric name to make it easier for the individual to socially integrate in their communities. This is common with the children in these families. Some of these children grow up to be adults who are not aware of what their real first name is, having never had need to look at their birth certificate. Meanwhile, they possess identity documents that contain the name they have always used. This is because most of us who are in our forties and above did not obtain a social security card until our teenage years, when we decided to go to work.

continued, next page
at sixteen. Prior to this there was no need for a social security card or an identity document. By this point the individual was used to filling out documents with the name they used. Although this is most common amongst immigrants it also occurs in the normative population.

3. Adults and Children Transitioning to Another Gender

a. Adults

The central issue with adults transitioning to a gender different from that which they are identified as on their birth certificate is that which relates to the criminal status of the individual who requests a name change.12 These individuals are at a higher risk of participating in activity that is likely to find them arrested or gaining the attention of law enforcement officers (LEOs). This population is eight times more likely to participate in sex work in comparison to women for survival.13 They are also likely to commit drug related crimes.14 Thus, the requirement in the Florida Statute to report “whether the petitioner has ever been arrested for or charged with, pled guilty or nolo contendere to, or been found to have committed a criminal offense, regardless of adjudication, and if so, when and where” can present problems for a petitioner in this case.15 This Statute also requires the individual to state that their “civil rights have never been suspended or, if the petitioner's civil rights have been suspended, that full restoration of civil rights has occurred.”16 Most practitioners read these sections and advise those seeking assistance because they have been arrested, or processed for a crime, that they are unable to assist the petitioner and that a name change cannot and will not be granted. However, this is an inaccurate assessment.

The section of the Statute introducing the criminal record of a petitioner did not exist until June 15, 1995 and has seen subsequent changes further flushing it out on July 1, 2004.18 The section of the Statute addressing registering as a sexual offender or predator was passed and became effective on July 1, 2014. The Statute also specifically requires the clerk of the court to send a report along with the final judgment to the Florida Department of Law Enforcement.19 What is of particular interest is that the Statute further states,

“If the petitioner is required to register as a sexual predator or a sexual offender pursuant to s. 775.21 or s. 943.0435, the clerk of court shall electronically notify the Department of Law Enforcement of the name change, in a manner prescribed by that department, within 2 business days after the filing of the final judgment.”20

Thus, clearly the legislature assumes petitioners with convictions for felonies can and will petition the court for a name change and are likely to have same granted. Ostensibly, these same petitioners, who have felonies, will not have their voting and gun rights restored in Florida. This is further evidenced by the Florida Supreme Court, in 1991, wherein they overturned a denial of a petition without granting a hearing because the petitioner was incarcerated.21 The court's assumption the petitioner was ineligible was judicial error.22

This issue was further flushed out in a Fourth District Court of Appeals case wherein another petitioner, Mullin, with a prior felony was denied a name change because of his criminal record and “had not had his civil rights restored.”23 Mullin argued that the court was not allowed to consider the felony since the conviction was entered prior to the effective date of the applicable statute, which was June 15, 1995, and the appellate court agreed.24 The Mullin court repeated the necessity of granting a petition “in the absence of a evidence of a wrongful or fraudulent purpose.”25 The dissent in Mullin is worth reading since it discusses how the statute may run afoul of First Amendment rights.

b. Children

Children in this situation are not going to have the same issues with criminal arrests and convictions that adults do. However, they will face conflict in obtaining the name change when parents disagree. Interestingly, the statute allows a parent to petition the court alone, without the necessity of being joined by the other parent.26 The interesting part of this section allows the petitioning parent a choice of notice, either personal or constructive.27

Many practitioners may feel name changes are far too simplistic an area to practice in but underestimate the need for a skilled attorney to advocate on behalf of a litigant. Others do it because they think it’s simple. Although, the latter may be true a good bit of the time, there are plenty of litigants who need assistance. Practitioners are advised to think twice about turning down the opportunity but should measure the depth of the water before they leap.

Endnotes

1. Florida Family Law Rules of Procedure Form 12.982(a) Adult; 12.982(e) minor; and 12.982(e) Family. For the purposes of this article the author will not discuss each section of the petition but instead the complicating issues that appear in serving clients requesting name changes.

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ibid, at Sec. 202(c)(2)(B).

ibid, at Sec. 202(a)(1).


https://en.wikipedia.org/wiki/Driver%27s_licenses_in_the_United_States.

This information is based on the author’s actual knowledge of the process. It is important to note this information has been supported by many clients of the author who have also anecdotally shared this information. Other clients have also indicated that agency offices in rural areas were less likely to require an affidavit as described herein and instead would accept a sworn statement from the applicant.

This occurred three times in the author’s family. Genealogy records show his maternal grandfather’s first name changing three times in his birth certificate and census records when recorded while residing his family, which included his twin brother. Two other family members also had their name changed anecdotally and recorded in official government records.

Wages v. State, 160 So.3d 100 (Fla. 4th DCA 2015). Wages requested a name change to be able to conform with the National Real ID Act of 2005. Although his birth certificate showed a name he was given upon birth, his Mother later requested a social security card for her son and registered him under a completely different name. Wages used this name for his lifetime and always identified by this second name, including when he was arrested and convicted of misdemeanors and declared bankruptcy.

For purposes of this discussion the author will not be discussing the nuances of obtaining gender marker changes through the courts when necessary.

Florida Statutes §68.07(3)(h) (2018).


ibid.


ibid.

In re NAME CHANGE PETITION OF Bryan Patrick MULLIN, a/k/a Patrick Bryan Mullin, 892 So. 2d 1214 (Fla. 2nd DCA. 2005); Finfrock v. State, 932 So.2d 437 (Fla. 4th DCA 2006).

ibid.

ibid.


ibid. In re Benitez, No. 3D17-1502 (Fla. 3d DCA 2018).
PowerPoint Pro Tips

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Need some ideas on how to take your PowerPoint skills to the next level? This article is a compilation of some of the best pro tips out there for PowerPoint 2016—formatting, video, transitions and even font size—that hopefully will take your next presentation from “blah” to “WOW.”

**Follow the 10/20/30 Rule.** Venture capitalist Guy Kawasaki says a PowerPoint presentation should have 10 slides, last no more than 20 minutes and contain font no smaller than 30 points.

- **10.** According to Kawasaki, 10 is the optimal number of slides because people can’t comprehend more than 10 concepts in one meeting.
- **20.** For a one-hour presentation, factor in time to make your presentation work with the projector, interruptions from people coming and going and the inevitable technical difficulties. In a perfect world, if you give your pitch in twenty minutes you have forty minutes left for Q & A.
- **30.** How many times have you seen as much text as possible crammed into the slide and then the presenter reads it word for word? Not only is it boring, Kawasaki says this is a no-no because the audience ends up reading ahead of you faster than you can speak. Use fonts no smaller than 30 points and you’ll be forced to identify the most relevant parts of your presentation and learn how to talk about them.

**Use Designer to Create Amazing Layouts.** Who has the time or ability to design eye-catching presentations? Thankfully, the PowerPoint Designer feature uses your text and images and creates slide layout suggestions for you.

- **Create a new presentation and choose one of PowerPoint’s built-in themes.**
- **Click File > Options > General and check the box for “Automatically show me design ideas.”**

**Add Audio and Video.** Adding sound to your PowerPoint is super easy. Just click Insert > Audio and select the music file you want to include. You can also do the same with video; PowerPoint even allows you to search for and embed online videos from YouTube. But did you know you also can record audio voiceover directly into your presentation? Use your computer’s built-in microphone or connect a USB microphone to your computer for better quality.

- Choose the slide onto which you want to record the audio.
- Click Insert > Audio > Record Audio.
- Name the audio, then click the red record button to start recording. When you finish, click the blue square to stop recording. Click Play to check how it sounds. You can re-record it by following the same steps.
- When you’ve got a recording that works, click OK and your audio will appear as a speaker icon in the center of the screen.

**Navigate with Zoom.** Are you still clicking through PowerPoint presentations one slide at a time? Zoom lets
you navigate around your presentation in a more interesting way. By creating a Zoom, you can jump to and from specific slides and sections in an order you decide. Maybe you have one slide that summarizes your key points. Zoom lets you jump to the slide you want and then go right back to your place in the presentation.
- Click Insert > Zoom.
- Summary Zoom lets you see all of your presentation slides at one time. Slide Zoom allows you to jump to a single slide anywhere in your presentation and a Section Zoom is a link to a section already in your presentation. You can use it to go back to sections you want to really emphasize or to highlight how certain pieces of your presentation connect.

Zoom for PowerPoint is only available to Office 365 subscribers and only on Windows. Use Zoom Tools on the Format menu to customize transitions and backgrounds.

**Morph It.** Morph is an easier, faster way to create animations—and it’s available with an Office 365 subscription. Morph creates the appearance of movement in text, shapes, pictures, SmartArt, WordArt and charts.
- Duplicate one of your slides, then edit the duplicate slide by moving objects around, adding or removing text, changing graphics and colors, etc. Note: The two slides you are connecting need to have at least one object in common such as text, a shape, a picture or a chart.
- On the Transitions tab, select Morph. PowerPoint will automatically animate the changes you made.

**Use Your Smartphone as a Remote and Laser Pointer.** Have you ever been distracted by a presenter who can’t seem to get the transitions right, or worse, stops speaking because he or she is trying to advance slides using a laptop? Avoid this by turning your phone into a presentation tool.
- Download the free PowerPoint app for Android, iPhone, or Windows phones.
- Connect your phone to the projector with an HDMI cable or WiFi through AirPlay or ChromeCast.
- Bonus: You can create and share presentations on the PowerPoint app and then continue working on them once you get back to your computer.

**Convert Your Presentation Into Video.** Not everyone has PowerPoint on their computers, and sometimes you might want to share your amazing PowerPoint on social media or post it to your website. It’s easy to create a video and pick a format that works for the location where you’d like to share it.
- Save all of your changes, then go to File > Export > Create a Video. All of your timings, narrations, animations and transitions will be retained.
- Select the resolution for your video and decide if you want to include slide timings and narrations. Next, choose a default time for each slide to appear on the screen and then click Create Video.
- Name your file, choose your file type and save it to your computer. MP4 format is a good choice because it’s supported by common social media sites like Facebook and Twitter. Click Save to generate your video.

If you’re looking for more resources on how to take your PowerPoint skills to the next level, you can find many easy-to-follow tutorials on YouTube and in Microsoft Office Support.

**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.
Tax Considerations for Marital Agreements

By Miranda M. Weiss and Alfred J. Stashis, Jr.
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When drafting marital agreements, due consideration is not always given to relevant tax provisions. Such provisions can potentially result in significant tax savings to one or both parties. Marital and family law attorneys should recognize the value of various tax provisions in order to ensure their clients are maximizing potential benefits.

This Article addresses various considerations to keep in mind when representing clients contemplating marital agreements.

Gifts during Marriage

During the marriage, each spouse may wish to retain the ability to freely make gifts to or for the benefit of other individuals and/or charities, including family members and potentially the other spouse, as may be desired. For example:

Sample Language 1: Gifts. Nothing in this Agreement shall be considered a waiver by either party to make gifts to the other, but this provision shall not be construed as a promise or representation that any such gift, bequest or devise will be made. [Spouse 1] recognizes that [Spouse 2] may wish to confer gifts or benefits on others, including his/her family members, whether by gifts or other transfers during lifetime or by inheritance upon death. Each party agrees that the other shall have an unlimited, unfettered right to do so without any limitation, restrictions or impairment except as otherwise provided in this Agreement.

Lifetime gifts between U.S. citizen spouses qualify for the unlimited marital gift tax deduction. Gifts to other individuals qualify for the annual gift tax exclusion, which is $15,000 as of January 1, 2018.

Spouses who agree to split gifts in the taxable year may make tax-free gifts to any individual up to $30,000 per donee per year. This gift-splitting option doubles the amount that one spouse may give to an individual in the taxable year, and can result in substantial tax savings over time. For example, assume Spouse 1 and Spouse 2 agree to gift split annual exclusion gifts. During years 1-10, Spouse 1 makes gifts of $30,000 each year to ten individuals, including four children and six grandchildren. If Spouse 2 agrees to gift split during each of those years, the result will be that all $3,000,000 worth of Spouse 1’s gifts to family members will be covered by annual exclusions and neither Spouse will utilize any of their available lifetime gift tax exemption or GST tax exemption.

If Spouse 2 had not consented to gift splitting in the foregoing example, then Spouse 1 would have made $1,500,000 of taxable gifts during years 1-10, thereby utilizing $1,500,000 of lifetime gift exemption and $900,000 of lifetime GST tax exemption. Or, if Spouse 1 had no available exemption remaining, Spouse 1 would be responsible to pay approximately $388,000 in gift tax and $360,000 in GST tax.

Thus, one tax consideration attorneys should address in drafting marital agreements is the agreement to split gifts. Of course, the marital agreement should also specify who is liable for the tax due, if any, on gifts made in excess of the annual exclusion amount when spouses consent to split gifts since both spouses will otherwise be individually liable for the tax. The sample language below contemplates that when spouses elect to split gifts, the donor gifting the property will bear the gift tax liability in excess of the exemption amount. For example, if Spouse 1 and Spouse 2 agree to gift split, and Spouse 1 gifts $500,000 of Spouse 1’s separate property to Spouse 1’s son, and there is insufficient gift tax exemption available, then Spouse 1 would bear the gift tax liability for the amount in excess of the $30,000 annual exclusion amount.

Sample Language 2: Gift Splitting. If the parties elect to split gifts for federal gift tax purposes, each party shall pay his or her proportionate share of all gift taxes due, if any, calculated according to each party’s proportionate ownership interest in the Separate Property and Marital Property gifted.

Given that the lifetime gift tax exemption amount has increased to $11.18 Million per spouse as of January 1, 2018, in cases where one spouse is significantly wealthier than the other, there can be significant value to the wealthier spouse in having the ability to avail of the less wealthy spouse’s lifetime gift exemption through gift splitting. Consider the case where Spouse 1 has a net worth of $20 Million and unused gift tax exemption of $5 Million, while Spouse 2 has a net worth of $2 Million and unused gift tax exemption of $11.18 Million. If gift splitting is elected, Spouse 1 could make gifts of $10 Million to his/her children by
utilizing Spouse 1’s remaining $5 Million gift exemption and $5 Million of Spouse 2’s gift exemption, with no gift tax due. Spouse 2 would still have $6.18 Million of available gift exemption remaining after Spouse 1’s gifts under current law, which is more than sufficient to cover Spouse 2’s $2 Million in assets, including the likely growth thereupon. If gift splitting were not elected in the foregoing example, the same $10 Million worth of gifts made by Spouse 1 would have triggered approximately $2 Million (40% of $5 Million) in gift tax for Spouse 1.

**Income Tax Returns During Marriage**

Couples must decide whether they will file their income tax returns jointly or separately during their marriage. Generally, spouses who choose to file joint returns receive greater tax relief than those who file separately. This is because a lower top marginal tax rate is generally available to couples filing jointly, as are greater exclusions and credits.

It can be helpful to run the numbers in each case to see whether a joint return will result in overall tax savings. When there is a significant discrepancy in earnings between the spouses, filing jointly will generally result in a lower top marginal tax rate for the higher earning spouse. For example, assume Spouse 1’s taxable income is $175,000 and Spouse 2’s taxable income is $50,000. In 2018, if both spouses file separately, Spouse 1 would be in the 32% top marginal tax bracket and Spouse 2 would be in the 22% top marginal tax bracket. Whereas, if Spouse 1 and Spouse 2 agreed to file their income tax return jointly, their top marginal tax rate would be 22%—a 10% decrease for Spouse 1.

Although tax savings are a significant variable, drafters of marital agreements must also address the liability for payment of any taxes due under a joint return. A common approach is to provide that each spouse must pay his or her proportionate share of the overall income taxes, as follows:

Sample Language 3: *Tax Returns.* If both parties agree, they shall file joint income tax returns during the marriage. Otherwise, the parties shall file separate income tax returns and pay their own taxes, interest and penalties as well as costs of preparation. If the parties file joint income tax returns, each party shall pay his or her proportionate share of all income taxes. The proportionate share of each party shall be an amount bearing the same ratio to the total joint tax liability for the period covered by the return that (1) the amount of income tax for which each party would have been liable, if the party had filed a separate return for the period reporting the items of income, deduction, gain, loss, credit, etc. bears to (2) the total of the amounts for which both parties would have been liable if both had filed separate returns for that period. The filing of any joint income tax return shall in no way modify or be regarded as modifying, explicitly or implicitly, any of the terms of this Agreement, and the inclusion of any item of income classified as Separate Property, or any proceeds from the sale, exchange of investment of Separate Property, as reported or reportable on any jointly filed federal income tax return during the marriage, shall not convert such income or property to Marital Property or permit the other to claim any legal or equitable interest thereto or therein. If interest or penalties become due on a joint return, the party responsible for causing such penalty or interest shall pay the interest or penalty. If neither party is directly responsible, or if both parties are responsible, such interest or penalty shall be the obligation of and paid by the parties in the same proportion as the taxes for that year.

For example, assume that if separate returns were filed for 2018, Spouse 1 would owe $50,000 in income tax and Spouse 2 would owe $10,000 in income tax; whereas if a joint return were filed, the total tax due would be $55,000. Under the above formula, Spouse 1 would be liable for $45,833.33 = $50,000/$60,000 or 83.33 percent of the $55,000 taxes due under the joint return, and Spouse 2 would be liable for $9,166.67 = $10,000/$60,000 or 16.67 percent of the $55,000 taxes due under the joint return.

As illustrated, planning for the filing of joint returns may result in tax savings for one or both spouses. Attorneys and advisors for both spouses should consider whether filing a joint return would benefit their clients and, if so, how to structure the method for determining payment responsibility.

**Tax Issues in the Event of a Divorce**

The Internal Revenue Code provides that no gain or loss is recognized on a transfer of property from one individual to a former spouse if the transfer is made incident to divorce. The Internal Revenue Code further provides that any transfers of property or interests made pursuant to a written settlement agreement where divorce occurs within three years after the date beginning one year before the agreement is entered into shall be deemed to be a transfer made for full and adequate consideration in money or money’s worth.

Under current law, effective until December 31, 2018, alimony paid under a divorce or separation instrument is deductible by the payer, and the recipient must include such amounts in his or her income. The payer can deduct alimony whether or not the payer itemizes deductions. Significantly, however, the 2017 Tax Cuts and Jobs Act provides that alimony payments made pursuant to a divorce agreement finalized or modified after December 31, 2018 will no longer be deductible to the payer or includable as income to the recipient. Alimony paid pursuant to a divorce or separate agreement executed...
prior to January 1, 2019 will continue to be deductible to the payer and reportable as income to the recipient as under current law.

While many provisions of the 2017 Tax Cuts and Jobs Act provide for a sunset date, the non-deductibility of alimony payments and inclusion of such payments in gross income does not sunset. Thus, wealthy clients who divorce and are required to pay alimony will lose substantial current tax benefits over time. Family law attorneys should therefore consider adding certain language to marital agreements to address potential adjustments to alimony payments in order to attempt to maintain close to the status quo, as follows:

Sample Language 4: Alimony Payments. At any time or times that alimony is payable under this Agreement and such alimony is not deductible to the payer under the Internal Revenue Code and not includible in the payee’s gross income under the Internal Revenue Code, then such alimony payments shall be reduced by the average tax rate of the Parties, as determined using the average marginal tax rate of both parties for the year immediately preceding the year of payment.13

The language above provides that alimony payments will be reduced by an amount equal to the estimated tax allocable to the alimony payment, as determined by calculating the average tax liability of the payer and the payee for the prior year. Assume that the preliminary alimony amount of $50,000 is due in 2020, Spouse 1 had 2019 income of $150,000 and a 24% average marginal tax rate, while Spouse 2 had 2019 income of $70,000 and a 22% average marginal tax rate. The average marginal tax rate of the spouses for the year immediately preceding the year of payment is therefore 23%. The tentative alimony payment amount of $50,000 in 2020 would be reduced by $11,500 in estimated tax and an alimony payment of $38,500 would be made in 2020.

Because over time the inability to deduct alimony payments will likely result in the loss of substantial tax deductions to the payer and a substantial tax-free benefit to the recipient, attorneys should consider including language in marital agreements which adjusts the manner for calculating required annual alimony payments.

Death of Spouse

The Internal Revenue Code provides that marital bequests made by a deceased US citizen to a surviving US citizen spouse qualify for the unlimited estate tax marital deduction if such bequests are made either outright or in the form of qualified terminable interest property (QTIP).14 Outright bequests are simplest; however, many decedents will choose to provide for their surviving spouse via a QTIP Marital Trust. In addition to offering better creditor protection, the QTIP approach allows the deceased spouse to control ultimate disposition of the trust assets upon the surviving spouse’s subsequent death.

An often overlooked provision is the estate tax portability election. This election provides the surviving spouse with the opportunity to increase his or her basic $11.18 Million exclusion amount by the amount of estate tax exemption which was not utilized by the deceased spouse (the “Deceased Spousal Unused Exclusion Amount” or “DSUE amount”).

For example, consider two individuals contemplating marriage. Spouse 1 has an estimated taxable estate of $25 Million. Spouse 2 has an estimated taxable estate of $2 Million. Spouse 1 would likely want his/her marital agreement to provide that if Spouse 2 predeceases Spouse 1, the Personal Representative for Spouse 2’s Estate will make a portability election, so that Spouse 1 may take advantage of the Spouse 2’s DSUE amount.15 Under the foregoing example, if Spouse 2 died in 2018 having made no lifetime taxable gifts, and the portability election is made on a timely filed federal estate tax return for Spouse 2’s estate, Spouse 1 would receive approximately $9 Million of Spouse 2’s unused exemption, potentially resulting in approximately $3.6 Million of estate tax savings under current law upon Spouse 1’s subsequent death.

In drafting such provisions, careful consideration should be given to whether the surviving spouse can cause the Personal Representative of the deceased spouse’s estate to make the portability election, as well as how the expense for making the portability election will be allocated. Consider the following language:

Sample Language 5: Use of Deceased Spousal Unused Exclusion Amount. The parties acknowledge that the Internal Revenue Code currently provides the opportunity for the deceased spousal unused exclusion amount (as defined in I.R.C. § 2010(c)(4)) (the “DSUE amount”) to be transferred to the surviving spouse for estate and gift tax purposes (the “Portability Election”) pursuant to an election to be made following the death of a spouse. The parties further acknowledge that, in order to make the Portability Election, the executor of a deceased spouse’s estate is currently required to file a Federal estate tax return showing the computation of the DSUE amount, within nine (9) months following the deceased spouse’s death plus any filing extensions approved by the Internal Revenue Service.

[Spouse 1] and [Spouse 2] agree that the survivor of them shall be entitled to have the benefit of the deceased spouse’s DSUE amount to the greatest extent permitted under applicable Federal law. Each party hereby agrees to direct the executor of his or her estate in his or her last will and testament or in any other testamentary instrument to do all things necessary to make a valid Portability Election, if requested.
by the surviving party to do so, to transfer his or her DSUE amount to the other. The party receiving the benefit of the DSUE amount shall reimburse the estate of the deceased party for all reasonable costs incurred by the deceased party's executor in the preparation and filing of any documentation necessary to make the Portability Election, including an estate tax return. The parties acknowledge that the DSUE amount of either spouse cannot be determined until the death of such spouse and that each party may make gifts during his or her lifetime or otherwise dispose of his or her property at death in accordance with the terms of this Agreement which would reduce or even eliminate the DSUE amount of a deceased spouse. Nothing contained in this paragraph shall be construed to limit the ability of either spouse to dispose of his or her assets, either during life or at death.

The sample language above provides that the surviving spouse may cause the deceased spouse’s Personal Representative to file an estate tax return in order to make the portability election so that the decedent’s unused exemption amount may become available to the surviving spouse. The sample language also provides that the surviving spouse will reimburse the deceased spouse’s estate for the expenses incurred in preparing and filing the estate tax return for portability purposes.

**Conclusion**

There are numerous potential tax benefits available to married persons which should be considered by attorneys in drafting or advising with respect to marital agreements. Failure to consider such benefits may result in the loss of substantial tax savings otherwise available to one or both spouses.

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**Endnotes**

1. All Sample Language provisions in this Article are intended for educational purposes only. The language should be vetted carefully and tailored to meet each individual client’s needs.
2. 26 U.S.C. § 2523. Assuming both spouses are U.S. citizens during the taxable year. Gifts to a spouse who is not a U.S. citizen are governed by § 2523(i) and beyond the scope of this Article.
5. This example assumes the gifts to grandchildren are made outright or in § 2642(c) trusts.
6. As of January 1, 2018, the lifetime gift and estate tax exclusion has increased to $11.18 Million per taxpayer, or $22.36 Million for a married couple, less prior lifetime taxable gifts, and assuming each spouse is a U.S. citizen.
7. GST tax refers to Chapter 13 of the Internal Revenue Code, which imposes a tax on the transfer of property as “incident to divorce” if (i) such transfer occurs within 1 year after the date the marriage ceases or (ii) is related to the cessation of the marriage.
8. 26 U.S.C. § 1041(a)(2). Section 1041(c) defines a transfer of property as “incident to divorce” if (i) such transfer occurs within 1 year after the date the marriage ceases or (ii) is related to the cessation of the marriage.
9. 26 U.S.C. § 2516. The Internal Revenue Code provides transfers of property from an individual to a spouse or former spouse in settlement of his or her marital or property rights or to provide a reasonable allowance for the support of a minor or is not treated as a gift where transfers are made pursuant to a settlement agreement and a divorce occurs within the 3-year period beginning on the date that is 1 year before such agreement is entered into regardless if the agreement is approved by a divorce decree.
10. 26 U.S.C. § 215(a) (permitting the deduction of alimony payments); 26 U.S.C. § 71 (a) (requiring the inclusion of alimony in gross income).
14. 26 U.S.C. § 2056. QTIP is defined in § 2056(b)(7)(B) as property passing from the decedent to the surviving spouse in which the surviving spouse is entitled to all the income from the property at least annually and is the only permissible recipient of income or principal during surviving spouse’s lifetime. The property qualifies for the marital deduction if the QTIP election is made, and the property is included in the surviving spouse’s gross estate for federal estate tax purposes upon the subsequent death of the surviving spouse.
15. 26 U.S.C. § 2510(c)(2)(B) allowing for the surviving spouse to increase his or her applicable exclusion amount by the amount of the deceased spouse’s unused exclusion.
Benefits of Being a Member of The Florida Bar Family Section

Mary Elias, CMA, CDFA, CFE
West Palm Beach

I am a non-attorney, affiliate member of the Family Law Section of The Florida Bar. I joined the Family Law Section because of my forensic accounting and fraud experience in family law matters. I find that being an affiliate member offers benefits and opportunities in my professional practice. Those benefits and opportunities include:

- Networking with attorneys who practice extensively in marital and family law.
- Networking with other affiliate members of the Family Law Section.
- Involvement in committees, such as Support Issues, Equitable Distribution, Litigation Support and Children’s Issues.
- Attending continuing education courses at discounted member rates.
- Receiving the Family Law Section’s quarterly publication of The Commentator.
- Receiving the Family Law Section’s monthly FAMSEG e-Newsletter.

As an affiliate member, I have taken advantage of the numerous opportunities to network with attorneys and other professionals who practice marital and family law. The section has numerous events throughout the year that include the Marital and Family Law Certification Review Course, Section committee meetings and in-state and out-of-state retreats. Most events include a Mix & Mingle or reception that allows for those in attendance to socialize on more informal basis.

Over the last five years, I have participated in various Family Law Section committees. The list of the various committees is found on the Family Law Section website. Members can choose from the Substantive Law Committees or the Operational Committees. This is a great opportunity to learn first-hand what is being proposed to the legislature before it becomes law and perhaps even provide valuable input. There is no cost to attend the committee meetings and an added benefit is the reception at the end of the day!

The Family Law Section offers numerous continuing education opportunities where you can earn CPE credits for your professional designation requirements. Additionally, there is a reduced charge to attend as a member of the section and great topics to pick from.

The section has two publications that members receive. The Commentator Magazine is published quarterly. Articles relevant to the section are always welcome from other professionals. The second publication is a monthly e-Newsletter called FAMSEG. This newsletter is where you will find all the upcoming events, EC Member Spotlights, awards, announcements, pictures from section events, and much, much more. This is a great way to get yourself known as a supporter of the Family Law Section of The Florida Bar.

Mary Elias, CMA, CDFA, CFE is the Director of Forensic Accounting at Divine Blalock Martin Sellari in West Palm Beach, Florida. Ms. Elias is a Certified Divorce Financial Analyst, a Certified Fraud Examiner, and a Chartered Professional Accountant-Certified Management Accountant.
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Be a Hero Today: Two Secrets to Get Green Cards for Your Clients

By Elizabeth R. Blandon, Esq.
Weston, Florida

Arrests of undocumented persons have risen over fifty percent compared to this same time in 2016. The fear is palpable. The dream of many foreigners – especially those who may have entered without authorization years ago but now have lives here – is legal permanent residency. This status allows them to live and work in the United States permanently. Persons who have this status receive green cards. (Yes, literally, they are green.)

In family court proceedings, having a green card makes for a stronger argument that the foreigner will be able to remain in the United States.

Foreigners can obtain green cards even if immigration judges have ordered them deported. Ex-spouses of residents and U.S. citizens who have been psychologically mistreated can receive green cards even if they are no longer married to the abusers. This article briefly summarizes both of these laws, which – when used by an experienced immigration lawyer – will make you a hero to your clients.

Provisional Waiver Even with a Deportation Order

The Provisional Waiver is currently one of the few ways to obtain legal permanent residency by “forgiving” ONE unauthorized entry into the United States. Importantly, your client can only have entered the United States ONCE without authorization after 1997.

If your client has a U.S. citizen or legal permanent resident spouse or parent, the following persons – regardless of whether they entered without authorization or have an order of deportation or removal (so long as it has not been reinstated) – can get green cards:
• Spouses and Parents of U.S. Citizens
• Children of U.S. Citizens (Whether Married or Not, Regardless of Age)
• Spouses of Permanent Residents
• Unmarried Children of Permanent Residents (Regardless of Age)
• Brothers and Sisters of Adult U.S. Citizens

If your client does not have a U.S. citizen or legal resident spouse or parent, she may still be able to get a green card with a U.S. citizen sibling who is older than 21 years of age. The U.S. citizen sibling can apply for their parent to BECOME a legal permanent resident. Thus, the foreign sibling will have an LPR parent and will qualify for this program; the foreign parent will have an LPR Spouse and will qualify.

The process involves the immigration lawyer working with both U.S. Citizenship and Immigration Service and Department of State. If the client has a deportation order, additional work will also be required with the Immigration Court system. Nevertheless, this path ends with one very grateful client, who can finally be counted in a country where they may have spent decades.

VAWA Based on “Common” Mental Cruelty

Another law that allows foreigners to obtain legal permanent residency despite an illegal entry and despite having a deportation order is the Violence Against Women Act. This law is falsely named: Violence is not required, and it also applies to men! Fortunately, the law protects foreigners who have survived physical abuse OR extreme mental cruelty by a U.S. citizen or legal permanent resident spouse.

Because we represent VAWA clients who have never been physically hurt at all, hospitalization records are not required. Police reports are not required. We demonstrate the harm using client and witness statements, which we edit meticulously (for grammar, spelling and clarity) to ensure that they convey the horror endured.

The standard to demonstrate extreme mental cruelty in immigration is much lower than demonstrating abuse in a family law court. In fact, we have won cases based on what is sadly considered commonplace in some homes: coercion and threats, intimidation, ridiculing, isolation, denying and blaming, economic abuse and demanding sexual favors.

By letting your clients know about the Provisional Waiver and VAWA options, you become an ambassador of opportunity. You will be the one they remember as the person who put them on a path to a work permit and eventually U.S. citizenship.

Elizabeth R. Blandon, Esq., is Chairperson of the Nationality & Immigration Board Certification Committee. Board certification is the highest lawyer rating in ethics and ability by the Florida Bar. Her book “Top NINE Immigration Must-Knows for Family Law Attorneys” is available free of charge by emailing ERBlandon@blandon-law.com. Her ebook about VAWA benefits is also available online at www.Blandon-Law.com.
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