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Family Law Section of The Florida Bar

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ON THE COVER: Photograph courtesy of CATECOMM

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I hope you enjoy reading this, my second Chair’s message for the Commentator. I want to say a very special THANK YOU to all of the members of the Family Law Section who have worked tirelessly on behalf of the Section. We just finished our biggest Section event of the year, the 2019 Family Law Review Course which took place at the Gaylord Palms Resort in Orlando, January 25-26. This event was a huge success, with phenomenal reviews, record attendance, and at a new venue. The event sold out weeks in advance! The Seminar was, hands down, one of the most successful seminars ever put on by the Section! I was happy to see many of you at our mid-year Section meetings where the committees were working tirelessly, where the hard work accomplished between our August meetings and mid-year meetings clearly paid off. I want to express my gratitude for all of your hard work! I must specifically point out and express my absolute sincerest thank you to the amazing group—the Review Course committee, namely Chair Bonnie Sockel-Stone and committee members Heather Apicella, Sarah Kay, and Michelle Klinger Smith, who crushed this years’ seminar and putting together an incredible line up of speakers for this year’s event.

In the last issue of the Commentator, I shared the success of the Sections’ bi-annual Leadership Retreat that took place in August at the Colony Hotel in Palm Beach. Our Section’s Fall meetings were held in conjunction with the Leadership Retreat. The next Leadership Retreat will be held in the Summer of 2020 and I want to encourage all Section members to start thinking now about attending that Retreat. Attending the Leadership Retreat provides members with helpful information on both Section work and leadership in the Section. I know that the attendees in August enjoyed team building, legislative tips, Robert’s Rules training and generally about the Section’s operations and our work. It is a great opportunity to meet new and seasoned members of the Section, too!

Since the last issue, the Section held the Out-of-State Retreat in Nashville, Tennessee. To say thank you to Bonnie Sockel-Stone and Amy Hickman, would simply be insufficient. They took this Retreat, as Co-Chairs, and made it an event that will never be forgotten. A big thank you also to our Section Administrator, Willie Mae Shepherd. These ladies put together a wonderful agenda that allowed for both relaxation in the beautiful fall weather of Nashville in October, as well as an awesome and informative CLE presentation on “Business Valuations” from Z. Chris Mercer, founder and CEO of Mercer Capital. So many memories, but some of the highlights of the weekend include touring the historic Ryman Auditorium, enjoying lunch at Puckett’s Grocery, and closing the weekend with a great dinner together at Kayne Prime Steakhouse, where we laughed a lot and enjoyed getting to know one another over the “5 C’s” ice-breaker I made each person in attendance endure! If you know a member who attended, ask them about that one! We were also treated to a special night out at the Ryman...
to enjoy a concert by Ben Rector, courtesy of event sponsor, Foster-Morales Sockel-Stone. (A special thank you to Dori and Bonnie!)

My last “event” before the annual convention is a wonderful In-State Retreat, which will take place at the exclusive and beautiful Ocean Reef Club, in Key Largo, April 11th through April 14th. The retreat co-chairs Heather Apicella, Michelle Klinger-Smith and Trish Armstrong are planning an exciting weekend, including a golf cart scavenger hunt, swimming, snorkeling, boating, relaxing, dancing and lagoon games for all! Ocean Reef Club is very family friendly and I am hopeful to have many members and your families attend. This CLE will be a training in Imago therapy, in a workshop setting, which I am very excited about and even more intrigued by this concept. I certainly encourage all Section members to consider attending this event, especially anyone who is interested in becoming more involved in our Section. Attending Section retreats are a great way to get to know other dedicated family law practitioners from around our State in a more intimate and relaxing setting.

Plans are also well underway for our 2019 Trial Advocacy Workshop in Tampa. The Trial Advocacy Workshop committee, led by co-chairs Sarah Kay and Jack Moring, is already well into their planning for this event. Our registration and announcement has already gone out, so

Save the Date* for July 25th through July 29th, at the Tampa Marriott Waterside Hotel & Marina, located on the Channelside in downtown Tampa. Check the Family Law Section website for registration information, as registration is limited to 80 participants. You do not want to delay in registering for this event! As always, this year’s program will be staffed with many highly qualified board-certified lawyers and judicial officers. This Workshop provides lawyers of every skill level an opportunity to be grouped with other attorneys with comparable trial experience, to practice their trial skills in a small group setting. The Section will once again be providing a number of scholarships for this event, so be on the lookout for that information as well.

As I close my comments for this Edition of the Commentator, I do want to take a moment to remind all of you of what I try to urge in someway, in my Chair’s messages, is to give each person reading these, something I have learned, likely the hard way. Some of those things I wish someone would have told my younger self or someone had shared with me along the way.

So, below I summarize a few rules I have given you over the last few months, “rules” to help find, create or maintain your sanity and maybe let you in some of those little secrets I learned along the way or from making mistakes, which I share now with a smile.

Rule One: Make failure your fuel.
Rule Two: Lead from the desk or bench.
Rule Three: Champion each other.
Rule Four: Demand the floor if you have something to say.
Rule Five: Forgive yourself and others, apologize if you have done someone wrong, and learn when to move on.
Rule Six: Don’t look back with regret.
Rule Seven: Champion your own cause.
Rule Eight: Find your tribe or team and keep them.
Rule Nine: Don’t take yourself so seriously.
Rule Ten: Learn which people are “real” and those that are not, then go back to Rule Five & Six.
Rule Eleven: Take a step back, breathe and hit the “restart” button on occasion.

Lastly, MAKE A DIFFERENCE. Making a small difference, changing one person’s life or family
is enough. As you go on through the rest of this Bar year, don’t just ask yourself “what do I want to do?” Ask yourself “**who do I want to be?**” The most important thing to remember is that what you do will never define you, **who you are always will**. Who you are does matter, but what **impact you have is what really counts**. The impact can be small, like helping a colleague out in a bind or BIG like working on legislation that will impact hundreds of children in this State. Whatever it is, figure out what your purpose is and don’t look back.

I urge you to determine your purpose, but I also want to encourage you to become involved in the Family Law Section. My experience in the Section has been challenging, rewarding, educational, entertaining as well as professionally, personally and socially beneficial to my life. If you are not sure how to get involved, please reach out to me, abigail@abeebelaw.com and I promise to try and assist you in any way I am able. The work this Section does, daily, monthly and yearly is astonishing in looking back and reflecting on my time with the Section. I assure you, you will agree.

For those members I am lucky enough to work with year after year, new members, seasoned members and those contemplating their involvement, let us all remember what brought us to the Section in the first place, and let’s continue to make this year -one where we have all made a difference.

*Abigail Beebe, Esq.*
Look for information on the Family Law Section's website:
www.familylawfla.org/event/

April 11 - 14
**In State Retreat**
Key Largo, FL

May 9
**CLE: 2019 Legislative Update**
AUDIO WEBCAST
12:00 pm - 2:00 pm

June 26 - 29
**Annual Awards & Installation Luncheon**
**Committee Meetings & Executive Council Meeting**
Boca Raton, FL

July 25 - 28
**2019 Trial Advocacy Workshop**
Tampa, FL
Message from the Co-Chairs of the Publications Committee

Sonja Jean and I, the Co-Chairs of Publications, are thrilled to bring to you the Winter edition of The Commentator! Philip Wartenberg, our Guest Editor, under the guidance of our esteemed Commentator Chairs, Anya Cintron Stern and Anastasia Garcia, has done a terrific job of rounding up some interesting articles for your reading pleasure. We invite you to grab a cup of tea (preferably David’s Tea’s “Serenity Now” or “Buddha’s Blend, our favorites), sit in a comfortable chair, and delve into this edition. You will find lots of useful information: news about and photos from Section events; tips on 21st Century parenting from Amanda Tackenberg of Foster-Morales Sockel-Stone, LLC, Lisa Tipton’s ideas on how to craft a firm newsletter for marketing purposes; a joint article from accountants Paul Garcia and Angel Lopez on the implication of Section 199A of the Tax Cuts and Jobs Act and the determination of qualified business income; and William Shepherd’s piece on the Save Our Homes Cap. Keith Grossman offers his prespective on bringing peace to the table in family law cases, and Robert Merlin discusses the need to make family law financial information private. In addition, you will be entertained by Reuben Doupé’s “But This is a Court of Equity!” and you will be inspired to pick up a copy of Broken Circle: Children of Divorce and Separation by Karen Klein once you read the review provided by Jorge Cestero, Past President of the AAML, Florida Chapter and Past Chair of the Family Law Section. Enjoy!

Message from the Co-Chairs of the Commentator

The Commentator is privileged to have Philip S. Wartenberg, Esq. as its Guest Editor this edition and our gratitude for his commitment to this edition knows no bounds. We acknowledge and appreciate the sacrifice of all the talented authors for their submissions, and welcome articles from all interested professionals. In this edition of the Commentator, William Shepherd, Esq., General Counsel at the Hillsborough County Property Appraiser, provides insight on the equitable distribution of the Save Our Homes cap and importance of timing the final judgment to permit a spouse with adequate time to establish a new homestead. Keith Grossman, Esq. proposes useful language directed to understand clients at a deeper level, ultimately resulting in client’s more satisfied with your efforts to help them in a difficult period. Ruben Doupé, Esq. provides a historical and current schooling of the concept of justice and equity in Florida with helpful language to embolden Courts to utilize their equitable power. Jorge M. Cestero, Esq. reviews Broken Circle: Children of Divorce and Separation by Karen Klein, a book of collective photographs of individuals once children of divorce, with their commentary. We hope that their articles inspire your practices and your inscription. It is with great enthusiasm that we present this edition of the Commentator.
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It has been a great honor for me to have been given the opportunity to serve as the Guest Editor of this Winter 2019 edition of the Commentator. My first real introduction to the statewide Family Law Section was over 20 years ago, when I had the opportunity to co-write two separate articles that were submitted and ultimately published on behalf of the Section. I can personally attest to the positive impact that those articles had on both my legal career and with my Section involvement as a whole. All these years later, working on the other side of that publication process as a Guest Editor has been very illuminating for me and also very rewarding. I want to thank the Commentator co-chairs, Anastasia Garcia and Anya Cintron Stern, along with the Section’s Publications co-chairs, Sonja Jean and Laura Davis Smith, for providing me with this opportunity.

With this edition of the Commentator, we are pleased to have a wide array of articles that we believe you will find quite informative. As just one example of that, the portability of the “Save-Our-Homes” cap on primary residences was a hot topic over a decade ago, prior to the Great Recession. At that time, William Shephard, general counsel of the Hillsborough County Property Appraiser’s Office, was a frequent speaker at our family law events locally in Tampa, as we dealt with how to fairly divide marital residences that had greatly appreciated in value. Following the Great Recession and the drastic decline of home values, issues surrounding the preservation and division of the “Save-Our-Homes” cap obviously became far less important in our cases. However, with the improving real estate market and appreciating home values around the State of Florida, this issue of portability has once again become very relevant. I personally appreciate Will’s generosity of his time in contributing an excellent article regarding this issue.

I want to also personally thank all of our other contributors to this Winter 2019 Edition of the Commentator. Finally, a big “thank you” goes out to Lisa Tipton, our Section’s Communications Consultant, who has not only contributed an article for this issue but has assisted greatly in getting this issue to publication. I want to encourage all Section members and affiliate members to submit an article for consideration by the Section’s Publication committee. The Section as a whole truly benefits from these contributions.
DID YOU KNOW? Non-Attorneys Can Become Affiliate Members of the Family Law Section of the Florida Bar!

Benefits of becoming a member:

- Attend and participate in live meetings concerning cutting edge Marital & Family Law issues.
- Network with Family Law attorneys, judiciary, and members from across the State of Florida at meetings and social events.
- Receive a discount for Family Law Section CLEs, including the Marital & Family Law Review Course.
- Receive the Family Law Section’s Commentator, a quarterly publication containing all of the latest news involving the Family Law Section and Florida family lawyers.
- Receive the Family Law Section’s e-Newsletter, FAMSEG.
- You can even publish articles concerning your field in the Commentator and FAMSEG.
- Receive recognition for your credibility and dedication to the area of Marital & Family Law.

Affiliate members consist of:

- Mental Health Professionals
- Vocational Experts
- Parenting Coordinators
- Social Investigators
- Mediators
- CPAs & Forensic Accountants
- Collaborative Professionals
- FL Law School Students & Professors
- Guardian Ad Litems
- Business Evaluators
- Paralegals
- Expert Witnesses
- Appraisers
- Actuaries

Please visit the Family Law Section of the Florida Bar website to register as a member at familylawfla.org.

Membership is only $65.00.
As a family law practitioner, it is likely that your parenting plans contain a provision that requires shared parental responsibility over major decisions regarding the health, welfare, safety, and education of the children. But consider the following scenario: Your client calls you because she and her ex-husband are in disagreement over letting their sixteen-year-old daughter get that tattoo she’s been requesting, or the lip ring, or the nose job. Perhaps the scenario is slightly more innocuous, but the answer is just as murky – another client calls you, upset because he wants to provide his third grader with a cell phone and an Instagram profile, but his ex-wife thinks the child is too young. There’s nothing in the Parenting Plan that specifically addresses these issues and your clients want to know, “what happens now?”

Varying parenting styles can be helpful when parties are married and a burden once they’re divorced, particularly when new technologies create a whole new set of parenting decisions rife with the potential for disagreement. So how do parents with different philosophies on child-rearing deal with 21st century parenting challenges when the court has ordered that they share parental responsibility? What exactly constitutes a “major decision” requiring shared parental decision-making; and what are some topics you may want to consider discussing with your client and incorporating into your Parenting Plans to avoid potential disagreements in the future?

Pursuant to 61.13(2)(b)(2), the court shall order that the parental responsibility for a minor child be shared by both parents unless the court finds that shared parental responsibility would be detrimental to the child. Under the principle of shared parental responsibility, major decisions affecting the welfare of a child are to be made after the parents confer and reach an agreement. See § 61.046(16), Fla. Stat. (2018). In the event that the parents reach an impasse, the dispute should be presented to the court...
Shared Parental Responsibility
CONTINUED, FROM PAGE 11

for resolution and the court must resolve the dispute by applying the best interests of the child test.1 Sotnick v. Sotnick, 650 So.2d 157, 160 (Fla. 3rd DCA 1995); Tamari v. Turko-Tamari, 599 So.2d 680, 681 (Fla. 3rd DCA 1992); See § 61.13(2)(b),(3), Fla. Stat. (2007); Gerencser v. Mills, 4 So. 3d 22, 23–24 (Fla. 5th DCA 2009). Of course, the trial court can determine that such an impasse constitutes a substantial change in circumstance, requiring modification of the final judgment in the best interest of the children and awarding one parent ultimate decision-making. Watt v. Watt, 966 So. 2d 455, 458 (Fla. 4th DCA 2007).

Practically speaking, however, presenting the issue to the court for adjudication is not so simple. First, the court might be reticent to get involved in the day-to-day child-rearing decisions of parties. For that reason, many judges will require the parties to attend mediation prior to setting a hearing date or rendering an order. Accordingly, the time it takes to get a hearing and an order on an issue might be impractical for the parties. Second, an impasse will not always rise to a “substantial change in circumstances” standard. Although a judge may award ultimate decision-making over specific aspects of the child’s welfare to one parent, Florida case law has shown that the courts require that the parties have a history demonstrating an extensive inability to cooperate before they award ultimate decision-making authority to one parent over the other. Sotnick, 650 So.2d at 160; Tamari, 599 So.2d at 681; Martinez v. Martinez, 573 So.2d 37, 41 (Fla.

1 There is one notable exception, however, when the matter involves the religious training and beliefs of the child. The court may not make a decision in favor of a specific religion over the objection of the other parent absent a clear, affirmative showing that the religious activities are harmful to the children. Mendez v. Mendez, 527 So.2d 820, 820 (Fla. 3rd DCA 1987); Mesa v. Mesa, 652 So.2d 456, 457 (Fla. 4th DCA 1995).

Establishing the same rules for both parents’ households can create a sense of cohesiveness and unity in parenting that demonstrates to the children that the parties are working together and are still a family. As such, you may want to discuss some of the following issues with your client in considering the establishment of age-limits or other parameters regarding these issues in your parenting plans:

- Tattoos, body piercings, or other body modification:
  - Do the parties agree to consent to any of these modifications while the child is a minor? If so, are there specific locations/modifications that they agree should not be permitted while the child is a minor?

- Cosmetic procedures:
  - If the child wants a cosmetic procedure performed for self-conscious or other reasons, are the parties unified in how to handle it? Do they agree on allowing or not allowing certain procedures?

- Cell phone usage:
  - What is an appropriate age for the child to be given a cell-phone? Who is going to pay for the cell phone? Is taking away the child’s cellphone an appropriate punishment? Are there specific times when the child will not be permitted to use the cell phone?

- Social media presence and usage:
  - Will the child be permitted to have social media? Are there certain social media platforms that are off-limits? What age is appropriate to permit the child to create a social media presence? Should both
parents have the password so they can monitor the child’s social media activity?

- Dating:
  - At what age should the child be permitted to date? Should there be a curfew and should both parents implement the same curfew?

Ultimately, encouraging the parties to co-parent and confer regarding common parenting issues ahead of time, and proactively addressing these topics while drafting your parenting plans, can save the parties from future conflict and avoid the stress of litigation down the road.

Amanda Perez Tackenberg practices marital and family law in Miami, Florida as an associate at the firm of Foster-Morales Sockel-Stone. She graduated cum laude from the University of Florida Levin College of Law where she earned the Family Law Certificate, received book awards in the Juvenile Civil Clinic and Genetics and the Law, and was a recipient of the Terrye C. Proctor Memorial Scholarship. She is a proud alumna of the University of Virginia and she enjoys volunteering at the Children’s Home Society, pro bono work through Dade Legal Aid Put Something Back, reading, and spending time with her Husband, Brian, and baby, Olivia.
Dissolution of Marriage and the Save Our Homes Cap

By William D. Shepherd, Esq., General Counsel, Hillsborough County Property Appraiser

Upon receiving a homestead exemption from property taxation under Article VII, Section 6(a) of the Florida Constitution, a property receives two main benefits: (1) The dual $25,000 exemptions; and, (2) The “Save Our Homes” 3% cap on increases in the assessed value. Of those two benefits, the family law practitioner would be wise to understand the relationship between the Save Our Homes cap and a dissolution of marriage proceeding.

The Basics

First, the basics. The homestead exemption from property taxation, found in Article VII, Section 6(a) is similar, but not the same as the homestead exemption from creditors found in Article X, Section 4 of the Florida Constitution. Grisolia v. Pfeffer, 77 So. 3d 732 (Fla. 3d DCA 2011). Generally speaking, in order to receive the homestead exemption from property taxation, the property must be the primary residence of the owner of the property as of January 1st of the tax year, who must file a timely application with the county property appraiser. Ownership as of January 1st can be via legal or equitable title. Fla. Stat. 196.031(1). Where the property is owned by a husband and wife and both resided on the property, both are considered to be receiving the homestead exemption, even if only one of the spouses applies for the exemption. Fla. Stat. 193.155(8); F.A.C. 12D-8.0065(2)(b);1 Kelly v. Spain, 160 So. 3d 78 (Fla. 4th DCA 2015). A “family unit” is only entitled to one homestead exemption, although marriage is not necessarily the deciding factor as to what determines a “family unit”. Wells v. Haldeos, 48 So. 3d 85 (Fla. 2d DCA 2010); Brklacic v. Parrish, 149 So. 3d 85 (Fla. 4th DCA 2014).

The Save Our Homes cap, approved by the voters in 1995, limits the annual increase in the assessed value of the property to 3% or less annually, irrespective of the increase in the actual market value (called the “just value” in property tax circles.) Art. VII, Sec. 4(d); Fla. Stat. 1933.155. Thus, in a rising real estate market, the assessed value of the property will increase by no more than 3% annually. This cap is designed to protect property owners from large jumps in property taxes caused by rapid increases in property values. The Save Our Homes cap is administered by the county property appraiser and is applied to the assessed value of the property, not the market value. The cap is applied to the market value as of January 1st of the tax year and is calculated as the lesser of: (1) the market value increase for the previous year, or (2) 3% of the assessed value of the property as of January 1st of the current tax year. Fla. Stat. 192.002(1).

1 The first benefit of the homestead exemption is that the first $25,000 of value is exempted from ad valorem property taxes. The value between $50,000 and $75,000 is also exempted from property taxes, with the exception of the school board millage.
there is gradually created a gap between the *just* value and the *assessed* value. This gap presents a savings in property taxes that would not be realized if the property did not have the homestead exemption.

**Portability of the “Save Our Homes” Cap**

In 2008, the Save our Homes cap became “portable,” meaning that the Save Our Homes benefit could be transferred to a new homestead property. This essentially turned the Save Our Homes benefit into an annuity and a marital asset. Now, instead of losing the cap upon purchasing a new homestead property, the cap can be transferred an unlimited amount of times. Along with this concept came a myriad of statutory and administrative guidelines, some of which are quite confusing. By far the most confusing aspect is when joint owners of the homestead property seek to each take a portion of the cap as a result of a dissolution of marriage. A warning is appropriate here: There are 67 county property appraisers in Florida and not all interpret the statutes and rules on portability in the same manner. Thus, a discussion with the local county property appraiser before making a decision in this area is highly recommended.

In order to determine the potential cap amount that is transferrable, calculate the difference between the previous homestead’s “just value” and the “assessed value”. That amount is the cap benefit. Where the just value of the previous homestead is less than the just value of the new homestead (an “upsizing”), the owner may take the full amount, up to a maximum of $500,000. Where the just value of the previous homestead’s just value is greater than the just value of the new homestead (a “downsizing”) the homeowner takes a percentage of the cap equal to the ratio of the old just value to the new just value. Fla. Stat. 193.155(8)(a),(b); F.A.C. 12D-8.0065(4).

First and foremost, there is a timing issue tied to portability of the Save Our Homes cap which is not entirely clear from the statutory language. Florida Statutes, section 193.155 allows a transfer of the cap, “[…]when the person who establishes a new homestead had received a homestead exemption as of January 1 of either of the 2 immediately preceding years.” Said in more simple terms, the person seeking to port their cap benefit can only miss one January 1st without a homestead exemption. For the former spouse living temporarily in an apartment, they have a limited time in which to re-establish a homestead exemption. Certain strategies may be employed here. By way of example, if the dissolution of marriage is final on December 31, 2018, then the party has to purchase a home and reside there by January 1, 2020 – a year and a day later. If however the dissolution of marriage is final on January 2, 2019, the spouse has all of 2019 and 2020 in which to acquire a home and reside there – almost two years. In either case, only one January 1st has passed without a homestead exemption. In order to transfer the cap benefit, the owner must file, along with a new homestead exemption application, a Department of Revenue Form DR-501T with the county property appraiser by March 1st. F.A.C. 12D-8.0065(3)(a).

Where two or more persons have homestead on the same property, one or more of those persons may transfer a percentage of the cap, equal to their percentage ownership, to a new homestead. However, upon timely filing a form with the county property appraiser, spouses have the unique ability to designate a percentage of cap that differs from the percentage of ownership in the property. Thus, in a dissolution of marriage scenario, the parties can negotiate to take a greater or lesser percentage of the cap to a new homestead property. Fla. Stat. 193.155(8)(d); F.A.C. 12D-8.0065(3). The request to designate a different percentage must be requested on Department continued, next page
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of Revenue Form DR-501TS and filed simultaneously with the homestead exemption and portability application and once filed is irrevocable. Fla. Stat. 193.155(8)(f), (h).

Portability When One Spouse Stays in the Homestead Property

One area that remains unclear is whether, in the case of one party staying behind in the marital home, the party remaining in the marital home must file paperwork “abandoning” and then reclaiming the homestead exemption in that home in order to allow the party leaving the home to take a portion of the cap. Under an earlier Department of Revenue Emergency Rule, that appeared to be the case. See F.A.C. 12DER 12-07(6)(“If only one of the previous owners of the homestead property moved to another parcel and other previous owners of the homestead property stayed in the original homestead, the homestead would not be abandoned and the one who moved could not transfer any assessment difference.”) Thus, in order for a full “abandonment” of the previous home, the party remaining behind had to create the fiction of “abandoning” and then instantaneously reclaiming the homestead. That can only be done by filing paperwork with the property appraiser. That emergency rule was converted into F.A.C. 12D-8.0065, but that language no longer exists. However, the rule states that in the case of joint tenants with rights of survivorship, such paperwork is still required. The rule also still states that in order to transfer the cap, a requirement is that the “previous property was abandoned” – note the language says “property” as opposed to only the interest of the spouse leaving. This is one area where contacting your local county property appraiser is necessary. If such paperwork is required, then the attorney would be wise to mandate compliance in the marital settlement agreement. Otherwise the former spouse remaining in the marital home could refuse to file the required paperwork and the spouse moving to another home would be unable to transfer any portion of the Save Our Homes cap.

Conclusion

The ramifications of the Save Our Homes cap to a dissolution of marriage proceeding are obvious. Because of the transferability of the cap, it has essentially become a marital asset, and the family law attorney needs to address it in dissolution of marriage proceedings.

William D. Shepherd is general counsel for the Hillsborough County Property Appraiser in Tampa, Florida, where he has represented the office in all property tax matters since 1997. During the course of his career he has represented both property owners and county property appraisers in property tax matters and has litigated all types of property tax cases including real estate and tangible personal property valuation cases, exemption disputes and agricultural classification challenges. Mr. Shepherd was also counsel on numerous appellate decisions in the property tax field. He is a graduate of the University of South Florida in Tampa and the John Marshall Law School in Chicago, Illinois. He is a frequent lecturer on property tax matters.
Qualified Business Income: How Section 199A of the Tax Cuts and Jobs Act Impacts Income Determinations in a Florida Family Law Setting.1

By Paul Garcia, CPA/CFF, CVA and Angel Lopez, Jr., CPA, JD, LLM Taxation, Coral Gables

What is Section 199A?

Section 199A of Title 26 of the United States Code was enacted by Congress on December 22, 2017 as part of the act commonly referred to as the Tax Cuts and Jobs Act.2 It generally applies to taxable years beginning after December 31, 2017.3 Section 199A allows non-corporate taxpayers, subject to certain limitations, calculations, and exclusions, a deduction equal to the lesser of 20% of qualified business income earned in a qualified trade or business, or 20% of taxable ordinary income.4 What this means is that the majority of individuals that are either self-employed or that have ownership interests in entities that are pass-through in nature (i.e., single member LLC’s, S-Corporations, or partnerships) will benefit from an additional deduction, subject to certain limitations, on their 2018 individual income tax returns.

However, while the concept of Section 199A is simple, the mechanics are quite complex. In particular, as in the majority of circumstances where one must follow rules outlined in a statute, the terms used in the statute have particular meaning. For example, “qualified business income” and “qualified trade or business” are specifically defined in the statute.5 The definitions of the relevant terms within the statute and their proper application are critical in determining the amount of the allowable deduction.

Following are the relevant definitions which must be understood before an analysis is performed:

- “Qualified Business Income” means “for any taxable year, the net amount of qualified items of income, gain deduction, and loss with respect to any qualified trade or business of the taxpayer”.6
- “Qualified items of income gain, deduction, and loss” means:
  
  “…items of income, gain, deduction, and loss to the extent such items are (i) effectively connected with the conduct of a trade or business…and (ii) included or allowed in determining taxable income for the taxable year”7

- “Qualified Trade or Business” means “any trade or business other than (A) a specified service trade or business, or (B) the trade or business of performing services as an employee”8
- “Specified service trade or business” is defined as:
  “any trade or business (A) which is described in section 1202(e)(3)(A) (applied without regard to the words “engineering, continued, next page
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architecture”) or which would be so described if the term “employees or owners” were substituted for “employees” therein, or (B) which involves the performance of services that consist of investing and investment management, trading, or dealing in securities, partnership interest, or commodities (as defined in Section 475(e)(2))

- Section 1202(e)(3)(A) (as it relates to any trade or business for purposes of the definition of “Specified service trade or business” above) states:

   “any trade or business involving the performance of services in the fields of health, law, engineering, architecture, accounting, actuarial science, performing arts, consulting, athletics, financial services, brokerage services, or any trade or business where the principal assets of such a trade or business is the reputation or skill of 1 or more of its employees.”

A specified trade or business as defined in §1202(e)(3)(A) therefore does NOT include, for example, lawyers or accountants who have set up their own practices. So, if a family law attorney’s client has her own law practice, then the business income from her law practice will presumably not be defined as “Qualified Business Income” because it does not come from a “Qualified trade or business” as defined in the statute and will generally not qualify for the 20% deduction available under §199A.

Once the relevant terms are carefully considered, the conclusion is that the amount that can be used as the base to multiply by 20%, for purposes of determining the potential deduction available under §199A, must be an amount attributable to a trade or business whose income and deductions are allowed in the determination of taxable income for the year. In the case of a self-employed individual that owns an S-Corporation which is not a specified service trade or business (as defined above), the amount that can be used is the company’s taxable income for a given year.

Income Determination in Florida

Determining a party’s income in Florida in a family law setting is typically an essential component of the proceedings. As a matter of fact, a party to a petition for dissolution in Florida generally files a financial affidavit with the court which lists a party’s income and expenses for purposes of the dissolution proceedings. The amount of income earned by a party drives the amount of child support that will have to be paid and alimony determinations (whether for temporary support purposes or for permanent alimony). It is therefore critical to properly determine a party’s income.

In Florida, income:

“means any form of payment to an individual, regardless of source, including but not limited to: wages, salary, commissions and bonuses, compensation as an independent contractor, worker’s compensation, disability benefits, annuity and retirement benefits, pensions, dividends, interest, royalties, trusts, and any other payments, made by any person, private entity, federal or state government, or any unit of local government.”

Income in Florida is therefore a comprehensive number that takes into consideration all sources of payments to an individual without necessarily contemplating the source from where those payments originate.

In the case of an individual that is self-employed and/or has pass-through entities, §199A becomes relevant because it impacts the net-after tax income available to that individual in conjunction with his income determination. However, if the income calculation for an individual that is self-employed and/or has pass-through entities is computed on the basis of the holding in Zold v. Zold, then, because...
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the amount to be included in income would be limited to the individual’s distributions from the entities he owns, the principles of §199A would not apply. In the case of a calculation using the distributions from his company, that individual would not have “Qualified Business Income” from a “Qualified trade or business” as defined in the statute but, rather, distributions.

Section 199A comes into play after a party’s income is determined in accordance with Florida Family Law. Once a party’s income is calculated, then and only then can the principles of §199A be applied to determine that individual’s potential §199A deduction. Therefore, for purposes of determining a party’s income in accordance with Florida Family Law, Section 199A must be taken into consideration when a party is either self-employed or has an ownership interest in entities that are pass-through in nature, unless the principles in Zold v. Zold are applied. In particular, consideration must be given to the amount of “Qualified Business Income” from a “Qualified trade or business” to calculate the deduction.

The Impact of Section 199A on Determining Income

As outlined above, because §199A was enacted and is available to certain taxpayers, it must be considered in the determination of income in a family law setting in Florida. One of the reasons that §199A was enacted was to help self-employed people in a competitive corporate world. The congressional intent of the Tax Cuts and Jobs Act was to reduce taxes and tax rates across the board – from individuals to corporations. In particular, the corporate tax rate for C-Corporations went from a top rate of 35% to a flat rate of 21%. Therefore, §199A was included in the Tax Cuts and Jobs Act in order to provide a benefit to the individuals that own pass-through entities so that they would also pay taxes at a reduced rate relative to C Corporations.

Prior to the enactment of the Tax Cuts and Jobs Act, individuals that owned pass-through entities would pay taxes on all of their income (including income from pass-through entities) at their individual marginal tax rates. This meant that the effective rate for some of those individuals may have been higher than the top rate of 35% applicable to C Corporations before the Tax Cuts and Jobs Act. All of their income (wages as well as pass through income) was taxed once to that individual based on the tax bracket he would fall into after considering taxable deductions. Subsequently, with the enactment of §199A, these same individuals have the ability to take the Qualified Business Income deduction – provided all the requirements of §199A are met – which has the effect of reducing their effective tax rates. In this way, individuals are also seeing a benefit from the enactment of the Tax Cuts and Jobs Act for pass-through income just as C Corporations saw a tax rate reduction.

In order to illustrate the impact that §199A has on the determination of income in a Florida family law setting, the following example is provided: Assume Sergio has a restaurant called Maria’s Restaurant, an S-Corporation, and Sergio owns 100% of the shares of stock. The net income for Maria’s Restaurant for 2018 is $50,000 and its taxable income is also $50,000. The Qualified Business Income (as defined in §199A) for purposes of our calculation is therefore $50,000. Let’s also assume that Sergio’s only source of income is Maria’s Restaurant. Thus, in this example, Sergio’s taxable ordinary income, assuming Sergio’s tax status is “single”, is $38,000 ($50,000 less $12,000 standard deduction).

Next, the deduction has to be calculated. We have to take the lesser of 20% of the Qualified Business Income or 20% of taxable income.

In Sergio’s case, 20% of the Qualified Business
Income is $10,000 ($50,000 * .20) and 20% of taxable ordinary income is $7,600 ($38,000 * .20). Consequently, the §199A deduction for Sergio for 2018 is $7,600 (the lesser of $10,000 and $7,600).

In Sergio’s case, his income for 2018 is $50,000 (see the example above). Thus, for purposes of determining alimony or child support guidelines in accordance with Florida family law, we know that the number to use for Sergio is $50,000 as the annual amount, unless there is a Zold v. Zold argument. $50,000 annually is the number that is used for determining the deduction to arrive at Sergio’s after-tax net available income on a monthly basis for purposes of calculating the child support guidelines and/or the amount of alimony that he would have to pay.

The impact that §199A has in calculating income under Florida family law is that it must be taken into consideration to determine if one’s client can benefit from it. The actual income determination process as per Florida Statutes, §61.046(8) is not hindered or altered. The method of calculating income in a family law matter in Florida does not change. Rather, what happens is that once the income amount is calculated, consideration must then be given to whether or not §199A applies to determine what the net income available after-tax is when calculating alimony and child support.

**Conclusion**

As discussed above, §199A of Title 26 of the United States Code does not, in and of itself, impact the mechanics of the income calculation or determination in accordance with the Florida Statutes and Florida family law. Rather, what §199A does is provide self-employed people a potential tax deduction, subject to certain exemptions and limitations, that is calculated based on Qualified Business Income, as defined therein. Therefore, family law practitioners in Florida must be aware that §199A may be applicable, and must consider its potential effects to their clients along with being aware of the general concepts found in §199A. Family law practitioners that want to be ahead of the game should consult with tax professionals and forensic accounting professionals to obtain more information regarding the specifics of §199A and the potential impact that it can have in each of the cases in which §199A may be relevant. As stated earlier, §199A is complex – the concept is simple but the mechanics are far from it. However, in order to provide a valuable service and give prudent legal advice to clients, family law practitioners that want to lead the way in their practices should be aware of the potential impact and ramifications of §199A.

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personal, corporate, trust & estate tax matters. He is also a Florida Supreme Court Certified Family Mediator.

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Endnotes
1 It should be noted that, for purposes of this article, the general definitions and concepts of 26 U.S.C. §199A are presented to provide a general understanding of its application as it relates to Family Law matters in Florida. However, since the enactment of §199A (see note 2 below), tax practitioners have noted that the statute contains numerous limitations, exceptions to those limitations, and contradictory, if not ill-defined terms, within the statute. The expectation is that there will more likely than not be disputes between taxpayers and the IRS which will undoubtedly result in revisions to the statute and/or the promulgation of regulations in the very near future. This will provide clearer guidance as to the application of the statute. Thus, this article is not intended to be a full analysis of the provisions of §199A from a tax perspective but rather to create awareness amongst family law practitioners in Florida of its existence and to provide a general understanding of §199A. The additional calculations, exemptions, limitations and other specific items of §199A are beyond the scope of this article.
3 Id. at 2053.
4 Robert S. Keebler, CPA/PFS, MST, AEP and Peter J. Melcher, MBA, JD, LLM, Qualified Business Income Deduction, p. 7 (PDF)
11 Supra note 1
13 Florida Statutes, §61.046(8) (2018)
14 Zold v. Zold, 911 So.2d 1222, 1234 (Fla. 2005). In this case, the court held that undistributed “pass-through” income is not automatically attributable to a shareholder-spouse under Chapter 61 of the Florida Statutes.
15 Id.
20 The following example is provided to illustrate the general concepts of §199A and for family law practitioners to be aware of its existence and it general purpose. It should be noted that the mechanics of §199A are very complex. There are a myriad of calculations to consider including income thresholds, limitations and exemptions that are technical and beyond the scope of this article.
23 Supra note 14
"But This is a Court of Equity!"

By Reuben Doupe, Naples

Every family law attorney will do it at least once in their career. You will stroll into Court feeling confident in your client’s case; you know the facts backward and forward. Then it happens... opposing counsel hands you some legal jurisprudence that you have never seen before and makes a compelling argument for the Judge to kick your case out of the courtroom. Feeling desperate, you’ll search the corners of your mind for a reason to distinguish this legal buzz-saw, only to find cobwebs. Then, you’ll utter a phrase that has been the “Hail Mary pass” for family law attorneys forever, “But Judge… this is a Court of Equity!” That phrase will be followed by your recitation of the facts which paint your client out to being the saint that they are, and you ask the Judge to do the “fair” thing in this case, regardless of what some other judge thought was the right thing to do for someone else in another case.

I have witnessed this argument, multiple times, and unfortunately have even had occasion to use it myself. But legally, what does it mean to be in a “Court of Equity,” and does this argument have any legal merit?

To understand the root of this principal, we must first review exactly why the Court of Equity (or Chancery, for those who prefer proper English) exists. Pursuant to my friends and colleagues at Wikipedia, the true origin of the Court of Chancery, began with Kind Edward I of England, when he grew tired of dealing with the large number of cases coming before him. To address his overloaded docket, he passed a statute that provided for certain specific actions to be first taken to the Chancellor. This court of the Chancery (the Chancery were the personal staff of the Chancellor), evolved to become the place for issues dealing with the law of equity, which required something more fluid and adaptable than the common law, which by contrast was strict and rigid. As early as the 1300’s, relief in the Court of Chancery could only be sought by filing a Petition which must show that there was no remedy to the problem in the common law. The primary distinction that set the Court of Chancery apart from the court of law are the remedies available, which include specific performance and injunctions concerning future conduct. The Court of Chancery was not only reactive, in being able

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1 The name of the court is a Court of Chancery, and the types of actions heard are Equitable Actions. Thus the phrase a “Court of Equity,” is a misnomer.

“Do not actually say the words ‘court of equity,’ remove that phrase from your vocabulary as it is nothing more than a white flag signal to the judiciary that you know you have lost. Instead, point out that the issue raised is one in which the court has judicial discretion”

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to right past wrongs, but could also prevent future wrongs from occurring, contrasted to the common law courts which were limited to money damages to cure past wrongs. By the 1800’s, the Court of Chancery was granted the power to award money damages in addition to equitable relief, and ultimately by the late 1800’s, the English Courts were united into the High Court of Justice, with a Chancery Division.

A little closer to home, the Florida Constitution of 1885 created the Circuit Courts and gave the Circuit Courts “exclusive original jurisdiction in all cases in equity, also in all cases at law.” Article V Section 11. From the beginning, the State of Florida held that actions at law and equity would not require a separate Court. While it carved out specific issues at law that may lay with County Court, it maintained that Circuit Court was the proper venue for equitable actions.²

In summary, a Court of Chancery, is an equitable court, contrasted to and different than a Court of Law. The Court of Chancery has the ability to issue additional remedies over and above damages in the form of a money judgment. The courts are very similar in procedure, but differ significantly in the types of relief available.

Although the Florida Courts of law and equity have always been unified physically, the distinction between equitable relief and legal relief remains. “[W]hile our rules of procedure have been changed to substantially eliminate all distinctions between common law and equitable actions, the basic distinction between equity and law actions has been preserved.” Rodriguez v. Dicoa Corp., 318 So.2d 442 (Fla. 3d DCA 1975). This means that equitable concepts, as applied to equitable relief or equitable actions, remains alive and well in Florida. Further, the Florida legislature has chosen to provide an express reminder that “Proceedings under [Chapter 61] are in chancery.” Fla. Stat. §61.011 (2018). This opens up the trial judge in dissolution actions to be “governed by basic rules of fairness as opposed to the strict rule of law.” Rosen v. Rosen, 696 So.2d 697, 700 (Fla. 1997). In Rosen, the Supreme Court took this concept one step further with respect to section 61.16, in that the statute “should be liberally—not restrictively-construed to allow consideration of any factor necessary to provide justice and ensure equity between the parties.” Id. This clearly expands the types of facts that a trial court can consider when applying the statute, to ensure that the relief granted is equitable.

Other courts have similarly described the role of the court when dealing with an action in chancery, “Equity is a court of conscience; it demands fair dealing in all who seek relief, and requires decency, good faith, fairness, and justice.” Schetter v. Schetter, 279 So.2d 58, 61 (Fla. 4th DCA 1973) (Walden J., dissenting). “Equity imperatively demands of suitors in its courts fair dealing and righteous conduct with reference to the matters concerning which they seek relief. He who has acted in bad faith, resorted to trickery and deception, or been guilty of fraud, injustice, or unfairness will appeal in vain to a court of conscience, even though in his wrongdoing he may have kept himself strictly ‘within the law.’” Weegham v. Killefer, 215 F. 168, 171-72 (D.Ct.Mich.1914).

However, equitable principals do not give the court license to ignore the law entirely. For example, in the Rodriguez case, the trial court was reversed for applying equitable principals to a legal action. Rodriguez, 318 So.2d at 446. Further, in Coltea v. Coltea, 856 So.2d 1047.

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² Delaware, Mississippi, New Jersey, South Carolina and Tennessee maintain the two separate courts of equity and law.

³ Here the Weegham court is discussing the specific concept of unclean hands.
1052 (Fla. 4th DCA 2003), the Third District emphasize[d] that the granting of equitable relief is rarely mechanical and is usually subject to principals and standards. Equitable discretion is not unlimited or open-ended, a wooden application of ancient maxims. Equity is often under the influence of legal rules. See also Schwartz v. Zaconick, 68 So.2d 173, 175 (Fla. 1953) ("Equity, although not as inflexible as the law, is nevertheless administered within established limits and upon recognized principals.") Where equity surfaces most obviously in a Chapter 61 action are "on the many issues the Legislature has chosen to delegate specific discretion to trial judges to fashion an outcome tailored to the facts and circumstances of each case, largely eschewing thereby the use of inflexible rules. This is especially true with regard to matters of support of minor children and needy spouses." Coltea, 856 So. 2d at 1052. With this explanation from Coltea, the true meaning of principles of equity as they are applied in a Chapter 61 proceeding begins to take shape. The concepts of equity allow a trial court freedom to consider all of the facts of a case when making a decision. In discussing the equitable proceeding of partition, the First District has stated, "Because partition is a subject of equitable jurisdiction, the trial court will be affirmed unless it is shows that the trial court abused its discretion in determining whether credits or set-offs are appropriate." 16 So.3d 298 (Fla. 1st DCA 2009).

From a practitioner’s view, equitable principals are presently realized through the concept of judicial discretion. Ultimately, on any issue in which the trial court’s decision would be subject to an abuse of discretion standard of review, those are equitable considerations. Contrarily, any issues which would subject the court to a de novo review on appeal, are not within the court’s discretion and will not allow for the court to apply equitable principles. In arguing those issues which allow for discretion, counsel may allude to all of the facts presented and the court should consider all of the collective relief granted to insure overall fairness in the ruling.

Even discretionary decisions, however, are not without limitations as explained in Canakaris v. Canakaris. "The discretionary power that is exercised by the trial judge is not, however, without limitation, and both appellate and trial judges should recognize the concern which arises from substantial disparities in domestic judgments resulting from basically similar factual circumstances. The appellate courts have not been helpful in this regard. Our decisions and those of the district courts are difficult, if not impossible, to reconcile. The

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4 As an aside, Coltea sets forth an interesting discussion about the legal difference between a “divorce” and a “dissolution of marriage,” for anyone that has been curious about the distinction in terminology.

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trial court’s discretionary power is subject only to the test of reasonableness, but that test requires a determination of whether there is logic and justification for the result.* 382 So.2d 1197, 1203 (Fla. 1980) (emphasis added).

Return now to our flummoxed trial attorney, ready to unleash his last second Hail Mary and appeal to the trial judge’s belief that justice and fairness mandate that the court ignore the case law and rule instead in favor of his client. When you find yourself in this inevitable position, first, do not actually say the words “Court of Equity;” remove that phrase from your vocabulary as it is nothing more than a white flag signal to the judiciary that you know you have lost. Instead, point out that the issue raised is one in which the court has judicial discretion. Point out that

5 If it was not a white flag before, it will be now that the Statewide Family Law judiciary have read this article.
6 If however, the issue raised does not allow any judicial discretion, then you should find a manner in which you can maintain your dignity by conceding the point of law, and you should be better prepared next time.

through the Court’s exercise of discretion, the Court should not limit its review to the narrow holding of an appellate court case, which was based on a wholly different set of facts and the principles of fairness in that case may have dictated a different result. After all, appellate opinions rarely recite all of the facts necessary to truly understand the rationale for the trial judge’s decision. So in your case, your Judge must review and consider all of the facts presented in this case. As part of this discretionary decision, the Court must consider the entire picture and whether granting or denying the relief would truly be just and fair to or for your client.

Reuben A. Doupé is a partner at Coleman, Hazzard, Taylor, Klaus, Doupé in Naples, Florida. Mr. Doupé is Board Certified in Marital and Family Law and a Fellow in the American Academy of Matrimonial Lawyers. Mr. Doupé is a graduate of the University of Miami and the University of Florida School of Law and throughout his career has been involved with the Family Law Section of the Florida Bar, where he presently serves on Executive Council, as Co-Chair of the CLE Committee, and as Co-Secretary of the Legislation Committee.

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It Is Time To Make Financial Affidavits and Other Documents Private In Family Matters

By Robert J. Merlin, Esquire, Coral Gables

In most dissolution of marriage and paternity matters, financial affidavits and many other documents are automatically filed with the court, thereby making them subject to public scrutiny. The time has come to further limit the documents that become part of the public record in family matters, because the public disclosure of many documents serves no public purpose, but does expose the family, especially children, to unnecessary risks. Given the huge problems with identity theft and abuse of children, the risk of harm to parties and their children far outweighs the benefit of public disclosure of private information.

Rule 12.285 of the Florida Family Law Rules of Procedure requires the filing of a Certificate of Compliance with Mandatory Disclosure, but the rule does not require the actual filing of any documents other than financial affidavits and child support guideline worksheets. Rule 12.285(e)(1) specifically requires the filing of the financial affidavit. However, Rule 12.285 does not apply to simplified dissolution actions, so financial affidavits are not required to be filed in those actions. Rule 12.285(a)(1) prohibits a court or the parties from modifying the rule with respect to financial affidavits and child support guidelines worksheets. There is no good reason why financial affidavits and other documents related to a dissolution of marriage or paternity action should be required to be filed with the court in certain circumstances but not in others.

There is a long-standing philosophy in the United States that court proceedings should be open to the public, and especially open to the press. An excellent discussion of that common law principle continued, next page
can be found in *Barron v. Florida Freedom Newspapers*, 531 So.2d 113 (Fla. 1988). It should be a given that an open judicial system is critical to preserve our form of democracy. But even in the seminal *Barron* decision, the Court recognized that there are circumstances under which court proceedings should not be open to the public. Most appellate decisions that address the issue of public access to courts refer to “court proceedings,” meaning hearings and trials, e.g., *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 n. 17, 100 S.Ct. 2814, 2829 n. 17 (1980), but in *Barron*, the Florida Supreme Court made specific reference to proceedings or records, *Barron* at 118.

Our existing statutes refer to certain proceedings being closed to the public, such as adoptions (Florida Statutes §63.022(4) (i) and 63.162); paternity matters (Florida Statutes 742.031, at the discretion of the judge); and juvenile proceedings (Florida Statutes §39.00145). Florida Statutes §119.071 identifies certain public records that are exempt from disclosure. That statute specifically recognizes the risk of disclosing Social Security numbers and states, “The Legislature recognizes that the social security number can be used as a tool to perpetuate fraud against an individual and to acquire sensitive personal, financial, medical, and familial information, the release of which could cause great financial or personal harm to an individual.” Florida Statutes §119.071(5)(b). Thus, Social Security numbers are to be kept confidential. It is time for attorneys and judges, as advocates for the well-being of the public, to make more private information confidential in the dissolution of marriage and paternity cases that we handle. The Florida Legislature has the power to deem certain information to be exempt from public disclosure. The Florida Supreme Court also has the power to deem certain court records to be exempt from public access. Rule 2.420 of the Florida Rules of Judicial Administration sets forth the process for keeping certain information confidential. That rule should be expanded to protect financial affidavits and marital settlement agreements from public disclosure.

The comment to Rule 12.000 of the Florida Family Law Rules of Procedure recognizes that family law cases are different from other civil matters. We have our own family law rules of procedure for that reason. Justice Rosemarie Barkett recognized in her specially concurring opinion in *Barron* that dissolution matters are entitled to special considerations. “By their very nature, dissolution cases always involve significant privacy rights. Thus, the privacy interests in those cases must be given greater consideration than, perhaps, in other kinds of civil litigation.” *Barron* at 120. And Justice Parker Lee McDonald stated in his dissenting opinion that, “In my opinion, the rights of the public to information contained in a domestic relations lawsuit is minimal, if existent at all.” *Barron* at 121.

At the very least, financial affidavits should be automatically treated as confidential, as other confidential information is treated in Rule 2.420 of the Florida Rules of Judicial Administration. There is no public interest in having an individual’s financial affidavit open to public scrutiny. Just as the rest of the documents that are exchanged with a Certificate of Compliance with Mandatory Disclosure are not filed with the court, the parties’ financial affidavits should not be automatically filed with the court either. As long as the financial affidavits are exchanged between the parties, they will be available for temporary relief hearings, trials and post-judgment modification and enforcement hearings as needed, rather than automatically being part of the public record.

Similarly, there is no good reason for marital settlement agreements to be required to be
filed with the court. If the parties agree that they do not want their agreement to be filed with the court, they should not be required to make the agreement part of the public record. Parties should have the right to restrict what information is made public about their private lives. If either party needs to enforce, modify or interpret a marital settlement agreement, the document can be filed at that time. As Justice Barkett wrote in her specially concurring opinion in Barron, “[T]here may be grave danger that the litigants’ personal rights or those of third parties will be harmed by scandalmongering, the sole effect of which is to undermine reputation, privacy or justice.” Barron at 120. Many marital settlement agreements incorporate parenting plans in which details of where a child goes to school and the child’s extra-curricular activities are disclosed. Under no circumstance should such information be made available to the public, thereby exposing the child to unnecessary risks. Similarly, marital settlement agreements often refer to specific bank, investment and retirement accounts and other assets. A party who is dissolving a marriage or is involved in a paternity matter should not have to pay the penalty of having personal financial information made public, thereby exposing the party to nefarious conduct by others who would take advantage of the mere public disclosure of such information.

When I was Chair of The Florida Bar Family Law Rules Committee in 2017, we created a sub-committee to look at all aspects of the financial affidavits that we use in our family matters. That sub-committee is capably chaired by Cory Brandfon, Esquire, from Miami. The sub-committee created a survey that has been distributed to judges, magistrates and attorneys throughout Florida. One of the subjects that is addressed in the survey is whether financial affidavits should be exempt from public records disclosure. Once the sub-committee completes its work, it will make recommendations to the Family Law Rules Committee. If the Family Law Rules Committee believes that financial affidavits should be exempt from public disclosure or that the financial affidavit forms should be changed, the amended rules and forms would be presented to the Florida Supreme Court for consideration. At that time, the proposed amendments would be open for public comments.

I hope that the Family Law Section and the individual attorneys who practice family law in Florida will support an amendment to the existing Florida Family Law Rules of Procedure to no longer require that financial affidavits be filed with the court and an amendment to the Florida Rules of Judicial Procedure to exempt financial affidavits and marital settlement agreements from disclosure if they are filed with the court.

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Being A Peacemaker from the Initial Consultation

By Keith Grossman, Esq., Fort Myers
With assistance from and appreciation to: Kevin R. Scudder

At the 2018 Annual Conference of the Florida Academy of Collaborative Professionals, I was inspired to re-analyze how I conduct my initial client consultation by trainer Kevin Scudder, a Collaborative Attorney and Mediator who had travelled from Seattle, Washington to share his knowledge.

Kevin’s consultation focuses on peaceful resolution options, which is different than the traditional divorce consultation. Kevin says, “As a divorce lawyer focused on Peacemaking (helping my client reach a client-focused peaceful resolution) my initial consultations are completely different and are experienced through the Peacemaker lens. These consultations are very different from a traditional consultation. Instead of gathering information needed to construct legal arguments and to start preparing pleadings, consultations through the Peacemaking lens are focused on meeting the client where they are, to hearing about their sadness, pain, regrets, hopes and, most importantly, to start providing your client the information they will need to start the work of looking toward the future and the goal of creating a resolution with their spouse based on full disclosure and informed consent.”

From the Peacemaker lens the questions focus on identifying the underlying interests of the person with who you are speaking. For example:

Is it okay if I ask you some questions that will be helpful for me in being able to better help you? [Assuming a “yes”] Thank you.

How are you today?

Can you share with me more about the ________ [sadness; anger; fear; etc . . ]?

What activities do you do to keep yourself from feeling [sadness; anger; fear; etc. ]?

How are the children doing? Do you have a picture I can look at so I can put a face to the name?

As you move through the uncoupling process (physically, emotionally, psychologically) what is most important to you?

I can tell that you are not at your best today, as we sit here and talk about your divorce. I would like to know, however, what a happy ________ looks like. How do you see your future?

Are you open to us working together to do all we can to help you get to that “happy ________” place?

Describe to me what you’ve already tried to get to that “happy ________” place.

Peacemaking questions are not intended to be interrogative in nature, but rather, enlightening for understanding and change. It gives the client space to examine themselves to see things from a new perspective and to open up new solutions. It also affords the attorney an understanding in order to assist the client in reaching their post-divorce goals.
In our dispute resolution trainings we talk a lot about paradigm shifts.

Kevin says, “Just as asking questions have helped me with my own paradigm shift, the questions we ask our clients are the cornerstone of helping them make their own paradigm shifts as they move from what they are experiencing as a hopeless situation to one in which they construct based on those things that are most important to them.”

Consultations from the Peacemaking lens have to be practiced and entered into intentionally. We cannot expect to be good at a new skill unless we study the underlying elements of the skill, try the new skill, debrief the times we use the new skill, and then try it again. It will take time and many tries before this style of consultation becomes integrated into our practices.

As a starting point, the style of questions you would ask at an initial consultation are open-ended questions that act as an invitation for the client to share the information they want to share. These questions often begin with “what,” “how,” “who,” “where,” and “when.”

It will be necessary to follow-up with your client after they have shared what they want to share because some of the most valuable information you can get from them is what they do not want to share with you for reasons of shame, pain, family of origin, or other reason. When you follow-up with the client there is a difference between “tell me more” (which is an order, not a request), and “Thank you for sharing that information. May I ask a few follow-up questions?” When you ask for permission from your client, you are creating a safer place for the client to share additional information, while building a higher level of trust.

Just as there are words to use in your conversation to connect with the client and to create a space where your client is willing to share with you information they may not otherwise think they were going to share, there are certain words that have a direct, immediate, negative impact on the conversation. Here are continued, next page

YOUR PHOTO
COULD BE ON
THE COVER!

If you would like to submit a large format photo for consideration, please email it to Anastasia Garcia (agarcia@anastasialaw.com) or Anya Cintron Stern (anya@anyacintronstern.legal), Co-Chairs of the Commentator.
Being a Peacemaker
CONTINUED, FROM PAGE 33

some words you may want to work on easing out of your communications, whether in a client consultation or other conversations you have in your work:

Why
This word has a tendency to be taken as a judgment and blame. Instead of asking “Why did you do that?” you can ask “What was your intention when you . . . ?”

But
This word negates everything that comes before it, such as “I liked what you said but . . . .”

War Words
Stop using the word “opposing”. And “other”. Or “win”, “lose”, “more”, “less”. We have the opportunity to model a different way of speaking with and treating each other. If we are asking our clients with whom we work to act differently, what better way can we help them than by changing our own behavior that is inconsistent with what we are asking of our clients.

War Stories
Stop telling litigation War Stories. Instead, choose to talk about the client-focused out-of-court work you are doing, your successes and your challenges. Start telling Peacemaking stories.

During the consultation keep your eyes on the client rather than taking notes (which usually entails your losing eye contact). Take enough notes to remind you of important things to remember, and, after the conversation, fill out the notes in the privacy of your office.

Maintaining eye contact and watching your client will give you as much, or more, information about your client that you would have missed had you not been looking. By paying attention you will find times when your client wants to say more, or when they are hesitant, which gives you valuable information as well. Some people will have an assistant in the room to take notes for this very reason.

Here is just some of what you can possibly draw out during a consultation conducted through the Peacemaking lens:

- The client’s emotional state (i.e.: leaver / leavee; stages of grieving; fear)
- Suitability for different divorce processes
- Their sense of fairness (rights; faith; needs; equity)
- An idea of their potential peacemaking competencies and behaviors
- How they process information and make decisions
- Goals, needs, interests, motivations, and values
- Habits and structures that might be holding them back

Here are some questions (non-exclusive) that you can experiment with in your next consultation:

1. How are things going for you?
2. How do you feel I can best help you today?
3. What is challenging for you about the situation in which you are in?
4. What would you change about your current situation?
5. What do you do for fun? What does your spouse do for fun?
6. What do you think would reduce conflict in your life?
7. If you could change one thing right now, what would it be?
8. If your spouse were here, what one thing would they want to change?
9. How would you describe the communication styles of yourself and your spouse? Could it be better?
10. What triggers you? What triggers your spouse?
11. Are you afraid for yourself physically or emotionally at home? If your spouse were here how would that question be answered?
12. What does a happy (client name) look like? How would your spouse answer that question?
13. Would you be willing to work with me to create a resolution that contains as many of the things that you and your spouse determine is most important?

There are also descriptor questions you can to get deeper into an answer so you better understand a situation:

- Will you help me understand...
- Would you be willing to say me more about . . . .
- I would like to make sure I understand what you are saying..
- I'm curious about...
- Would you describe further..

Being a Peacemaker from the time of the initial consultation results in my really understanding what my client is looking for, in a deeper working relationship with my client and, ultimately, in happier clients who feel they achieved something they never accepted: a resolution where both my client and their spouse/partner can say “I was treated fairly” and “I treated my spouse/partner fairly.” Agreements constructed in this manner are the durable ones, where parties do not spend years, and lots of money trying to achieve what they think they deserve or entitled to.

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**Keith Grossman** helps families negotiate and manage divorce, child custody, and related family law issues more comfortably and with honor. Keith is a Collaborative Attorney, a Family and Circuit Civil mediator certified by the Supreme Court of Florida, an Arbitrator qualified by the Florida Supreme Court, and an educator.

The Lee County Association of Family Law Professionals awarded Keith the 2015 Hugh E. Starnes “Think Outside the Box” award for leadership, critical thinking, innovation, and dedication to non-adversarial practice. The Cape Coral Community Foundation has also recognized Keith as a nominee for the 2018 Elmer Tabor Generosity Award.

Keith is also an Adjunct Professor at Florida Gulf Coast University teaching Alternative Dispute Resolution.

Keith graduated from the University of Florida with a law degree as well as a Bachelor of Science in Journalism. He is a Past President of the Lee County Bar Association, as well as President of the Collaborative Professionals of Southwest Florida and a Board member for the Florida Academy of Collaborative Professionals. Keith can be reached at Keith@AttorneyGrossman.com or at his website www.AttorneyGrossman.com
How to Create Great Law Firm Newsletters

By Lisa McKnight Tipton, APR
Consultant to the Family Law Section of The Florida Bar, Florida/Arkansas

If you’re looking for an inexpensive way to share information with colleagues, referral sources and clients, develop a newsletter for your firm. Newsletter content can allow you to demonstrate your experience with certain types of cases, share photos of your firm’s community involvement or provide Q & A on various topics related to your practice areas. With just a few tools and a subscription to an easy-to-use mail program like Constant Contact or MailChimp, you can create interesting, readable and engaging newsletters.

Content. You probably subscribe to numerous legal-industry publications and receive newsletters from a variety of sources like your local bar association, The Florida Bar and community groups. Create a list of topics that connect to your practice areas and stay on the lookout for related content. You can sign up for Google and Yahoo! news alerts, follow legal blogs, monitor ABA Family Law Group publications and search online for sites that offer lists of family law content subjects. You also can follow The Florida Bar and other legal entities on social media.

The key to effective content is connecting without making a sales pitch for your services. Instead, try to provide information and perspectives that help readers solve problems or answer questions. Your content is not meant to substitute for legal advice, of course, but sharing useful information can establish you as an authority on a topic, which can solidify your reputation and make clients and referral sources seek you out. Offer information about practical topics that affect your readers’ lives. Avoid bragging and instead try to imagine having a conversation with your audience. It’s not about you—it’s about them.

Be sure that your articles don’t read like legal journals. Strive for straightforward, clear content that avoids excessive punctuation and long sentences. If you aren’t an experienced copy editor, sign up for grammar and editing services like Grammarly or WordRake, which can help simply and clarify your words.

Design. Most popular online mail services offer mobile-ready templates that make newsletter creation a snap. Select a template that resembles the style of your website and edit the theme to populate your newsletter with colors and typefaces like those on your website.

You can name your newsletter or simply use a generic nameplate like “Smith Firm News Winter 2019.” Add your firm logo and contact information. You could start from scratch and create a custom newsletter design but using a template will help your newsletter look more professional, be more reader-friendly and maintain consistent formatting.

Pro Tip: If you want to match the exact colors and fonts on your website, here’s a trick: Go to your home page, right click, and in the dropdown menu select “View page source.” Your site’s HTML code will display. Hit “Ctrl F” and the “Find” box will appear. Search for “font” and “color,” which are your website text and graphic element colors. Let’s say your search for “color” came up with color: #062755. This is the hex number. Enter the number on ColorHexa and
you’ll see that it’s a navy blue. ColorHexa also gives you RGB and CMYK color translations.

**Graphics.** Copy-heavy newsletters are boring. Break up your content by including images that relate to your topic areas. Many online mail services offer access to stock photos—basic images are free, and premium can be purchased. One great way to find free-to-use images is [Google Advanced Image Search](https://www.google.com/search?tbm=isch&tbs=isz:lf), which allows you to filter your results to find images that you have permission to use. Just use the “usage rights” advanced search filter and select “free to use, share, or modify, even commercially.”

Want to jazz up your newsletter even more? Try using high-contrast fonts from your website’s typefaces, incorporating extra color blocks, making use of effective white space and adding quotes in large type for emphasis.

**Hyperlinks.** Be sure to incorporate links in your newsletter that allow readers to click through to your website or to other sites where they can find additional information. If you want to feature a certain area of your site—the resources section, for example—include a link to that page. If you have been involved in a recent 5K race to benefit a local community organization, include a hyperlink to the organization or run’s website. The key is to include several links so that you can track engagement.

After you send the newsletter, use the mail program’s response feature to review who opened it, who unsubscribed, who clicked and who shared. Note the topics and areas of the newsletter that received the most clicks and focus on enhancing those for the next letter. Be sure that you remove the opt-outs from your mailing list.

**Bar Rules.** Under Florida Bar rules, newsletters sent by mail or email must comply with Rule 4-7.18(b). Newsletters also must be filed for review under Rule 4-7.19, unless they are mailed only to other lawyers, current clients, former clients and people who have requested the newsletter.

Informational newsletters that contain the lawyer or law firm’s name, address, phone number and fax number must be filed for review. If the promotional information about the lawyer or law firm does not change from issue to issue, only the first issue of the newsletter is required to be filed for review and subsequent issues do not need to be filed for review ([Advertising Opinion A-99-1](http://www.floridabar.org/ethics/).)

**Dissemination.** Once you’ve created your newsletter masterpiece, make sure that you send it out regularly. If quarterly is the most frequent publication schedule your firm can manage, then plan to send out newsletters on that schedule. Set a reminder for yourself to start editing content in a timely matter and treat your deadline as seriously as a filing deadline.

To gain extra life from your newsletter, you can post it to your website, promote it on social media and create blog posts on each topic. This allows others to benefit from your content even if they are not on your mailing list. You also can add a newsletter sign-up feature on your website that allows people to opt-in to receive your mailings.

**Pro Tip:** You can provide links directly to the pages on which individual articles appear. Here’s how: Post the newsletter to your website and copy the long URL. For example, the Family Law Section Fall 2018 Commentator URL is [http://familylawfla.org/wp-content/uploads/2018/11/Commentator-Fall-2018.pdf](http://familylawfla.org/wp-content/uploads/2018/11/Commentator-Fall-2018.pdf). To direct readers to photos from the Leadership Retreat and Fall Meetings, which appear on page 16 of the Commentator, just add #page=16 (or whatever page number to which you want to go) to the end of the URL. So, to go directly to page 16 of the Fall Commentator to view the retreat photos, this is the URL: [http://familylawfla.org/wp-content/uploads/2018/11/Commentator-Fall-2018.pdf#page=16](http://familylawfla.org/wp-content/uploads/2018/11/Commentator-Fall-2018.pdf#page=16). If you’re posting to social
media, be sure that you shorten the URL using Bitly or another URL-shortener. The page 16 link from above turns out like this: https://bit.ly/2zekM7E. This step is key; nobody likes long URLs.

You can see how this feature allows you to link readers directly to various articles that appear in your newsletter, so that each can be promoted on social media or on your blog. This extends the life of your newsletter and allows you the ability to share different topics that might be of interest to your followers.

In conclusion, online mail programs make it easy for you to create newsletters that are consistent with your firm’s branding. Most online mail programs like Constant Contact and MailChimp offer free options and trials, so you can experiment with templates and content without making a long-term investment.

Numerous content sources and free graphics are readily available online. Your newsletter can be repurposed into social media and blog posts, which allow you to reach others outside your mailing list. Regular dissemination of a firm newsletter allows you to share firm news, offer insights and demonstrate that you are an authority figure in particular practice areas. If you haven’t tried a firm newsletter, now’s the time!

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.
BOOK REVIEW

Broken Circle: Children of Divorce and Separation

By Karen Klein

Reviewed by Jorge M. Cestero, Esq., Past Chair, West Palm Beach

Let me start by saying that I keep this book on the coffee table in the waiting room at my office. For good reason. We have and are often solicited to purchase books (hard copy or electronic) for our offices. This is something completely different. This is something that most works on family law don’t provide. It offers something prospective clients and we as lawyers need. The reason I keep this book on my waiting room coffee table is that it offers perspective.

Broken Circle is a book of photographs with commentary. The photos, by renown photographer (and part-time Florida resident) Karen Klein, are of young adults from around the world, once children of divorce. Each photograph is accompanied by commentary by that person, describing their divorce experience in hindsight. The perspective of these young adults is both fascinating and educational, whether you are a prospective client or a family lawyer.

Perspectives range from Mary, who saw so much conflict between her parents that she “doesn’t know who I really am,” to Jessica, who felt she was forced to choose between parents as she became older but now makes “a concerted effort to build others up,” to Mason, who received love and support from both parents after divorce to the extent that he feels unhindered by the whole thing.

Broken Circle is an important work because we see the varied outcomes and effects divorce has on children in the long run, and we see their perspective, visually through the photos and in words, after they have gained some level of maturity. Several clients have told me they enjoy looking at the book, and several have asked me why I keep it in my office. The answer is usually the same: Perspective.

Broken Circle: Children of Divorce and Separation

by Karen Klein is available from amazon.com and at www.brokencircleproject.org.
Keep up with what’s new in the Section!!

Follow us on Social Media!
- Be the in the know!
- See lots of pictures!
- Stay Connected!
- Get Involved!

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