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Family Law Section of The Florida Bar
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ON THE COVER: Photograph courtesy of Grant Gisondo

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It is such an honor to be Chair of the Family Law Section. I must admit, this year has been full of new experiences and challenges, most of which I could never have anticipated when I began this journey almost four years ago. During this unprecedented time of separation and social distancing, we have each recognized how interconnected we truly are and how important it is for us to reach out and support one another. For me, I have learned to appreciate my friends even more than I did before I was Chair of the Family Law Section. I am lucky that I have dear friends always willing to tell me the truth even when it is something that is difficult to hear. They know that I do not take offense to their comments because listening to their candor gives me the ability to grow and develop as a person. I am so grateful that I have the unwavering support of my husband, Steven, my assistant Janice and a core group of friends; some of which are members of the Section and others who do not practice law at all.

As Chair, I also want to recognize those individuals that devote countless hours to the Family Law Section. One group in particular that comes to mind is the entire Publications Committee lead by Sarah Sullivan and Anya Citron Stern. I have to thank Amanda Tackenberg for coordinating the Commentator submissions, Krystine Cardona for coordinating the Section’s Florida Bar Journal Submissions and William “Trace” Norvelle, Cash Eaton and Bernice Bird for our monthly FamSEG. I also thank Chelsea Miller for ensuring my messages to our Section members reflect my sentiments and gratitude.

There are many things that the Section does for the benefit of Florida’s families that go unrecognized. In fact, many of you may not know that the Family Law Section helped draft a handbook that is disseminated to individuals that are applying for a marriage license pursuant to Florida Statute 741.0306(1). Our Publications Committee and Legislation Committee were tasked with facilitating this project this year and I want to recognize, Shenna Benjamin-Wise, Jack Moring, Sarah Sullivan, Trish Armstrong, and many others for putting in many hours of time to make sure that we accomplished the goal of publishing a comprehensive and timeless publication for marrying couples.

Until I became involved with the Section, I was not aware that proposed rule changes in the Florida Rules of Court, be it civil, family, mediation or otherwise that impacts the practice of family law, require review and written comments by the Family Law Section’s Rules and Forms Committee. General Magistrate Kristi Beth Luna and Kristin Kirkner lead the committee responsible for reviewing, interpreting and commenting on proposed rules to the Florida Supreme Court.

The Family Law Section is also tasked

continued, next page
with organizing and hosting continuing legal education opportunities for Florida’s family law practitioners. The Section takes pride in organizing a wide variety of CLE opportunities ensuring Florida’s practitioners are well-versed in the law. The Section has a variety of great CLE’s, including those on business valuations, Zoom appeals and the Case Law Update. I want to thank Reuben Doupe, Ron Kauffman, Jamie Epstein, Lindsay Gunia and Doug Johnson for working on the Case Law Update. Many of the CLEs that are offered by the Section are available for after-market purchase for convenience. Additionally, under the stewardship of the Section’s Immediate Past-Chair, Amy Hamlin, the Section began to offer Facebook “Live” events. The Facebook Live events are short videos that are both topical and timely; and, the Section is continuing to offer these throughout the year. In October, we held a Facebook Live event on technology tips for Domestic Violence presented by Tenesia Hall. You can access any of our past Facebook live events on the Section’s Facebook page. If you have any suggestions or topics for future CLE events or, are interested in presenting for Facebook Live, please reach out to our CLE committee. Facebook Live events are at no cost and can be viewed at any time.

I encourage each of you to become involved with the Family Law Section of the Florida Bar. This is the perfect year to join, especially since you can attend meetings without leaving your home or office. We are always looking for articles to be published in FAMSEG, the Commentator and the Florida Bar Journal. I want to thank each of you for your membership and support of the Section and the Section sponsors. I also want to thank our section administrator Willie Mae Shepherd for her continuing assistance and support.

In closing, I will leave you with this quote: Everyone makes mistakes, but only a person with integrity owns up to them. – Nicole Guillaume
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2020 has shown us that, even in the midst of a pandemic, an election year, and what feels like near-daily political and social upheaval (or perhaps as a result of being in the midst all of it), people are creative. Whether by necessity or out of sheer boredom, the past several months have felt nothing short of theatrical in some respects. As a profession, we’ve creatively dealt with how to set-up and handle virtual offices, virtual hearings, balancing virtual schooling with the demands of work and home-life, and solving the unique and difficult problems that have arisen as a result of some of these unique times. Somehow, many of our members have felt inspired to write think-pieces on novel issues, commentary on our profession, or columns of advice to other professionals. Not only am I impressed, I am also grateful and inspired. We gladly welcome submissions relating to the practice of family law.

If you find yourself with a unique set of facts, a complex problem, or an issue you think needs to be addressed by our judiciary or legislature, please write and submit your article to the Commentator. For more information, please email us at publications@familylawfla.org.

**Editor’s Correction**

**Gina Szapucki, Esquire** is an associate at Ward Damon and concentrates her practice exclusively in the areas of marital & family law. Gina quickly realized she had a passion for helping families while clerking for a family law firm. Prior to joining Ward Damon, she practiced marital & family law at a boutique law firm. Her drive to assist and guide families during challenging times continues to grow. Gina represents clients from all walks of life while zealously advocating for individual’s rights under Florida law.

Gina is originally from New Jersey but has called Florida home for the last 15 years. She is a proud Chi Omega Alumni and in her spare time enjoys traveling, cycling, exploring new restaurants and cuisines.
When explaining the different branches of our United States government to my children, I often ask my kids which branch of government does mommy belong to? They look at me with big question marks, because the judicial branch seems so far removed from their daily lives, and is a very abstract concept to them. But, I explain to them, the idea of the different branches of government has a huge impact on our daily lives. We have seen a lot of changes to our government and the way our government is perceived by our citizens. But, what hasn’t changed, is the importance of lawyers and our participation in interpreting, enforcing, and even changing the rule of law. And, for many families, family law is the only interaction they may have with an attorney or a judge in their lifetime. Over the past two decades, Florida family court filings have ranged anywhere from 28.2% to 44.7% of all circuit court filings (including civil, criminal, and probate). That is a significant chunk of court filings, meaning family law attorneys are busy and their work has a big impact on the court’s and our community. There are thousands of cases where statutes are applied by the Court and case law interprets the legislative branch’s intent. Lawyers play a powerful role in the judicial branch of government.

Being part of the judicial branch as an attorney cannot be by passive association. Lawyering is more than a job, it is a profession, with very specific and clear ideals expressed in the oath we take and the rules by which we adhere. Being involved in the Family Law Section exposes you to other lawyers who are at the top of the profession. It also allows you to engage in policy and improvement for other family lawyers across the entire state. Family Law Section participation allows you to maximize the impact of your membership in the judicial branch of government. So, as we fight to maintain what is best for our community and push to improve how lawyers and courts address the needs of our clients/parties, let us engage with one another through Family Law Section membership and involvement. If you are interested in learning more about the Section and how you can contribute, please contact membership@familylawfla.org.

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It has been challenging to maintain normalcy in our daily lives amidst COVID-19. Personally, my family has endured its highs and lows in the last several months, from the passing of my maternal grandfather, lovingly called “Pipo,” to my bouncing baby nephew entering this world. It gave me solace to rely on family, friends, and colleagues.

My newest colleagues derived from the Family Law Section. While my husband adoringly listens to my family law tales, it has been such a pleasure to connect with family law practitioners around the state as a result of virtually attending committee meetings and working together to bring you Issue II of the Family Law Section’s Commentator.

One of my favorite discussions in connection with this issue was with the Honorable Gary P. Flower while we collaborated on the article, Civility and Professionalism in the Family Law Practice. I carefully listened as he spoke words of wisdom about each tenet of professionalism that was examined in the article. It was refreshing to learn his perspective, especially given his experience as a member of the judiciary. One of the most important concepts he emphasized was to continue learning. He makes an effort to re-read the rules often, sets apart time to read Ehrhardt’s Florida Evidence, and he keeps up with the Florida Law Weekly articles despite his bustling schedule. He emphasized: “know your craft.” Often, we look to others as a beacon of hope— an example of what we would like to emulate. The Honorable Gary P. Flower sets a great example. Knowing your craft to reach a high degree of knowledge in this practice takes discipline, but it can be achieved. That same evening, I began to re-read the Florida Family Law Rules of Procedure and ordered Ehrhardt’s Florida Evidence.

Issue II of the Family Law Section’s Commentator consists of thought-provoking articles on an array of topics, including tips on helping your family thrive during quarantine by Dr. Rachael Silverman, strategies to successfully settle family law mediations during COVID-19 by Hadas Stagman, Esq., Funding Divorce Settlements and Support – SBA Economic Injury Disaster Loans (EIDL) by Bob Javid, CPA, and a proposal to enact statutory protection for Jewish women in Florida akin to New York’s Removal of Barriers to Remarriage statute to avoid spousal control and manipulation by Anthony M. Genova, Esq., Anthony J. Caggiano, Esq., and Lauren A. Bromfield.

This issue also consists of two articles that delve into the Hague and International Child Abduction Remedies Act, specifically, an article on the recovery of attorney’s fees and costs in pro bono cases under the International Child Abduction Remedies Act by Diego Pestana, Esq. and Natalia Reyna-Pimeno, Esq. and an article that dissects the nature of passports in connection with family law court ordered seizures and surrenders in federal and state court by Richard A.C. Alton, Esq.

Thank you again to the authors who submitted the above articles for Issue II of the Family Law Commentator. If you are interested in submitting an article, please send your submissions to publications@familylawfla.org.

I hope you find this issue to be informative and motivational!
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Five Strategies to Settle Family Law Cases During COVID-19

By: Hadas Kohn Stagman

Although many things have changed as a result of Covid-19, one thing that has not is a couples’ desire to end their marriage. In fact, the quarantine and shelter in place laws may have actually pushed more couples to divorce. Despite this uptick in couples that want to change their marital situation, many feel paralyzed or stuck in their marriage because of the uncertainty and instability in people’s lives, particularly surrounding income and employment. It is unclear what income courts will impute to individuals and how the courts will handle dramatic changes in people’s assets, liabilities and child care needs. Additionally, if courts utilize today’s likely unreliable financial information, the parties may have to return to court on contempt motions and petitions for modification when circumstances return to “normal.”

But even with the instability and uncertainty surrounding a family’s financial picture, there are strategies that attorneys can implement to settle their disputes quickly without sacrificing their client’s rights. Below are five strategies designed to help attorneys formulate marital settlement agreements that allow their clients to move forward while planning for the future as best as they can during these uncertain times.

1) Build Automatic Modifications into the Agreement

Many people’s incomes have dramatically changed in the past six months. Most likely this change is temporary, but no one knows if this “temporary” situation will last a few months or a few years. One effective strategy to settling divorce cases now is to build in automatic modifications to the agreement so that the parties know what to expect when their income improves. If alimony and child support are at issue in the case, but the parent’s annual income has dropped significantly due to lay-offs, the agreement can have automatic increases to alimony and child support that will be triggered when that parent’s income increases.

For example, in a situation where the Husband’s annual income was $150,000 pre-COVID and now he is only receiving unemployment compensation, the couple can agree to calculate child support based on an imputed annual income of $50,000 and agree to modifiable alimony for a certain number of years, commencing immediately at $100 a month. Then the parties can build into the agreement a provision that would “kick in” if or when the husband begins earning a minimum of $75,000 gross annual income. Specifically, the agreement can attach child support guidelines based on $75,000, $100,000, $125,000 and $150,000 annual income and also specify that the alimony would increase by a certain amount (for example, $300-$500) per month for every $25,000 increase in the husband’s income. This provision would allow the parties to settle their dispute immediately without worrying about having to return to court in the future when the husband’s employment situation will likely return to “normal.”
2) Draft a Plan “A” and Plan “B” (even Plan “C”) into the Agreement

There are many people that are still employed but are very concerned that in the near future they may be forced into early retirement if their company’s business does not improve. In order to settle these cases, a good strategy is to anticipate the different scenarios in the agreement. For example, the agreement may presume that the husband will continue at his current job (Plan “A”) but also provided for Plan “B” if husband was forced to retire early and live off of his pension benefits. Additionally, the agreement can even incorporate a Plan “C” alternative scenario that projects the husband receiving his pension and also obtaining comparable employment with a different company. These three contingency plans can give both parties peace of mind and the ability to move forward amid the uncertainty.

3) Provide Flexibility in the Agreement Regarding the Unknows

Many families rely on an end-of-year bonus as a substantial component of their income to support their family’s expenses throughout the year. During this pandemic, many are fearful that they will not receive this end-of-year bonus this year or for the next few years. Consequently, many disagree over what income to use for child support and alimony purposes. An effective strategy for the parties in this circumstance is to use the parent’s current income, without a bonus, as the salary for purposes of child support and/or alimony, but include a stipulation that provides for the other parent to receive a significant portion of the bonus (40% or 50%) at the end of 2020. Additionally, the parties can provide that the other parent will continue to receive a portion of such bonus for the next few years (more likely at a reduced amount - 30% or 40%) to make up for the reduced child support or alimony. This arrangement allows both parties to feel comfortable moving forward with the uncertainty while at the same having reassurance that they are protected.

4) Identify a Joint Goal and Acknowledge the Uncertainty of Getting There

This strategy has been useful pre-COVID and can be very helpful during these uncertain times in paternity or modification cases where one parent wants to reconcile a bad relationship with the child(ren). In these types of mediations, there is often a reunification therapist that is agreed to by both parties and a framework for a timesharing plan. Since the pandemic started, most therapists are seeing patients via Zoom, and so the reunification therapy can commence immediately for the child(ren) and the parent seeking reunification. Often in these mediations the goal that the parent wants to reach is identified and written into the agreement, but the time frame on how long it will take to get there is unspecified. By agreeing to a framework, but leaving open when the final goal would be met, the parent petitioning for the relationship can feel comfortable knowing he/she will ultimately have a consistent timesharing schedule. The other parent can also feel comfortable with this agreement knowing that the child(ren) would cautiously transition into the new relationship with an expert therapist guiding the way.

5) Finalize the Divorce, but Take Time Moving Forward

In the past few months, I have mediated several cases where the parties plan to finalize their divorce, but continue to live together. Some of these agreements allowed for the parties to live together for a specific period of time while others even allowed the parties to further extend that time frame if either party were unemployed. In one matter, the parties intended to continue living together indefinitely continued, next page
Five Strategies
CONTINUED, FROM PAGE 11

until one party asserts that he or she is no longer comfortable with the arrangement. In each of these agreements, we incorporated an itemization of how the parties will share household expenses and whether at the end of the stated timeframe, one party will buy out the other’s interest or if they will sell the house and share the net proceeds.

There is never a perfect time to divorce, but the pandemic should not result in couples delaying a decision that they are ready to make now because their financial situation is uncertain. The strategies discussed above should allow mediators and practitioners, in a mediation setting, to tackle the instability and uncertainty of this time period while at the same time enable couples to move forward with their lives.

Hadas Kohn Stagman is based in Palm Beach County and is an attorney who is now a full-time mediator and focuses exclusively on family law mediations. To date, she has mediated over 2,000 cases. In 2018, Hadas was appointed by the Florida Supreme Court to the Mediator Ethics Advisory Committee (MEAC) for a 4-year term. She works with both family law attorneys and pro se clients. Hadas is passionate about helping individuals resolve their family law conflicts outside of the courtroom.

Endnotes
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TAMPA  CLEARWATER  TRINITY  DADE CITY
Jewish Women Deserve Protection From Spousal Control and Manipulation in Dissolution of Marriage Actions

By Anthony M. Genova, Anthony J. Caggiano and Lauren Bromfield

In dissolution of marriage actions, the playing field should be level between the parties. Yet, in actions involving Jewish men and women, religious customs can drastically impact negotiations. Jewish law empowers the husband alone to decide whether to permit divorce. Notwithstanding procuring a civil divorce under the State of Florida, until such time the husband provides a Get— the wife is essentially in religious limbo. The “Get” is the document required to be written by a husband and given to his wife to satisfy the Jewish religious tenets. Otherwise, his spouse remains a “married” woman.

While it may be difficult to imagine contemporary women being considered to be property of their husbands, in today’s dissolution actions, there is still an ostensible gender inequity inherent in Jewish divorce laws, such that the husbands are permitted to manipulate and seek to control their Jewish spouses. Jewish Divorce and Family Law: The Ketubah and the Get succinctly explains:

Under Jewish law, marriage is a contract willingly entered into by a man and a woman, with the marriage contract (called a “ketubah”) defining each one’s rights and obligations (there are other ceremonial requirements, but the ketubah is a key ingredient). Jewish marriage is not a creature of the state, and no state action, state involvement, or state ceremony is mandated. Divorce, however, is accomplished only unilaterally: by the man writing a Get. Even if the divorce is done by agreement, the Get is still written only by the man (and accepted by the woman).

Tracing its origins to the Bible, Jewish law states that only the husband gives the wife a Get. A woman has no power to divorce her husband — and so long as he fails to write the Get, she remains married to him. Under Orthodox tradition, because a woman is “acquired” by her husband in marriage via the marriage contract, the contract cannot be broken or terminated by anyone except her husband. Not even the rabbi has the power to terminate a Jewish marriage.

Obviously, a Jewish husband should not be able to withhold the Get to gain a litigation advantage over his spouse. Yet, that is exactly what can occur in Florida and other states.

One state where a Jewish woman is protected from such abuse is New York. The New York legislature has limited the husband’s power over the “Get” by enacting the §253 Removal of Barriers to Remarriage Statute. Although the statute is phrased in seemingly neutral language, its purpose is to curb what has
been described as the withholding of Jewish religious divorces, despite the entry of civil divorce judgments by spouses acting out of vindictiveness or employing economic coercion. See Governor’s Memorandum of Approval, McKinney’s 1983 Session Laws of New York, pp. 2818, 2819.

The legislative intent of Domestic Relations Law § 253(3) was principally to prevent the husband in the case of a Jewish divorce from using the denial of a “get” as a form of economic coercion in a civil divorce action (see Perl v. Perl, 126 A.D.2d 91, 94–95 [1987]; Scheinkman, Practice Commentaries, McKinney’s Cons. Laws of N.Y., Book 14, CPLR C253:1 at 716).


Statutory violations result in heavy fines and serious financial hardship essentially ensuring that the husband will cooperate to give his wife the Get. Specifically, in pertinent part, it provides:

6. As used in the sworn statements prescribed by this section “barrier to remarriage” includes, without limitation, any religious or conscientious restraint or inhibition, of which the party required to make the verified statement is aware, that is imposed on a party to a marriage, under the principles held by the clergyman or minister who has solemnized the marriage, by reason of the other party’s commission or withholding of any voluntary act. Nothing in this section shall be construed to require any party to consult with any clergyman or minister to determine whether there exists any such religious or conscientious restraint or inhibition. It shall not be deemed a “barrier to remarriage” within the meaning of this section if the restraint or inhibition cannot be removed by the party’s voluntary act. Nor shall it be deemed a “barrier to remarriage” if the party must incur expenses in connection with removal of the restraint or inhibition and the other party refuses to provide reasonable reimbursement for such expenses. “All steps solely within his or her power” shall not be construed to include application to a marriage tribunal or other similar organization or agency of a religious denomination which has authority to annul or dissolve a marriage under the rules of such denomination.


A bill was subsequently introduced in 2019, which provides in pertinent part:

9. Notwithstanding the provisions of subdivisions two, three, four and five of this section, in any action or proceeding to annul a marriage or to file for a divorce, both parties shall remove any religious or conscientious barrier to remarriage as described in subdivision six of this section within ninety days of filing for such annulment or divorce. A person who fails to comply with the requirements of this subdivision shall be subject to a fine of twenty-five hundred dollars per week until such barriers to remarriage are removed, unless the other party has waived in writing the requirements of this subdivision.

Id. §253:9 (emphasis added).2

New York has clearly and aggressively responded to protect all persons involved in dissolution actions. Importantly, the passage of the Removal of Barriers to Remarriage Statute has had no negative impact on New York. The Jewish population of New York is approximately nine percent (9%) and following the enactment of the Removal of Barriers to Remarriage Statute, its community continues to flourish. Consequently, such a statutory scheme would likely have no negative impact in any state that adopts such legislation. In Florida, for example, the Jewish population is only one-third (1/3) of that in New York, or approximately three percent (3%). Therefore, the statutory scheme’s adverse impact on Florida should be even less.

Without similar statutory protection, Jewish
women in Florida and elsewhere facing a vindictive spouse may need to seek refuge in New York before filing for divorce. The residency requirement in New York can be satisfied in one year. Of course, only those women who have the financial means would be able to relocate to New York in order to obtain both a state and religious sanctioned divorce. Sadly, less fortunate women who hold deeply religious beliefs may elect to remain in a dead marriage. Should they be forced to endure hardship and coercion? Or, will they consider abandoning their faith and religion?

The Fourteenth Amendment to United States Constitution guarantees that no state shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. In Florida divorce actions, anyone who satisfies the residency requirement and proves the marriage is irretrievably broken is entitled to a final judgment of divorce. A Jewish woman deserves due process and equal protection of the laws administered in Florida. Enabling men to economically coerce their spouses because of the interplay with religious tenets arguably considers women unequal from men under the law.

As stated in the case Zablocki v. Redhail, “The right to marry is a fundamental right protected by the Due Process Clause, and only ‘reasonable regulations’ of marriage may be imposed.” Zablocki v. Redhail, 434 U.S. 374, 386 (1978). Making a woman wait for her opportunity to remarry because of her former husband’s vindictive vendetta is by no means a “reasonable regulation.” Why does Florida lack a statute akin to New York to address the unjust result of men purposely withholding a Get?

By maintaining the status quo, Jewish women may feel compelled to involve their rabbi in divorce proceedings to address the husband’s control. Yet, such a result would violate the First Amendment’s implicit right to privacy against governmental intrusion. Certainly, the right to privacy within marriage should remain inviolate. Fortunately, the United States Supreme Court has found and protected privacy rights in the context of family matters. For example, in Eisenstadt, Justice Brennan held the Massachusetts statute violated the equal protection clause when it permitted married persons to obtain contraceptives to prevent pregnancy but prohibited distribution of contraceptives to single persons for the same purpose. Eisenstadt v. Baird, 405 U.S. 438 (1972). More than three decades later, the United States Supreme Court held that a Texas statute was unconstitutional when it made it a crime for two persons of the same sex to engage in certain intimate sexual conduct. Lawrence v. Texas, 539 U.S. 558 (2003).

Florida should adopt a statute comparable to New York’s §253 Removal of Barriers to Remarriage Statute to level the playing field for Jewish women seeking a divorce. Women are not property and should no longer be subject to economic coercion in dissolution proceedings. Women are entitled equal rights to marry and to divorce. Family law practitioners recognize that only a relatively small number of cases go to trial. Without the court intervention that would ensue at trial, there is an even stronger need to prevent the blatant unequal bargaining power between Jewish wives and their husbands who withhold the Get. Florida should no longer permit a Jewish husband to prevent his wife from obtaining a divorce. Rather, Florida should act to ensure all its citizens, men, and women alike, are afforded due process and equal protection under the law and an unbridled right to privacy.

Anthony M. Genova currently serves on the Executive Council of the Florida Bar Family Law Section and is a Florida Supreme Court Certified
Anthony J. Caggiano is Board Certified in Civil Trial Law and has served as Chair of The Florida Bar Civil Trial Certification Committee. He is a member of the American Board of Trial Advocates (ABOTA) and a shareholder in the Orlando law firm, Florida Trial, P.A., handling family and civil matters throughout Florida.

Lauren Bromfield is a graduate of the University of Florida and is a third-year law student at the University of Miami. She currently serves as a Certified Legal Intern at the Miami-Dade State Attorney’s Office with the Misdemeanor Domestic Violence Unit. She also serves as Vice President for the Health Law Association, Treasurer for Child Advocacy and Family Law Society, and as Third-Year representative for First Generation Law Association.

Endnotes
3 U.S. Const. amend. XIV, §2.

The International Child Abduction Remedies Act: Recovery of Attorney’s Fees and Costs in Pro Bono Cases

By Natalia Reyna Pimiento and Diego M. Pestana

The Hague Convention on the Civil Aspects of International Child Abduction1 implemented in the United States by the International Child Abduction Remedies Act, or ICARA2—is the international community’s effort to ensure that children “wrongfully removed or retained” by parents involved in international family disputes are returned promptly to their country of habitual residence.3 According to the Department of State, which serves as the United States Central Authority for the Hague Convention, over eight hundred cases of children “wrongfully removed and retained” in the United States were reported in 2018.4 The number of lawyers available to handle these cases, especially on behalf of indigent families, is limited because there is no right to counsel in ICARA cases.5 As a result, many parents and children suffer from prolonged and indefinite separations.
International Child Abduction Remedies Act
CONTINUED, FROM PAGE 17

To address this problem, volunteer attorneys—indeed, or through the Hague Convention Attorney Network created by the U.S. Department of State—may provide support to individuals seeking pro bono services.\(^6\) Representing indigent parents and children in ICARA cases provides attorneys with some of the most rewarding personal and professional experiences.\(^7\) Although those experiences alone are invaluable, attorneys may also recover attorney’s fees and costs under ICARA in certain circumstances. The purpose of this article is to explain those circumstances.\(^8\)

I. Entitlement to Attorney’s Fees and Costs in Pro Bono Cases

Attorney’s fees and costs awarded under ICARA are intended to deter the unlawful removal of children and restore the petitioner to the position he or she was in before the unlawful removal.\(^9\) An ICARA case might last anywhere from a few weeks to a few months. Despite their relatively short duration, ICARA cases are highly litigious and generate fees and costs quickly. Complex ICARA cases commonly result in petitioners incurring up to six figures in fees and expenses.\(^10\) Considering that the main purpose of undertaking cases on a pro bono basis is to offer legal services to indigent individuals for free, courts are hesitant to award attorney’s fees to pro bono counsel.\(^11\) Nonetheless, various circuits, including the Eleventh Circuit, recognize that awarding fees and costs to pro bono counsel deters wrongful removals and improper litigation tactics.\(^12\) So, whether a petitioner is represented on a pro bono basis or not, attorney’s fees and costs may be awarded so long as any award achieves the purpose of ICARA.

A. The Standard

Under ICARA, “[a]ny court ordering the return of a child . . . shall order the respondent to pay necessary expenses incurred by or on behalf of the petitioner . . . unless the respondent establishes that such order would be clearly inappropriate.”\(^13\) By ICARA’s statutory language, an award of attorney’s fees and cost requires a two-fold inquiry by the courts. First, a court must determine whether an award of attorney’s fees and cost is clearly inappropriate. Second, a court must determine whether fees or expenses were necessary for the return of the child. This section will address each inquiry in turn.

B. Whether an Award is Clearly Inappropriate

ICARA creates a presumption of entitlement to attorney’s fees and costs to the prevailing petitioner.\(^14\) To rebut that presumption, the respondent must demonstrate that an award would be “clearly inappropriate.”\(^15\) Although the “clearly inappropriate” standard has no statutory definition, the Eleventh Circuit has recognized two non-exclusive factors that petitioners, respondents, and their counsel should consider in determining whether an award of attorney’s fees and costs applies to their case. The first factor is the financial hardship to the respondent.\(^16\) The second factor is the respondent’s good faith belief that the removal of the child was legal or justified.\(^17\)

1. Financial Hardship for the Respondent

An award of attorney’s fees has been found clearly inappropriate when the fee award would impose such a financial hardship that it would significantly impair the respondent’s ability to care for his or her child.\(^18\) For example, a court declined to award fees and expenses to pro bono counsel when the respondent made $12.22 per hour as a warehouse worker to support three children and the imposition of the award would significantly impair her ability to care for her children.\(^19\)
Similarly, an award of attorney’s fees and costs has been found clearly inappropriate when the respondent’s financial situation will simply result in the inability to pay. In this situation, however, rather than denying and award of attorney’s fees and costs, courts tend to reduce the fee award based on the respondent’s financial situation. For example, a court reduced an award of fees by twenty-five percent, when the respondent was a stay-at-home mother, received no spousal or child support after her divorce, and had no assets or income to pay the requested fees.

If the respondent cannot pay an ICARA award because of his or her financial status, the respondent must provide evidence demonstrating inability to pay. Proof of a respondent’s present financial hardship, however, might not be enough to prevent an award of attorney’s fees and costs when the respondent can generate future income. For example, a district court found that a respondent, who could not work during the ICARA proceedings because of her immigration status, failed to carry her burden to show that an award of necessary expenses was clearly inappropriate because she was a doctor with the “prospective ability” to repay the expenses incurred in the future.

2. Good Faith Belief that Respondent’s Actions were Legal or Justified

An award of attorney’s fees and costs has also been found clearly inappropriate when a respondent has a good faith belief that her actions in removing or retaining a child were legal or justified. The Eleventh Circuit recognizes at least two bases to establish good faith belief: (1) a belief that the removal is permitted or consistent with the law of the country of habitual residence, and (2) a belief that the other parent consented to the removal of the child.

Although there is no specific evidentiary standard to prove a respondent’s good faith belief, the Eleventh Circuit requires at least “credible” and “concrete” evidence. For example, in Rath v. Marcoski, the Eleventh Circuit discussed whether a mother, who was ordered to return her son to the Czech Republic, had established that an award of attorney’s fees and cost was clearly inappropriate in her case. The mother argued she removed the child under a good faith belief that the father consented to the removal. Specifically, the mother proved the father signed a “Declaration of Intent,” in which he stated it was in his son’s best interest to be a United States citizen. She also showed that the father helped her to obtain a Consular Report of Birth Abroad and an American passport for the child and signed an immunization waiver form to vaccinate the child in the United States. Despite this evidence, the Court concluded that the mother provided no credible evidence that she had a concrete plan or timeframe for leaving the place of habitual residence of the child; nor did she demonstrate that the father knew or consented to the removal.

The mother also argued that the removal was consistent with Czech Republic law. The mother produced a legal opinion letter provided by a Czech Republic attorney that she interpreted to mean she had the right to remove the child. The court found the opinion was prepared post-removal and had no foundation in the factual circumstances of the parties. Therefore, the mother failed to carry her burden to establish that an award of attorney’s fees and costs was clearly inappropriate in her case.

3. Other Factors

The Eleventh Circuit allows respondents to raise other factors to rebut the presumption that a petitioner is entitled to attorney’s fees and costs. As recognized by other jurisdictions, whether an award of expenses is clearly inappropriate is determined under “equitable principles.” So, respondents may look to equitable doctrines to meet their burden. For example, appealing to the equitable doctrine of

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unclean hands, the Second Circuit held that an award of fees is clearly inappropriate when the respondent has suffered from domestic abuse at the hands of the petitioner and the removal of the child is, at least in part, related to such violence.\(^{32}\)

The cases discussed in this section demonstrate that although a respondent must establish that an award of attorney’s fees and costs is clearly inappropriate, courts have discretion to decide what factors to consider in determining whether a respondent has met his or her burden.

**II. Caselaw on Attorney’s Fees, Costs, and Expenses**

If the court determines that the respondent unlawfully removed the petitioner’s children and an award is not clearly inappropriate, the respondent must pay the petitioner’s expenses incurred because of the proceedings.\(^{33}\)

Specifically, the losing respondent must pay the following:

- Necessary expenses incurred by or on behalf of the petitioner, including court costs, legal fees, foster home or other care during the course of proceedings in the action, and transportation costs related to the return of the child . . . .\(^{34}\)

The petitioner bears the burden of showing that requested costs were incurred during the course of ICARA proceedings.\(^{35}\) Affidavits alone can establish the reasonableness of the petitioner’s requested cost award.\(^{36}\) This section will now provide an overview of how federal courts in Florida award attorney’s fees in ICARA cases. Then, this section will do the same for costs and expenses under ICARA.

**A. Attorney’s Fees Awarded in Florida Federal Courts**

To begin, counsel for the petitioner must know the lodestar analysis applies to an award for attorney’s fees under ICARA.\(^{37}\) Under the lodestar analysis, an award for attorney’s fees equals the hours counsel reasonably worked multiplied by a reasonable hourly rate.\(^{38}\) The hourly rate generally depends on counsel’s experience in ICARA cases. For example, one court awarded hourly rates of $350 for first-year associates, $450 for an attorney who litigated more than seventy ICARA cases nationwide, and $610 for a partner with appellate clerkship experience at a large firm’s appellate litigation group.\(^{39}\)

In some cases, courts award expenses as part of an award for attorney’s fees under ICARA. One court awarded attorneys’ expenses for airline, transportation, and lodging as part of an award for attorney’s fees.\(^{40}\) Those expenses, however, are usually awarded as part of the petitioner’s costs, as the next subsection illustrates.

Various issues might arise that result in the petitioner receiving its requested award with lesser judicial scrutiny. For instance, one court awarded hourly rates of $600 and $300 because the respondent failed to contest the reasonableness of the attorneys’ hourly rates.\(^{41}\) In other cases, courts reduce awards. One court reduced an award by ten percent because of counsel’s failure to keep detailed billing records.\(^{42}\) Another court reduced an award by twenty-five percent because of the respondent’s financial status.\(^{43}\) These cases demonstrate that counsel must keep in mind the importance of detailed billing records and the importance of the respondent’s financial status and response to a motion for attorney’s fees under ICARA.

**B. Expenses Awarded in Florida Federal Courts**

When awarding costs and expenses under ICARA, federal courts in Florida generally look at how related expenses were to the
proceedings. For example, a court awarded the cost of two flights from Guatemala when the petitioner lived there and needed to fly to the United States to attend ICARA hearings. Similarly, another petitioner recovered costs incurred because of the child’s lodging, food, and transportation. Courts also look at the reasonableness of expenses related to lodging, with one court awarding lodging expenses when the petitioner stayed at affordable hotels. The petitioner may also recover transportation costs he or she incurs while attending court-ordered supervised visits with the child.

Not all expenses incurred during ICARA proceedings are awarded to the petitioner. Although one court awarded meal costs the petitioner incurred while she attended ICARA proceedings, another court denied those costs. Further, courts decline to award expenses when the petitioner fails to show those expenses were necessary for the ICARA proceedings.

Petitioners seeking to recover expenses under ICARA must realize that expenses awarded under Section 9007(b)(3) of ICARA, like transportation and lodging expenses, are distinct from costs awarded under 28 U.S.C. Section 1920, which lists the costs a court may tax. Costs usually recoverable under Section 1920 are similarly recoverable in ICARA cases. For instance, prevailing petitioners in ICARA cases have recovered Clerk fees; deposition costs; interpreter and translation costs; the cost of serving summonses and motions; and expedited-transcript costs. But the petitioner still must demonstrate that costs requested under Section 1920 were necessary for the ICARA proceedings.

III. Conclusion

The cases provided in this article are not meant to be exhaustive but illustrative. Although the purpose of pro bono services is to provide legal aid free of cost, pro bono counsel in ICARA cases should be aware that attorney’s fees, expenses, and costs are recoverable to a prevailing petitioner. The petitioner’s counsel should carefully document all fees and costs so he or she can successfully request those expenses after the ICARA proceedings. Motions and supporting documentation that explain the reasonableness and necessity of hourly rates, work expended, and requested expenses and costs will likely have a better chance of succeeding than motions that fail to do so. Similarly, if pro bono counsel is on the losing side of ICARA litigation, he or she should be ready to explain why any award for costs against his or her client should be reduced if the respondent cannot financially bear a large award for costs.

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Endnotes

4 See U.S. Department of State, Incoming Hague Convention Cases to the U.S. Central Authority, Applications

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7 ICARA expressly confers concurrent jurisdiction on state and federal courts. 22 U.S.C. 9003(a). Therefore, ICARA cases provide great opportunities for attorneys practicing at state level to get familiar with federal court trial practices.
8 This article refers to a parent who seeks the return of a child as a petitioner and a parent who removes the child from his or her habitual residence as a respondent.
12 See Rath, 898 F.3d at 1311 (citing Cuellar v. Joyce, 603 F.3d 1142, 1143 (9th Cir. 2010) (awarding fees to petitioner’s pro bono counsel to deter wrongful removals and improper litigation tactics)); see also Moreno v. Martin, No. 08-22432-CIV, 2009 WL 10719545, at ‘2 (S.D. Fla. June 22, 2009) (awarding fees to law firm representing a petitioner on a pro bono basis). adopted in 2008 WL 4716958; Watkins v. Mobile Housing Bd., 632 F.2d 565, 567 (5th Cir., Unit B 1980) (stating that “the fact that the prevailing party was represented by a public service firm or an association funded by public funds is irrelevant”).
14 Rath, 898 F.3d at 1308.
Introduction

Over the last decade, passports and their relationship to family law have percolated in my mind. The genesis of my work on foreign passport seizures relates back to a law review article I co-authored with my colleague, Jason Reed Struble.¹ That work focused on the seizure of foreign passports by the Department of Homeland Security in connection with immigration removal proceedings. Even then I realized an equally important implication could arise in family law matters.² While my initial law review article has been downloaded over 3,500 times, referenced by publications from around the world, and even cited to by the U.S. Court of Appeals, it has yet to fully blend itself into discussions centering on family law and international child custody proceedings.

After revisiting the topic of passports under international law over the past several years, I felt the urge to finally pull family law fully into the realm of my work on the subject.³

Foreign passport seizure is not a widely covered topic in either international law or Florida family law. As one of the few practicing attorneys who actively publishes works on the topic, I tend to receive phone calls from interested parties whose foreign passports were seized, both in the United States and Europe. It is an interesting convergence of our legal world, where customary international law, domestic law, administrative regulations, and practical human experience intertwine, often to the utter dismay of the person whose passport has been seized.

Passports, in some form, have existed

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for quite a long time—millenia, if you will. Historically, passports served as "an authorization to pass from a port or leave the country, or to enter or pass through a foreign country; a permit for soldiers to depart from their service; a sea letter; and a document issued in time of war to protect person from the general operations of hostilities." Additionally, "much that can be said about the nature and function of passports is derived from the jurisprudence and practice of each State with respect to its own passports and its view towards the passports issued by other States." Widespread consistent State practice arising from a sense of legal obligation therein supports the view that a particular practice has become a rule of customary international law.

In family law, both on a Federal and Florida level, courts may request the seizure or surrender of a child’s foreign passport when the child’s parents are involved in a custody dispute. This is done for a practical reason—to prevent parental flight with the child abroad. The presumption is that the passport should be returned if the flight risk is no longer warranted or the custody issues are adequately resolved.

The seizure of a foreign passport is indeed a seizure of the property of a foreign government. The passport itself is the property of the issuing State. A State’s sovereign right to determine its own citizens and the criteria for becoming one under domestic law is where that State’s property right in its passports reside. The issuing State has the right to demand the return from a foreign government taking custody of its passports since the actions of one State should not intrude upon the personal

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jurisdiction of another State. Mr. Struble and I concluded, in our initial work, that the United States government’s impounding of a foreign passport violates general principles of customary international law as it is an encroachment upon the personal jurisdiction of the issuing foreign government. However, my work up to this point has mainly focused on international and immigration law. I now turn to Federal and Florida family law to discuss the practical implications of search and seizure of passports.

Federal Court and the International Child Abduction Remedies Act (ICARA): The Provisional Remedies Case

In 2013, a Cuban citizen left Mexico with her minor child, and the minor child’s father, a Mexican citizen, remained in Mexico. The father filed a petition for return of the minor child to Mexico via federal court in the Middle District of Florida. The father sought immediate return of the minor child under ICARA. During the pendency of this petition, the father sought provisional relief, “including a Warrant of Arrest directing the United States Marshals Service to serve the Petition and any orders of this Court related to the Petition on Respondent, and to take into custody Respondent and J.V.O.’s travel documents to be delivered to the Court pending the resolution of these proceedings.” These requests were granted by the Court.

According to the Federal Judicial Center (FJC), on the basis of the father’s petition and evidence provided, the Court issued provisional orders directing the U.S. Marshals to, among other items, “seize and impound any and all travel documents in the mother and the child’s possession (passports, birth certificates, travel visas, green cards, social security cards or similar documents that might be used to obtain duplicate passports).” The authority for this provisional relief was derived from ICARA. The FJC notes, “the court’s authority for issuance of a provisional order exists under ICARA, 42 U.S.C. 11604(a),” which authorized the Court to “take or cause to be taken measures under Federal or State law, as appropriate, to protect the well-being of the child involved or to prevent the child’s further removal or concealment before the final disposition of the petition.”

ICARA was implemented from the Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention). Neither ICARA nor the Hague Convention specifically grant the authority to “seize” and/or “impound” a foreign national’s passport. ICARA and the Convention, do however, employ general terms that are familiar to family law attorneys, such as “take measures...to protect” and “to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures.”

The seizure and impounding factually did not take place since the mother attended Court and surrendered the requisite documents. The Court never discussed the potential incursion upon the sovereignty of a foreign State that resulted from a seizure and impounding of the foreign passports. It appears the Court felt it had authority to order it under its reading of ICARA. However, as my initial work on passports indicate, there may be a violation of the general principles of customary international law if the seizure or impounding did eventually take place, as opposed to the eventual surrender.

Florida Statutes: Surrender vs. Seizure

On the state level, Florida family law court judges are afforded certain powers concerning passports. These powers arise under Florida’s enactment of the Uniform Child Abduction Prevention Act (UCAPA). Specifically, Florida judges have the power to compel the parent of a minor to “surrender the passport of the child...” in any proceeding that involves ratifying...
a Parenting Plan. The prime operative word is *surrender*. This language included in the Florida Statutes is borrowed directly from UCAPA. UCAPA relates, “[a]n abduction prevention order may include one or more of the following... a requirement that the respondent *surrender* to the court or the petitioner’s attorney any United States or foreign passport issued in the child’s name.” The drafters of UCAPA envisioned wide latitude to prevent abduction. The official comments to UCAPA note, “[t]he court may do whatever is necessary to prevent an abduction, including using the warrant procedure under this act or under the law of the state.” This general language mirrors language found in the Hague Convention discussed above. One item remains unclear as to whether precise forethought was given to the choice between utilizing the term surrender as opposed to authorizing seizure; however, it is an important distinction. The seizure of a foreign passport violates generally recognized terms of customary international law, yet the surrender of the same by the bearer of the foreign passport tosses in a variable. The drafters of Florida’s UCAPA noted to ensure compliance with orders, it would be advisable to include language such as “VIOLATION OF THIS ORDER MAY SUBJECT THE PARTY IN VIOLATION TO CIVIL AND CRIMINAL PENALTIES.” Warning that the party failing to adhere to the state Court’s order may be found in contempt of Court. Thus, depending on the perceived enforcement needed by the state Court— fines, sanctions, or incarceration are in play. This result is slightly different than the Federal Court approach that appears to permit the U.S. Marshalls to directly seize the passport.

Does surrender under threat equate to an outright seizure? The result is the same, whereby the Court impounds the property of a foreign government. It is unclear whether the drafters of UCAPA paid mind to the potential international legal ramifications of choosing *surrender* as opposed to *seizure*. Since the result is the same, the distinction may not be as important, but still it is an interesting one, nonetheless.

### Implications of Family Law Courts Impounding of Foreign Passports

In 2010, I noted that it may be impractical for a U.S. agency to notify a foreign government when it impounds a passport, let alone return it to the issuing State’s consulate. Since then, in a 2014 Congressional hearing on passport fraud, the international community confirmed that through the INTERPOL database, countries have a mechanism to send information regarding lost or stolen passports. With a notification mechanism already in existence, impracticality may not be a fallback anymore. With the continued practice of impounding foreign passports, family law Courts and the United States in general, are opening themselves up to international disputes and retaliation. If a foreign State perceives the United States’ confiscation of one of its citizen’s passport as an encroachment upon its personal jurisdiction, that government could bring a contentious suit before the International Court of Justice for each particular instance. Interestingly, at least in Florida, through the enactment of UCAPA, there exists codified procedures for impounding a foreign passport. This codification is largely vacant under Federal law in both the family and immigration law arenas. Codification at least acknowledges the practical reasons behind such an act— to preventing abduction.

### Practice Note

**An Individual Lacks Standing to Request the Return of a Foreign Passport: U.S. v. Abdul-Ganiu**

Now as to a practice pointer for attorneys,
crafted from questions I am often asked to ruminant, “how can the Court (or specific government agency) keep my (or my child’s) passport?” The answer is found in a 2012 non-precedential case from the United States Court of Appeals for the Third Circuit. My work was a central tenet in the Court’s ruling on whether to release a foreign national’s passport.\(^35\) A jury convicted Mr. Abdul-Ganiu of several drug related offenses.\(^36\) A timely appeal followed, challenging both his conviction and sentence and requesting the return of his Nigerian passport.\(^37\) The Court of Appeals affirmed the lower court’s decision on his conviction. The Court also addressed the issue of the return of his Nigerian Passport:

Abdul-Ganiu also challenges the propriety of the District Court’s order at\(^38\) sentencing that he surrender his Nigerian passport. We conclude that Abdul-Ganiu lacks standing to contest the District Court’s directive as passports are the property of the issuing sovereign, not the holder of the passport. See Richard A.C. Alton & Jason Reed Struble, The Nature of a Passport at the Intersection of Customary International Law and American Judicial Practice, 16 Ann. Surv. Int’l & Comp. L. 9 (2010). Cf. 22 C.F.R. § 51.7 (providing that “[a] passport at all times remains the property of the United States”).\(^39\)

As such, U.S. Courts appear to be content to rely on the issue of standing with regard to foreign passport seizures. It is important to note that my work served a central tenet to the passport decision. The only law the Court could consider concerns U.S. property rights over its own passports, which is not the issue at fact in the case.\(^40\) This serves as an important reminder that there is no law regarding foreign passport seizures in the United States, and that this decision and others like it in the future will rest on standing.\(^41\)

At the end of the day, if your client is found to be desirous of their passport return in situations similar to those that I have discussed, they can be advised to seek the aid of their respective Embassy or Consulate officer.

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**Endnotes**

2. Id. at 25, n. 96. Referencing the Uniform Child Abduction Prevention Act (2006).
4. See Nehemiah 2:7-9. The Old Testament holds the earliest known reference to a document that embodied the nature of a passport under customary international law.
6. Id. at 18.
7. Alton & Struble, supra note 1, at 14.
8. Turack, supra note 5, at 226 (citing THE DAILY TELEGRAPH, Nov. 11, 1967 at 16). See also Passports. 3 HACKWORTH DIGEST § 259, 437-38 (1942). See generally British passport (“This passport remains the property of Her Majesty’s Government in the United Kingdom and may be withdrawn at any time.”), Jamaican passport (“This passport remains the property of the Government of Jamaica and may be withheld or withdrawn at anytime.”), and Canadian Passport Order (“Every passport shall at all times remain the property of Her Majesty in right of Canada.”).
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9 Nottebohm Case, 1955 I.C.J. 4. The ICJ stated that it is the sovereign right of all states to determine its own citizens and criteria for becoming one in municipal law.

10 Turack, supra note 5, at 226 (citing The Daily Telegraph, Nov. 11, 1967 at 16). See also Passports, 3 Hackworth Digest § 259. 437-38 (1942).

11 See Greek National Military Service Case, 73 I.L.R. 606, 607 (Federal Administrative Court 1973) (Federal Republic of Germany). The Court said, “It [the issue of an alien’s passport could represent an encroachment on the personal jurisdiction of another State. In such a case consideration should be given to the emphasis put by that other State upon the exercise of its personal jurisdiction by means of its competence to issue passports.” See also Nottebohm Case. 1955 I.C.J. at 23.


13 Marquez v. Castillo, 72 F. Supp. 3d 1280 (M.D. Fla. 2014).

14 Id. at 1282.

15 Id.

16 Id.

17 Id. at 1283.

18 The Federal Judicial Center is the research and education agency of the judicial branch of the U.S. government. The Center was established by Congress in 1967 (28 U.S.C. §§ 620–629). See fjc.gov.


20 Id.

21 See International Child Abductions Remedies Act, 22 U.S.C. § 9004(a) (formerly classified as 42 U.S.C. § 11604(a)).


23 Id.

24 Hague Convention, supra note 22.

25 Marquez v. Castillo, supra note 12. at 1283.


29 Id. at sec.8(c)(4)(B).

30 Id. at 19

31 Id.


33 Passport Fraud: An International Vulnerability Hearing Before the Subcommittee on Border and Maritime Security, House of Representatives, 113th Cong. 2 (April 14, 2014); Serial No. 113-62.

34 See Ian Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 713-16 (OXFORD 1998).

35 U.S. v. Abdul-Ganiu. 480 F. App’x 128 (3d Cir. 2012). A jury convicted Mr. Abdul-Ganiu of possession with the intent to distribute 100 grams or more of heroin in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B)(i), and of importing a controlled substance into the United States in violation of 21 U.S.C. §§ 952(a) and 960(b)(2)(A).

36 Id.

37 Id.

38 Id.

39 Id. at 8-9

40 An interesting side note: this case is subsequently cited in Bankruptcy Court, in a case concerning a seizure of a U.S. passport, which is not the factual issue at hand in U.S. v. Abdul-Ganiu. See In Re Eric Dawson (U.S. Bankruptcy Court District of Maine) (Sept 2017).

41 See Alton, Revisiting the Nature of a Passport, supra note 3. There may be some arguments to be made if the Court obtains the passport by unconstitutional means.
How to Avoid Being Your Next Client: Tips on Helping Your Family Thrive During Quarantine

By Rachael Silverman, PsyD, ABPP, Board Certified in Family and Couple Psychology
www.drrachaelsilverman.com

Imagine you’re driving in the car. It’s been about 3 hours and you hear from the backseat, “Are we there yet?” Your spouse yells, “Stop kicking your brother and yes, we are almost there!” If this sounds like the start to your last family vacation, then you are probably questioning how you are going to survive quarantine with your family. As a board certified psychologist in family psychology, I’d like to share some tips with you to help your family’s psychological health and wellbeing during and after quarantine.

Stress is not a symptom of the coronavirus. In fact, stress is a byproduct of our interpretation of the coronavirus and here’s the good news, stress can be successfully managed with the help and support of our family. When a family is under stressful conditions for an extended period of time in a confined space, there are more chances for both positive and negative interactions. Essentially, stress can either bring out the worst or the best in a person. What makes the difference? How easily we can tap into our stress management tools, including healthy attitude, physical exercise, relaxation strategies, assertiveness, cognitive flexibility, and our ability to cooperate and communicate with our support system, or in other words our family.

It is important to understand the factors that increase stress for a family in quarantine.

The most common factors are: inconsistent information, length of time in quarantine, overload of information, the fear of contagion, monotony, poor communication, fear of the unknown, boundary crossing, inadequate amount of resources, parenting differences, job security, and financial uncertainty. Of these, the three most stressful factors for any family are poor communication skills, financial uncertainty, and boundary crossing. Let’s discuss communication strategies first.

Families with positive communication express appreciation and gratitude for one another, gratitude, are able to compromise, and have the ability to have fun and laugh with one another. These families will thrive even in the worst conditions. They look for opportunities to show gratitude and interest in one another over the smallest of things like putting the toilet seat down or cleaning the dishes. Sounds too simple to have an impact? Trust me, when a family is in a confined space for an extended period of time, NOT doing these small things add up quickly, but doing them and having them acknowledged by a family member goes a long way.

When there is a disagreement, which there will be, healthy families are able to negotiate and compromise while listening and validating their loved one’s feelings. Healthy families don’t have to agree in order to understand and convey empathy and respect for their loved one to move forward; their goal of a disagreement is to understand their loved one’s feelings about continued, next page
Helping Your Family Thrive
CONTINUED, FROM PAGE 29

the situation. For many attorneys this might be a challenge, but remember your living room is NOT the courtroom and your spouse and children are not witnesses being cross examined. Remember that validation is the process of learning about, understanding, and expressing acceptance of your loved one’s emotional experience of the situation. In order to validate someone’s feelings you must first understand his/her feelings about the situation and then be able to accept them.

Validation does not mean you agree or approve; it means you accept the person's feelings, which helps your loved one to feel understood, safe, and loved. “I may not agree that this happened at 2pm with Professor Plum in the ballroom with the candlestick, but I understand that I hurt you and it is never my intention to hurt you. I am sorry for hurting you. What can we do differently next time?” Healthy family members summarize what their loved one said, “What I hear you saying is ___” before discussing their feelings and needs. They confirm that their loved one feels validated and then explains their feelings, needs, and perception of the situation. When explaining their perception, they focus only on their feelings and understanding of the situation NOT assuming their loved one's feelings or needs or recounting their perception of their loved one’s actions. For example, after you have spoken for a short while, let your family member paraphrase what you said. Help your family member understand your point of view. If the paraphrase is inaccurate, gently restate what you meant focusing on your feelings. This is how you actively listen to one another and not just listen to respond. By actively listening, you are conveying respect and empathy, which creates an environment of emotional safety.

Express your needs in a positive way rather than a harsh, defensive, critical way. Share one thing you and your family members can do differently next time. For example, “I feel frustrated when I cook dinner and have to clean the dishes. I would feel appreciated if we could find a way to share these jobs. I will clean the dishes tonight if you can clean them tomorrow night.” These strategies will not stop families from having conflict. In fact, conflict can result in a family’s emotional growth as long as they have the right tools to communicate about the conflict and in most cases come to a resolution. The communication surrounding a conflict will be positive if it conveys acceptance of your family member’s feelings with affection and humor.

Healthy families also express affection and demonstrate empathy. In order to do this, it is important to be aware and understanding of the expected feelings during a time of stress including guilt, fear, stress, worry, and anger, and individuals are likely to project those feelings onto those they love. Healthy family members are able to stop themselves before reacting to their loved one’s negative feelings and take time outs, which are 20 minutes of separation to engage in self-soothing, relaxation exercises, when one or both of them are overstimulated. Then they come back to discuss the issue again in a calmer way now that they have emotional distance from the issue. In a quarantine, you will need to go to separate rooms or parts of the house.

Financial uncertainty is one of the most stressful factors for families during a crisis. Beyond differences in how one person saves and one person spends, which creates discord with or without crisis, during the coronavirus pandemic, panic shopping, job insecurity, medical bills, and the stock market’s volatility can all add to an increased amount of stress. Healthy families sit down together and plan a budget with the information they have available to them now. It is important that every member of the family understand the situation, as long as they are age appropriate, and are given an identified role ahead of time. For example, if your college aged child is home now and running up a high Amazon bill, discuss this in a calm way and explain how
he/she can help the family’s finances by staying within a certain amount. As a family, develop creative ways to work together and define what is acceptable spending and what isn’t. Try not to focus on post coronavirus because that is an unknown. Use the information you have at hand to work together. If you have young children, reassure them that you are planning and that the family is safe. Ask them for their ideas on how to save and try to include those ideas in the budget. This can be validating even to the youngest child.

Humans are social creatures and therefore, need one another especially under stress. However, we don’t need one another to solve our problems for us, which families often believe is their role; we need each other to feel less alone. During stress, we tend to push the ones we love farther away by blaming them or projecting our guilt, anger, worry, sadness, etc., when in fact we should be leaning on each other. This blurring of emotional boundaries is another issue for families in quarantine. It is paramount to establish clear and consistent boundaries as early in the quarantine process as possible. Discuss how much time to spend together and when you are feeling overwhelmed how your loved one can hear that without feeling rejected or hurt. Try to plan traditions, create new rituals like family movie night, take turns planning meals, rotating chores, and take walks at least twice a day together. Remember to help each other in small ways and see this as an opportunity to learn more about one another.

On a final note, it is important to note some quick tips that will make a long-lasting impact: physical exercise, cognitive flexibility, and the expression of gratitude. Being able to adapt to changes together by rolling with the flow is key to a healthy family. You can do this by helping each other keep things in perspective. During an increased time of stress, we are more likely to lose sight of what’s important, and during this pandemic, even toilet paper has become essential. Let’s not lose sight of how important our loved ones are to us and show them that we appreciate them by saying thank you. If your partner leaves the toilet seat up after you asked him not to, try not to crucify him. Keep it in perspective by looking at your ridiculous amount of toilet paper and remind yourself that he fought off people at the grocery store to get you that toilet paper. It’s about being grateful for the little things and being flexible so we keep it in perspective.

And it’s ok to laugh too! We are all in this together and we will be stronger together for it.

Rachael Silverman, Psy.D., ABPP is a board certified licensed psychologist in private practice in Boca Raton. She is board certified in Couple and Family Psychology, which is the highest level of certification and recognition. She specializes in clinical and forensic psychology, which includes couple, family, adult, adolescent, and child therapy as well as psycho-educational and gifted testing, personality assessments, comprehensive reports, and forensic psychological evaluations. As a respected member of the community, she was the President of the Florida Psychological Association (FPA) Palm Chapter, recipient of the 2016 Kaslow Family Fund Award, and was the Florida Psychological Association’s Early Career Psychologist Network Chair. Currently, she is the Editor-in-Chief of the American Board of Professional Psychology (ABPP) Academy of Couple and Family Psychology newsletter and the American Board of Professional Psychology Academy’s Early Career Psychologist Board Member. Dr. Silverman has been a guest on Miami’s radio station Power 96.5 morning show, featured as an expert in national and local magazines and newspapers, published in professional journals, and the co-host of a weekly segment discussing mental health topics on the Steve-O and Rene morning radio show. She is a qualified expert witness and has testified in Family and Criminal Court cases. For more information, please refer to her website: www.drrachaelsilverman.com
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The images of professionalism etched during the Professional Responsibility Course in law school quickly fade away once freshly minted lawyers realize that some colleagues prefer not to subscribe closely to the rules of professional conduct ingrained during law school, but rather prefer to hang on the fringes of ethics and professionalism, constantly pushing the envelope. It can be extremely challenging to practice law with this dynamic. Many family lawyers can vividly recall when their colleagues disclosed their weariness of family law. Not because they were disenchanted with the practice of law, but rather because they were drained from the emotional turmoil of family law, inclusive of the increasingly combative relationship between themselves and their adversaries.

Family law carries an emotional component that other areas of the law do not. Like other lawyers, family lawyers assume the stress of their client; however, the family lawyer’s stress pertains to issues regarding the client’s family, often times the single most important aspect in the client’s life. Many research articles have described the grief felt during a divorce akin to a death, with a similar process for recovery.¹ And, even a “win” really isn’t a win when you are representing a client in a paternity, divorce, relocation, child support, or other family law issue.

An eloquent and informative article in Voir Dire, a publication of the American Board of Trial Advocates, written by the co-author of this article, the Honorable Gary P. Flower, identified civility as the key element of professionalism in the practice of law.² The article draws attention to the lack of education on a global scale that has resulted in the practice of law devolving from a “learned profession to an MMA contest of words and expressions far removed from intellectual argument well-rounded in the actual facts of a matter...”³ This article incorporates a family law component to the aforementioned article given the sensitivity and emotionally charged nature of the practice of family law.⁴

1. **Set an example for your client.**

Undoubtedly, family law clients undergo one of the most stressful and traumatic experiences of their lives during their family law proceeding. As much as we long to go back in time and point our clients in the right direction, unfortunately, it is not an option. Clients made their life choices long before retaining their lawyers.

By the time the client is in their lawyer’s office, their judgment is often clouded. In the midst of the client’s hostility towards their partner or spouse, the client may not realize the negative impact their actions will have on the proceeding, their image to the tribunal, and their children. Refrain from taking the client’s issues personally. There is a stark difference...
between empathy and assuming the identity of the client. Lawyers should strive to approach the client’s issues objectively and rationally while bearing in mind their client’s best interests.

Further, the lawyer’s disposition to the client, the tribunal, and the lawyer’s adversary in the proceeding will set a tone that will persist throughout the case. If the client witnesses a civil exchange between their lawyer and an adversary, the client may be more inclined to follow suit with their partner. Set an example that reminds the client that their family law case is not a Hollywood movie. It is a reality. The client’s actions will have a lasting effect even after the case is over.

2: Avoid the temptation to make inflammatory remarks. Lawyers are obligated to zealously advocate for their client; however, it is neither productive nor efficient to become so aggressive that the case is unable to be resolved due to the lawyer’s conduct. Raising one’s voice has never validated impropriety. Lawyers must seek to be exemplary in our conduct. Refrain from making improper or disparaging comments to other lawyers. In these instances, hostility solely wastes precious time and the client’s funds. The client loses. “Avoid the temptation to act unprofessionally and rise to the challenge when you experience unprofessional behavior.” As you do what is right, important, and noble, you may suffer criticism for doing so, but often times that criticism is evidence that what you did was the right thing.

There are consequences to making inflammatory comments to other lawyers. First, it violates the Oath of Admission to the Florida Bar, “To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in written and oral communications.” Second, it violates the Rules Regulating the Florida Bar, specifically Rule 4-8.4(d), to “engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis...” A lawyer who violates the Rules Regulating the Florida Bar may be subject to disciplinary action.

Before succumbing to a potentially unnecessarily aggressive stance, consider that an adversary may be undergoing personal battles that you are unaware of. Remember this and be kind! A simple “gentle reminder” email to an adversary may suffice. Often times, an adversary’s response is followed by an apology for the delay. As professionals, lawyers should not underestimate the power of forgiveness of an adversary’s conduct or the power of an apology for one’s conduct. In fact, practicing forgiveness can have powerful health benefits. Remember, mercy is the fabric of greatness.

3: Make health a priority. There is a well-known quote by Supreme Court Justice Joseph Story, “that [the law] is a jealous mistress, and requires a long and constant courtship. It is not to be won by trifling favours, but by a lavish homage.” Justice Story was absolutely correct. The law never sleeps. The taxing details of a family law practitioner’s cases will keep them up at night. The stress of the family law practice can, and will, affect interactions with adversaries, colleagues, and co-workers to the detriment of the family lawyer.

According to the Florida Bar’s Mental Health and Wellness Center, 28% of lawyers suffer from depression. An informative article from Harvard Law’s Lawyer Depression Project, It Is Time to Normalize Mental Health Check-Up identified symptoms that impact lawyers’ mental health issues. The symptoms are broken down into three categories: biophysical, psychological,
and social.\textsuperscript{11} The article identifies numerous prevention interventions that promote mental wellness and reduce the risk of mental disorders, including healthy diet, exercise, sleep, coping skills, good peer relationships, communicative participation, and access to support services.\textsuperscript{12}

As the Harvard Law’s Lawyer Depression Project article suggests, “getting help when help is needed is a critical preventive intervention.”\textsuperscript{13} The average delay between the onset of mental health symptoms and treatment is 11 years.\textsuperscript{14} Putting off treatment can affect suffering and treatment trajectory. “Lawyers should make mental health check-ins a routine part of their lives and practice.”\textsuperscript{15} Mental health is of utmost importance.

Lawyers are inclined to make their careers the focus of their lives. Many lawyers turn to their career as their source of purpose and energy. The legal profession is a vocation, one that is critically important, but ultimately it is a means to live. It would be prudent for lawyers to maintain a broader perspective on career versus life. Lawyers need to have a life outside of their careers.

Unwind after a hard-won day of work. Reflect on the larger reality that exists whether through an organized religion, meditation, or simply a philosophical pursuit of your choosing. Learn or participate in a hobby, travel, or engage with family and friends. Make sure to have a well-rounded support system. Find friends outside of the law. Also, while it is easier said than done, limit venting about work for a specific period of time, e.g., from the office to your driveway. Get any grievances out of your system then focus on your loved ones upon your arrival at home. It is only fair to them.

4: Mentorship. Mentorship has been the singular most important asset of many legal careers. Find a mentor who not only exemplifies the standard you would like to emulate, but also one that will guide, support, and advocate for you. It is common to become too fixated on the details of a legal or professional issue to look at the situation as a whole. A mentor can help their mentee when the mentee cannot see the forest for the trees. “One of the greatest values of mentors is the ability to see ahead what others cannot see and to help them navigate a course to their destination.” — John C. Maxwell.

Try this, find a mentor outside of your practice area. Find a non-lawyer as a mentor, they may have shocking answers that consider an angle you never envisioned. Also, consider the perspective of someone who is not your associate, colleague, or paralegal; find someone who is disinterested. Another opportunity to gain a different perspective is to speak with a former adversary whom you respect. You may gain valuable information about how you are perceived, strengths that you can polish, or learn weaknesses to improve upon.

Those lawyers who are fortunate to have mentors who instill a sense of civility as opposed to unprofessional conduct will learn quickly that unethical, demeaning tactics, i.e., interrupt the court, yell during a teleconference, make inflammatory comments, does not equate to skilled lawyering. The most reputable lawyers are able to engage in assertive positions, when necessary, but execute their argument tactfully to maintain the desired level of professionalism.

Many seasoned lawyers enjoy promoting professionalism and proper advocacy. One of the best ways to meet other family law practitioners is to join a professional organization such as the local Inn of Court, Bar Association, Young Lawyers Division of the Bar, or committee of the Family Law Section. Colleagues serve as an invaluable resource for professional growth and development. Establishing a rapport with colleagues outside of the courtroom may also benefit the level...
of professionalism inside the courtroom and, it may add a little levity to the emotionally heightened practice of law in which we practice.

5: Know your craft. Strive to continue learning. Often, lawyers will receive valuable material during Continuing Legal Education (“CLE”) seminars, conferences, or lectures. Upon returning to their office, the lawyer will either save the material in their electronic files or place the valuable material atop the lawyer’s desktop or credenza. Despite the lawyer’s well-intentioned efforts, the CLE material either reduces to a décor or becomes buried amongst other electronic resources, never to be seen again. Studying the material becomes an aspirational goal as opposed to a priority.

Alas, lawyers have responsibilities after work that require additional strength; the primary caregiver for a loved one who needs medical attention, a single parent, an individual bogged down with household responsibilities, and the list of obligations goes on. Understandably, most lawyers do not have the mental capacity after an arduous day to catch up on substantive rules or case law. Notwithstanding the above, lawyers should endeavor to periodically carve out a fraction of their time to reinvest in themselves. Like the personal finance strategy, “pay yourself first,” lawyers should exercise the same school of thought to hone their craft.

Knowledge is critical. The rules change often. Re-reading the rules is powerful to maintain a strong foundation. Re-read the Florida Family Law Rules of Procedure, Rules of Evidence, the Florida Rules of Judicial Administration, and remain abreast of new case law through the Florida Law Weekly opinions and CLE courses. Keep the criminal case opinions in Florida Law Weekly on the list of items to read, they are chock-full of evidentiary issues from which to learn and grow.

Another helpful tip is to master between 10-12 seminal state supreme court cases on the critical areas of family law. While opinions ultimately turn on the facts, often causing conflicting opinions from the District Courts of Appeal, a lawyer may triumph on their argument if they understand the theoretical underpinnings of the seminal cases to augment their client’s case. Lastly, be punctual, time is a commodity whose value, once spent, cannot be recaptured.

6: Know your personal limitations. Lawyers, new or seasoned, should understand their limitations. Mistakes have consequences. To avoid a viable legal malpractice claim for an issue in which the lawyer is inexperienced, it is wise to seek a colleague’s advice or outsource the task. Lawyers should ask an experienced colleague if they would be interested in reviewing the lawyer’s work product, case file, or trial strategy in exchange for payment for the experienced colleague’s time, assuming there is no conflict of interest or other potential violation of professional responsibility. Additionally, outsource work if necessary. By way of example, if the lawyer is inexperienced in dividing a complex qualified deferred compensation plan, the lawyer should retain an experienced professional to prepare the Qualified Domestic Relations Order (“QDRO”). There is no shame in being shrewd to forego a potential costly mistake otherwise.

Get to know a seasoned appellate attorney if you do not have experience writing appeals yourself. Ideally, try to meet with an appellate attorney prior to your upcoming hearing or trial to determine potential pitfalls in case the matter goes on appeal. This prophylactic measure could save your client money.

7: Be courteous to the Judicial Assistants, clerks, and all court staff. The court staff plays an integral role in the operation of our court system. In addition to the ever-
increasing workload due to the sheer volume of cases, members of the court staff are often the first line of assistance for pro se litigants in navigating the court system. Do not take offense if they are short with you. They may simply be spent by that day’s work. Recall that amid the current COVID-19 pandemic, the court staff works tirelessly to continue the administration of the courthouse so cases can continue moving swiftly to a disposition. Learn the Judicial Assistants, clerks, and court staff’s names. Thank them for their time.

Judicial Assistants have become “well acquainted” with lawyers who are disrespectful to them and other members of the Judge’s staff. Word to the wise, the Judge’s staff will inform the Judge and other members of the courthouse of the lawyer’s disrespectful conduct, which will not bode well for that lawyer. Judges strive to get it right. They work hard to put aside feelings and biases to avoid any appearance of impropriety. However, judges are also human beings. While the judge will react professionally in the courtroom, the lawyer’s disrespectful behavior may have implicit ramifications to their case(s) and clients. Judges strive to get it right. They work hard to put aside feelings and biases to avoid any appearance of impropriety. However, judges are also human beings. While the judge will react professionally in the courtroom, the lawyer’s disrespectful behavior may have implicit ramifications to their case(s) and clients. To further the mantra of this article, maintain civility and professionalism.

8: Use the Information Age as a resource. The Information Age has dramatically shifted the practice of law. In the wake of the COVID-19 pandemic, lawyers have the ability to attend hearings, depositions, mediations, and other important meetings from the comfort of their own home through video conferencing applications. Social media has also been an effective tool in the family law arena. Among other benefits, social media has been paramount for purposes of research, marketing, evidence, developing relationships, and seeking expert witnesses or fact witnesses.

Many lawyers are members of online interest groups on social media websites. Some of the legally related interest groups garner hundreds or thousands of members. While social media has promoted the growth of the family law practice, we must keep in mind that civility should be at the forefront while engaging with colleagues through a virtual medium.

Within the online groups, lawyers have the opportunity to engage in academic discussions with other lawyers nationwide within minutes. Lawyers can inquire about case law, seek mentorship, or simply vent about the practice of law. However, some lawyers have taken this opportunity to make inappropriate comments about fellow lawyers, judges, and clients. Refrain from posting improper or disparaging comments about colleagues, judges, or clients on the internet and social media platforms. Be mindful that someone who knows the colleague, judge, or client to whom they referred in the post will read it and inform the person mentioned in the post. Lawyers are entitled to their opinions about other members of the bar; however, posting improper or disparaging comments is far from appropriate.

9: Confidentiality. As discussed above, one of the advantages to the internet and social media is the ability to engage in academic discussions about the law given the ease and prompt responses to a colleague’s inquiries. Make sure not to divulge too many details about the case that could disclose confidential information. An adversary may be reading a comment on the group’s page. Most importantly, lawyers need to preserve the sanctity of the attorney-client privilege. Lawyers have avoided this conundrum by modifying the details of their case prior to posting their question online.

While the above suggestions and cautionary tales are not exclusive, they serve as an effort to address the most common professionalism and ethics issues that consistently arise in the family law practitioner’s arena.
Judge Flower was appointed to the Bench by Governor Jeb Bush in January of 2000. He is currently the County Court Administrative Judge. Judge Flower’s legal career began when he was hired by then State Attorney Ed Austin as an Assistant State Attorney in 1987. During his tenure at the State Attorney’s Office, Judge Flower was assigned to the Special Prosecution Division, the Repeat Offender Court, and completed his service as a Division Chief in Civil Forfeiture. Judge Flower was a partner in a medium sized firm where he practiced Family law. While in private practice, Judge Flower received an AV rating from Martindale Hubbell.

Judge Flower is the current North East Regional Chair for Leadership Florida and a graduate of Leadership Jacksonville. Judge Flower is a past President of the Conference of County Court Judges, a past Education Chair of the Conference and serves on the faculty of the Florida Judicial College: The Advanced College of Judicial Studies and the Traffic Adjudication Program.

Krystine Cardona is a matrimonial and family law attorney at RCC Family Law located in Coral Gables, Florida. Krystine shares RCC Family Law’s commitment to individual solutions tailored to each family’s need and high-quality legal representation. There is no “one size fits all” in family law. Krystine earned her law degree from Nova Southeastern University Shepard Broad College of Law and holds a Bachelor of Science in Business Management from Florida State University. In addition to practicing family law, Krystine is an avid Florida State Seminoles fan and fitness enthusiast. She and her husband, Joey, live in Miami, Florida with their two dogs, Harley and Remo.

Endnotes
2 Gary P. Flower, Civility Is a Key Element of Professionalism in the Practice, Voir Dire (Spring 2019).
3 Id.
5 Flower, supra note 2.
7 R. Regulating Fla. Bar. 4-8.4(d).
11 Id.
12 Id.
13 Id.
14 Id.
15 Id.
LAWYERS DON’T NEED TO TRACK EVERY MINUTE OF EVERY DAY, THANKS TO ME.

Watch all of the videos at www.smokeball.com/Florida
It is no secret that COVID-19 has decimated the economy of the United States. Businesses, their owners, and the employees of those businesses have experienced adverse economic consequences because of the pandemic. The economic struggles faced by almost all in our society are likely to have a direct impact on divorce cases that you have closed and cases that you are currently working to finalize. It’s a safe bet to say that there are many people out there who own a business, and as a result of COVID-19, are having difficulty paying their child support, alimony, or even making payments required by an equitable distribution agreement. If you have such situations arising in your practice, an SBA Economic Disaster Injury Loan (EIDL), could be a viable solution to recommend to your clients.

What is an EIDL?

EIDLs have been in existence since 1953 and are intended to help businesses recover from economic losses resulting from disasters such as fires, earthquakes, tornados, and hurricanes.1

The passage of the CARES Act by Congress made EIDLs available to businesses in all 50 states that have experienced financial hardships on account of COVID-19. The CARES Act also relaxed the eligibility requirements for an EIDL approval.2

While the law allows for EIDLs of up to $1,500,000, the SBA has made it their policy to cap EIDL loans at $150,000,3 and the loans are available through December 31, 2020.

In order to be eligible for an EIDL, as a result of the COVID-19 pandemic, a business must be unable to pay its ordinary and necessary operating expenses or is unable to sell or produce its own goods or services for sale.4 Sole proprietors who file a Schedule C and independent contractors with no employees are also eligible for an EIDL.5

EIDL Terms

As previously discussed, the EIDL limit per SBA policy is $150,000. The loan amount is computed by subtracting cost of goods sold from gross revenues and dividing the result by two. For example, assume a retailer with gross revenues of $500,000 and cost of goods sold of $300,000. The EIDL amount would be $100,000 ($500,000-$300,000= $200,000/2= $100,000).

The EIDL loan carries a thirty-year repayment term at an interest rate of 3.75% (2.75% for nonprofits). There is a one-year deferment period on repayment of the EIDL from the date the loan proceeds are received and there is no prepayment penalty should the EIDL be paid in full prior to the loan maturity date.

Unlike the Payroll Protection Program (PPP) loans, EIDL loans are not forgivable. However, one attractive feature of EIDL loans is that for EIDLs under $200,000, no personal guarantee
of the loan is required of the business owner. Therefore, if the business does not survive and the EIDL was not paid in full, the business owner will not be personally liable for repaying the outstanding balance of the loan. This provision does not apply to sole proprietors who file a Schedule C on their Form 1040. However, it is my opinion that this presents a planning opportunity for sole proprietors to advise them to form an entity and elect S corporation status in order to avoid the personal liability on the EIDL and as a means of reducing overall taxes by minimizing the self-employment tax on taxable income not paid as reasonable wages to the shareholder(s).

Use of Proceeds

The EIDL has a number of strict rules on how the proceeds must be used, but let’s examine two ways in which EIDL proceeds can be used in order to help our divorce clients obtain the funds they need to be compliant with their support and alimony obligations.

First, loan proceeds can be used for payroll of the owner of the business. In small closely held businesses, it has been my experience that in most of the companies in which I have worked, the owner is not drawing a reasonable salary from the business. In fact, more often than not, in small, closely held businesses the owner is not drawing a salary out of the business at all and takes distributions of net income instead. The objective of this strategy is the minimization of payroll taxes. Therefore, it is my opinion that EIDL proceeds can be used to increase the payroll of shareholder employees in small closely held businesses. The other scenario that presents opportunity to use EIDL proceeds to put money directly in the business owners’ pocket is repayment of emergency loans made to the business personally by the business owner on account of COVID-19. With continued, next page
Economic Injury Disaster Loans  
CONTINUED, FROM PAGE 41  

the adverse economic effects of the pandemic, it is highly likely that many small business owners made a capital infusion into their business of personal funds with the intention of keeping the business afloat. The EIDL allows these emergency loans to be paid back to the business owner with EIDL funds, with proper documentation.

Applying for an EIDL  
The application process for an EIDL is very straightforward and takes about fifteen minutes. The EIDL application is made directly with the SBA (as opposed to banks for PPP loans) and can be applied for directly on the SBA website. The SBA generally has not required supporting documentation such as tax returns or financial statements to complete the loan application and obtain the EIDL proceeds.

Takeaways  
On account of COVID-19, the SBA is offering EIDLs to assist businesses that have been adversely affected with up to $150,000 in EIDL monies. The EIDL presents a unique opportunity for practitioners in divorce cases to present solutions to clients that will help facilitate closing cases where one party to the divorce owns a business and has run into cash flow problems on account of the pandemic. The EIDL is relatively easy to apply for and obtain, with favorable terms and a one-year deferment period on payments.

If you would like to obtain a sample letter to provide to your clients, which explains in layman’s terms what an EIDL is and how to apply for an EIDL, please email me and I would be happy to provide you with the sample letter. More information on EIDLs can also be obtained directly from the SBA’s website.

Lastly, I have received several inquiries on the impact of the proposed Social Security Tax deferral on the calculation of alimony. It is my professional opinion that the additional cash flow from the payroll tax deferral is a loan that must be paid back to the government and does not constitute additional income available to the payor of alimony, and therefore should be excluded from alimony computations.
Bob Javid has over 17 years of diversified public accounting experience including auditing, taxation, and matrimonial forensics. Bob is a graduate of Florida Atlantic University, where he earned his B.A. in accounting, graduating magna cum laude. Bob’s practice is located in Boca Raton where he concentrates the majority of the practice on matrimonial forensics. In his free time, Bob is an avid scuba diver and is involved in charitable causes with the Jewish Federation of Broward County.

**Endnotes**

2. 15 U.S.S. Section 9009.
In Memory of Maurice Jay Kutner

One of the true founding fathers of Florida Family Law, Maurice Jay Kutner lost a brief cancer battle on October 6, 2020. Mr. Kutner — simply “Kutner” to those who knew him well — graduated from the University of Miami School of Law in 1965. He began his more than half century legal career as a Captain in the United States Army, serving as Chief Prosecutor in the Judge Advocate General’s Corp. After a short stint as an Assistant Public Defender for the Eleventh Judicial Circuit in and for Dade County, Florida, Kutner forayed into Family Law and never looked back.

Kutner was in the inaugural group of the Florida Bar’s Certified Marital and Family Law attorneys, and, throughout his career, was consistently at the forefront of leadership and education in the legal arena. Simply by way of example, Kutner served as Chair of the Family Law Section of The Florida Bar, President of the Florida Chapter of the American Academy of Matrimonial Lawyers, and Chair of the Family Law Section of the American Bar Association. Kutner was a Fellow of the International Academy of Family Lawyers, he was the Founder and Past President of the First Family Law American Ints of Court, and he was a frequent and highly esteemed speaker, presenter, and educator.

To say that Maurice Jay Kutner was a leader is an understatement: he was that and so much more. Kutner was a mentor, a friend, an inspiration, a proponent of transparency in litigation, the epitome of professionalism. Kutner was clever and witty and always present. Oh, and Kutner could laugh — from deep in his belly, and, most humbly often at himself. His laughter was contagious. Kutner wanted to know everyone’s story. He was truly interested in getting to know each human being who crossed his path, and he let you know that he thought you mattered. Kutner was Marisol’s beloved husband, and he was a loving father and grandfather.

And, those who knew Kutner knew that he was a man of the sea. Kutner loved his boat, and during June Bar meetings in Boca Raton, he would regale his friends and colleagues with his boat docked just outside the meeting halls.

Kutner loved what he did for a living, and he loved living. May his memory be for a blessing.

Thank you, Kutner, for paving the way for all of us.

Respectfully,

2020-2021 Executive Committee
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