Halfway through my term as Chair of the Family Law Section, I can honestly say, so many of us have grown professionally and personally from the rapidly changing world surrounding us. It is such an honor to be Chair of the Family Law Section. And, despite all the change to our personal and professional lives, I am most thankful for the opportunity to grow as a leader and a lawyer. The Family Law Section was able to adapt, due to the amazing members on Executive Council and the Committee chairs, and continue pursuing meaningful legislation affecting Florida’s families, producing quality continuing legal education, and publishing relevant articles to enhance our livelihood. Our adaptation included choosing virtual formats for meetings, conducting business using technology and migrating our live seminars to virtual for everyone’s safety. Facebook Live! modules have provided “quick tips” for members and, after a lot of debate and planning, over 1525 people are expected to participate in the first ever completely virtual Certification Review Course, produced in partnership with the Florida chapter of the American Academy of Matrimonial Lawyers.

Lawyers play such a vital role in the judicial branch and are the conduit of justice—for our clients, for children, for the community. 2020 gave us an opportunity to realize that we as lawyers are problem solvers, peacekeepers, and advocates. The opportunities to strengthen our communities and our profession abound in 2021, and instead of running away from 2020, we must take notice, take heart and use all of those great adaptation skills we learned to better serve more families.

Issue 3 of the Commentator continues the tradition of strong content to provoke thought, encourage learning, and inspire excellence. Many thanks to Jennifer Miller-Morse for guest editing, Amanda Tackenberg for her leadership as Vice Chair of Publications in charge of Commentator, as well as to Sarah Sullivan and Anya Cintron Stern as Chairs of the Publication committee. The hard work done, without much fanfare, results in high quality publications that benefit the legal community.

I know that 2021 gives us more chances to grow and ensure that we act with integrity in every aspect of our lives. In closing, I will leave you with this quote:

“Though nobody can go back and make a new beginning, anyone can start over and make a new ending.” ~Chico Xavier
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Commentator Chair’s Message

By Amanda P. Tackenberg

As Jennifer Miller-Morse so eloquently put it in her Guest Editor Column, 2020 held endless opportunities for creative problem solving in our practices and in our lives. It also was a chance to change our mindset, practice grace with ourselves, our clients, and our colleagues, and increase our capacity to grow and learn. Whether you have embraced the new challenges and technologies spurred on by the pandemic or whether you can’t wait for our lives to return to normal, the way it was B.C. (before Covid), we hope you find the articles in this issue informative and thoughtful. If you already think of yourself as a problem-solver,” a “creative-thinker,” or a “zealous advocate” we hope these articles give you another tool in your toolbox to help your clients. As we enter 2021, we hope that you stay positive, test negative, and have a successful 2021.

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.
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Recent developments, inspired by the daily challenges of practicing during a pandemic, pushed us to innovate in remarkable ways. Members of our Family Law Section coalesced to revise rules, share developments, impart practice pointers, and test helpful software. The effect can most succinctly be described as truly collaborative—not a label most non-lawyers use when describing family law practitioners. We may be physically separated from one another, but technology has brought our members closer. With the guidance of our Chair, our members are engaged in more frequent meetings inspiring projects that benefit all who practice in family law-related fields—not just attorneys. From the Section’s various committees, to every article published in FamSEG, the Commentator and the Bar Journal, the Florida Bar Family Law Section leaves its mark. Helen Keller wisely stated, "alone we can do so little; together we can do so much." And in the midst of the worldwide pandemic, the Family Law Section is the embodiment of this ideal. When composing that 2021 New Year’s resolution, provide yourself with a little grace, reflect on your ability as a lawyer to adapt (also not a common trait of the traditional lawyer) and then consider how your time and talent can enhance the Section—then join us in collaborating into the next decade! The benefits include working alongside the highest rated lawyers in the state, staying on top of the latest legislative and regulatory changes affecting our practice, problem solving issues affecting Florida’s families. The benefits are boundless. Here’s to a new year, new goals, together—as a team!
We have all read the headlines. Since the pandemic began we are seeing multiple alarming trends such as
- massive increases in unemployment
- increases in substance abuse
- increases in divorce filings
- increased domestic violence
- deteriorating educational attainment for our kids
- substantial increases in mental health problems such as anxiety and depression

Many family lawyers are struggling with some of these problems in their own lives.

It is enough to make you turn off your news feed and begin rewatching all 540 episodes of Survivor.

The Florida Bar Family Law Section is here to offer a more constructive option — practical problem solving ideas for you to think about and apply in your practice to help you and your clients navigate the stressful, uncharted waters we find ourselves in at this unprecedented time.

In this issue, we have reached out to experts in substance abuse, parent coordination, social investigations, forensic accounting, collaborative law and estate planning to provide our members with timely, creative and practical solutions to help their clients. Some of these ideas are new. Some of them may not have even been feasible before the pandemic. In this time of crisis, the Family Law Section is choosing to highlight opportunities for Florida’s family lawyers to play a pivotal role in de-escalating family conflict and helping Florida families navigate their legal problems without undue trauma. This important aspect of our Section’s mission was highlighted in the Section’s 2018 revision to the Bounds of Advocacy Goals for Family Lawyers in Florida.

The alarming level of family dislocation occurring right now provides an urgency and an opportunity for our Section members to follow this guidance to make a positive difference in the lives of Florida’s families.

This year our Section Chair Doug Greenbaum has made “integrity” the centerpiece of our Section’s platform. At a time of upheaval for so many Florida families, the integrity of our members in pursuing the problem solving goals emphasized in the Section’s Bounds of Advocacy are more important than ever. This issue of the Commentator is designed to help you “solve disputes with grace and dignity”.

Bounds of Advocacy Goals for Family Lawyers in Florida at page 2.
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The word “divorce” conjures up a host of strong negative thoughts and feelings for so many people - those who have gone through the process themselves and those who have watched close friends or family members go through it. Because “marriage” is a legal relationship in the US, the dissolution of a marriage requires a legal process to be completed. Family lawyers and judges around the country, who are well aware of the wide dissatisfaction with the legal process for dissolving marriages, are constantly on the lookout for ways to improve the system.

In Florida, some of these recent improvements include a new statutory provision and rules and procedures for “collaborative” divorce. Another recent change designed to improve the options available to help separated Florida families struggling to better co-parent their children were a series of amendments to the rules and procedures for “parent coordination”.

Many of the recent divorce process alternatives such as collaborative divorce and parent coordination are designed to redirect divorcing families away from courts and into alternative dispute resolution settings where the parties are encouraged to seek resolution of their differences through negotiation processes, facilitated by various third party neutrals, and their own lawyers.

A problem with the new divorce process alternatives, as well as the longstanding litigation model, is a critical first step for the parties that is too often overlooked by the lawyers and facilitators who are advising the parties – the failure to defuse the painful and complex emotions that helped trigger the divorce in the first place.

A typical person who has decided that their marriage is irretrievably broken may feel a wide variety of strong emotions, including, for example, feeling betrayed, angry, and victimized. Attorneys may, if they notice that their client is suffering emotional turmoil, instruct their client to see an individual counselor or therapist. This counselor or therapist is outside of the divorce process. The emotional “upset” that led to the divorce in the first place may or may not be resolved by this ad hoc individual therapy. Sometimes individual therapy makes it worse.

Once the legal process is initiated, the spouses are swept into the process of collecting financial records, filling out forms and answering questions about their employment, education and all sorts of discovery. They soon learn that each conversation with their lawyer costs a lot of money. They begin to think twice about contacting their own lawyer even when they are confused or upset.

The emotional “upset” that led to the divorce in the first place continues to fester. Many spouses simply try to “get past” their upset feelings by stuffing them under the surface in order to get through the divorce. The parties...
are each left with unresolved emotional fall-out that can impede their ability to reach a settlement in the first place, or to abide by their agreement or final judgment later.

At the conclusion of the legal dissolution of marriage process, if this emotional fall-out has never been addressed, it can feel like a snowball rolling down a hill, which grows larger and larger as it rolls. Additionally, if the parties have children together, they are expected to come together and co-parent during and after this adversarial process, despite their built up animosity and blame. These are the litigants who often return to court again and again.

What if spouses who have decided that their marriage is irretrievably broken were able to defuse their powerful emotions and begin to get “emotionally” divorced before they embarked on the “legal” dissolution of their marriage? In this paper, we propose a first step for couples who have decided to divorce that we call “Pre-Divorce Analysis and Validation Experience” or “PAVE”. PAVE counseling does not have to be expensive or time-consuming. With the help of a properly trained counselor, in a few sessions, the spouses can identify and clear the emotional upset that led to their decision to divorce, before they embark on the legal process to divorce. The PAVE counselor can also help equip each spouse with key communication skills they will need during and after their divorce.

An example of the PAVE process:
1. Each spouse attends an individual session with a mental health professional trained in PAVE.
2. The PAVE counselor walks each spouse through the pre-divorce analysis and validation exercises, which are designed to facilitate an emotional clearing and validation process with each spouse before the legal process begins. The counselor can also provide each spouse with constructive communication tools and techniques they can use during and after the divorce. The spouses can schedule additional sessions at their option.
3. The PAVE counselor can meet with both spouses together if they wish.
4. If there are minor children, the PAVE counselor can meet with the children if the parents wish.
5. Each spouse determines if they want to schedule additional sessions with the PAVE counselor.
6. Each spouse determines if they want the PAVE counselor to provide any information to his or her divorce attorney.
7. The PAVE counselor can remain on the sidelines as a resource to the parties and their attorneys as needed through the divorce process.

This is just one example of a possible process. The goal is to enable spouses who have decided to end their marriage to identify and defuse their emotional upset outside of the legal process, ideally before they even begin the legal process. The actual steps are extremely flexible but the common denominator is a PAVE counselor who is trained to facilitate emotional clearing and validation for divorce.

The number of people seeking to divorce in the U.S. is expected to increase significantly as COVID restrictions are lifted around the country. The courts in Florida are already backlogged as a result of the pandemic. A significant increase in parties seeking to divorce will put further strain on our already strained family courts. If PAVE counseling can redirect even a fraction of future Florida divorces to successful, less adversarial alternative dispute resolution processes, Florida’s families and courts stand to gain incalculable benefits for years to come.

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Lisheyna Hurvitz is a Licensed Mental Health counselor, a Supreme Court Certified Family Mediator and a Parenting Coordinator, who has been in private practice for over 35 years with an emphasis on helping individuals and families through high conflict situations such as divorce and recovery from sexual violence and abuse. Ms. Hurvitz has served as a court-appointed Parent Coordinator and Therapist in Miami-Dade, Broward, Palm Beach and Sarasota Counties, and assisted many other families in family court proceedings at the invitation of one or both parties involved in high conflict court proceedings. She has pioneered many progressive and innovative methods of teaching individuals and families how to communicate effectively during difficult situations, to co-parent or parallel parent more effectively, and to raise healthier children in the midst of divorce. Ms. Hurvitz maintains a practice in Boca Raton, Florida, but also assists many patients throughout Florida and around the world via remote counseling. To learn more about Ms. Hurvitz, please visit her website at www.lisheyna.com.

Jennifer Miller-Morse, Esq. received her law degree from Harvard Law School in 1991, where her classmates included Barack Obama and Neil Gorsuch. Jennifer remained in the Boston area where she practiced law for many years before relocating to Florida. In 2012, Jennifer opened Miller Morse Law, a private practice in Boca Raton concentrating on family law. Jennifer serves on The Florida Bar Family Law Section Continuing Legal Education Committee, Domestic Violence Committee and Publications Committee. She is an Emeritus member of the Craig S. Barnard American Inn of Court and a member of the Advisory Council of the Florida Women’s Business Center, a U.S. Small Business Administration grantee program dedicated to helping women entrepreneurs start and build successful businesses in Florida. For more information about Jennifer or Miller Morse Law, visit www.millermorselaw.com.

Endnotes
2 Florida’s Parenting Coordination statute, § 61.125, Fla. Stat., was enacted in 2009. The Florida Supreme Court subsequently adopted corresponding rules of procedure and forms, which have been amended several times over the years. Florida Family Law Rule of Procedure 12.742 and Forms 12.984 and 12.988; In re Amendments to the Fla. Fam. Law Rules of Proc., 27 So. 3d 650 (Fla. 2010); In re: Amendments to the Fla. Fam. Law Rules of Proc.; New Rules for Qualified & Court-Appointed Parenting Coordinators, 142 So. 3d 831 (Fla. 2014). In re Amendments to the Fla. Rules for Qualified & Court-Appointed Parenting Coordinators, 284 So. 3d 402 (Fla. 2019).
Collaborative Family Law: Lessons Learned

By Jerome H. Poliacoff, Ph.D.

As a psychologist, I have witnessed firsthand the adverse impact of litigated divorce on families - sometimes for generations. Collaborative divorce came about when lawyers finally figured out that divorce is not a legal issue - it is a personal relationship issue that has legal attachments. In 1990 Minneapolis lawyer Stuart Webb founded collaborative divorce after fifteen years of practicing divorce law with its attendant roadblocks, frustrations, and vagaries of the court system.

With the passage of the Collaborative Law Process Act in Florida in 2017, family lawyers have a ready-made tool with which to reduce the levels of conflict and stress in family law proceedings, a tool all the more relevant in the age of COVID and rising divorce rates. In view of the focus of this issue of the Commentator on de-escalating conflict in family law practice in the age of COVID, I have reached out to several colleagues to share their Collaborative Law experiences.

Here are their stories.

If You Think Your Clients Can't Benefit from Collaborative Law, Think Again

By Carolann Mazza, Esq.

In the age of COVID, I am glad that I discovered Collaborative Law. Transitioning my family law practice from litigator to peacemaker took a while, and a lot of “help from my friends”, and now in 2020, I would do it all over again. Here is the story of my personal paradigm shift.

I was first introduced to the term “Collaborative Law” over a decade ago. At the time, I was representing the mother in a modification of custody matter in which the mother, in her effort to gain what was then called “sole custody”, was alleging the father was an alcoholic and unfit to have custody of their two children, ages 12 and 14 years old.

The family judge (a fan of what she called “therapeutic justice”) began telling the parents, in no uncertain terms, that they were destroying their children, that contentious litigation by parents caused all kinds of problems in children, including depression, suicide, violence, and prognosticating that their children would surely not be able to have loving relationships as adults.

My client was crying hysterically, the father was close to tears, and I was angry. As I attempted to cut in to refocus the judge on why we were there, counsel for the father kicked me under the table and discreetly shook his continued, next page
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head. After the hearing, we spoke outside and he asked me if I had heard of “Collaborative Law” and I told him I had not. He invited me to a practice group meeting and later became a mentor.

During and after an extended two day, fourteen hour training, I thought to myself, “This is easy; I am collaborative, reasonable, and I am always settling my cases.”

Only years later, did that statement, “... I am always settling my cases” become a symbol in my mind of how much I just did not get about Collaborative Law. Not only did I not make the paradigm shift, I did not recognize that there was one to be made. Despite my training, and my enthusiasm, I did not ‘get’ any Collaborative cases for many years. I began to think that clients did not want Collaborative divorces. I did not realize that I had not bought into the process and, more significantly, I did not fully understand the process.

Several years after my initial training, a dear friend of mine who practices family law in northern New York called me and told me the International Academy of Collaborative Professionals (IACP) was having its annual conference (called a Forum) in Washington D.C. This lawyer and I have a mutual friend in D.C. and we thought it would be a great excuse to visit her. So, I went to the Forum that year. And I never looked back. The energy and enthusiasm for shifting from litigation to collaboration (“peacemaking” is another term often used) was palpable. My peers there were genuinely friendly and wanted to help. And, most important of all, they believed in this process. As I attended sessions, I began to realize what all the hype was and that the Collaborative Process offers hope to many people facing family conflict.

I also began to realize things about myself that I hadn’t noticed (or wanted to notice) - that maybe I needed to make some internal changes before I would be able to fully function in a collaborative manner. I started doing some inner work and taking courses on listening, on non-defensive communication, and on conflict, and conflict resolution. And I trained. I enrolled in basic and advanced Collaborative Law courses, even though I had yet to have a case. I went to every IACP Forum in the years that followed. I attended the first Collaborative Basic Training the IACP offered in Phoenix, Arizona in 2011.

I made a life altering decision that began with transitioning my family law litigation practice from a full-service family law firm to an out-of-court process only family law firm.

I have learned that I am still learning. I make mistakes. Sometimes, my behavior is not collaborative. But I have come to really appreciate the value of the team approach to helping divorcing families divorce peacefully (or as peacefully as possible).

I have the great good fortune to work on a regular basis with some of the sharpest and most skilled Collaborative practitioners in South Florida. I rely on them; they rely on me.

I continue to take as many training courses as possible. Every time I do, I learn something new. Every case and every team bring a fresh perspective.

I truly believe that Collaborative Divorce/ Collaborative Law is the only process that makes sense for families in conflict. Divorce is an emotional matter that manifests itself in fights over money and children. There is only a small legal component. It makes about as much sense to have a judge make decisions for couples in divorce as it does to have judges give marriage lessons prior to couples marrying in the first place.

I believe that the only experts in a couple’s divorce are the couple themselves; they just
I’ve learned so much in my collaborative practice. Unexpectedly, once in a while now, a client begs me to co-counsel . . . with her trial lawyer. These clients come to me, drowning in a pitching sea of litigation and desperately searching on-line for some kind of life preserver. They are so desperate that they’re willing to bring me in, despite that the other side isn’t willing to abate the litigation, i.e. to try collaboration.

Now please understand . . . I’m no mental health care professional. I’m just a lawyer. But the paradigm shift to collaborative practice sensitizes even us to the complicated struggle of emotions at play in the “everyday” divorce. So I prepped my last trial client for her third mediation by suggesting that she start off by apologizing for her extra-marital affairs.

In the morning, we took our places. My client and her trial lawyer on one side, next to me; her husband (also a lawyer, by the way), and his lawyer facing us. The mediator sat, organized and ready to go at the head of her weighty conference room table; the finance geek hid behind his computer screen at the other end.

Although I knew all four trial professionals, I introduced myself to my client’s husband and explained why his wife had retained me. I requested that we all indulge her as she had some preliminary comments to make.

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The room went quiet. She addressed her husband as though there was no one else in the room, briefly unburdening herself, relating why she had “needed” to cheat. But it wasn’t until she then apologized . . . for deceiving him, for hurting him, for breaking their vows, for betraying their marriage that the mood in the room shifted. His eyes filled with tears. It was like her husband had been holding his breath and now he could let it all go.

Magic. We settled that case in three hours. The mediator never said a word.

Joryn Jenkins received her B.A. from Yale when she was just 19 and her law degree from Georgetown. She is a trial lawyer with 40 years of courtroom experience, and taught for two years at Stetson before opening her private practice, Open Palm, in Tampa. She has well over 40 collaborative matters under her belt and now sometimes serves as a team mentor. Joryn’s clients say, “She helps people divorce each other without destroying their families.”

Joryn is the author of nine books, five of which are focused on collaborative practice, including Changing the Way the World Gets Divorced, How to Market Your Collaborative Practice. All of her books are available on Amazon or at www.JorynJenkins.com.

Joryn received an award given to only one person each year in the United States Supreme Court by the American Inns of Court. She has also been granted the President’s Award, the highest honor that the Federal Bar Association can bestow.

In her spare time, Joryn teaches marketing to lawyers and to collaborative professionals.

Collaborative Training Pays Dividends Beyond Collaborative Cases

By Christen Ritchey, Esq.

Our lawyers and staff – mostly women - began working from home at the onset of the pandemic as did my children Landon, age 7, and Kendall, age 4, whose schooling switched to virtual schooling at the same time.

Overnight my roles as attorney and business owner were meshed with my role as “mother” – both a stay-at-home mom and homeschool teacher. Now I not only needed to fill my days with drumming up work for my employees and keeping my worried clients calm, I also needed to keep my kids entertained and somehow squeeze in time to supervise homeschooling.

Before the coronavirus, when my children were in school and I was working at the office, my commute time between office and home was enough for me to decompress and shift into Mom mode. During this pandemic every parent whose children are home contends with little-to-no separation between work-mode and home-mode. For me it is important to try to create a transition time between my work and the time I spend with my children, whether that be a quick run or enjoying a glass of wine, just to clear my mind of the workday’s stresses –
not an easy switch when your work computer is in front of you at home. It takes a great deal of self-discipline to shut it down and move into family mode.

As a Collaborative trained attorney, I recognize that I have an easier time than most taking off my lawyer hat. Traditionally, litigation rewards the most combative and competitive drive in warring attorneys. Those traditional behaviors and metrics of success are not models I want to promote in my career or in my children. My children deserve a mother who can be patient, fun, and lenient. Collaborative cases help me keep a calmer and more peaceful presence both with clients and at home with my family.

My paradigm shift from litigation to collaborative attorney required a fundamental change in my mindset. As a Collaborative practitioner I have had to work at being mindful of changing my mindset, and my professional behavior, from adversarial to cooperative, to focus on the future not the past, to look at relationships and not facts, and to become a problem solver and peacemaker – a shift not all that dissimilar from when I need to transition from working professional to fun parent.

As a parent, it can be hard to watch Landon and Kendall sometimes inflict cruel and unusual punishments on one another. Landon has, on more than one occasion, broken his sister’s toy when she refused to give up playing with one of his. Kendall prefers corporal punishment and hits her brother when verbal communication fails to generate her desired results. Both behaviors take every ounce of my problem solving and interest-based negotiation skills to assist them in resolving the issue at hand.

Often I lose my patience but falling back on my Collaborative training helps me focus on their relationship and not on who is “right” in an argument, and more often than not – just like at work in Collaborative divorce - I am able to help the children resolve their issues much like in my Collaborative practice. Sometimes it is as simple as having them separate to different parts of our home to work on a project that diffuses the situation.

Parenting is a work in progress on a good day and the pandemic has brought out the best and worst in each of us. I don’t get it right every time, and certainly not every day but I know I can rely on my collaborative practice training to make the best of a bad situation.

Christen Ritchey is a family law attorney and partner with Johnson, Ritchey & Feldman in Boca Raton, FL. She is the secretary of the South Palm Beach County Collaborative Practice Group and Co-Chair of the FACP Outreach Committee.
In Memoriam: 
Joseph "Joe" Charles Hood 
(July 29, 1954 - Oct 2, 2020)

Joe, as most people called him, was lost to his family and friends when he passed away peacefully in early October at the age of 66. A debilitating auto-immune disorder struck him suddenly in March, 2014 and left him to linger in pain and total disability, frequently at the cusp of death, for another six and one-half years. And while he fought valiantly, he eventually could fight no more.

Joe worked his way through college by laying line for the railroad until he graduated from Southern Illinois University with his bachelor's degree and, subsequently, with his law degree. Immediately thereafter, he was commissioned in the U.S. Air Force and served at the JAG office in Guam. When not working, he enjoyed scuba diving and sailing there, until he was discharged as a Captain in 1984. He was most proud of his military service and accomplishments in the service of his country.

Joe began practicing law in Florida in 1983 and became Board Certified in Marital and Family Law in 1991, which he maintained until he retired on March 18, 2019. He developed a sub-specialty in military law within the setting of dissolution of marriage actions. He was also an evidence whiz and ahead of his time when it came to technology and the practice of law, serving as the first Chair of the Family Law Section’s Technology Committee which developed the

Section’s monthly online newsletter, FamSeg, which continues to this day.

He was awarded the Professionalism Award in 2003 by the Hillsborough County Bar Association and held many offices in HCBA’s Family Law section. Joe also sat on the Executive Council of the Family Law Section of The Florida Bar for 8 years, from June 30, 1999 to June 30, 2007, serving on the committees for Legislation, Continuing Legal Education, Publications, Technology and Equitable Distribution. Further, for many years he was a Master in the Inns of Court that met in Tampa.

Joe was known to be a person who would readily help any attorney who asked to bounce a question off him, particularly in the field of military divorce law. His legal mind was among the best and sharpest; he was one of those rare individuals who could recall the exact legal citation for seemingly any case. He frequently lectured on behalf of various local bar associations, as well as The Florida Bar, and was so respected in the legal community up and down the Gulf coast that many judges, bailiffs, and attorneys visited him in the hospital after he became ill.

He was very proud of his son, Patrick Joseph Hood, who worked in his office while attending law school. He is now an attorney working with Tampa’s Public Defender’s Office, where he has been employed since his graduation from Stetson Law School in 2015.

In his free time. Joe enjoyed watching golf and football, frequently with his son, as well as playing those sports and sailing. He loved going to the movies, too.

Joe is survived by his son, Patrick, his loving and devoted wife of 15 years, Yuwen, and their two young children, Sophia and Victoria. Yuwen was with him nearly every day after he became ill and was with him when he was finally released from the pain and chains of ill health that had tried to conquer him for so many years. Joe will also be missed by his extended family, his colleagues, and his friends, particularly by me, Martha-Irene (“Mardie”) Weed.

Simply put, Joe had a marvelous mind and a warm heart to all who knew him.

A full military funeral with a band and gun salute was held in Joe’s honor on Thursday, October 15, 2020 at the Bushnell National Cemetery in Bushnell, Florida. Members of Joe’s study group, the judiciary, his son’s friends from the Public Defender’s Office, and many others were in attendance to bid farewell to a kind soul who was loved and respected by all.
Divorce and Estate Planning During the COVID-19 Pandemic

By Jeffrey A. Baskies, Esq. and Brooke R. Eisensmith, Esq.

What a year it has been! With surprises around every corner, 2020 has certainly introduced new challenges for married couples worldwide. Indeed, COVID-19 has impacted us all.

Introduction

For some couples, quarantining with their spouse has been a blessing in disguise – a chance to deepen their bond and strengthen their relationship as a couple, and a chance to spend time with their children as a family. For others, quarantining with a spouse has undoubtedly caused new pressures and revealed marital issues that may not have otherwise been uncovered or dealt with for some time. It seems probable that a pandemic-driven storm of divorce filings is pending, although possibly clients await more “normal” social times before filing. So too, 2020 has created a perfect storm for estate planning and has led to an overwhelming demand for services.

The onset of the COVID-19 pandemic led many clients to their estate planners. First, those who had been procrastinating (either starting or finishing their plans) came out of the woodwork to complete their planning out of fear of the pandemic’s impact. Second, many clients (perhaps with too much time on their hands) began to question their own mortality in light of pandemic fears, leading to a surge of both old and new clients wanting to explore and revise their estate plans. Most recently, fears of 2021 tax changes post-election are leading to a stampede of irrevocable trust planning.

Thus, the pandemic has uniquely impacted both practice areas. Further, it is anticipated that many new divorce filings will occur, and those divorcing clients will need to explore their estate plans. Therefore, as you speak to your clients who are filing or going through a divorce during the COVID-19 pandemic, be sure to raise the following issues and stress the importance of estate planning in light of this significant life change and the added mortality risk associated with these times.

Estate Planning is Vital Whenever a Divorce is Filed

As a general rule, any client involved in a dissolution of marriage should meet with an estate planning attorney as early in the process as possible. Reviewing a divorcing client’s estate plan (or creating an estate plan if the client does not yet have one) immediately after a filing is vital and necessary in order to confirm that the client’s assets will pass to the intended beneficiaries and to ensure the appropriate fiduciaries are nominated to act on the client’s behalf. In the absence of such an estate planning review, it is extraordinarily likely that a divorcing client who dies or becomes incapacitated prior to a Final Judgment of Dissolution will leave her estate in a manner inconsistent with her true wishes and intent.
For example, should a client become incapacitated during the pendency of a divorce action without a new estate plan in place, or prior to updating the estate planning documents that were created when the marriage was intact, it is probable that the client’s spouse will have far more control over the client’s affairs than intended. The not-quite-yet-ex-spouse will likely have financial decision-making authority (under a Durable Power of Attorney) and health/medical decision-making authority (under a Designation of Health Care Surrogate, Living Will and/or Declaration of Preneed Guardian Form). However, had the client consciously considered and reviewed her estate planning documents after filing for divorce, experience tells us she would almost certainly have changed those documents and nominated alternate decision-makers.

Furthermore, should a client die during the pendency of a divorce without an estate plan in place, or any new estate plan in place, or prior to updating the estate planning documents that were created when the marriage was intact, it is probable that the client’s spouse will needlessly and unfortunately inherit far more than the client actually intended at the time of death. Again, experience tells us that if the client consciously considered and reviewed her estate planning documents after filing for divorce, she would almost certainly have changed those documents to reduce (as much as legally possible) the share of her estate passing outright to her not-quite-yet-ex-spouse.

Consider a typical scenario in which a married couple creates an estate plan after having their first child. That client’s estate plan likely leaves her entire estate to her spouse and nominates her spouse to serve in various fiduciary roles, both in the event of the client’s incapacity and upon the client’s death.

If the client becomes incapacitated at any time during the divorce proceedings, the spouse the client is in the process of divorcing will be entitled to make financial and health care decisions on the client’s behalf. In this case, simply executing new health care documents would protect the client; however, unless the client’s divorce counsel reminds her to revise her estate plan, she may not realize how vital it is to contact an estate planner as soon as the divorce begins.

Further, Florida law provides that the provisions of a married client’s Will or Revocable Trust that affect the client’s spouse become void upon divorce (i.e., entry of a Final Judgment), not upon the filing of an action for dissolution. Accordingly, if the client dies during the pendency of a divorce having not yet removed her spouse as a beneficiary and/or fiduciary under her estate planning documents, the not-quite-yet-ex-spouse will have full control over the administration of the client’s estate and will possibly inherit the client’s entire estate. Without visiting an estate planning attorney, the client’s new (post-filing) intent may be frustrated, and the truly intended beneficiaries may be left with nothing. The same result will occur if the client fails to remove her spouse as the designated beneficiary of certain assets (e.g., retirement accounts or life insurance policies). This unfavorable result can be avoided by ensuring your clients review and update their estate planning documents as soon as the divorce process begins.

 Protecting one’s children is another important motivator for divorcing clients to engage in estate planning. If the client has children, the client should nominate guardian(s) to serve in the event the client and the client’s spouse die leaving minor children. The client should also appoint trustees (and alternate trustees) to manage the inheritance passing to the client’s children upon her death. Indeed, appointing the proper guardians for minor children and

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shielding the children’s inheritances in trusts (to be managed by the trustees the client selects) may be the most important reasons for clients to meet with an estate planning attorney once a divorce has commenced.

Florida’s Elective Share and Intestate Share

Florida’s elective share statutes protect a surviving spouse from disinheritance, regardless of any provisions in the deceased spouse’s estate planning documents to the contrary. Although Florida’s augmented elective share statute may not be totally avoided during the pendency of a divorce, Florida law authorizes the use of an elective share trust, which a divorcing client should consider implementing in her Will or Revocable Trust.

By including provisions for an elective share trust in her estate planning documents, the client is able to nominate the individual or financial institution of her choice to serve as trustee of the elective share trust for her spouse. Further, since the assets are held for the client’s spouse in trust (rather than being distributed to the client’s spouse outright), the client can designate the ultimate beneficiaries of any assets that remain in the elective share trust upon the spouse’s death. In other words, with proper estate planning initiated at the outset of the divorce, in the event of her untimely death during the pendency of the divorce, a client can keep her assets away from her husband’s next spouse, and she can protect those assets for the benefit of her children as well.

If, on the other hand, the client dies with no estate plan, Florida’s intestacy statutes provide that the client’s surviving spouse will be entitled to the client’s entire intestate estate, provided that (i) the client is not survived by any descendants, or (ii) the client is survived by one or more descendants, all of whom are also the only descendants of the client’s surviving spouse and the surviving spouse has no other descendants (i.e., no children outside the marriage). If the client is survived by a descendant who (i) is not a descendant of the client’s surviving spouse, or (ii) is a descendant of the client’s surviving spouse, but the client’s surviving spouse has one or more descendants that are not descendants of the client, then the client’s surviving spouse will be entitled to one-half of the client’s intestate estate. Under either scenario, the client’s surviving spouse is likely to inherit more than the client would have provided for, had the client consciously planned her estate.

Estate Planning and Issues Raised by the Pandemic

For the reasons enumerated above, including the increased health risks associated with the pandemic (and likely for many other reasons as well), all divorcing clients should be referred to estate planning counsel to review their present estate plan (or the consequences of having no plan – i.e., intestacy) and should create a new estate plan in consideration of their pending divorce. However, even this act is more complicated due to the COVID-19 pandemic.

On the one hand, pre-pandemic, it was possible (maybe even easy) to arrange an in-person meeting for the client and the estate planner. Oftentimes, such meetings might coincide with meetings with divorce counsel. However, with many offices closed and many estate planners and divorce attorneys working remotely (and not engaging in such in-person meetings), arranging for this vital service now takes more effort.

Moreover, not only are there new challenges to initiating a divorcing client’s estate planning, but there are also new challenges to implementing and executing such plans. For
example, pursuant to Florida law, revisions to a client’s estate planning documents must be made by written instruments, which need to be signed in the presence of two witnesses, and in some cases also require a notary public. While Trust Agreements and Designations of Health Care Surrogate Forms may be executed without a notary, a Durable Power of Attorney requires a notary to be valid (specifically, a notary is required to execute any Durable Power of Attorney where the client initials certain “super powers” thereunder). A Will, on the other hand, will be validly executed so long as it is signed in the presence of two witnesses, who sign in the presence of the testatrix and in the presence of each other (i.e., so long as everyone is present while everyone signs). However, a Will can only be made "self-proved" if an affidavit is attached and executed at the time of signing, which affidavit must be notarized. Thus, while a Will may be validly executed without a notary, it will be harder and more costly to probate the Will if it is not self-proved (i.e., if it is not also notarized on the self-proving affidavit at the end of the document).

As a result of offices being closed and difficulties arranging witnessing and notarization, it has become inconvenient and perhaps nerve-wracking for clients to coordinate the execution of their estate planning documents. This is of course exacerbated considering the current emphasis on “social distancing.” There are stories of people executing documents in a “drive-in” fashion, meaning they sign their documents in their car with witnesses who watch in the driveway. There are also stories of people meeting with their neighbors to sign their Wills outside their homes with everyone wearing masks, standing far apart and bringing their own pens.

Recent changes to Florida law allow for some estate planning documents to be both witnessed and notarized on-line/remote, a change that is particularly (and coincidentally) helpful in the wake of the COVID-19 pandemic. However, it appears the use of on-line Will and Trust execution (witnessing and notarization) is both a rare occurrence and an often difficult and painful one for the client. Moreover, most clients prefer to meet their estate planners in person and have their counsel arrange and oversee the witnessing and notarizing of the documents. Unfortunately, the COVID-19 pandemic has made document executions uniquely challenging.

**Conclusion**

Notwithstanding the difficulties in initiating and executing estate plans, to avoid adding further stress to an already highly stressful situation, it is vital that divorce attorneys refer their clients to estate planning counsel. Providing your divorcing clients with plenty of time to effect the desired changes to their estate planning documents and to execute them in accordance with the formalities required under Florida law will certainly make your clients feel more comfortable and protected by their trusted advisors.

Of course, you want to be careful to protect yourself as well. As trusted advisors, divorce attorneys would be doing themselves and their clients a great service by fostering these estate planning discussions early (and often) in the divorce process. Further, you would be providing a valuable service by informing your clients of all potential issues (including estate-related issues) that may arise by virtue of their divorce.

Ultimately, we suggest that it be your standard practice to advise your divorcing clients to meet with an estate planning attorney as one of the initial integral steps in the divorce process.

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The Forensic Accountant’s Role in De-Escalating Conflict During COVID

By Rick Hoagland CPA/ABV/CFF, CFE, CVA

We have all been there – the high-conflict divorce case filled with lots of animosity, even hatred. And we have all seen and felt the toll that those cases take on everyone involved – the parties, other family members, even the professionals. Now, these cases are further complicated by the challenges inherent in dealing with the COVID-19 pandemic. Can the involvement of a forensic accountant help to de-escalate such cases? In my experience, the answer is an emphatic YES!

In my 27 years of professional experience, I have had the opportunity to be involved in hundreds of divorce cases. As you might expect, the degree of conflict in those cases has covered the spectrum from minimal (“let’s get this done – help us figure out what’s fair”) to off-the-charts (“I’d rather wipe it all out instead of giving her/him any of it”). From these experiences, I would like to share a few ways that a forensic accountant can help de-escalate and resolve the financial issues in most divorces.

Keep in mind that, as an expert witness, a forensic accountant is supposed to remain independent and objective. Where the lawyer’s job is to be an advocate for his or her client, the expert’s job is to be an advocate for their opinion. As such, we are often able to bring some insight as to the financial issues that might not be apparent from the client’s perspective.

Tip #1 – Involve a forensic accountant early in the case. Early discussions with the lawyer, client, and accountant can play a major role in determining the scope of needed discovery and establishing realistic client expectations.

In one case, I was hired after the parties had exchanged extensive discovery and attended their first mediation. The client had accurately told the lawyer that the soon-to-be ex-spouse “paid everything through the business”. Unfortunately, that was not the whole story. Based on the client’s representations, the lawyer had fought to obtain very comprehensive discovery related to the business. There had been hearings on motions to compel, and there had been third-party authorizations allowing my client to obtain bank statements and canceled check images at my client’s expense.

Upon my engagement, I was provided all discovery and the attorney’s and client’s view of the case. It did not take long for me to realize that the client’s understanding was not complete, and that much of the comprehensive discovery probably had not been necessary. The opposing spouse owned 50% of the business and handled day to day operations; the other 50% was owned by an investor-owner who had no operational knowledge but who meticulously kept track of all accounting aspects of the business. Yes, there were many personal expenses paid by the business on behalf of each of the owners, but all such payments were properly treated as distributions. All credit card charges continued, next page
were likewise allocated as either business or personal, and payments were recorded accordingly. I was left with the unpleasant task of telling the client that the lawyer’s expectation of significant “unreported income” of the other spouse did not exist.

How could this have been avoided? An initial analysis of the entity’s tax returns and reported distributions to its owners, combined with the fact that mandatory disclosure had not revealed any significant accumulation of assets that couldn’t be explained by the disclosed compensation and distributions from the business.

Tip #2 – If both parties have retained forensic accountants, let the forensic accountants communicate directly with each other. At a minimum, this should streamline the discovery process; it can even lead to discussions about resolving the case.

In the case described earlier, I was given the authority to discuss discovery and financial aspects of the case with the opposing expert. He confirmed the degree to which the 50% investor-owner kept track of accounting matters, and we ultimately had a joint meeting with the investor-owner (who suggested an unconventional way of resolving the equitable distribution aspect of the case that ultimately was accepted by both parties).

In another recent case, I was given the green light to discuss the case with the opposing expert early in the process. We were able to avoid hearings about discovery matters, and we worked directly with each other to obtain
additional discovery where either of us thought it was necessary or appropriate. While all discovery still went through the attorneys, it was less costly and did not result in the degree of conflict that is often seen in other cases. Further discussions between the accountants allowed us to focus the case on areas of disagreement, and ultimately to get the case settled at mediation.

Tip #3 – Embrace less-traditional approaches to using a forensic accountant in the engagement. These might include using a jointly retained accountant, having the parties and accountants meet as a group to address financial aspects of a case, or consider collaborative divorce. I have participated in each of these approaches, particularly in recent years.

When I am approached to be a jointly-retained forensic accountant, I emphasize to each lawyer and client that I work for all of them – there are no secrets. Whenever possible, I have an initial meeting with both parties together. While both spouses are always invited to attend subsequent meetings, these meetings may be separate. Often, this is because there usually is one spouse that wants or needs more of an education about the financial aspects of their case. Once both parties are comfortable with their understanding of the financial issues, I then work with the lawyers and parties to develop and refine the financial resolution of the case.

A recent engagement led to a mediation that first focused on issues related to the parties’ children. The parties spent a lot of time working towards the resolution of these issues; it was starting to look like we might not get to the financial aspects of the case. At the suggestion of one of the lawyers, we agreed that the forensic accountants would try to work together to craft a resolution to the portion of the case related to financial issues while the mediator worked with the lawyers to finalize the parenting plan. The accountants met separately. We each understood the financial circumstances and our parties’ concerns, and together developed a potential settlement scenario. After presenting the scenario and making a few revisions requested by the parties, we were able to settle the case in full.

Collaborative divorce is perhaps the ultimate de-escalation of a divorce proceeding. Under the full team interdisciplinary collaborative divorce model, a team of professionals is assembled – a lawyer for each party, a financial neutral and a facilitator. The team works together to help the divorcing spouses to peacefully and respectfully develop and implement their own settlement, without judicial intervention. An added benefit of the collaborative divorce process is the privacy that is maintained – none of the parties’ affairs become a matter of public record.

The collaborative engagements that I have been involved in have included much of the varying degrees of conflict as I described earlier. One case was so businesslike that the team agreed that it was almost an unfair representation of the collaborative divorce process, as the parties seemed to have agreed on most of the outcome before the process was even started. We were able to educate the parties about the remaining areas to address, and they quickly reached a resolution of these issues.

All of these approaches can be implemented, notwithstanding the COVID-19 pandemic. In fact, the accelerated adaptation of technology has made it easier than ever to do so.

Can all conflict be de-escalated? Of course not! However, the involvement of a forensic accountant in divorce cases introduces an independent perspective that can lead to the de-escalation of conflict, identification of many areas of agreement, and allow you to focus

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Co-Workers

Virgil

Tweet & Biggz

Riley

Snow

Fritz and Gustav
on creatively resolving the remaining areas of actual dispute.

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**No One Saw That Coming! Co-Parenting During a Natural Disaster or Pandemic**

By Elizabeth M. Edwards, Esq. and Rebecca Amster Cantor, Esq., M.S.

No matter how carefully you review your client’s Parenting Plan, how thoughtfully you think about the calendar, count the overnights, and take into consideration the family’s culture, religious practices, and soccer practices, it is inevitable that an issue will arise that you didn’t see coming. It turns out that attorneys do not have crystal balls after all. In the wake of the current global pandemic, when neither the government, the scientists, nor the courts have solid information or guidance, our clients will ultimately turn to us, their attorneys and counselors, for advice on how to best co-parent their children when a dispute arises. What should our advice be? This Article discusses how the legal system has addressed the impact of COVID-19 as it relates to parenting issues; provides the best practices and protocols in crafting parenting plans that takes into consideration catastrophic events such as a pandemic or natural disaster; and offers practical advice and alternative dispute resolution options that may best serve our clients when faced with extraordinary parenting circumstances.

**The State of the Law**

As the coronavirus began to sweep across the State of Florida and the world, courts in different circuits throughout the state of Florida began issuing Administrative Orders regarding courtroom practice. Most circuits postponed or cancelled in-person hearings, including criminal hearings and jury trials. Almost all Family Divisions pivoted to Zoom technology to continue operations, including motion calendar hearings, evidentiary hearings, and even full trials. In at least two circuits, the courts provided
specific Administrative Orders regarding how to handle time-sharing in the context of the pandemic. Specifically, in the 17th Judicial Circuit in and for Broward County, Florida, Administrative Order 2020-30-Temp, provided in part, “Regular timesharing, as set forth in the parties’ Parenting Plan or applicable court order, shall continue until the last day of the child(ren)’s school, as designated in the parties’ Parenting Plan… Then, summer timesharing shall being [sic] as set forth in the parties’ Parenting Plan or applicable court order.” The Administrative Order also provides, “In the event that the Governor of Florida and/or any other government official issues an order that requires parties or a party to restrict movements as a mass or partial quarantine or suppression strategy to mitigate or slow the spread of COVID-19 (often referred to as “shelter in place” or “stay at home” orders)... the parties are to discuss their family’s best methods to meet the requirements of the child(ren)’s school, remain with siblings if possible, and be safe. If regular timesharing and exchanges can occur and be consistent with any governmental orders, then regular timesharing shall continue as Ordered by the Court and, if necessary, as further described above. If there is any governmental order issued that does not allow a parent or parents to move about the community freely, the parent with the majority of timesharing (183 overnights) shall keep the child(ren) until that governmental order is lifted, or a Court Order is entered.” The Administrative Order continues, “Video-conferencing and phone contact shall be honored as set forth in the parties’ Parenting Plan and should be increased to “regular and consistent contact” to alleviate fears and concerns the child(ren) may be experiencing during this time.” And furthermore, “the Parties should assume that any parent losing time because of measures taken for COVID-19 will receive make up timesharing, and that the Court will sanction behavior that it deems unreasonable”.

The 11th Judicial Circuit in and for Miami-Dade County, Florida, issued a similar Administrative Order 20-06 which states in part, “the Court expects all parties to continue to adhere to all final judgments, temporary orders, settlement agreements, or other orders of the Court awarding parental responsibility or time-sharing.” Moreover, this Administrative Order states that, “unless otherwise prohibited by an existing Court Order, each parent is prohibited from unreasonably restricting access of the child(ren) to the other parent.” The Administrative Order further states that, “parents are strongly cautioned that unreasonable, hurtful, or destructive behavior may be sanctioned by the Court in accordance with Chapter 61 of the Florida Statutes.”

By reviewing these Administrative Orders, we can deduce several basic principles regarding the Courts’ view on timesharing as it relates to the pandemic. We see that the Courts place priority in maintaining the status quo, if possible, and that stability and predictability for minor children is paramount. Additionally, the Court may prioritize the minor child’s physical safety and wellbeing, sibling relationships, and schooling if a child would be required to stay in one location due to the global pandemic. The Courts may also seek to alleviate the minor child’s worries and fears, including ensuring frequent and continuing contact with both parents, even if it can only be accomplished through telephonic or video conferencing. It is critical to note, the underlying theme of these principles is truly a “best interest of the child” standard, and that the child’s best interests supersedes that of the adults in the case. Further the Administrative Orders anticipate that not all parents will seek to act in the children’s best interest, but may instead seek to utilize the global pandemic to advance their own personal interests. Those parents who do so, have been warned that their actions will not be looked upon favorably by the Court.

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Even though the Courts have provided attorneys with some guidance through the issuance of Administrative Orders, there are a lot of unknowns. Medical advice and guidelines regarding COVID-19 have remained extremely fluid as of the date of this Article, with the CDC changing its recommendations regarding social distancing, mask-wearing, and even sanitization protocols necessary to protect people in a variety of social, schooling, or work environments. As a result, parents may often feel a sense of whiplash as they try to make smart and safe choices for their children. When parents conflict with one another, or worse are amidst a highly litigious custody case, it often falls to the courts to make the smartest and safest choices for the children.

In April 2020, in the matter of Greene v. Greene (2020 Westlaw 3467689), in the 11th Judicial Circuit in and for Miami-Dade County, Florida, the Court was tasked with determining whether a parent who worked as an Emergency Room physician and treated COVID-19 positive patients, posed a danger to the minor child. The trial court found that the potential exposure of the virus justified the other parent having 100% timesharing during the pandemic, and further ordered that a violation of the ruling was egregious enough to order the physician parent to jail for 20 days. Ultimately, these orders were reversed on appeal and subsequently vacated by the Court.

Similarly, in the case of Manley v. Russell, in the 17th Judicial Circuit in and for Broward County, Florida, evidence was presented which showed a Facebook post with a picture of the Mother not wearing a mask which stated, “No mask for this girl!”. The Court took that evidence into consideration and addressed the safety of the minor child on the issue of mask-wearing, or failure to wear a mask, by one parent. The Court considered that evidence in ruling that the Mother would only be permitted to exercise supervised timesharing. The Court further ordered that “after a safe and reliable vaccination against COVID-19 is available, the mother may be vaccinated and the child may be vaccinated thus eliminating that particular danger to the child which is in the child’s best interests as determined by the father’s decision-making authority and the court”. Subsequently, an order was entered by the Court vacating the restrictions on the Mother’s timesharing due to Governor DeSantis moving the State of Florida into phase 3 of re-opening, and no longer requiring masks in public places in the State of Florida. These two cases show the varied and sometimes extreme rulings by judges and demonstrates that some judges are still trying to balance health risks and timesharing.

Not only are the rulings varied, but whether a judge will qualify a COVID-19 related parenting matter as an emergency or urgent in order to grant an expedited hearing also depends on the judge and the facts in a particular case. The 17th Judicial Circuit in and for Broward County Florida Administrative Order No. 2019-9-UFC defines a child emergency as “a matter of imminent or impending abuse, neglect, or abandonment affecting the health, safety, or welfare of a child.” The Administrative Order further states that “visitation is not an emergency”. During the COVID-19 pandemic, there have been numerous incidents of one parent withholding timesharing from the other parent due to COVID-19 related reason. Pursuant to the Administrative Order, withholding timesharing due to COVID-19 is not basis for granting an expedited hearing, and many judges have denied expedited hearings on that basis. To the contrary, there have been many COVID-19 related matters presented to judges in which an expedited hearing was
requested and granted such as travel, in person versus virtual school, issues in limiting a vulnerable child’s or a vulnerable adult’s exposure to the virus, etc. Some judges may grant expedited hearings on some COVID-19 related matters and others will not. There has also been a situation where an attorney had requested an expedited hearing and obtained a hearing simply by putting the word “COVID” in the title when the motion was not COVID-19 related. It’s important for family law practitioners to know the statewide rules and Administrative Orders in their local circuits to determine what types of matters are truly emergencies, and that the COVID-19 pandemic should not be misused as a pretext to obtain an expedited hearing. When presenting a case to the court, it is important for family law practitioners to realize that COVID-19 disputes are highly fact intensive. Attorneys need to address the medical risks of the family at issue and specify those risks. They also must stay up to date regarding public health directives at the federal, state, and local levels. Additionally, with medical advice and CDC guidelines remaining fluid, it is important for family law practitioners to determine whether it is more beneficial to request specific relief, such as should the child attend in-person versus virtual school, as opposed to whether it will resolve the need to request a future hearing by asking the court to award one parent temporary ultimate decision-making authority regarding schooling during the pandemic. That way, in the event a local school changes or the public health directives evolve, the parties do not need to return to court to have the order modified. It is also very important that family law practitioners who are defending that position craft the order in a way that specifically states that it is limited to pandemic-related issues and are temporary in nature, so that one parent does not have ultimate decision-making authority indefinitely after the COVID-19 pandemic is over.

Judges, in the face of limited information, are having to make tough decisions which are neither consistent across jurisdictions nor even across the same division. It is being reported anecdotally that some judges will only allow virtual time-sharing for one parent, while others order all parties to wear masks while adhering to the timesharing schedule. Some judges are permitting travel in and around the state of Florida, and some are not. Some judges are allowing inter-state travel, while others are strictly prohibiting it. The rulings on in-person versus virtual schooling, have also varied. This lack of certainty makes it problematic in trying to anticipate a judge’s ruling as to these types of matters, and is further evidence that attorneys may want to resolve these matters and implement procedures in their parenting plans to minimize reliance on the courts.

Creating an Effective Parenting Plan

Given the dearth of direction from the Courts, which is understandable given the uncertainty around the Coronavirus, it becomes imperative for attorneys to work diligently in crafting Parenting Plans that anticipate such uncertainty.

An important goal in drafting Parenting Plans is to address the best interests of minor children which includes the child’s safety. Now that we have seen the effects of the global pandemic on parenting issues, it may be important to add a provision in our Parenting Plans that address a pandemic, natural disaster or other catastrophic event that may affect the public safety. It should ensure the safety of their children which includes the children’s physical, psychological and emotional wellbeing. For example, in the event there is an option between in-person school versus virtual school, which will the parents choose. In making that determination, it might be helpful to factor in whether the child has a medical issue, whether there is a vulnerable adult at the child’s home, continued, next page

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whether one parent has the ability to participate and assist the child in virtual schooling, etc. Other provisions should provide for travel restrictions in the event of a pandemic or natural disaster, and whether there needs to be mutual agreement between the parties prior to travel, or whether the parties shall follow governmental agencies as guidelines to determine limitations on travel. Other helpful provisions may address the requirement of communication with the other parent in the event of a pandemic or natural disaster, such as the requirement to monitor the health of the parents and the child and update the other parent in the event of a potential exposure to the virus. Another suggestion would be to create a list of people who the children will be permitted to have in-person contact with in the event of a pandemic or other wide-spread health related disaster. There is no magical language to protect both parties in crafting a “pandemic provision” in a parenting plan, but a suggestion might be to draw upon local Administrative Orders and upon the policy of Florida for guidance. Because we know what the Courts see as “in the child’s best interest”, the parenting plan can address the same. Some suggested language might be as follows:

“The parties recognize that outside forces, such as a natural disaster or a global pandemic, may impact the day-to-day time-sharing that their children enjoy with each of them. In the event of such a circumstance, the parties agree that they may be required to temporarily alter the time-sharing schedule to ensure the safety and well-being of the minor child. In considering what type of alterations might need to be made to the time-sharing schedule, the parties shall consider the following:

1) Maintaining the status quo of time-sharing schedule, if possible.
2) The physical safety of the minor child.
3) Preserving sibling relationships, including half-siblings, and step-siblings.
4) Maintaining consistent access to schooling for the minor child, if age appropriate and possible.
5) Alleviating the minor child’s worries and fears about the natural disaster or other national or worldwide situation; and
6) Creating opportunities for frequent and continuing contact with both parents if the regular time-sharing schedule must be altered. Frequent and continuing contact includes meaningful access to the parent through all means possible, including telephone, video, or other electronic contact.”

Although it was hard to see it coming, the pandemic has brought to light that there are other catastrophic events that may happen that can affect the parties’ time-sharing, such as hurricanes. Hurricanes can affect us from as short a period -of -time as a day, to several weeks or months. Living in Florida, it would seem appropriate for parenting plans to include provisions which contemplate what happens in the event of a hurricane, pandemic or other natural disaster. Just as the pandemic has affected timesharing and schooling, a hurricane can also affect those types of issues, although usually for a shorter time- period. In addressing a hurricane, a suggestion may be to provide for what happens as a hurricane progresses; for example, if we are in a hurricane watch, regular timesharing shall continue and in the event of a hurricane warning, the child shall remain with the parent currently exercising time-sharing until the hurricane warning passes. The practitioner may also want to include a provision addressing what happens if one parent loses power and the other parent has
power as a result of the storm. Should the circumstance arise where the parties must decide whether a child shall attend school in-person or virtually, having a provision that addresses this scenario would be helpful as well.

**A Solution in Plain Sight**

Although the COVID-19 pandemic has highlighted the need for more detail in parenting plans, there are a variety of parenting issues that may arise that we as attorneys cannot anticipate. In such cases, alternative dispute resolution may be a good option.

Many family law attorneys can usually predict which cases will become highly litigious and result in significant court time with little resolution or satisfaction to the parties. They also know how difficult it is to obtain immediate hearings to obtain orders on urgent and emergency motions. And, given how trying and difficult these types of highly litigious cases are, it may be appropriate for counsel to consider putting in place a professional who can act with immediacy to help the parties reach a resolution on their time sharing or other parenting plan-related issues. Parenting Coordination, as authorized in Fla. Stat. 61.125(2) provides

> “a child-focused alternative dispute resolution process whereby a parenting coordinator assists the parents in creating or implementing a parenting plan by facilitating the resolution of disputes between the parents by providing education, making recommendations, and, with the prior approval of the parents and the court, making limited decisions within the scope of the court’s order of referral.”

For highly litigious cases, it may serve both the parties’ and the minor children’s best interests
Co-Parenting During a Natural Disaster or Pandemic
CONTINUED, FROM PAGE 35

for the parties to put into place a Parenting Coordinator in order to assist them in future limited decision-making, particularly in the face of public health and safety concerns. Parenting Coordinators are trained in both law and in alternative dispute resolution tools. When empowered by the Court, they can make short-term decisions in the best interest of minor children. These decisions, depending on the parties’ agreement or Court Order, can be implemented by the Parenting Coordinator without the need to return to Court, saving the parties significant time and allowing attorneys to feel confident knowing that their clients are seeking effective resolution to meet their immediate legal needs.

Conclusion

The COVID-19 pandemic has been a challenging time for many people and has brought to light uncertainty within the legal system and our parenting plans. It has shown us that there are some parents who are using the global pandemic as a sword to cut into the other parents’ time-sharing with minor children, and are not considering the true cost of removing a child from a parent without notice or explanation to that child. It has also shown us how we can improve our parenting plans and use additional resources to assist our clients in the event of a catastrophic event.

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Rebecca Amster Cantor, Esq., M.S. has practiced in the field of Family Law in and around South Florida for the past 20 years. With an undergraduate degree from Cornell University in Human Development and Family Studies, as well as being dually-disciplined as an attorney and as a therapist, Rebecca’s practice is limited entirely to Guardian ad litem, Parent Coordination, and other similar work in cases before the Family Law Bench. An educator for the 11th Judicial Circuit Family Bench Lunch and Learn Series, for the Cuban American Bar Association, and the Florida Association of Family and Conciliation Courts, Rebecca’s work-focus and greatest interest has always been in serving the best interests of children in family court. When not working, Rebecca can be found running 5k’s, 10k’s, half and full marathons in the great state of Florida, often-times at Walt Disney World.

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2020 has brought lots of changes, good and bad, to all of us. For years, most of us have enjoyed the consistency of having the same familiar Florida Family Law Rules of Procedure. We have developed helpful cheat sheets and forms for clients to ease the burden of gathering the required mandatory disclosures and have well set procedures for deadlines within our practices. As with most things, change is often needed to modernize, update and give consideration to the ever changing landscape of families and their needs. That time has come for Florida Family Law Rules of Procedure.

Changes to rules and the adoption of forms is often a long process. These changes were proposed by the Florida Bar Family Law Rules and Forms Committee. The proposed changes have been through two comment periods, including the one allowed pursuant to the Florida Supreme Court. The Family Law Section Rules and Forms Committee provided comments which were considered and resulted in some changes. The formalized end product is one that has been vetted and poured over by numerous family lawyers. It has hopefully resulted in improvements that will benefit families and the practice of family law.

On November 12, 2020, the Florida Supreme Court approved extensive updates to the Florida Family Law Rules of Procedure and adopted both updates and new forms. All of these changes will be effective on January 1, 2021. These changes can certainly be viewed as a modernization of the Family Law Rules of Procedure.

Many of the changes expand the type and amount of documents to be produced as a part of mandatory disclosures, but others provide changes that will create clarification or consistency with the Florida Civil Procedure Rules. It is noted that since March 16, 2017, Florida’s Family Law Rules of Procedure have been stand-alone rules. Despite that fact, the rules are consistent with the Civil Procedure Rules.

This article is an overview, but it is not an exhaustive recitation of the changes. Family Law Practitioners should read the rules in full and be familiar with them in their practices. Failure to adhere to these rules, particularly in the area of mandatory disclosures, could result in, at a minimum, embarrassment, but potentially sanctions or malpractice. The major changes are discussed herein, but this article does not include all changes, particularly the minor changes or purely clerical changes.

**Florida Family Law Rule of Procedure 12.060**

Changes to the language were made in Family Law Rule of Procedure 12.060 to “harmonize” the rule with Florida Rule of Civil
Procedure 1.060. The new rule now requires that a case be dismissed if the service charge for a change of venue is not paid by the party who commenced the action within thirty (30) days. In the past, the language read that the case "may" be dismissed; however, that wording was changed to "must".

**Florida Family Law Rule of Procedure 12.285**

Rule 12.285 was originally adopted in 1995 with the hope that early production of documents would minimize litigation. This is the fifth amendment of the rule, and is the largest overall.

The biggest changes occurred within Florida Family Law Rule 12.285, Mandatory Disclosures. The rules were not only updated, but also revised to provide clarity and greater specificity as to what is required to be produced. The intent, as stated by the Florida Supreme Court, was to create a better understanding of the parties’ finances and increase fairness and disclosure. The changes include not only an expansion of the documents that must be produced, but also expand some of the time periods for which documents must be produced in certain areas.

Practitioners should be careful to note the changes in timelines for production of documents, including prior to a temporary needs hearing. Previously, a party requesting temporary relief was required to file required documents with the notice of hearing. The new rule requires that either party seeking relief file the required documents at least ten days prior to the temporary financial hearing unless previously served. If a party is not requesting relief, they are still required to serve the required documents at least five days prior to the hearing, unless already served. Sanctions for failure to produce remain the same and should be noted. The failure to timely produce items could result in your not being able to admit them into evidence, unless good cause is shown. A savvy practitioner will certainly be aware of this rule and willing to move to exclude vital evidence if not provided timely. This can be especially damaging at final or temporary hearings wherein your client is requesting financial relief.

In most cases, the amount of production has expanded. For example, paystubs are now required to be produced for the past six months versus the past three months. Throughout the rule, the time period for production is now clearly designated as through the date of compliance with the rule. For example, paystubs produced on July 1st would now be produced from January 1st to June 30th.

There are a number of expansions in production which will certainly benefit the parties. The requirement to provide tax returns now requires the production of all accompanying documents to the return, W2s, K-1, 1099s and other schedules. This information will expand upon the understanding of the parties’ taxes.

Parties are now required to file supporting documents with their Financial Affidavits; however, this is limited to only those documents which support the numbers used for determining income and the value of assets and debts. Many of these items will likely be produced in the normal course of mandatory disclosures, but practitioners will be a need to ensure that the values in those areas of the Financial Affidavit all have supporting documentation. What is unclear from this change is whether the supporting items for income should include support for the deductions in determining income. While the rule is rather general and uses the term “income,” it would certainly benefit the parties and be the best practice to produce the health
insurance breakdown and other items that would be necessary to calculate net income and/or child support.

In addition to the rule changes requiring documents to be produced in support of the Financial Affidavit, the forms themselves were also revised to remove the notary blocks. Parties must still sign under oath and assert that the document is truthful; however, the need for a notary is no longer required.

Parties are now required to provide all canceled checks for any account, including brokerage accounts, for which they have check-writing privileges. The intent, as set out in the rule, is so that the payee and purpose of each check can be seen. This can be rather burdensome; however, most canceled checks are now available online to the parties.

In an update to the current times, parties are now required to produce documentation related to virtual currency. Virtual currency is defined under the rule as “...a digital representation of value that functions as a medium of exchange, a unit of account, and/or a store of value”. Florida Family Law Rule of Procedure 12.285(d)(11). Twelve months of statements are required for any item owned during that time and a summary of currently owned items.

Parties are also required to produce all affidavits of non-paternity or judgments of disestablishment of paternity for any minor or dependent children which were born or conceived during the marriage. This change is clearly one that addresses the modern trend of untraditional families.

Although often requested by parties in discovery, the new mandatory disclosure rules require the parties to produce a credit report prepared or used in the past twenty-four months. This should assist both attorneys and litigants in determining if there are unknown liabilities which need to be addressed. It further may benefit party’s in the long run on issues involving damage to their credit from the failure to a spouse to pay certain debts held in their name or jointly.

To assist practitioners, two checklists have been provided at the end of this article; however, attorneys should be familiar with the rules and requirements for mandatory disclosures and carefully review the new rules.

Florida Family Law Rule of Procedure 12.350

Minimal changes were made to the requirements for the production of documents. Added to the rule was a requirement to file a notice of the documents produced pursuant to Rule of Judicial Administration 2.425. The documents themselves are not required to be filed with the court; however, notice of what was provided now is specifically required.

Florida Family Law Rule of Procedure 12.491

Rule 12.491 specifically deals with child support enforcement. The changes made primarily impact the notice required for hearings set before a child support hearing officer. This includes specific language which must be included in the notice and a requirement that the notice indicate whether the proceeding will be recorded or if a court reporter was present. It further adds language, consistent with that to General Magistrates, that the order provide if the hearing was recorded and/or a court reporter present. The Notice of Hearing forms for these cases was also updated to include this language.

Changes to the Family Law Forms

A number of the family law forms were updated as a part of the most recent changes. This includes adding in e-service and e-filing selection and removing the notary block from a number of documents with the intent to increase self-represented litigants access to the
Rules and Forms Update
CONTINUED, FROM PAGE 39

Courts. This includes removing the notary block on the following forms:
- Financial Affidavits (Short and Long)
- Affidavits of Diligent Search and/or Inquiry
- Standard Family Law Interrogatories (Original, Enforcement and Modification Proceedings)
- Certificate of Compliance with Mandatory Disclosures

While the requirement for a notary has been removed, each of these documents still states that it is being signed under penalty of perjury and that the facts stated within the document are true.

The forms were also updated to remove the terms “Husband” and “Wife”. Those terms have now been replaced with “Petitioner” and “Respondent” making them gender-neutral, in keeping with modern times and the changes to family structure.

Several new forms have been adopted which should help both the self-represented litigant and attorneys in preparing cases. This includes the new Petition for Grandparent Visitation and Order form. These forms are consistent with Florida Statutes Section 752.011 adopted in 2019.

The new forms may be located at https://www.flcourts.org/Resources-Services/Court Improvement/Family-Courts/Family-Law-Forms.

Thank you to all the 2019-2020 Family Law Rules and Forms Committee Members who assisted with the Family Law Section’s review of the proposed rules and forms and to the Florida Bar Family Law Rules Committee’s work in drafting and proposing these changes.

Special thanks to Aaron J. Irving, Esq., and Joel M. Weiner, Esq. for their assistance in reviewing and editing the charts provided with this article.

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MD Chart and Temp Relief Checklist follows.
<table>
<thead>
<tr>
<th>Mandatory Productions for Initial or Supplemental Proceedings</th>
<th>Date Provided:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Financial Affidavit</td>
<td></td>
</tr>
<tr>
<td>All documents that support the income, asset and liabilities figures entered into the Financial Affidavit *</td>
<td></td>
</tr>
<tr>
<td>Complete Federal and State Personal income tax returns, gift tax returns and foreign tax returns for past three years</td>
<td></td>
</tr>
<tr>
<td>If tax returns have not been filed for any of the past three years, the W2, 1099 and K-1 for that year should be filed in lieu of the return</td>
<td></td>
</tr>
<tr>
<td>All W2, 1099, K-1 and accompanying schedules and work sheets compromising the tax returns</td>
<td></td>
</tr>
<tr>
<td>Paystubs for six months immediately prior to compliance with disclosures</td>
<td></td>
</tr>
<tr>
<td>If no paystubs, a statement by the producing party identifying the amount and source of all income for the past six months</td>
<td></td>
</tr>
<tr>
<td>All loan applications, financial statements, credit reports or other form of financial disclosures, including financial forms, prepared or used within 24 months</td>
<td></td>
</tr>
<tr>
<td>All deeds evidencing any ownership in property held at any time in the last three years</td>
<td></td>
</tr>
<tr>
<td>All promissory notes or other documents evidencing money owe to either party at any time in the last 24 months **</td>
<td></td>
</tr>
<tr>
<td>All periodic statements for the past 12 months for all checking accounts and all other accounts**</td>
<td></td>
</tr>
<tr>
<td>All brokerage account statements held by either party within the last twelve months **</td>
<td></td>
</tr>
<tr>
<td>Copies of canceled checks and registers, whether written or electronically maintained, for any account with check writing privileges</td>
<td></td>
</tr>
<tr>
<td>Most recent statement and statements for the past 12 months for any profit sharing, retirement, deferred compensation or pension plan ***</td>
<td></td>
</tr>
<tr>
<td>The summary plan description for any retirement, profit sharing or pension plan ***</td>
<td></td>
</tr>
<tr>
<td>Most recent statement and statement for the past twelve months for virtual currency transactions **</td>
<td></td>
</tr>
<tr>
<td>A listing of all current holding of virtual currency</td>
<td></td>
</tr>
<tr>
<td>Declarations page: the last periodic statements for the past twelve months and the certificate for all life insurance policies insuring the party’s life, life of the party’s spouse, whether group or otherwise</td>
<td></td>
</tr>
<tr>
<td>All current health and dental insurance cars covering either party and/or their dependent children</td>
<td></td>
</tr>
<tr>
<td>Corporate, partnership, and trust tax returns for the last 3 tax years if the party has an ownership interest</td>
<td></td>
</tr>
<tr>
<td>All promissory notes evidencing a party’s indebtedness for the last 24 months, whether since paid or not</td>
<td></td>
</tr>
<tr>
<td>Credit card and charge account statements and other records showing the party’s indebtedness as of the date of the filing of the action and for the last 24 months</td>
<td></td>
</tr>
<tr>
<td>All present lease agreements **</td>
<td></td>
</tr>
<tr>
<td>All written premarital or marital agreements entered into by the parties during or before the marriage</td>
<td></td>
</tr>
<tr>
<td>All affidavits and declarations of non-paternity or judgments of disestablishment of paternity for any minor or dependent children born or conceived during the marriage</td>
<td></td>
</tr>
<tr>
<td>In modification proceedings: any written agreement entered into between the parties since the order to be modified was entered</td>
<td></td>
</tr>
<tr>
<td>All documents support the producing party’s claim that an asset or liability is non marital, for enhancement or appreciation of non-marital property or for an unequal distribution of marital property. These documents should be produced for the time period from the date of acquisition of the asset or debt to the date of production or from the date of marriage, if a premarital acquisition</td>
<td></td>
</tr>
<tr>
<td>Any Court orders directing a party to pay child or spousal support</td>
<td></td>
</tr>
</tbody>
</table>

*Note that Financial Affidavits should be served with any petition for child support or modification of child support pursuant to Florida Statute Section 61.30(14)

If an amended Financial Affidavit is filed, the subsequently discovered or acquired documents support the amendments to the Financial Affidavit must be provided

These items should be updated if a material change occurs in their financial status per Florida Family Law Rule Of Procedure 12.295(f)

Sanctions for failure to produce within the required time period, in violation of a pre-trial order or before a non-final hearing, can result in these items being non admissible at the hearing unless good cause found for the delay. Florida Family Law Rule 12.285(g)

** These items include those held in the name of the person, individually or jointly, in the party’s name as trustee or guardian for a party or a minor or an adult dependent child of both parties, or in someone else’s name on the party’s behalf

*** Required for any item in which the party is a participant or an alternate payee receiving payments
<table>
<thead>
<tr>
<th>Mandatory Disclosures for Temporary Financial Relief</th>
<th>Date Provided:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Must produce within 45 days of service or within any time consistent with an extension agreed upon by the parties or court ordered</td>
<td></td>
</tr>
<tr>
<td>If not previously provided these items must be served by any party seeking relief 10 days prior to the hearing on temporary financial relief. If responding party is not seeking relief must provided five days prior to the hearing</td>
<td></td>
</tr>
<tr>
<td>These items should be updated if a material change occurs in their financial status per Florida Family Law Rule Of Procedure 12.295(f)</td>
<td></td>
</tr>
<tr>
<td>Sanctions for failure to produce within the required time period can result in these items being non admissible at the hearing unless good cause found for the delay. Florida Family Law Rule 12.285(g)</td>
<td></td>
</tr>
<tr>
<td>Financial Affidavit (Cannot be waived and must also be filed with the Court. Parties should utilize the correct form based upon whether their income is $50,000 and above or $50,000 and less)</td>
<td></td>
</tr>
<tr>
<td>All complete Federal and personal income tax returns, gift tax returns and foreign tax returns for 3 years with attachments</td>
<td></td>
</tr>
<tr>
<td>If no tax return, a transcript may be filed as provided by IRS Form 4506T</td>
<td></td>
</tr>
<tr>
<td>IRS Forms W-2,1099 and K-1 for the past two years if no taxes filed for those years</td>
<td></td>
</tr>
<tr>
<td>Paystubs for six months immediately prior to disclosure</td>
<td></td>
</tr>
<tr>
<td>Time periods for production are from the date of disclosure</td>
<td></td>
</tr>
</tbody>
</table>
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Our guest editor has proffered the title *Opportunities for Family Law Problem Solving in This Time of Pandemic* and she has invited various experts to offer “practical problem-solving ideas … to apply … to help you and your clients navigate the stressful, uncharted waters we find ourselves in at this unprecedented time”. This article is intended to help relieve the stress attendant in the conduct of a social investigation.

Consider the following, not uncommon (vexing, stressful, time wasting, expensive) scenario:

Psychologist Iman X. Pert is the agreed expert asked to conduct a social investigation in the divorce of Bob Father and Jane Mother. They have two children, ages 4 and 8, and are represented by competent counsel (Sara Bravehart for Mother, and Dan Darling for Father).

Dr. Pert is a well-respected, experienced, often referred to, child psychologist in the local circuit who has done a very complete evaluation. He has been subpoenaed by Mother’s counsel and the subpoena includes a request that he bring with him, and have available for inspection, his entire file.

Dr. Pert appears for the deposition with his file in tow (three binders of documents: case notes, collateral interview notes, filings of court documents submitted to him by counsel for review, and testing results of the parents) – so far so good, then:

When asked to pass his file along the conference table for review by Mother’s counsel, and her expert consultant Dr. Pert declines citing (i) both privilege (Father’s, although his attorney Mr. Darling has not asserted any privilege) and confidentiality concerns regarding the testing materials, along with (ii) reference to a (outdated and superseded) Florida Administrative Code, and finally, (iii) that without a court order he cannot (will not?) release any records and then only to a designated psychologist licensed under F.S. 490.

Angered and frustrated Ms. Bravehart files a motion with the court for the release of the records which, after much expense, after the passage of time, and after paying Dr. Pert’s hourly fee receives the requested records EXCEPT any reference to Father’s testing, or Father’s communication with Dr. Pert, which are redacted in broad bold black felt tip pen ink.

My observation as a child, family, and forensic psychologist is that pandemic or otherwise the foregoing scenario reflects two recurring, challenging, problems family lawyers encounter when examining psychological testimony which this article addresses:

(i) “What are the rules or standards governing the conduct of psychological evaluations for the courts – and does the evaluation report I have been handed comport with those standards, or not?” and

(ii) “Now that I have the evaluation report (or court ordered therapy is underway) how do I obtain (or protect) access to the records?”
What do psychologists do in family court?:

Psychologists are frequently called upon (i) to evaluate the mental status of a parent alleged to suffer from some emotional impairment (e.g., depression) or condition alleged to endanger the child (e.g., substance abuse), or (ii) to evaluate the status of a child with special needs (e.g., ADHD, autism) in order to make recommendations as to treatment and time sharing options, or more generally (iii) to conduct an evaluation to offer recommendations for timesharing (i.e., a social investigation).

The “examination of persons” is consistent with the civil rule of the same name and calls for, in part, for there to be “good cause shown” for the motion which must also include the “time, place and scope” of the evaluation.

The rule regarding the “examination of the child” requires in part that “Any order entered under this rule shall specify the issues to be addressed by the expert” and allows for interviews of the child (BUT NOT apparently of the parents) to be recorded.

In contrast to the rules governing the evaluation of persons or of a minor child the report in a social investigation goes directly to the court.

While the focus of each of the examinations may differ (at least by a plain reading of the title) all of the evaluations address in some form or other “parenting competency” as it relates to the best interest of the minor child.

In the course of the evaluation (or in providing treatment) records are generated – contemporaneous recording of meetings with the parents, the children, the parents and children together, collateral interviews (e.g., teachers, care takers, relatives) are made, testing is administered, scored, and interpreted, and there is correspondence with counsel.

Psychologists – treating therapists especially, but also court appointed evaluators (as in the scenario above) – are often reluctant to – if not adamant about –release records citing among many rationales (i) outdated Florida Administrative Code rules, (ii) the American Psychological Association’s Code of Ethics, (iii) misunderstood interpretations of Federal law (i.e., HIPPA), (iv) copyright law and contractual obligations, and (v) the misunderstood application of privilege and confidentiality.

This refusal by psychologists to release records eventuates in the additional time and expense of going before the court to obtain records that are reasonably expected to be available for discovery in a court ordered or mutually agreed upon evaluation.

To ease the stress borne out of the frustration lawyers may have with psychologists (and, in truth, psychologists may have with lawyers) here is basic information that may serve to avoid the problems (and frustration and expense) described in the opening scenario.

What is a “reasonable psychologist”?:

Florida statute 490 is the statute under which psychologists are licensed, and enabled under the statute is a Board of Psychology that promulgates rules (Administrative Code Rules) that govern various aspects of psychologists’ professional behavior (e.g., standards for records, and record keeping requirements).

Florida Statute 61.122 – referred to by my colleagues as either the “reasonable psychologist statute” or the “psychologist risk management statute” – provides that “a psychologist appointed by the court to develop a parenting plan recommendation…. is presumed to be acting in good faith if the psychologist’s recommendation has been reached under standards that a reasonable psychologist would use ….” (Emphasis added)

The analogous statutory provision, more globally encompassing, is Florida Statute

continued, next page
490.009(1)(r) which calls for discipline for a psychologist found to be
“Failing to meet the minimum standards of performance in professional activities when measured against generally prevailing peer performance, including the undertaking of activities for which the licensee is not qualified by training or experience”.

The standards for evaluations are a roadmap to understanding (and if necessary challenging) psychologists’ recommendations.

The standards for evaluation are not defined under either F.S. 61.122, nor are they defined under F.S. 490.009.

Nevertheless the prevailing standards by experienced and “reasonable” psychologists would be those promulgated by the professional associations that have authorized task forces in their specialty to create standards, the American Psychological Association (APA), the Association of Family and Conciliation Courts (AFCC), and the American Academy of Child and Adolescent Psychiatry (AACAP).

Each of these organizations have published numerous additional standards for the evaluation of various sub-populations, or populations with special needs or conditions, including, but certainly not limited to the evaluation of persons with disabilities, of culturally diverse populations, or members of the LBGT community.

Of crucial importance in any evaluation (family law or otherwise) is the screening for domestic violence, for which standards have recently been introduced by the AFCC and the Battered Women’s Justice Project (at afccnet.org).

The rules and the law about records and records release.

My colleague Bruce Borkosky, and his co-author attorney Mark Thomas, have published an excellent article concerning the release of mental health records in the family court system, providing everything you wanted to know about the psychotherapy privilege in (Florida) cases of divorce and child custody, and answering the question “When are therapy records permitted or required to be introduced as evidence?”

The authors draw attention to the rules applying to the disclosure of mental health records in the/ to the legal system, writing

Disclosures of mental health records to the legal system are easily confused with disclosures to other parties because they have overlapping, but distinct, rules for disclosure. HIPAA does not apply to matters of privilege. Privilege requests are, instead, governed by F.S. §90.503, regulating professions, and case law. A full definition of privilege is beyond the scope of this article, but the general rule of law is “everyone testifies,” whether via submittal of records or in-person testimony. Some persons are permitted not to testify — a privilege — because legislatures have decided that some relationships are important to protect. Privilege is, thus, a partial derogation of the law. Privileges, however, are not absolute. Legislatures have enacted exceptions to privilege, and some circumstances void the privilege — a waiver. If either an exception or a waiver applies, it means that testimony is required” (Emphasis added)

Where psychotherapist patient records are concerned the case law on access to records in a timesharing evaluation – either by an evaluator, or upon motion of either party for the other parent’s therapy or psychiatric records is pretty clear – absent the occurrence of a “calamitous event”, such as an attempted suicide during the course of the litigation, prior, and current, records are off limits.

In the context of a court ordered evaluation the courts generally favor the protection of Social Investigation CONTINUED, FROM PAGE 45
patient psychotherapist privilege particularly when a “parent had agreed to submit to psychological examination, [the] non custodial parent and [the] court would be adequately apprised of parent’s present psychological condition”.

That said the records of a court ordered evaluation are NOT protected, privileged, or confidential.

A well written, complete court order helps direct the “reasonable psychologist” to asking (“investigating”) the questions of concern and allows for a simpler discovery process.

Knowing that the rules for examinations do not adequately address the release of records to anyone but other “qualified investigators”, and that psychologists will cite numerous reasons why records can’t be / won’t be released the writing of a comprehensive court order is the best ounce of protection against later pounds of problems.

When court orders do not address what shall be released to whom and when evaluators neglect to secure signed authorizations from both parents, obtaining the needed authorizations at the conclusion of the evaluation can be difficult and obtaining a Court Order can subject the litigants to the needless expense of court appearances by both attorneys.

When one litigant is dissatisfied with the evaluator’s work, that litigant is likely to seek a thorough examination the evaluator’s methodology, data, and the nexus between the data gathered and the opinions expressed.

The litigant who wants the evaluator’s work scrutinized will sign any authorization form that is presented by the evaluator. The litigant who is pleased with the evaluator’s expressed opinions is motivated to obstruct any examination of the evaluator’s work and, as a result, may decline to sign a statement authorizing the release of the entire file.

Thus, by attorneys failing have a comprehensive, detailed order, and by psychologists failing to inform both parties and their counsel about the methods, procedures, and policies in the evaluation process, and failing to secure authorizations from both parties in advance, the evaluator and the attorney create a knot the untangling of which can be both time consuming and expensive.

Thank you for reading, and above all stay safe.

**Dr. Jerome Poliacoff** is a child, adolescent, adult and family and forensic psychologist licensed in the state of Florida.

He completed pre and post doctoral internships and training at the Children’s Psychiatric Centers in Miami, Florida; he has served as a staff consultant to the Northwest Dade Community Mental Health Center; and was on the clinical staff of Charter Hospital of Miami where he served as co-director of an adult inpatient unit.

Frequently called as a consulting and testifying expert in both Family and Civil courts as an expert in cases involving discrimination and harassment claims in Federal employment law cases he has been admitted as an expert in the assessment and defense of tort claims for emotional damages in cases involving children, adolescents and adults, and appointed as a social investigator and or engaged as consultant in high conflict family law cases.

With the passage of the Collaborative Law Process Act (2016) Dr. Poliacoff is a child specialist and serves on the boards of the Collaborative Family Law Institute (CFLI) in Miami-Dade County, and on the board of the statewide Florida Academy of Collaborative Law Professionals (FACP). Dr. Poliacoff maintains a private practice in Coral Gables, Florida (and on zoom around the state) where his time is spent providing both clinical and forensic services.

continued, next page
for child custody evaluations in family law proceedings.

American Psychologist, 65(9), 863–867.

(a)(1) Examinations may include, but are not limited to, examinations involving physical or mental condition, employability or vocational testing, genetic testing, or any other type of examination related to a matter in controversy.

Rule 12-361. Examination of Minor Child

Rule 12-364. Social Investigation

12:363 (2) An examination under this rule is authorized only when the party submitting the request has good cause for the examination. At any hearing the party submitting the request has the burden of showing good cause.

(e) Written Study with Recommendations.

The investigator shall prepare a written study with recommendations regarding a parenting plan, including a written statement of facts found in the social investigation on which the recommendations are based. The written study with recommendations shall be furnished to the court and a copy provided to all parties of record by the investigator at least 30 days before any hearing at which the court is to consider the written study and recommendations, unless otherwise ordered by the court.


3. The evaluation focuses upon parenting attributes, the child’s psychological needs, and the resulting fit. Application .... The most useful and influential evaluations focus upon skills, deficits, values, and tendencies relevant to parenting attributes and a child’s psychological needs. Comparatively little weight is afforded to evaluations that offer a general personality assessment without attempting to place results in the appropriate context...(page 864).


The references in the footnotes are essential reading for the family lawyer requesting, reviewing, or challenging a psychological evaluation.

61.122 Parenting plan recommendation; presumption of psychologist’s good faith; prerequisite to parent’s filing suit; award of fees, costs, reimbursement.


See: https://www.flrules.org/gateway/ChapterHome.asp?Chapter=64B19-19

- The definition of records (64B19-19.002 Definitions)
- The requirements for the contents of a psychologist’s records (64B19-19.0025 Standards for Records)
- The conditions by which records may be released (64B19-19.005 Releasing Psychological Records).
- The psychologist’s obligation to maintain confidentiality (64B19-19.006 Confidentiality)


The descriptive document provided by the evaluator shall specify the intended uses of the information obtained during the evaluation, shall include a list of those to whom the evaluator will make the report available and the manner in which the report will be released, and shall confirm that evaluator policies governing the release of items in the case file will be in conformance with applicable laws and court rules. This information shall be provided to the litigants and to their attorneys in advance of the first scheduled session, so that litigants may obtain advice of counsel and be able to examine the document in an unhurried manner and in an atmosphere that is free of coercive influences.

24 Peisach v. Antuna, 539 So.2d 544 Fla.App. 3 Dist. 1989. See also: Atty. Ad Litem for D.K., 780 So. 2d at 310 (“We do not think that the patient/psychotherapist privilege should be overcome simply to satisfy the routine practice of the evaluator and psychologist.”).


26 An order that addresses (i) the questions to be answered in the evaluation, (ii) the nature of the court’s concern, (iii) the manner in which and to whom records may be released, (iv) adherence to the standards a reasonable psychologist would use.

27 See: AFCC Standards, 4.1 WRITTEN INFORMATION TO LITIGANTS

Child custody evaluators shall provide each litigant with written information outlining the evaluator’s policies, procedures and fees.

(a) Even when litigants are submitting to an evaluation in response to a directive from the court, evaluators shall provide detailed written information concerning their policies, procedures, and fees. ....

28 The interested reader is invited to write to Dr. Poliacoff (jpolicoff@gmail.com) and request a copy of a model court order for social investigations that meets the standards that a ‘reasonable psychologist’ uses.
LAWYERS DON’T NEED TO TRACK EVERY MINUTE OF EVERY DAY, THANKS TO ME.

Watch all of the videos at www.smokeball.com/Florida
The COVID pandemic has been a devastating time for many people, as we are forced to juggle uninvited change, powerlessness, and a dose of daily anxiety. While many Floridians who are feeling the effects of the pandemic have the ability to effectively manage the unknown, addicts and alcoholics significantly struggle with this reality.

Of course the problem of addiction is nothing new in Florida. But the COVID pandemic has significantly exacerbated the problem. Florida’s family law practitioners can play a critical role in helping to safeguard this high risk population. Family lawyers are also in a unique position to help redirect members of this at risk population toward a healthier lifestyle.

First, it is critical to understand the challenges this population faces. As many addicts and alcoholics live with high levels of fear and panic, COVID is an added stressor that causes worry, concern and unbearable levels of anxiety. This routinely leads to unhealthy coping skills, many of which can be life-threatening and illegal, including increased use, overdose and potential suicide. This population is also characterized by the inability to tolerate high levels of stress, leading to further harmful and risky behaviors that frequently surface in legal proceedings such as divorce, domestic violence, drug trafficking, possession, DUI and prostitution.

Overall, family lawyers can play an important role in counseling at risk clients to obtain professional help in the form of counseling, therapy, psychiatric services and other support services. Legal issues can be a "rock bottom" for your client. You can try to use this critical juncture to encourage them to discontinue their life threatening and dangerous behaviors and commit to change. Without consequences, why would anyone be motivated to discontinue what they are doing?

Below are some of the practical steps you can take if you are retained to represent someone who appears to have a problem with alcohol or other substances. Your first step is to identify a licensed therapist specialized in addiction who can assess your client’s needs. Ideally, you should identify a practitioner who is certified through the state of Florida as a CAP (Certified Addictions Professional) or a MCAP (Master level Certified Addictions Professional). Many courts maintain approved lists of practitioners, as well as probation offices, and many driving schools. Additionally, you can check in your local area for a licensed Masters (LMFT, LMHC, LCSW) or Doctorate level (PhD or PsyD) clinician experienced in conducting assessments for substance use disorders. If the individual you are representing presents with an alcohol or drug problem, it would be recommended to have your client meet with an MCAP (Master’s level Certified Addictions Professional) for assessment and substance abuse counseling. You can use this professional’s clinical

continued, next page
impression formulated by the assessment for clinical recommendations.

The assessment process begins when your client meets with the licensed therapist to complete a thorough assessment. Ideally, the comprehensive assessment that your client will obtain at this early stage will assess their biological, psychological and sociological areas of their life, in addition to a detailed history of their substance use. Based on this assessment, the practitioner can formulate a diagnosis. Based on the diagnosis, the practitioner may refer your client to medical detox, inpatient residential treatment, a partial hospitalization program or an intensive outpatient (IOP) program to obtain help. The evaluator may also refer the client to a Psychiatrist or Psychiatric Nurse Practitioner for a Psychiatric Evaluation. During this evaluation a client will be assessed for psychotropic medications to supplement the Psychotherapy, as well as offer a second clinical recommendation to a particular level of care, which could include residential, PHP, IOP, OP, psychiatric care, medication management, 12 step meetings, sponsorship and various support groups. Some additional referrals which may be recommended would include: Soberlink (a handheld breathalyzer which tests clients on a schedule or at random, several times per day, and reports the results to a doctor, therapist, family member or loved one). Also, there are many support groups to choose from which provide an additional layer of support such as Alcoholics Anonymous, Narcotics Anonymous, Sex and Love Addicts Anonymous, Cocaine Anonymous, Overeaters Anonymous, Smart Recovery, Celebrate Recovery and Dharma Recovery (formerly known as Refuge recovery).

Depending on the outcome of the evaluation process, as a family lawyer, you may be in a unique position to redirect an extremely high risk client away from life threatening and dangerous behaviors using legal procedures such as:

- ☐ Baker Act²
- ☐ Marchman Act³
- ☐ Guardianship⁴
- ☐ Court Ordered Substance Abuse Assessments
- ☐ Court Ordered Mental Health Assessments
- ☐ Court Ordered Therapy

Although these legal proceedings may seem “punitive” they are actually critical life saving interventions that can provide your highest risk clients with the best chance to secure their safety and give them a necessary push toward change. Also, important mental health services are available through these legal proceedings, promptly and affordably. As an attorney serving this population, it is important to be aware of this option to obtain timely services and treatment.

As a family lawyer, you may be in a unique position to encourage early intervention that could improve your client’s options in a future family law dispute. For example, a case where a couple may be struggling with the quality of their marriage due to one partner’s excessive drinking, pill use or inability to remain sober would be an example of a couple who could benefit from a clinical assessment and/or therapy prior to beginning divorce proceedings. Additionally, if a mother or father is fighting for custody of their son or daughter due to a separation or divorce, it would be helpful to have the parent stable and assessed for substance use if this has ever been a problem in their life. When a client is living a life which is filled with daily drug use or alcoholism, that person’s family lawyer may be one of the few people in a position to influence the addict’s behavior, especially when he or she is going through a divorce or other significant family dispute.

Mind of an Addict
CONTINUED, FROM PAGE 51
It is important for the legal community to recognize the challenges of representing this sensitive population. It is also important for family lawyers to recognize the crucial role they can play in reaching this high risk population at a time when they may be more receptive to treatment. As a Master Level Certified Addictions Professional, I have seen firsthand that when addicts and alcoholics experience serious legal consequences for their poor judgment and behaviors, including in their family law proceedings, they can be uniquely receptive to learning from their mistakes. A legal proceeding such as a divorce, custody case, or domestic violence arrest can be the pivotal event which motivates your client to redirect the course of their life. As a Florida family lawyer, you can help encourage that crucial redirection.

Amy Effman is a Masters level Certified Addictions Professional (MCAP) and a Licensed Marriage and Family Therapist (LMFT) in Boca Raton, Florida. Specializing in the treatment of addiction and mental health, Amy has extensive experience working, directing and consulting for treatment centers in Florida, New York and Southern California. Amy has also worked with the Broward County Drug Courts, provided Substance Abuse Evaluations and Substance abuse counseling for Palm Beach County Probation, and provided Substance Abuse Assessments for accredited DUI driving schools. Her extensive clinical experience with high risk individuals in the legal system has included support to family law attorneys, criminal defense attorneys, and probate attorneys, as well as Guardians and Guardians Ad Litem. To learn more about Amy Effman LMFT, MCAP, please visit her website at www.mytherapistamy.com

Endnotes
1 Master Level Certified Addictions Professional
2 Florida Statutes Section 394.451 et seq.
3 Florida Statutes Section 397.301 et seq.
4 Florida Statutes Section 744.101 et seq.
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