Spring has arrived, and despite the COVID-19 pandemic, The Family Law Section of The Florida Bar has continued to have a very successful year. The Family Law Section will have our first socially distanced live event since the Certification Review Course held in January 2020. The Members of the Executive Council and the entire Family Law Section continue to work to make life better for Florida’s families. Our Legislation Committee, chaired by Jack Moring and Sheena Benjamin-Wise, has been very busy during this legislation session.

The Section, along with the American Academy of Matrimonial Lawyers, held a successful Certification Review Course in February 2021. I want to thank the Certification Review Committee and Susan Stafford for ensuring that over 1,650 people attended virtually. I know that we all hope in 2022 we can return to a live Review Course.

During the Certification Review Course, our own Publications Committee Chair, Sarah Sullivan, was awarded the Visionary Award for all she has done for Florida’s families.

As my term as Chair of the Family Law Section comes to an end, I want to thank the members of the Executive Council and all of the committee members for their hard work during the 2020-2021 bar year. They have given many hours of their time to help the Section achieve its goals. I also would be remiss if I did not thank the Past Chairs of the Section who were always available to give me guidance and support.

In closing I want to leave you with a quote from Maya Angelou: “People will forget what you said, people will forget what you did, but people will never forget how you made them feel.”
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As Covid-vaccinations increase, a new Bar Cycle approaches, and a sense of normality begins to return, I am once again amazed at what we collectively endured this past year. So many changes have happened in the span of a year and so much of our legal, professional, and social lives continue to change and be affected by the pandemic. The articles in this issue's Commentator consider how the legal system can catch up to ever-evolving technology, marketing, changes in family dynamics, and scientific phenomena. I’m sure many of you would agree that throughout all of the changes, the steadfastness of our community, our colleagues, and our families has been a constant source of comfort. We hope you enjoy the articles in this issue, as well as this issue's feature: families in family law.

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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Message from the Co-Chairs of the Publications Committee

By Anya Cintron Stern and Sarah Sullivan

Reflecting back to this time, last year, the practice of law is almost unrecognizable. Florida family law practitioners underwent dramatic change in how they gain clients, prepare cases, litigate and advise clients. With the guiding hand of our Chair, Doug Greenbaum, the Section has been able to turn those pandemic obstacles into opportunities. The Publications Committee has thrived. Krystine Cardona, Vice-Chair of Publications in charge of article submissions to the Florida Bar Journal, edited and submitted four articles accepted for publication by the journal as well as guest editing for the Commentator. She accomplished all of this while on bed rest and then as a first time mother to twin girls. She makes multi-tasking and crushing goals look easy. Amanda Tackenberg, Vice-Chair of Publications in charge of Commentator provided our readers with premium content for family law practitioners. The FAMESG editorial board, William “Trace” Norvell, Bernice Bird, and Cash Eaton, offered carefully curated “hot tips” in the form of FamSEG keeping readers up-to-date on important family law cases, rules, Section events, technology tips, and best practices. The publications committee Special thanks to Chair, Doug Greenbaum, for his leadership, fortitude, purpose, and direction. The transition out of the pandemic will take some time. But, with vaccinations readily available and courts reviewing reopening plans the new bar cycle provides us with plenty of hope and anticipation. July 1, 2021 marks the beginning of the new bar cycle. During our virtual annual meeting in June, the Section will welcome a new Executive Committee, new Executive Council members and new Committee Chairs. We are thrilled for what the future brings for the Family Law Section.

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The pandemic has shown the resiliency of family lawyers. Family lawyers rose to the occasion by transitioning to virtual practice, brainstorming innovative solutions to unfamiliar problems, and staying informed and connected through The Florida Bar Family Law Section. This year has proved that family lawyers truly can handle anything.

This issue includes a unique feature on Families in Family Law. It was an honor to be able to reach out to families across the state practicing together. Working with my Dad, Jerry Kornreich, has been one of the most rewarding experiences of my life – my admiration for his knowledge, sensitivity to clients, and professionalism is unending. My Mother, the late Judge Amy Karan, was the recipient of the Family Law Section’s Visionary Award in 2010, and her life’s work in protecting victims of domestic violence inspires me daily. To be able to follow in my parents’ footsteps is a source of pride. It was heartening that so many of the families I spoke with expressed similar love and veneration for one another.

Family lawyers deal with the most personal and difficult family situations: who better to address these situations than family firms who understand family dynamics? There is something so special about the unique mentorship offered by family to their family, and the lessons of one family being imparted to others. Through the feature, we hope to spotlight the many families in our profession who draw on their own experiences as family to help support families in need.

This issue also highlights the creativity of the family lawyers in our State who have bravely stepped up to offer their views on novel issues. Gratitude and appreciation to the authors of Issue 4: Marck Joseph, Esq., Steven Spann, Esq., Aaron Irving, Esq., Troy M. Farquar, Esq., Lauren Alperstein, Esq., Aimee Gross, Esq., Jerry Reiss and Jeffrey Thomas, Esq., for their contributions and hard work. Thank you to Chair Doug Greenbaum, the Chairs of the Publication Committee, Anya Cintron Stern, and Sarah Sullivan, Editor and friend Amanda Tackenberg, and the Section for entrusting me to guest edit this special Issue of the Commentator. I recommend volunteering to guest edit a future issue to any family lawyer interested in exploring new ideas and meeting brilliant family law thinkers around the State. To learn more about how you can guest edit a future issue, e-mail publications@familylawsection.org.

Wishing you all a speedy end of the pandemic and to see you in person again soon.
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2021 SuperLawyer Rising Star
Chapter 751, Florida Statutes, titled "Temporary Custody of Minor Children by Extended Family," was created to enable a child's extended family to petition the court for authority to care for a child when the child's parents are not fully able or are unwilling to provide adequate care. Chapter 751 recognizes that many minor children not only live with, but are also cared for by members of their extended family and are therefore not dependent children. However, these extended family members often lack the proper legal documentation that explains and defines their relationship to the child, and which sets out the parameters of their decision-making authority over the child. As a result, Chapter 751 was enacted in 1993 to provide a mechanism for extended family members to obtain legal decision-making authority over the minor family member. Thus, the Statute can serve as an alternative to dependency in situations where a child is at risk of becoming, or who is, a victim of abuse, abandonment, or neglect. The Statute also provides a mechanism for parents to legally delegate decision making authority over a child. The decision-making authority granted to an extended family member by the court is either premised on the parents' consent, or based on clear and convincing evidence that the parent is unfit.

Since its enactment Chapter 751 has been amended three times, the most recent amendment having gone into effect on July 1, 2020. The most recent changes to Chapter 751 and its application to relative custodial matters will be addressed in this article.

An extended family member who is granted decision making authority under Chapter 751 can exercise decision making authority over a minor child to promote their best interests in all aspects including:

a) “Consenting to all necessary and reasonable medical and dental care for the child, including nonemergency surgery and psychiatric care.

b) Securing copies of the child’s records, held by third parties, that are necessary for the care of the child, including, but not limited to:
   a. Medical, dental, and psychiatric records.
   b. Birth certificates and other records.
   c. Educational records.

c) Enroll the child in school and grant or withhold consent for a child to be tested or placed in special school programs, including exceptional education.

d) Do all other things necessary for the care of the child…” Fla. Stat. § 751.01 (2020).

Only certain individuals with familial relations to the child may petition the court for relief under Chapter 751. The 2020 amendment to
the chapter expands the class of individuals who may petition. An "extended family member" means any person(s) related to the child within the third-degree by blood or marriage, or a stepparent currently married to one of the child’s parents, and not currently involved in any related family law matter with a parent (i.e. dissolution, domestic violence). Fla. Stat. §751.011 (2020). The 2020 amendments to Chapter 751 added “fictive kin” to the class of persons who may petition the court. The term “fictive kin” is derived directly from the dependency statutes, Fla. Stat. §39.01 (2020) specifically. “[F]ictive kin,” means “a person unrelated by birth, marriage, or adoption who has an emotionally significant relationship, which possesses the characteristics of a family relationship, to a child...” Fla. Stat. §39.01(29) (2020).

An example of a "fictive kin" situation may be one like the following. The child’s mother and father are unmarried. The child’s father has never been involved in the child’s life. Instead, the child’s mother and her partner raise the child together for many years, but the two never marry. For all intents and purposes, the mother’s partner serves as a father figure to the child. Unfortunately, the child’s mother passes away and the mother’s former partner, and the child’s “father figure,” petitions for temporary relative custody under the guide of a “fictive kin.” The purpose of this amendment is to authorize someone who shares a close family-like relationship with the child to petition for their care despite not being a blood relative or step-parent as required under the former version of the statute. Before filing a petition pursuant to Chapter 751, one must first identify what sort of custodial arrangement is the most appropriate. Chapter 751 recognizes two separate custodial arrangements which have separate pleading requirements: temporary custody, which is exclusive to the parent’s custody and decision-making authority; or concurrent custody, which is comitant to the parent’s custody and decision-making authority. The type of custodial arrangement sought depends on the facts of the case and the best interest of the child. The custodial rights granted to an authorized petitioner under Chapter 751 derive based on the parent’s consent, or proof that the parent is unfit, discussed infra.

Third parties can neither intervene into an ongoing dispute between two parents nor can third parties petition simply to gain visitation/timesharing rights without certain conditions precedent being properly pled. Troxel v. Granville, 530 U.S. 57 (2000) (held a parent’s fundamental right to raise their child free of government intrusion may not be abridged absent a showing that the parent is unfit); see also, Richardson v. Richardson, 766 So. 2d 1036 (Fla. 2000) (held it unconstitutional to treat parents and grandparents alike by giving grandparents custody rights equal to those of a parent based solely on the best interest of the child without first demonstrating substantial harm to the child). cf., Chapter 752, Fla. Stat. (2020) (titled “Grandparental Visitation Rights,” which provide for “[a] grandparent of a... child whose parents are deceased, missing, or in a persistent vegetative state, or whose one parent is deceased, missing, or in a persistent vegetative state and whose other parent has been convicted of a felony or an offense of violence evincing behavior that poses a substantial threat of harm to the minor child’s health or welfare, may petition the court for court-ordered visitation with the grandchild under this section...”).

As a prerequisite to filing, certain jurisdictional...
requirements set forth in section 751.02, Florida Statutes must be met. Both custodial arrangements require the petitioner to be caring for the child full-time in the role of a substitute parent and have the child presently living with them, or, have the parent’s signed and notarized consent. Fla. Stat. §751.02(1) (2020). Perhaps expanding the class of petitioners in these cases, the Statute also authorizes an extended family member seeking concurrent custody to petition if they had physical custody of the child for at least 10 days within any 30 day period in the prior 12 months so long as that extended family member does not already have delegated legal authority by the parent to care for the child that grants the same powers that a Chapter 751 order would grant them, such as a Power of Attorney given by the parent. Fla. Stat. §751.02(2) (2020).

The petition also has several pleading requirements which, if not adequately plead, may result in procedural motions filed in opposition. First, each petition for either temporary or concurrent custody must be verified. Fla. Stat. §751.03 (2020). Both types of custody arrangements require the petitioner to include statements to the best of their knowledge and belief, regarding the following:

- The child’s name, date of birth, and current address, as well as his or her parent(s) address(es);
- The names and current addresses of the persons with whom the child has lived during the past 5 years as well as the places the child has lived during the past 5 years;
- Information concerning any custody proceedings in Florida or any other state;
- The petitioner’s residence, mailing address, and their relationship to the child;
- A statement that it is in the best interest of the child for the petitioner to have custody.

The petition must also include the following attachments if applicable:

- Any temporary or permanent orders for child support, the court entering the order, and the case number.
- Any temporary or permanent order for protection entered on behalf of or against either parent, the petitioner, or the child; the court entering the order, and the case number.

If the petitioner is seeking concurrent custody, the petitioner must additionally allege:

- The time periods during the last 12 months the child resided with the petitioner;
- The type of document, if any, provided by the parent or parents to enable the petitioner to act on behalf of the child;
- A statement regarding the services or actions the petitioner is unable to obtain or undertake without an order of concurrent custody; and
- Whether each parent has consented in writing to the entry of an order of concurrent custody.

The concurrent custody petition must also annex any consents or documents provided by the parents to assist the petitioner in obtaining services for the child to the petition. Fla. Stat. §751.03(8) (2020).

If the petitioner is seeking temporary custody, either the consent of the child’s parent(s) is required or the petitioner must specifically allege “the specific acts or omissions of the parents which demonstrate that the parents have abused, abandoned, or neglected the child as defined in chapter 39.” Fla. Stat. §751.03(g) (2020). The petitioner should also state the time period for which the petitioner is requesting temporary custody, including a statement of the reasons supporting the request. If a temporary custody order is entered after a finding that the parents are unfit, the newest amendments to the statute
authorize the court to establish reasonable conditions, which are in the best interests of the child, for transitioning the child back to the custody of the child’s parent or parents. Fla. Stat. §751.05(6) (2020). Therefore, the petitioner may include any other statements in their petition for temporary custody that are related to the best interest of the child, including, but not limited to, a reasonable plan for transitioning custody back to the parents. Fla. Stat. §751.03(14) (2020).

Notably, it is possible to have a situation arise where a combination petition is appropriate (i.e. a Petition for Temporary and Concurrent Custody). This situation is not a plead in the alternative; rather, it is a combination plea based on a certain set of facts. For example, a divorced couple have two minor children. The Former Wife relocates by consent to California with the youngest child. The older child remains in Florida. Because she is retired, the paternal grandmother is better equipped to care for the older child’s individualized needs because the Former Husband’s work schedule precludes him from attending to the child’s day-to-day needs. In this situation, the paternal grandmother may file a Petition for Temporary and Concurrent Custody of the older child because she is seeking temporary custody of the child to the exclusion of the Former Wife and concurrent custody comitant the Former Husband (Note: the petition will not request relief for the youngest child because the paternal grandmother is not seeking authority over her). The pleading should encompass the requirements supra, specifically stating that both parties consent to the arrangement, with both parties’ consents filed with the court. Given there is a related case by virtue of the couples’ divorce, the practitioner should file a Notice of Related Cases.

A petition under this chapter may likewise request monetary support for the child while in the care of the petitioner. This can be accomplished in the case itself or if child support had already been ordered in a related matter, the petitioner may seek an order redirecting the support to the petitioner while he or she cares for the child.

Once the case is ripe for consideration, an order may be entered granting or denying the petition. An order granting concurrent or temporary custody much include specific findings that custody is in the best interest of the child. For orders of concurrent custody, the order must expressly state that the grant of custody does not affect the ability of the child’s parent or parents to obtain physical custody of the child at any time, except that the court may approve provisions requested in the petition which are related to the best interest of the child, including a reasonable transition plan that provides for a return of custody back to the child’s parent or parents. The practitioner should note that an order for concurrent custody may not be granted if one or both parent’s object. This is because concurrent custody, by its very nature, does not award custody exclusive to the parent, but rather concurrent with them. Thus, by its very nature, concurrent custody proceedings do not consider parental fitness. In the event an objection is filed to a concurrent custody petition, the petitioner is afforded the opportunity to amend his or her pleading to convert it to a petition for temporary custody. Fla. Stat. §751.05 (2020).

An order granting a petition for temporary custody may be granted either by consent of the parent(s) or after a hearing based on one or both parent’s objections. The court shall grant a contested temporary custody petition only if it finds clear and convincing evidence of the parent being unfit, meaning that the parent has abused, abandoned or neglected the child as those terms are defined in section 39.01 Florida Statutes. Id.

The most significant change to Chapter 751 in the 2020 amendments includes the ability of the court to enter “[a]…reasonable transition plan…for a return of custody back to the child’s parent or parents…” Fla. Stat. §751.05(4)(a-b) (2020).
Temporary and Concurrent Custody
CONTINUED, FROM PAGE 13

As the title of Chapter 751 implies, neither concurrent nor temporary custody orders entered pursuant to this chapter are necessarily permanent. Either parent may reopen the case and petition the court for a modification or termination of the order. For a concurrent custody order, the court shall terminate said order upon a finding that either or both of the child’s parents object to the order, except that the court may require the parties to comply with provisions approved in the order which are related to a reasonable plan for transitioning custody before terminating the order. Fla. Stat. §751.05(7) (2020). For a temporary custody order, the court may modify or terminate said order if the parties consent, or if modification is in the best interests of the child except that the court may require the parties to comply with provisions approved in the order which are related to a reasonable plan for transitioning custody before terminating the order. Id. If a parent is seeking to terminate a temporary order entered after a finding of that parent being unfit, the court may sua sponte establish reasonable conditions, which are in the best interests of the child, for transitioning the child back to the custody of the child’s parent or parents if the court finds the child was in the temporary custody of the extended family for a period of time the court considers to
be significant. In determining such reasonable conditions, the court shall consider all of the following:

1. The length of time the child lived or resided with the extended family member;
2. The child’s developmental stage; and,
3. The length of time reasonably needed to complete the transition.

Chapter 751 is not the only option a third-party may have in order to care for a child. Indeed, there are several mechanisms which may be proper depending on the situation, such as a power of attorney, consent to medical treatment, and guardianship proceedings. Nonetheless, Chapter 751 and its 2020 Amendments ensure that third-party extended family members have standing to seek relief for the child’s best interest.

Aaron J. Irving, Esq., a native of Central Florida, graduated from Florida State University cum laude. He received his law degree from Florida Coastal School of Law in 2010. Aaron is a partner at Integrity Law, P.A. in Jacksonville, Florida where he practices Family Law, Probate and Estate Planning, and Personal Injury. Aaron also serves as a court appointed Guardian ad Litem in family law matters affecting the best interest of the child. In addition, Aaron is an adjunct professor at Florida State College of Jacksonville, where he teaches litigation and family law. He is a barrister in the Florida Family Law American Inn of Court and also serves on the Domestic Violence and Rules and Forms committees of the Florida Bar.

Troy M. Farquhar, B.C.S. is Florida Bar Board Certified in Juvenile Law. Troy is the founding partner of Integrity Law, P.A. and is also a Senior Best Interest Attorney for the Eighth Judicial Circuit Guardian ad Litem Program. Raised in Lakeland Florida, Troy attended college at Florida Southern College before moving to Jacksonville where he graduated from Florida Coastal School of Law. In his private practice, Troy focuses on family law, estate planning and general civil litigation including personal injury. Troy is a Barrister with the Florida Family Law American Inn of Court and is a board member of JASMYN, a non-profit that focuses its advocacy on promoting the welfare and protections of LGBTQ youth in Northeast Florida.

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TAMPA CLEARWATER TRINITY DADE CITY
Managing and Mitigating the Imposition of Time-Sharing Restrictions on Your Clients

By Steven P. Spann, Esq.

Scenario 1: You get a frantic call from an old client. The “Ex” did it again. She relapsed and got picked up for another DUI. You file an emergency motion and get an expedited hearing. The Judge remembers the Ex and is not amused. Opposing counsel’s zealous advocacy is unavailing and the Judge suspends the Ex’s time-sharing. “Come back when you’ve got your life together.” Your client is radiating vindication. “You are,” your client tells you, “the very best.” Opposing counsel asks the Judge, “What does my client need to do to get her time-sharing back?” “File a motion in six months and we’ll see.”

Scenario 2: After closing arguments, the Judge, entirely inscrutable during the two-day trial, peruses her notes and, after what feels like an eternity, finally speaks. “I’m granting the mother’s petition to modify time-sharing. I find that the mother has established a substantial and material change in circumstances and, further, that it is in the best interest of the minor child that she primarily resides with the mother.” Your client squeezes your hand in gratitude. “But,” the Judge continues, “I’m setting a case management conference in 30 days and I want both parties at that time to present what steps the father must undertake to return to his equal time-sharing.”

Scenario 3: A young father comes to your office for a consultation. He tells you he attended a final hearing on his paternity case where the Judge ordered supervised visitation twice per week and told him that he could come back in a year to revisit whether he could start unsupervised time-sharing. “Did the Judge tell you what you needed to do to get unsupervised?” “No.”

As family law practitioners, we have all faced scenarios like those above, where we have advocated for or rallied against suspensions, restrictions, or modifications to a party’s access and time-sharing with her or his children. There is a split among the District Courts of Appeal as to whether, and under what circumstances, a court is required to set forth specific steps a party must complete to return to unsupervised time-sharing, have a time-sharing restriction lifted, and/or return to their prior, pre-modification time-sharing schedule. Although the Florida Supreme Court recently issued an opinion providing some clarity on this issue, the conflict among the District Courts of Appeal is not entirely resolved. The goal of this article is to provide an overview of the current state of the law on this topic. Part I addresses whether a court is required to implement “concrete steps” to enable a party to return to the prior, pre-modification time-sharing schedule. Part II provides an overview of those cases where a party’s time-sharing is reduced to supervised or is altogether suspended for a “temporary” but seemingly indefinite period of time. Finally, Part III discusses Ryan v. Ryan, which case, I suggest, is a useful model for managing and mitigating time-sharing suspensions and restrictions without running afoul of the appellate courts.

continued, next page
Part I: Post-Judgment Modifications

The day before this issue of the Commentator was scheduled to go to print, the Florida Supreme Court released its opinion in C.N. v. I.G.C., SC20-505, April 29, 2021, which resolved in part, whether it is “judicial error” if the trial court fails to “give a parent ‘concrete steps’ to restore lost time-sharing and return to the premodification status quo.” C.N. came before the Supreme Court after the Fifth DCA certified conflict in C.N. v. I.G.C with the Fourth District Court of Appeal’s opinion in Ross v. Botha as well as similar cases from the Second and Third Districts. This split emanated from a line of cases from the Second District which held that it was judicial error if a trial court did not fix benchmarks to enable a party to return to her or his premodification time-sharing when the time-sharing was reduced after a supplemental petition for modification. The outcome of the Second District cases, seemed entirely inconsistent with res judicata and as discussed below, was soundly rejected by the First and Fifth District Courts of Appeal (as well as by Judge Barbara Lagoa in her concurrence in Solomon v. Solomon). Now, the Florida Supreme Court has spoken and resolved the conflict. Sort of.

Providing the proper context on this issue requires some unpacking of the noteworthy cases. In Perez v. Fay, the trial court granted the father’s supplemental petition to modify time-sharing and parental responsibility. During the pendency of the case, the mother was limited to supervised time-sharing, twice per week for four hours each session, which apparently went well except for one “incident during which the mother allegedly ‘whisked’ the child away from the time-sharing supervisor and had a ‘private’ conversation” with the child.” Otherwise, the reports from the supervised time-sharing were encouraging. Still, when the trial court granted the father’s petition, it not only continued the mother’s supervised time-sharing but reduced it to only four hours per month. The Second District Court of Appeal reversed, finding the judgment “legally deficient on its face because it [did] not set forth what steps the mother must take to regain primary residential custody and/or meaningful unsupervised time sharing with her daughter.” (Emphasis added).

While it is understandable that the mother should be entitled to resume “meaningful unsupervised time-sharing” in the future, should the trial court have the discretion to permit the mother “to regain primary residential custody?!” How can practitioners reconcile this direction with the long-held paradigm that any modification of parenting plans requires proof of a substantial and material change in circumstances? This “extraordinary burden” is designed to “promote the finality of the judicial determination of the custody of children.” In Dukes v. Griffin, the First District Court of Appeal confronted these questions head on.

After six years of “rocky” post-divorce co-parenting, the father, Griffin, filed a petition seeking majority time-sharing. Upon consideration of Ms. Dukes’ misconduct related to time-sharing, the trial court granted the father’s petition, “flipped” the time-sharing schedule, and reduced Dukes’ time-sharing to “weekends, holidays, and summers.” On appeal, Dukes argued that the trial court erred by “failing to set forth steps in the final judgment by which [she] could reestablish majority time-sharing,” specifically relying on Perez. The First District Court of Appeal rejected her argument, holding there is “no underlying law requiring trial courts to enumerate steps for dissatisfied parties to re-modify time-sharing schedules, alleviate time-sharing restrictions, or regain primary residence and majority time-sharing.” Rather, the Fifth District held that future modifications should be sought pursuant to section 61.13, Fla. Stat and certified conflict with Perez and Witt-Bahls (discussed infra).

The Second District Court of Appeal revisited this issue in T.D. v. K.F., in which the trial court granted...
the father’s petition for modification and awarded him majority time-sharing. The mother, an Orange County resident, was permitted unsupervised time-sharing but only in Lee County, where the father resided with the child. The Second District Court of Appeal noted that the court’s order “contained no explanation for this modification of the nature and location of the mother’s time-sharing, and it provides no steps for the mother to follow to regain any time-sharing—whether supervised or not—with the child in Orange County.” The opinion concludes that, “because the order that modified the mother’s time-sharing did not identify any steps that [she] could take to regain her former time-sharing with her child, we reverse and remand for further proceedings on this single issue.”

In 2020, the Fifth District Court of Appeal entered the fray with C.N. v. I.G.C. There, the trial court granted the father’s supplemental petition and “reduced the Mother’s custodial time-sharing by almost two-thirds.” The mother, also relying on Perez, argued that the court erred by not establishing the steps needed to return to her prior time-sharing. Citing to Dukes and Judge Lagoa’s concurrence in Solomon, the Fifth District Court of Appeal opined that section 61.13, Fla. Stat., “neither authorizes nor requires the trial court to set forth the specific steps necessary to reestablish timesharing.”

The Second District Court of Appeal recently reevaluated this issue in Mallick v. Mallick, issuing an opinion that “[t]his chapter shall be liberally construed and applied.” In essence, Mallick eschews the bright-line approaches of the other Districts, holding that cases need to be determined on the individual facts of the case, imploring the trial courts to “exercise [their] discretion in light of all material circumstances.” The Florida Supreme Court finally accepted jurisdiction to bring some order to the Courts. In C.N., the Court held that “a final judgment modifying a preexisting parenting plan is not legally deficient simply for failing to give specific steps to restore lost timesharing.” However, the Supreme Court would not go so far as to agree with the Fifth District Court of Appeal’s proposition “that section 61.13(3), Florida Statutes, does not authorize trial courts to include such steps in a final judgment modifying a parenting plan.” This opinion, echoing the analysis in Mallick, seems to suggest that it is in the discretion of the court whether “concrete steps” for the restoration of pre-modification would be in the best interest of the child.

So where does this leave the family practitioners? It is important to note that C.N. and the other cases above stem from post-judgment modification of pre-existing time-sharing schedules. C.N. arguably leaves open the possibility that a court’s establishment of concrete step to the restoration of a premodification time-sharing schedule could be affirmed. How do we reconcile this with res judicata and moreover, how does that possibility

continued, next page
square the prohibition against prospective time-sharing modifications? Unanswered by the Supreme Court is whether concrete steps are required or merely discretionary when a party’s time-sharing is indefinitely suspended or reduced to supervised.

**Part II: Indefinite Supervised or Suspended Time-Sharing**

While “it is the public policy of this state that each minor child has frequent and continuing contact with both parents,” a trial court is within its authority to impose time-sharing suspensions and restrictions under bona fide exigent and emergency circumstances. Under such circumstances, is the trial court required to enumerate steps to allow the restricted parent to return to the status quo time-sharing schedule? In the Third and Fourth District Courts, the case law conclusively requires trial courts to enumerate “the specific steps [a party] must undertake in order to share time with the minor child…” Failure to do so is, as a matter of law, error.

One of the foundational cases is *Hunter v. Hunter*, in which the Third District Court of Appeal affirmed a one-year suspension of the father’s time-sharing. The underlying judgment, entered on the mother’s supplemental petition for a modification of time-sharing, stated that the father would be entitled to file a petition for a reinstatement of time-sharing but did not provide clear guidance as to what conditions must be met to permit the reinstatement. The Third District Court of Appeal affirmed the temporary time-sharing restriction but found the omission of reunification steps to be reversible error. “These deficiencies mandate remand for clarification of the conditions under which [the father] may regain visitation.”

One of the other most cited cases in this area is the Second District Court of Appeal opinion in *Grigsby v. Grigsby*. In *Grigsby*, the mother appealed from an interlocutory order entered during a pending divorce in which the trial court “temporarily” suspended the her time-sharing after finding that she had engaged in one of “the worst cases of parental alienation that [it] had ever seen.” Here too, the Second DCA affirmed the temporary suspension but nevertheless held that the trial court erred by “omitting” a ruling on the specific steps the Mother must take to reestablish time-sharing...” famously opining “the court must give the parent the key to reconnecting with his or her children.” In the cases that have followed *Hunter* and *Grisby*, the Third and Fourth District Courts have established a seemingly bright-line rule that, where there is a total deprivation of unsupervised time-sharing, it is incumbent upon trial courts to create the metrics that the parent will need to satisfy to return to unsupervised time-sharing.

The specificity of the steps to be taken was explored in detail in two crucial Fourth District appeals, notably in *Witt-Bahls v. Bahls I* and *Witt-Bahls v. Bahls II*. In *Witt-Bahls I*, when asked what steps the Mother needed to take to restore her unsupervised time-sharing, the court replied that it “would not give ‘a magical answer’” and placed the onus on the mother to “do what she thinks is best for herself and her son.” Unsurprisingly, this approach did not pass muster with the Fourth District Court of Appeal, that on remand, ordered the trial court to establish the steps for the mother to resume unsupervised time-sharing. The Fourth District Court of Appeal stated, though, “[w]e do not mean to suggest the trial court was obligated to set out every minute detail of the steps to reestablish unsupervised timesharing.” On remand, the trial court still missed the mark.

*Witt-Bahls* returned to the Fourth District Court of Appeal only a few months later. This time, the trial court ruled that the mother could resume unsupervised time-sharing when the child’s therapists approved. “The trial court believed its ruling injected the needed specificity required by our [prior] opinion. Unfortunately, it did not.”
In addition to improperly delegating authority to a third party, the order still “failed] to provide the mother with the key to reconnecting with her son.” This time, the Fourth District Court directed the trial court “to specifically enumerate the conditions which the mother must satisfy to obtain unsupervised visitation.” (Emphasis added.)

The Third District Court of Appeal has consistently reversed cases which resulted in indefinite suspension of unsupervised time-sharing. In a brief opinion in *Tzynder v. Edelsburg*, the Third District Court of Appeal reversed a final judgment which reduced the father’s time-sharing to “one time per week” of supervised time-sharing. The underlying modification was affirmed, but the Third District Court of Appeal instructed the trial court to “amend the final judgment to identify the necessary steps which Tzynder must take in order to reestablish unsupervised timesharing with the parties’ minor child.”

Two years later, in *Solomon v. Solomon*, the trial court adopted and incorporated into a final divorce decree, the report of an examining psychologist, who “recommended supervised visitation between the husband and the children, which ‘should begin with a goal of ending in a short time frame’” after the entry of the final judgment of dissolution of marriage. The psychologist recommended periodic review of the husband’s progress and whether to increase his time-sharing. The Third District Court of Appeal reversed, concluding that the psychologist’s plan “failed to set forth specific benchmarks or identify for the husband the steps necessary to terminate the supervised timesharing.”

In sum, the Second (until very recently), Third, and Fourth Districts are in lockstep that, when a parent’s time-sharing is restricted to only supervised time-sharing, failure to provide reunification benchmarks was erroneous as a matter of law. A parent should have clearly established, attainable benchmarks to resume unsupervised time-sharing. Whether this principle applies when a parent unsuccessfully defends a post-judgment modification and time-sharing is reduced remains a matter of debate.

**Part III: Ryan Alternative**

In reviewing the case law, the trends crystallize and coalesce into two categories: those cases where a parent’s unsupervised time-sharing is indefinitely suspended and those where a parent’s time-sharing is reduced after a modification action. Under the former, as illustrated in the cases from the Third and Fourth Districts, the parent must be given the “keys” to resume unsupervised time-sharing, whether the suspension is the result of an emergency hearing or after a full trial on a divorce or modification proceeding. On the contrary, when a time-sharing schedule is modified after a supplemental petition, it is not “legal error” not to outline steps to return that parent to the pre-modification time-sharing. However, that does not foreclose the possibility that the court would not have discretion to establish such concrete steps.

So how do we, as practitioners, manage these scenarios? The answer may lie in a case from the Third District Court, *Ryan v. Ryan*.47 In *Ryan*, the mother’s unsupervised time-sharing was suspended after a substance abuse relapse. The mother argued on appeal that the underlying order did “not specify the conditions that must now be met in order to lift the limitations on visitation...”48 The order, however, did require the parties to schedule a case management conference within thirty days, during which time, the mother was to wear a SCRAM bracelet and submit to a substance abuse evaluation. Although the order did not expressly delineate when the mother’s time-sharing would be restored, the Third District Court found “no error in this procedure, as it provides a clear path toward reconsideration of the timesharing limitations if enumerated conditions are met.”49 I would offer that *Ryan* offers an excellent model to be employed by the family law bench and bar.

Using *Ryan*, I would suggest the efficacy and
utility of a model where, when time-sharing is suspended or restricted, the court schedules a subsequent full hearing, or conducts a timely case management conference on the case, where a case plan can be more fully realized and the steps to resume time-sharing can be developed and subsequently monitored. It also gives the attorneys time to plan and confer with one another to present the case plan to the court at that time as well as to ascertain whether the parent whose time-sharing was restricted has complied with the court’s initial directions. This methodology would promote the child’s best interests.

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Mr. Spann is a graduate of Temple University’s Beasley School of Law in Philadelphia, Pennsylvania. During law school, Mr. Spann was a member of the Moot Court Honor Society and was a finalist in the law school’s annual appellate advocacy competition, the Samuel Polsky Competition. Mr. Spann was also recognized with an award for Outstanding Trial Advocacy and received the Barrister’s Award for Outstanding Trial Advocacy as a participant in the law school’s Integrated Trial Advocacy Program.

In addition to his juris doctor, Mr. Spann holds a Master’s degree in Educational Leadership with a concentration in Higher Education Administration from Appalachian State University and a Bachelor’s degree in English from North Carolina State University. Prior joining the firm, Mr. Spann worked for fifteen years in higher education administration, most recently at Philadelphia University where he served for five years as the Associate Dean of Students while attending law school. Mr. Spann also previously worked locally at the University of Miami and Barry University.

Mr. Spann is a member of the Family Law Section of the Florida Bar and the Florida First Family Law Inn of Court. In addition, Mr. Spann frequently participates in charitable and community service events and is on the Board of Directors of the Rotary Club of Coral Gables and Bet Shira Congregation in Pinecrest, Florida.

Endnotes
1. C.N. v. I.G.C., 291 So. 3d 204 (Fla. 5th DCA 2020).
2. Ross v. Botha, 867 So. 2d 567, 571 (Fla. 4th DCA 2004).
3. I.e., T.D. v. K.F., 283 So. 3d 943, 947 (Fla. 2d DCA 2019); Solomon v. Solomon, 251 So. 3d 244, 246 (Fla. 3d DCA 2018).
4. Solomon v. Solomon, 251 So. 3d 244, 246 (Fla. 3d DCA 2018).
5. Perez v. Fay, 160 So. 3d 459 (Fla. 2d DCA 2015).
6. Id. at 461.
7. Id. at 466.
10. Id. at 156.
11. Id.
12. Id. at 157.
14. Id. at 945.
15. Id. at 947.
16. C.N. v. I.G.C., 291 So. 3d 204 (Fla. 5th DCA 2020).
17. Id. at 206.
18. Id. at 207.
20. Id. at ‘2.
21. Id. at ‘5.
22. See e.g., Arthur v. Arthur, 54 So. 3d 454 (Fla. 2010).
24. See Gielchinsky v. Gielchinsky, 662 So. 2d 732 (Fla. 4th DCA 1995); Smith v. Crider, 932 So. 2d 393 (Fla. 2d DCA 2006).
26. Lightsey v. Davis, 267 So. 3d 12 (Fla. 4th DCA 2019).
28. Id. at 238.
29. Id.
31. Id.
32. Id. at 457.
34. Witt-Bahls v. Bahls, 203 So. 3d 207 (Fla. 4th DCA 2016).
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Diane M. Trainor, Esq., and Devon M. Quijano, Esq., The Law Offices of Diane M. Trainor, Miami. Mother and Daughter.


Jamie Alman, Esq., Michael Alman, Esq., and Jason Alman, Esq., Greenspoon Marder, Ft. Lauderdale. Daughter, Father and Son.

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Families in Family Law

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Mary Lou Rodon, Esq. and Jorge A. Alvarez, Esq., Rodon Law, PLLC, Miami. Mother and Son.

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As attorneys, we are all aware of the advertisements on billboards, bus benches, online, in social media, and through the mail, offering legal representation on a variety of matters. Many of us often link those advertisements and solicitation letters with personal injury matters and traffic tickets or criminal matters. But are you aware that the Florida Bar Rules do not have any restrictions for such advertisement, also known as solicitation, for family law matters?1

In this article we explore mail advertising solicitation in marital and family law cases and how it may impact your practice.

Over the past few years, we have seen a rise in the number of husbands, wives, fathers, mothers, former husbands and former wives, receiving via mail solicitation letters from practitioners letting them know that a family law action has been filed against him/her. These solicitation letters are issued in a range of family matters, including dissolution of marriage and paternity actions, and are usually received by the non-filing party before he or she has had an opportunity to either hear the news from his or her spouse or partner or be formally served. On numerous occasions, we have received calls or emails from our clients wanting to know why or how the opposing party found out they filed an action before they were even served. There are even times when a respondent we represent is notified about the filing prior to us knowing about it.

While these types of solicitation letters may not have negative consequential effects in other types of litigation, the consequences in family law cases are quite different and should not be treated lightly. A distinct difference is that a potential client in a personal injury case, criminal matter, or traffic ticket case, understands there is an action pending, or a potential action will be pending, because they are the one possibly injured, who has been accused of a criminal act, or who received the ticket. In family law matters, the exact opposite may be true. The consequences in family law cases are serious, and in some circumstances, may be a possible life or death matter.

We have all probably had the following type of scenario: a prospective client comes in who has been in an abusive (emotionally and/or physically) relationship but has never obtained and/or qualified for a domestic violence injunction. He or she wants to file for divorce but is concerned about the consequences he or she may face from their spouse, including potential emotional or physical abuse or violence when his or her spouse finds out. They may be in fear of being financially cut-off, so the client needs time to make a safety plan to make sure he or she and any children that may be involved are safe and possibly avoid an in-person confrontation, or he or she may need to figure out a way to avoid being starved-out financially.

Before solicitations became prominent in family law matters, family law practitioners could file a lawsuit and generally, the client still had time to...
make a safety plan, address financial concerns and/or make necessary arrangements to tell their spouse/partner they filed. However, those days have now passed. When your client decides they are ready to proceed with legal action, it is important, as their counsel, to know if they are in any way at risk or will be impacted by filing and failing to serve immediately. While technically you still have the standard 120 days to complete service prior to someone knowing, this is no longer reality. Why is that you ask? Because more and more attorneys across the State have begun checking the dockets for new filings and are sending out letters informing the Respondent that an action has been filed, usually within less time than normal service is to occur. While this may seem like a fair and reasonable way to advertise and obtain business to some, given the uniqueness of family law matters, perhaps there should be some exceptions and/or restrictions in the Florida Rules of Professional Conduct against solicitation letters in family law cases.

So given this change, we set forth the following helpful tips to keep in mind in navigating filing an initial/modification action in light of solicitation letters:

NUMBER ONE: When filing the action (this applies more so for an initial action than a modification), consider the family dynamic. Is your client in an abusive relationship? Assume notice will occur within days of filing. If your client is concerned about the ramifications that their spouse or partner may take when finding out a Petition has been filed, make sure they have their safety plan in place immediately. This safety plan may include, but is not limited to: (1) a safe place to temporarily reside in the event your client is fearful for his or her life; (2) a war chest of funds set aside to be used for living and litigation expenses in the event the other spouse decides to exert financial pressure on your client; and/or, (3) a new, secure email account in the event your client is concerned their spouse has access to his or email account.

NUMBER TWO: Consider the possible and/or pending domestic violence concerns that may come as a result of the non-filing spouse/partner receiving a solicitation letter. This goes in tandem with ensuring your client has a safety plan.

NUMBER THREE: Consider the possibility of one party withdrawing, depleting, liquidating, hypothecating, transferring funds, or moving around money once a solicitation letter is received. Will your client be cut off from support (alimony, child support, etc.) on a temporary basis? Make sure you check to see if your Circuit has a Status Quo order regarding keeping assets intact once a Petition for Dissolution of Marriage has been filed.

NUMBER FOUR: Will the other spouse change the locks of the house leaving your client having no other choice but to call as locksmith to change the locks back if the property is jointly titled? If the property is not jointly titled, will your client effectively be rendered “homeless” scrambling to find alternative living arrangements? Will they be left with no access to their personal belongings? If the children are from a different relationship, will this result in your client being unable to exercise his or her timesharing in an alternate residence?

NUMBER FIVE: What impact will the solicitation letters have on the parties’ children? Consider the ramifications if the children or child finds out his or her parents are getting a divorce or going through a paternity action by getting the mail. Will the children or child align with the parent who did not know the other parent filed until they received the letter? Be extremely aware and mindful of the timesharing issues that could arise as a result of a party receiving a solicitation letter. Will one parent or spouse attempt to withhold the children until a hearing can be obtained? (In the time of COVID, this may be months, as this is not usually considered an emergency.)

NUMBER SIX: What emotional impact does the solicitation letter have on the spouse receiving it? When the spouse receives a letter, will he or she be continued, next page
Solication Letters
CONTINUED, FROM PAGE 29

in a state of shock and not be able to comprehend what is going on making a stressful situation even more confusing and challenging to navigate? Will this result in bad judgment decision-making that may have long term impacts? For example, one party may be so angry and vindictive that they wait until the other party and child(ren) are not home and remove all the furniture or damage the house.

NUMBER SEVEN: The general rule is that once a party is served, they have 20 days to respond. However, these letters may prompt confusion and it is possible that someone receiving the letter may think that counts as service. Many of these letters use legal language or are not clear as to the timing of the 20 days. As a result, it is possible that the non-filing spouse may miss their deadlines with which to file a responsive pleading and face a default. Will this cause emotional distress, especially if they were unaware an action was being filed and believe they do not have the financial ability to retain counsel? In other words, there can be unnecessary litigation expenses or emotional tolls incurred as a result of the solicitation letters. Also, will the party receiving the letter review the petition and escalate tension because he or she sees claims regarding timesharing or support that anger him or her?

These are just some of the issues to consider when deciding when to file. But is there anything else that can be done to address this ongoing and ever rising concern about the solicitation letters in family matters? Should we also consider if change to the rule possible? For instance, in personal injury matters, someone who is injured is not permitted to be contacted by an attorney for 30 days. Should this be extended to family law matters? How about changing the solicitation rules to hold back sending out solicitation letters until the party is served or a minimum amount of days after filing (for instance, 30-60 days so a spouse or partner may have time to effectuate service)?

How about the possibility of restricting the solicitation letters to respondents in Florida Statutes Chapter 61 and Chapter 742 cases where there is an active injunction or where there were prior injunctions? Currently, there are no restrictions on solicitation letters even in cases where violence has been alleged in an injunction petition and/or found either on a temporary or permanent basis in an injunction order.

While Florida has many ethics rules on advertising and solicitation of business, the rules are very broad and leave a lot of wiggle room. That has resulted in many Bar rulings over the years to better clarify what is permissible. But none of these specifically carve out family law exceptions except for domestic violence injunctions. So are such carve outs or exceptions possible? We have looked to other States to see what, if any, level of solicitation is permitted. Here are some examples of what we found:

- Pennsylvania and Tennessee specifically have a strict limitation for solicitations in domestic relations/divorce cases. Pennsylvania specifically prohibits solicitation until proof of service appears on the docket. PA Rules of Professional Conduct R.7.3(b)(4) (2018). Tennessee prohibits solicitations in divorce matters if the solicitation is for pecuniary gain unless the filing for dissolution of marriage occurred more than 30 days prior to the communication or the lawyer has a family, close personal, or prior professional relationship with the person being solicited. TN Rules of Professional Conduct R.7.3(b)(4) (2017).

- Maine prohibits solicitation when it involves harassment, coercion, intimidation, and the like, but unlike many states, it includes a sentence that reads as follows: “the prospective client’s sophistication regarding legal matters; the physical, emotional state of
the prospective noncommercial client; and the circumstances in which the solicitation is made are factors to be considered when evaluating the solicitation.” ME Rules of Professional Conduct R.7.3(a) (2009).

- Illinois amended its rule in July 2020 to include that solicitation is not allowed if it seeks representation of the respondent in a case brought under any law providing for an ex parte protective order for personal protection when the solicitation is made prior to the respondent having been served with the order. IL Rules of Professional Conduct R.7.3(b)(3) (2020). It also includes a new comment that specifically mentions domestic violence. IL Rules of Professional Conduct R.7.3 cmt. 10 (2020).

- Alabama has a waiting period of at least 7 days after service to solicit in matters concerning a pending civil proceeding. AL Rules of Professional Conduct R.7.3(b)(1)(ii) (2009).

It is clear that our concerns on this immediate solicitation after filing is felt throughout the country. Is it time for the Florida rules regarding prospective client solicitation in family law matters to be changed? If you have a story, please share them with us as well as any solicitation letters that your clients may have received. In the meantime, we urge you to counsel your clients carefully and keep in mind these solicitation letters are out there and could have a significant impact on both parties.

Lauren is an attorney with Boies Schiller Flexner LLP and practices out of their Hollywood office. She represents clients in complex family law cases where she has litigated the full array of issues faced by people involved in family law matters and has been appointed as a Guardian ad Litem in highly contested family law matters. She has been selected as a Rising Star by Super Lawyers every year since 2015. Lauren is an active member of the Family Law section of the Florida Bar. She currently serves on the Executive Council of the Family Law section of the Florida Bar, the Legislation Committee and is the Co-chair of the Ad Hoc Solicitation Committee.

Aimee Gross, principal of the Law Office of Aimee Gross, P.A., is Board Certified in Marital and Family Law and practices exclusively in the area of family law. She has been practicing since 2002. Ms. Gross handles complex divorce and paternity cases, post-dissolution issues, pre and postnuptial agreements, and other family law related matters. In 2013, Ms. Gross was selected to be a Fellow for the Inaugural Class of the William Reece Smith, Jr., Leadership Academy of the Florida Bar and has previously been nominated as a top “Up & Comer” in Super Lawyers. Ms. Gross is very active in the Florida Bar Family Law Section and currently serves as Chair of the Support Issues committee and is a member of Executive Council, Legislation and CLE. She was the Chair for the 2016 and 2017 Marital & Family Law Review Course, Co-Chair of the 2015 Family Law Section Trial Advocacy Workshop and regularly lectures on various family law matters.

Endnotes

1 While throughout this article the term “family law” is used, it should be noted that for purposes of this discussion this does not include domestic violence injunction actions, which are an exception to the solicitation rules.

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TECHNOLOGY

The Walls Really Do Have Ears: Guarding Attorney Client Privileged Communications While Working from Your Smart Home

By Amber Kornreich, Esq.

Working remotely in the smart home age has created new and complicated challenges for guarding attorney client privileged communications. There is a tension between reaping the personal and practice benefits of connectedness and upholding the lawyer’s most inviolable duty to keep the client’s communications and data absolutely private when unexpected devices in the lawyer’s home may be silently eavesdropping or recording.

The Attorney-Client Relationship centers around trust and the client’s confidence that all one-on-one communications will remain secret. The Attorney-Client Privilege is known as the oldest confidential communications privilege in common law.¹ The United States Supreme Court has explained: “Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer’s being fully informed by the client.”² An ethical family lawyer would never knowingly volunteer confidential client information or communications without appropriate client authorization or a Court Order, but what happens when a lawyer’s devices join in or record those communications without the lawyer’s knowledge? If the lawyer realizes devices may be listening, can the privilege still be raised?

Family lawyers have frequent contact with clients, so serious consideration should be given to the potential vulnerabilities of their remote work environments. Family lawyers speak to clients regularly about their most personal problems, fears, and concerns in great detail. Financial records are additionally routinely exchanged via regular e-mail or text message without passwords, encryption, or using third party transfer methods, and sensitive financial information is often discussed including account names, numbers, institutions, and other identifying details that could be abused in the wrong hands. The Federal Bureau of Investigation recently reported: “In 2020, while the American public was focused on protecting our families from a global pandemic and helping others in need, cyber criminals took advantage of an opportunity to profit from our dependence on technology to go on an Internet crime spree.”³ Family law clients have strong interests in their attorney-client privileged conversations and information being protected from anyone – whether companies collecting data from smart home devices, cybercriminals, or family members or others in the lawyer’s home.
I. Assess Potential Risks

The first step family lawyers should take in assessing potential vulnerabilities in their remote working environments is to identify what devices may have the capacity to listen to their privileged conversations, and who may be around listening.

Smart Home is defined by the Oxford Dictionary as: “a home equipped with lighting, heating, and electronic devices that can be controlled remotely by phone or computer.”4 Smart devices are devices that can connect to the internet, communicate, and take commands. These devices can range from Smart Speakers like the Amazon Echo, Google Nest, and Sonos One, to smart televisions, smart security cameras, smart doorbells, smart outlets, smart locks, smart baby monitors, smart dog cameras, smart thermostats, smart lightbulbs, smart kitchen appliances, smart robot vacuums, smart fitness machines, smart beds, smart gaming consoles, wearable fitness trackers, smart watches, as well as laptops, iPads, cell phones, and more. Many of these devices can be controlled by and connected to digital voice assistants such as Amazon Alexa, Google Assistant, Apple Siri, Microsoft Cortana and/or Samsung Bixby.

According to a Pew Research Center survey, approximately 25% of adults in the United States have a voice-controlled smart speaker in their home.5 More than half of the adults who own smart speakers have privacy concerns about how much personal data their device collects.6 Family lawyers should reflect on their own privacy concerns and have an even greater burden to ensure their homes are safe spaces for private communications with clients or work product protected communications with other lawyers and/or experts.

continued, next page
The Walls Really Do Have Ears
CONTINUED, FROM PAGE 33

There are various tools available online to help identify what devices may be in play in your home. One of the leading open-source tools available is the IoT Inspector. The IoT Inspector is a program that identifies what third party services smart devices are communicating to and what information is being conveyed. Some family lawyers may want to download the IoT Inspector or similar tools to help determine what devices may be monitoring their spaces.

With so many devices “listening,” can even the best-intentioned lawyer ever truly protect their client’s privileged information and guard attorney-client privileged conversations while working from home?

II. Protecting Privileged Communications While Working from Home

As the world begins to see new hope after more than a year of the COVID-19 pandemic, many lawyers are re-evaluating their work lives and whether they will be working from their offices, their homes, or some hybrid of both in the future. Remote work may continue in some form or fashion even after the pandemic has passed, leaving lingering questions about how smart home devices and being outside of a traditional office setting may have lasting challenges for protecting attorney-client privileged communications. Of course, how to “turn the devices off”, to the extent possible, is the subject of an entirely separate article. The question seems to not only be how to switch off, but what privacy and safety concerns family lawyers should consider while working from their smart homes.

Security experts recommend law firms consider developing policies around appropriate use of smart home devices for lawyers and employees working from home. The policies should include advice on where the devices may be used in the home while remote work is in session, and should promote the use of “microphone mute” and “camera blocks” where available. Reasonable people can debate whether smart home devices in a lawyer or law firm employee’s home should be banned or eliminated completely, but this potential solution seems unrealistic. Family lawyers may need to consider whether in this new “smart” reality, if it is a possible to insulate their communications while working in the presence of smart home devices.

In order to fully appreciate the dangers, it is important to learn how smart devices work – especially “smart speakers” like Echo Alexa and Google Home, which are often the cause of the greatest concern. These devices may not “always” be listening, although there have been horror stories and reports of real teams of global engineers listening to recordings from these devices, including of people’s intimate conversations along with their real first names and serial numbers of their devices, in order to improve the algorithm. However, certainly smart speakers are constantly listening for their “wake word” to answer the users request (for example, “Alexa”). The devices listen to improve the user experience. The more data the devices can collect about you and your preferences, the more the parent companies can individually tailor services and advertisements they can offer you. It is possible to hear and delete these previous recordings – some of which may have been inadvertent. Certain devices have privacy settings that allow a user to automatically delete recordings. Diligent family lawyers who use smart speakers in their homes or remote workspace should consider reviewing the apps and privacy options that connect with their smart speakers and toggle “off” to any options that allow for recordings to be deleted or for recordings to be used to improve services or develop new features.

Of course, remote work also often involves sharing close quarters with family members. A family lawyer working from home should always...
consider taking client phone calls in areas where other family members are out of earshot, in addition to avoiding the use of speaker phone in shared spaces. Choosing an isolated area of your home that is free from potential smart home interference to take client calls is integral for cybersecurity reasons and to insulate private conversations from being overheard by family members. Additionally, taking a moment to quietly breathe on your own before or after your communications without external pressures may also have mental health benefits. Some studies have shown doing nothing and giving yourself a moment to sit still and reflect can increase productivity, creativity, and overall well-being.12

III. Other Smart Home Considerations

Aside from snooping on attorney-client privileged communications, there are a number of other smart home issues a family lawyer should consider.

Practice Benefits: Some family practice management software, for example billing programs, calendars, and some family law specific programs may have digital voice assistant connectivity to help streamline tasks and quickly input data. There is endless potential for family lawyers to take advantage of valuable time preservation and enhance their at-home workflow by using these devices. Smart home devices may even put more money in the remote-family lawyer’s pockets by saving costs on insurance premiums. Some companies will reduce home insurance rates if smart security systems are installed, and smart thermostats can help limit energy and electricity usage lowering monthly expenses.

Discovery Value: Smart home data on the family lawyer’s side may pose sticky ethical conundrums, but smart home data on the client side may be valuable for discovery purposes. Using the data in these devices may give us valuable information in our family law disputes. What if for example, a Husband is booking trips with his paramour through his Alexa device? We should examine and appreciate the immense amount of tracking, health, financial, and other information that can be revealed with a fair amount of accuracy from these devices. We have to both appreciate the risks for ourselves and our clients, and reap the rewards of this technology to the extent valuable information is available about opposing parties.

Domestic Violence Implications: Unfortunately, many family lawyers are already aware of the nefarious use of smart home devices in relationships involving domestic violence. As technology rapidly develops, so do the methods abusers use to torture their victims. Sadly smart home devices have made monitoring and controlling victims as simple as the push of a button. Reports of such abuses include abusers using smart thermostats to force victims to live in extreme heat or extreme cold, unlocking doors using smart home technology to remove items from the house or intimidate victims, and using smart speakers, Smart TV’s, and/or security equipment to monitor and record victims without their knowledge.13 Because some of these techniques can be used from afar or are more difficult to trace, it is important family lawyers understand these possibilities so they can better counsel and guide clients who may be enduring these situations.

Security: Moreover, aside from potential invasions of attorney-client privileged communications, smart home devices may increase lawyers’ vulnerability to cyber-attacks, not only compromising important client documents, e-mails, and conversations, but of the entire smart home. Reports have shown routers are the most vulnerable home device.14 Therefore, it cannot be overstated that lawyers must stay vigilant and maintain good cyber security practices, including using unique and lengthy passwords for each distinct device, frequently changing your passwords, including your home WiFi password, and always updating your devices to the latest software when prompted.

continued, next page
The Walls Really Do Have Ears
CONTINUED, FROM PAGE 35

IV. Conclusion

Family lawyers have an obligation to keep up with the latest changes in technology and the potential impact on their clients. Working from home in the Smart Home age has undoubtedly created some new and interesting challenges and questions for family lawyers to consider. Although there are many questions, one answer is clear: the walls really do have ears, and family lawyers should be thoughtful about where, when, and how they communicate with their clients while working from their smart homes.

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Endnotes
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The Florida Supreme Court ruled in \textit{Kaaa v. Kaaa}, 58 So. 3d 867 (Fla. 2010) that a non-marital home was \textit{mostly} marital property which, in effect destroyed the concept of separate ownership. The ruling was based on unusual facts that lead to obscure case law. After the Supreme Court ruling, the legislature attempted to correct the Court’s ruling and in doing so attempted to contemplate the facts in \textit{Kaaa}, while also anticipating similar facts would emerge in the future.

In 2018, Florida Statute §61.075 (2018) (hereafter “the Equitable Distribution statute”) was revised. The revised statute did the following: (1) clearly delineated what comprised marital contributions, (2) defined the marital component of property as the marital contributions to the property plus its share of appreciation; and, (3) set forth a complicated formula for determining the value of the passive appreciation. The formula in the revised Equitable Distribution statute can produce convoluted results. The courts have discretion to use a different formula that conforms to the clear statutory intent, which is defined in the marital property component. As a consequence, the revised Equitable Distribution statute that includes the formula to determine passive appreciation of non-marital property can be complicated, very confusing, and has the potential of producing bizarre results.

This article will illustrate that the burden to overcome the gift presumption is easily met because the statutory formula seldom produces a result that comes close to satisfying the clear statutory intent in the vast majority of fact patterns. This article will present the type of formulae that do. In order to demonstrate our position, we will delve into the history of Florida statutes and case law. The origin and inefficiency of the current formula is directly related to this history.

\textbf{Case Law and Statutory History}

Before the equitable distribution statute was enacted in 1988, case law controlled all classifications of property; it presumed all separately titled property was non-marital. The burden to prove otherwise fell upon the spouse wishing to establish it as marital property. The 1988 equitable distribution statute reversed well established precedent.

Before 1988, case law credited marital or non-marital appreciation based upon “equity.” The Florida Supreme Court first established this equitable concept in \textit{Landay v. Landay}, 429 So. 2d 1197 (Fla. 1983). The issue in \textit{Landay} revolved around the determination of a “special equity” in a marital home (i.e. whether the contribution of non-marital funds to a marital home should be considered marital property based upon the fact that title was held as tenants by the entirety). Neither the 1988 equitable distribution statute nor any subsequent statute defined non-marital property interest in a marital home; therefore, the analysis remained equity based. \textit{Landay}
determined that the spouse with a non-marital contribution in a presumed marital home by title enjoyed a “special equity” for the non-marital contribution. The Court then fashioned the formula discussed below to calculate that party’s special equity (hereafter "the Landay formula"). In 2008, however, special equity was merged into the Unequal Distribution of Marital Assets statute.

Prior to the 1988 equitable distribution statute, the Third District Court of Appeals first addressed crediting appreciation due to marital contributions to a home individually titled and purchased with non-marital funds in Gregg v. Gregg, 474 So. 2d 262 (Fla. 3d DCA 1985). Gregg recognized these facts differed greatly from the facts in the Landay case but nevertheless adopted the Landay formula to determine the marital portion of the appreciation of a non-marital home.

The Landay formula created a fraction that was multiplied by the home’s appreciation since the date of purchase thereafter, it added the non-marital down payment on the property to determine how much of the total amount of appreciation would be credited to the non-marital contribution. In other words, the fraction's numerator equaled the amount of the non-marital down payment upon its purchase. The denominator equaled the total purchase price of the home when acquired. Multiply the fraction by the total amount of appreciation to determine the special equity or the non-marital portion and award that portion to the party making the non-marital contribution.

Gregg utilized the same formula to calculate the opposite fact pattern. As stated above, Gregg involved the share of marital appreciation and marital contribution of non-marital funds to the marital home. The court applied the percentage-ratio approach, similar to that contained in Landay, to determine the special equity claim. There the court determined that the special equity was equal to the ratio that her contribution of non-marital funds bears to the entire purchase price of the property. The Landay formula for determining the marital portion of appreciation is essentially, 

\[
\text{Special Equity} = \left( \frac{\text{Purchase price} - \text{non-marital down payment}}{\text{purchase price}} \right) \times \text{appreciation}.
\]

When the mortgage has not been extinguished prior to the dissolution of marriage, the marriage gets credit for paying the amount due and owing when determining the proportionate share of earnings, which almost always gives the marriage the lion’s share of earnings, defeating the concept of individual ownership.

Before Florida Statute §61.075 defined marital and non-marital contributions, it was unclear whether the entire mortgage payment constituted “property” or only a portion of it. That is why the non-marital contribution was limited to the down payment although it might have included additional payments made in satisfying the mortgage prior to the date of marriage. That confusion was carried over into determining how the respective contributions share appreciation. The Landay formula that began this inquiry dealt with tenants by the entireties property, where the non-marital contribution could have been treated as an interspousal gift. When Florida Statute §61.075 defined the marital home as marital property, it continued to recognize the non-marital contribution as a special equity interest over which the court could exercise discretion in its award. Florida Statute §61.075 did not create a non-marital property interest in properties held as tenants by the entireties; instead, it was left as a claim for special equity.

The Third District Court of Appeal’s ruling in Gregg dealt with the distribution of a marital home before the formation of the equitable distribution statute. The Landay formula essentially reversed the Ball standard by adopting a formula that presumed the property was marital by giving it the same treatment the tenants by the entireties property receives.

The 1988 equitable distribution statute defined marital and non-marital contributions. It applied earnings to marital and non-marital
contributions in the same manner. Since the Ball ruling was reversed by the 1988 equitable distribution statute, the rulings that followed failed to test whether the pre-statutory formula in Gregg credited earnings on marital and non-marital contributions in a non-discriminatory manner consistent with the equitable distribution statute. It did not. Landay began as a tenant by the entireties property where there is no nonmarital property interest. As a special equity, the court apportioned appreciation on the basis of which the down payment bears to the purchase price; neither is related to actual contributions made by either spouse.

This article will demonstrate that the non-marital contribution in a non-marital property can be greater than the down payment; and, it can be less if the house was refinanced. It is important to note that the marital contribution implicit in Gregg is the purchase price less the down payment when the entirety of the mortgage is paid off during the marriage so that the property is unencumbered as of the “cutoff date” and, the property was never refinanced during the marriage. As both criteria are seldom met, using the Landay formula credits earnings to the marital contributions disproportionately and it discriminates in favor of marital contributions over a like amount of non-marital contribution. This is inconsistent with the 1988 equitable distribution statute. As was shown earlier the percentage of marital appreciation of a non-marital property that uses Landay is \((\text{Purchase price} - \text{down payment})/\text{down payment}\). Under this formula, the marriage receives credit for making contributions toward the loan it didn’t make, i.e., all of the mortgage, on the cutoff date, and which are still owed except when the mortgage is completely paid.

The Gregg ruling turned the advantage of ownership on its head. The owner bears total responsibility for a loss while the marriage is credited with a disproportionate share of earnings on the contributions it makes.

**Post-Equitable Distribution Statute**

The formula used in Landay that was applied to non-marital contributions in a non-marital home and that was adopted by the court in Gregg is problematic for two reasons. First, once the equitable distribution statute was enacted, it became the controlling authority as opposed to the prior case law rulings. Once that occurred, earnings on contributions required identical treatment based on the amount of contribution made because the equitable distribution statute credits earning identically to both contributions. In other words, the contributions are impacted regardless of their timing. The method of apportionment had to be based on the amount of its contribution to the total of all such contributions actually made, which the Landay formula does not do. Second, when the property was purchased as separate property with a non-marital down payment, the amount . The property could not be purchased without the loan and only the owner is responsible to repay it. Hence, when the equity is underwater, the owner bears all the loss. Therefore, the Second District Court of Appeal was correct in Straley v. Frank, 612 So.2d 610 (Fla. 2d DCA 1991) in that the “active” marital contribution is limited to the paydown of mortgage principal, which is created solely by statute. While the ruling failed to factor in statutory appreciation, that ruling should have put to rest the controversy of whether the mortgage principal alone is used in determining the marital share of appreciation since the statute specifically limits appreciation to the marital or non-marital contributions. Therefore, the formula in Gregg failed to follow the Florida Statutes in a number of ways. The Second District Court of Appeal ruling failed to include appreciation that was intended by the 1988 equitable statute so the Florida Supreme Court had no choice but to rule with the Gregg formula that addressed appreciation in 2010.
The 2018 revised Equitable Distribution statute defines statutory intent to align with the Second District Court of Appeal’s precedent, i.e., contribution drives the property’s appreciation, considers the home refinances raised in the 2010 Kaaa Supreme Court ruling, and it corrects the problem that the Second District Court of Appeal created by not including appreciation in its value. In creating the 2018 statute, the framers never questioned the appropriateness of the formula structure used in the Kaaa ruling. Instead, they modified parts of it, including how it applies to calculate appreciation of the marital contribution.

The structure of the Gregg formula was carried into 2018 statute; and, that explains why there is still a significant problem that the 2018 revised Equitable Distribution statute did not cure. Ostensibly, the new statutory formula uses the same structure that was shown to violate the equitable distribution statute by its unequal treatment of earnings applied to marital and nonmarital contributions and invert which portion received the benefit of the bias. In this way, the non-marital share is credited with contributions that it did not make on reducing the mortgage that remains unpaid on the cutoff date. This conflicts with the 1988 equitable distribution statute in the exact same way the Gregg formula does. It only reverses which contributions receives the bias. The new 2018 Equitable Distribution statute makes the bias much worse by creating an inappropriate adjustment on the amount of appreciation when the home was refinanced, which will be addressed at the end of this article.

The Correct Formulae

A correct formula can factor in timing with a simplified formula that sacrifices little accuracy by understating it, or a very simple formula that does not factor in timing that any court can easily execute. The latter was discussed in a 2007 Florida Bar Journal article, but it did not have the detailed foundation to support it as is laid out in this article. As discussed in that article, approximately half of the sister state rulings in Florida use this formula. It is discussed below.

Identifying the Theoretical Exact Share

Before demonstrating a superior formula that factors in timing and requires testimony, we need to demonstrate an exact formula no matter how impractical and oftentimes even impossible to achieve that may be. This is necessary in order to understand what assumptions need be made to make this practical and how they affect the accuracy of a precise value. Then, and only then, can we demonstrate a highly accurate formula involving moderate valuation expense.

We already discussed the correct methodology based on a proportionate share, which is far less accurate than it could be because it fails to impact the timing of the payments. It is a less expensive, less precise alternative; however, it fully complies with the 2018 statute without running amuck of the Equitable Distribution statute that treats appreciation on marital and non-marital contributions identically.

The exact marital portion is determined as follows: From the mortgage schedule one determines the marital contribution for that year and multiplies it by the segment rate of appreciation for that year. Then multiply the result by each and every segment rate of appreciation for each subsequent year, right up to the date of filing. All such marital contributions are similarly increased to the date of filing and the sum of all marital contributions improved with appreciation are the exact marital portion. The segment rate of appreciation equals the year-end equity increase divided by the equity at the beginning of the year. Care must be exercised that the end-of-year equity does not include the reduction in mortgage principal from the next mortgage payment.

The problem with an exact value is the requirement for yearly home appraisals needed to calculate the segment rates of appreciation. The

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problem securing yearly appraisals disappears by assuming uniform appreciation. Once that is done, segment rates are no longer needed, and the timing of the contributions is factored in by using the Dollar Weighted Method. Because most of the mortgage paid is at the end of the mortgage term, the assumption of uniformity and use of the Dollar Weighted Method used to factor in timing introduces minimal error because most of the principal repayment occurs at the end of the marriage as a consequence of compound interest. The assumption of uniformity is on appreciation, but how much contribution is credited toward the appreciation, where the dollar method credits most of its share at the end when very little appreciation occurs. Once that assumption is made no appraisals are needed, except on the cutoff date.

Dollar Weighted Method is Key to Impacting Timing

The "Dollar Weighted Method" is a widely used industry standard for making proper measurements. It was fully explained with examples showing how it works in the 2007 Florida Bar Journal cited in the endnotes. The article also explains accepted methods for determining a proportionate share of appreciation and why any methodology must include in the denominator the total of all such contributions actually made. It offered and explained the Debt Financing Method used by half the states in the United States and how, as a simplified methodology, it may be used to determine the marital contributions of a non-marital property. While that method made no attempt to factor in the timing of contributions, which far more accurately measures the non-marital share, it nonetheless is an exact proportionate share because it ratios the share of the paydown the marriage contributes to the total share made by both portions in determining an appropriate share of appreciation.

Finally, the discount of contributions based on the time the contributions were exposed to the force of earnings, divided by the value of all contributions is multiplied by the numerator, which is the paydown of all marital contributions. The denominator is the full amount of marital and nonmarital contributions actually made.

Refinancing the Non-Marital Home

The one-time recalculation of appreciation expressed by the revised Equitable Distribution statute is another huge problem if the property was refinanced during the marriage. Use of the "Debt Financing Method" easily overcomes the difficulty created with multiple refinances because there is no legitimate way to measure earning without determining interim results at each refinance. The statutory formula ignores the impact on how the proportionate share was changed when the refinance occurred, adjusting only the amount of appreciation on the cutoff date and nothing more. This prevents the marital share from receiving its proper share of earnings by treating the refinance as a marital loan having nothing to do with a refinance of the subject house.

The refinance could easily occur at the beginning of the marriage when the marital component was small. This means that the loan could not have been made without the contributions and appreciation made during the premarital period. Since the marital contribution is small, a sizeable loan could wipe out the marital contribution at a refinance. That outcome is not possible at the end of the marriage under the statutory formula because it prevents the appreciation from ever becoming a negative amount.

The guarantee that it could never be less than zero is flawed for a number of reasons. First, marital contributions do share in losses as well as in gains. Second, a large refinanced amount
will affect more than the amount of appreciation. It will affect marital and nonmarital principal, which is also part of the equity. The framers of the statutory formula understood that the refinance amount could be more than the amount of appreciation. Its failure to address its impact on principal could create an artificial value of negative appreciation that could not only wipe out marital contributions but also create a marital debt on a separately titled asset. This explains why it provided that the amount of appreciation in the suggested statutory formula could not be less than zero. The framers failed to recognize that there are other problems that were created when it failed to deal with adjustments to marital and nonmarital contributions that is required by the refinance.

The amount of a bank loan is based on equity, which exceeds the amount of appreciation. A loan reduces the amount of equity in the house, where the appreciation is only a part of that equity. Yet the marital funds invested in the house are indistinguishable from the non-marital funds. Adjusting only the appreciation and not the principal protects the principal from invasion whenever the loan exceeds the appreciation. Preserving principal is absurd. The lender does not make that guarantee, neither when the market collapses nor when the loan eats into principal. By deducting it from the appreciation, the formula used exacerbates the bias in a formula that disproportionately credits earnings on non-marital contributions.

The above argument is easily demonstrated with a 100% equity loan that distributes all the equity at the time of the loan. It wipes out all contributions at the point of the loan. That means there are no marital or nonmarital contributions

continued, next page
Marital Portion of A Non-Marital Home
CONTINUED, FROM PAGE 43

left at the point of the loan. It also means that every first mortgage payment afterwards and every second mortgage payment repaying the refinanced amount is with marital funds. Even though all the contributions are marital property and the property should be 100% marital property, the statutory formula preserves the nonmarital principal that has already been distributed; and at the same time, it shares disproportionately in earnings as before based on contributions that no longer exist. This is why marital and nonmarital interests must be redetermined at the point of the loan. Inasmuch as the loan cannot be secured without an appraisal of the property, there is just no reason to skip this intermediate step. Doing this intermediate step obviates the need to define an adjustment to appreciation brought about by the refinance.

The loan must reduce a pro rata share of equity and principal at the point of the loan. As the loan gets repaid, the repayment is made with marital funds and transmutes some of the non-marital principal into marital principal. As a consequence, several refinances can convert a non-marital home into a marital home without retitling the home in both names. Consider one refinance when the amount of loan is 100% of the equity, as shown above. That will not occur with the statutory formula that treats the loan as a marital loan, as opposed to a refinance based solely on equity in the home.

Conclusion

While the revised Equitable Distribution statute clears up the portion of the mortgage payment that creates marital property, it fails to simplify the calculation of the marital property and to calculate the amount of appreciation the marital contribution creates.

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Endnotes

2. The revised Equitable Distribution statute defines the marital contribution as the total payment of mortgage principal, plus its share of appreciation. Subsections I through IV of the statute outline a formula used to define how to calculate the marital appreciation. Subsection V permits the court to exercise discretion to modify the formula when “a party shows circumstances sufficient to establish that application of the formula would be inequitable under the facts presented.” The only formula mentioned within section 61.075 consists of the terms defined by subsections I through IV. Fla. Stat. § 61.075 (2020).
5. Ball v. Ball, 335 So. 2d 5 (Fla. 1975).
6. Id.
7. Landay v. Landay, 429 So. 2d 1197 (Fla. 1983).
8. Id.
10. Gregg v. Gregg, 474 So. 2d 262 (Fla. 3d DCA 1985).
11. Id.
12. Ball, 335 So. 2d at 5.
13. When the nonmarital contribution is the down payment, the marital contribution is the difference between the down payment and the total contribution. The sum of the two portions must add to all the total contribution, and the only time that happens is when the house is unencumbered on the cutoff date. That is why the denominator must equal the sum of marital and nonmarital contributions and not the purchase price.
14. Gregg, 474 So. 2d at 262.
In order to demonstrate the simplicity of the Debt Financing Method, the following example is offered. Suppose the nonmarital house was purchased with a $20,000 down payment and the purchase price was $200,000. Suppose further the amount owed when the parties married was $175,000. On the date of filing the equity in the home is $350,000; the house was not refinanced during the marriage and the amount owed is $150,000. The marital contribution is $25,000: $175,000 - $150,000. The non-marital contribution is $25,000: $200,000 - $175,000. The appreciation is $300,000: $350,000 - $25,000 - $25,000. The marital share of the equity is 50%: $25,000/($25,000 + $25,000). Its share of appreciation is $150,000: 50% x $300,000. Both portions in this example are identically worth $175,000: $25,000 + $150,000.

The parties married before 2007. Suppose a house worth $400,000 on 1/1/2007 was inherited in 2009 with no mortgage. In 2009, the home depreciated to $150,000 (appraised) and it was refinanced a month later to tap 90% of the home equity, which is $135,000. By 2019, $15,000 of the $135,000 was paid back and the home was appraised for $500,000. Under the statutory formula, the appreciation is $500,000 - $400,000 = $100,000 or <0, which cannot be less than zero. The marital portion under it is limited to marital principal, or $15,000, making the non-marital portion $350,000: $500,000 - $15,000 = $350,000. But the non-marital contribution was reduced from $400,000 on 2007 to $150,000 when the real estate market plummeted, less 90% of the loan borrowed against the $150,000 value (in 2009), reducing its contribution to $15,000: $150,000 - $135,000. As the house was unencumbered when it was refinanced, there were no marital contributions until afterwards. (If not for that, the $15,000 would be apportioned between marital and nonmarital portions as if the parties divorced on the date of refinance using the debt financing as the basis for recalculating contributions.) The amount of appreciation at the recalculation date is $500,000 - $150,000 - $15,000 = $335,000, and as both portions contribute identical amounts, $15,000, each portion shares in 50% of $335,000, or $167,500. Both portions are identically valued at $182,500: $15,000 + $167,500.
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Emergency Provisions in Parenting Plans

By Marck Joseph, Esq.

On March 17, 2020, the Supreme Court of Florida issued Administrative Order No. AOSC20-15, in response to the Governor of Florida’s declaration of a state of emergency and the Surgeon General and State Health Officer declaring a public health emergency due to the Coronavirus Disease 2019 (COVID-19). This began the shutdown of Florida’s Family Courts. While Florida’s families were already trying to navigate the Court system, confusion and lack of understanding about COVID-19 caused a massive shutdown of the world as we knew it. The confusion was exacerbated by the cancellation of schools and a subsequent stay-at-home order issued on April 1, 2020. Many co-parenting families faced new and unique challenges. Nothing prepared them for what was happening. Florida’s parenting plans were ill-prepared to address the wave of conflicts attacking the “child’s best interest” document either agreed upon by the parties and/or entered by the Courts. Without Florida’s Family Courts available for weeks after that, pandemonium ensued.

Even after the year, the Family Court is still reeling and recovering from the pandemic. And while we’ve been able to recover and continue to serve Florida’s families in the Family Court arena, we have to ask: “Why didn’t we see this coming?” By “this,” I do not mean the pandemic, but emergencies that may significantly affect parenting plans and the subsequent time-sharing schedule families are required to abide by absent an agreement. We live in Florida, where from June 1st through November 30th (hurricane season), we are always days away from a State of Emergency, school and business closures, and families trying to protect themselves. At the end of the day, why haven’t we thought about this before?

Florida Statutes section 61.13(2)(b) states:

(b) A parenting plan approved by the court must, at a minimum:

1. Describe in adequate detail how the parents will share and be responsible for the daily tasks associated with the upbringing of the child;

2. Include the time-sharing schedule arrangements that specify the time that the minor child will spend with each parent;

3. Designate who will be responsible for:
   a. Any and all forms of health care. If the court orders shared parental responsibility over health care decisions, the parenting plan must provide that either parent may consent to mental health treatment for the child.
   b. School-related matters, including the address to be used for school-boundary determination and registration.
   c. Other activities; and

4. Describe in adequate detail the methods and technologies that the parents will use to communicate with the child.

These elements create the skeleton for the overall parenting plan, which the Court may approve. While Florida Supreme Court Approved Family Law Form 12.995(a)–(c) is comprehensive, continued, next page
March 2020 taught us an important lesson: this is just not enough.

As family law practitioners, we have to revisit our approach to addressing parenting plans during and after the pandemic. While I otherwise believe that the parenting plans we help create consider our clients’ individualized needs, some considerations are unique to certain families’ dynamics. How could we have all collectively omitted “Emergency Provisions,” provisions to help families navigate when outside external forces prevent, disrupt, or confuse their parenting plan? Why don’t we more often consider an emergency alternate time-sharing arrangement or defining which conditions are considered emergencies that excuse strict performance of the time-sharing schedule? Or at minimum, we should outline parameters for families to navigate emergencies. We’ve heard of “Acts of God” provisions in contracts. Parenting Plans should also anticipate unforeseen events and include specific emergency provisions.

Reflecting on my time in the Family Law Section of the Florida Bar and my experiences navigating this pandemic and the issues it has caused, I would like to propose a list of items to consider when preparing future parenting plans. This list is not exhaustive, but provides suggestions to help families better navigate the many possible emergencies or “Acts of God” which may occur.

**Defining Emergency Situations**

The first essential consideration is when these provisions would “kick in.” The parenting plan should define the circumstances under which time-sharing may be suspended or temporarily modified considering the current climate. A declaration of a state of emergency may be a reasonable start point. Nevertheless, every individual parenting plan should be tailored to the client’s particular needs, such as a reoccurring medical condition, job issues, outside obligations, or other considerations.

**Status Quo Provision**

While many counties have some variation of a Status Quo Order when family court cases begin, what happens when a catastrophe occurs? Although it is presumed that a parenting plan is active unless agreed otherwise or modified by the Court, having an express provision defining when the terms can be suspended would eliminate any confusion in the event of a hurricane, earthquake, or any other occurrence that materially alters the standard dynamic of everyday life. While this provision standing alone may not solve all potential issues, coupled with some or all of the other provisions in this article will help many parents avoid conflicting decisions that create unnecessary litigation. A provision stating that time-sharing will continue as per the parenting plan unless an “emergency causes a significant impairment” would be a great starting point.

**Requirement For Written Discussion On Alternative Arrangements**

While a simple written e-mail or text message requesting a minor change may be a natural conflict resolution approach in healthy, successful co-parenting relationships, we as practitioners should always consider the worst case. Parenting plans should include an automatic requirement that each parent must communicate with the other regarding the “Emergency Situation” and propose alternative arrangements in good faith. A mandatory communication requirement helps parties address problems themselves and may create a mechanism to delay or prevent parties from running immediately to lawyers or the courts. Requiring communications to be in writing also memorializes the events should the communication break down and later require the Court to determine each party’s actions for any bad faith positioning or unreasonableness.
Provision For Alternate Arrangements For the Exchange of Minor Children

Parenting Plans should also include provisions for alternate arrangements for the exchange of minor children. This provision is important even during non-emergencies. So easily can circumstances of exchange break down a co-parenting relationship and bring families straight into litigation. Having an alternate arrangement for exchange if exchanges at the stated location and/or time is impractical should be strongly considered. The time and places of the exchanges should also be considered when drafting Parenting Plan provisions. For example, an alternate plan should be outlined if the Parents’ pick-up and drop-offs are directly from the school at the beginning or end of the school day, and the emergency causes school to be canceled. If the exchange is impractical, considering alternative people to effectuate the exchange may also be appropriate to consider. Taken together with the provision requiring written communications for alternative emergency arrangements, this provision pair gives parents the opportunity to agree first, an alternate set-up based on their needs, and accountability should the matter proceed to Court.

Provision For Automatic Makeup Time-Sharing in the Event Time-Sharing is Lost/Withheld

Florida Statutes section 61.13 addresses makeup time-sharing due to a parent’s bad acts. However, the Statute does not consider events which may necessitate a withhold of time-sharing. In an emergency situation, parents should not have to be fear a permanent loss of missed time-sharing due to the other parent’s actions if another parent’s action during the emergency was due to circumstances outside of their control. Having a provision that confirms that if a parent loses time-sharing may be entitled to make-up time should allow them to feel more comfortable having open, honest, and reasonable communications with the other parent and make decisions focused on the minor child’s best interest.

While this list is imperfect, and many considerations could be removed or added, the goal is to consider what those ideas should be and implement them in your practice. While drafting a detailed Parenting Plan that includes in depth emergency provisions may require more attorney drafting time, it will save families time and fees
navigating emergency issues once they arise. Emergency preparation requires a lot of future and speculative thinking from us as lawyers, but not being prepared for an emergency can be just as bad as the emergency itself.

Marck Joseph, Esq., is the founder and owner of The Joseph Firm, a South Florida-based practice focusing exclusively on Marital and Family Law. His strong passion for justice has resolved hundreds of cases for clients, involving divorce, alimony, equitable distribution, paternity (establishment and disestablishment), time-sharing (custody/visitation rights), child support, and domestic violence. He is also a Florida Supreme Court-certified family mediator and collaborative law practitioner. Marck also serves on various committees, including the 11th Judicial Circuit Grievance Committee, the Family Law Rules Committee, and the Florida Bar Family Law Sections Legislative Committee.

An experienced litigator who is dedicated to delivering his clients the results they deserve, Marck has a solid familiarity with each of the South Florida courts and agencies. The Joseph Firm has been trusted by national celebrities and maintains an established record for resolving high conflict cases and high net worth litigation. In addition to his unwavering dedication to his clients, Marck holds a steadfast devotion to giving back to his community. Marck is an advisory member for KidSide, an organization that serves children and parents in high-conflict family court cases. He has been a mentor for the Big Brothers Big Sisters program of greater Miami for over a decade and is an active sponsor of both the Boys and Girls Club and The Positive Imprint Club. He is also a lifetime member of the internationally-active Haitian Lawyers Association and regularly participates in local seminars to share his legal knowledge with other lawyers and the local community in South Florida. Marck has committed his life and practice to strengthening the presence of positive, community-oriented men in South Florida.

Marck received both his Bachelor of Arts in Business Administration and his Juris Doctor from the Florida International University and FIU College of Law, respectively.

With offices in Miami-Dade, Broward, and Palm Beach counties, Marck is proud of his firm’s reputation for service, integrity, and results.

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