Welcome from the Chair

Commentator Chair Message

Message from the Co-Chairs of the Publications Committee

Guest Editor’s Corner

It’s Time to Revisit Belcher: Taking the Final Step Toward Contractual Autonomy in Prenuptial Agreements

QDROs: Solutions to Retirement Plans Refusing Division Dates in the Past

22 2022 Leadership Retreat & Fall Meetings (Photos)

24 Applying Co-Parenting Applications to High Conflict Cases

26 Awards & Installation Luncheon (Photos)

30 Fair Is A Four-Letter Word

35 Feeling Your Way Through a Family Law Appeal

38 Effect of Disability on a Spouse’s Income: A Vocational Expert’s Perspective
Welcome from the Chair

Magistrate Philip S. Wartenberg, 13th Judicial Circuit, 2022-2023 Section Chair

Welcome to the first edition of this year’s Commentator! The Publications Committee, led this year by Anya Cintron Stern and Amanda Tackenberg, have already been hard at work on lining up great and informative articles for this coming year. Along with the very capable assistance of Chelsea A. Miller, this Committee will no doubt keep this Commentator at the same high level that we have come to know.

I have selected for my year as Chair, the theme of embracing our Section’s diversity, in all its forms, and expanding on our Section’s inclusiveness. As luck would have it, the Florida Bar has also chosen a similar theme for this year – so I cannot take any credit for the “INCLUSION” lapel pins that you will see over the course of this Bar Year. But – I will be more than happy to give you one!

There is much to already appreciate about our Section’s efforts in the regard to the diversity of our membership. For this year, I hope to expand the geographic diversity of the Section and its statewide reach. One way to do this is with our CLE programming – and I am happy to report that an all-day, live CLE on financial issues is being finalized now for February 24th, 2023 in Destin at the Sandestin Resort. (Save the date!)

I also hope to encourage professional diversity within our Section. Already, this year’s Marital and Family Law Review Course in January has been specifically designed with multiple speakers from the judiciary as well as non-attorney professionals to complement the board certified attorneys who are presenting.

I have also asked our Long Range Planning Committee, led by Chair-Elect Sarah A. Kay, to continue last year’s initial efforts on bringing more diversity to our Section’s philanthropic ambitions. Many of you know how the Family Law Section has been the overwhelming #1 contributing Bar Section to the Florida Bar Foundation. I have tasked Sarah and her committee to look for other ways in which the Section can meaningfully use our resources in furtherance of our aspirations of “Serving Florida’s Families and Promoting Professionalism.”

Lastly, I hope to use my messaging, and the messaging of the Section, to promote diversity and inclusion throughout our Section and throughout the State. This publication, and our monthly e-newsletter FAMSEG, will assist me with that. To that end, if you have anything that you want to share in that regard, please reach out to me or to the Publication Committee co-chairs – we would love to hear your thoughts and suggestions.

I will close my first Chair’s message with a heartfelt “thank you” to every Section member who has encouraged me along my path of Section service and leadership. I have the enviable task of “taking the baton” from our esteemed past Chair Heather Apicella who has left this great Section in great shape. The bar has been set very high! I especially need to thank two Tampa “legal legends” for being part of our recent Installation Luncheon. First, Joe Hunt, for his introduction

continued, next page
speech – from his gentle (or stark?) reminder of how much both he and I have both somehow managed to accomplish during our respective almost-30-year legal careers in Tampa; to quoting some inspiring words borrowed from an 80’s alternative rock favorite of ours (see below). Last but most fittingly, Joe shared the very gracious words sent in (from some faraway exotic location, of course) from his law partner Nancy Harris – an invaluable mentor to me and to so many other family law attorneys in Tampa - who took a chance on me back in 1998 as her first associate, thus setting me on this path through Section leadership. Thank you, Joe and Nancy.

I am truly blessed and humbled to have been given your trust and confidence in leading this fantastic organization this upcoming year. If I can be of service, please let me know.

“All the people gather, fly to carry each his burden,
We are young despite the years.
We are concern, we are hope despite the times”

“These Days” – R.E.M.

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The 2022-2023 Bar Cycle feels as though we are beginning to return to some semblance of normalcy. The Family Law Section kicked off this year with our in-person Fall Committee Meetings that were held in conjunction with the Section’s Leadership Retreat in Coral Gables at The Biltmore in August 2022. There was an outstanding turnout at our Publications Committee meeting where our members engaged in a brainstorming session regarding potential articles for this year’s publications. Being together in-person promotes professionalism and encourages participation. It is this collaboration that helps to enhance our profession. It is my hope that as this year progresses our members will remain engaged with the Section and specifically, the Publications Committee. The Commentator seeks articles that will provide our members with knowledge and practice tips that enhance our profession, and each of us, as individual practitioners. As always, we are looking forward to providing our members with engaging articles and resources to assist in your practice. Thank you to Michael Mendoza, the guest editor of Issue 1; and, to all our authors for their hard work in making this Issue possible.

The Section welcomes article submissions that are related to the practice of family law. Please feel free to contact me at cmiller@rosswayswan.com or Publications@familylawfla.org, with any questions, comments, or submissions for the Commentator. I hope that you enjoy this Issue.

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The Publications Committee warmly welcomes our Chair, Phil Wartenberg, who will undoubtedly lead the Section to great accomplishments and build from the successes of the Section’s Immediate-Past Chair, Heather Apicella! To that end, this Committee strives to tirelessly ensure that its publications educate and inspire Florida’s family law practitioners to meet the needs of Florida’s families. To meet this goal, the Committee wants to tap into our greatest resource—YOU! All of the great work completed by this Committee and the Section would not be possible without your tireless efforts, contributions, and ability to put pen to paper (or aggressively clack away at the keyboard). Feel free to send in those submissions to: publications@familylawfla.org. And thank you to all of our authors, our Guest Editor Michael Mendoza, and Chelsea Miller, Vice-Chair of the Commentator, for your contributions to this edition of the Commentator.
It has truly been an honor and a privilege to serve as the guest editor for the first edition of the Family Law Commentator during the 2022-2023 Bar Cycle. Thank you to the Commentator Chair, Chelsea Miller, the Co-Chairs of the Publications Committee, Anya Cintron-Stern and Amanda Tackenberg, and to all the authors of the articles of this edition, for their hard work, dedication, and commitment to the betterment our profession and to Florida’s families.

In my role as guest editor for this edition, I had the privilege of editing an article by Brian Tackenberg, Esq., which addresses the development of the case law and treatment of temporary alimony waivers in prenuptial agreements, and ultimately suggests a modern reconsideration of the current precedent regarding this topic in favor of the sanctity of contracts. Ned Price, Esq. shares his experience and perspective on mediations in the family law context and explores the significance of the often-misplaced terms of “fair” and “reasonable” in such proceedings. And William Slicker, Esq. contributed a valuable article on the utility of co-parenting applications to families experiencing transition and separation in high conflict cases.

You will also enjoy contributions from independent professionals with whom we, as family law practitioners, frequently interact and retain to assist our clients with their cases. Specifically, vocational experts Devin Lessne and Beth Leitman have co-authored an article sharing their perspective on the effect of a disability on a spouse’s income in a family law case. And financial analyst and retirement plan expert Tim Voit authored a timely article dealing with a recent trend he has seen in his work with certain plan administrators, and how this shift impacts the work of the family law attorney in obtaining qualified domestic relations orders (QDROs).

Within this edition, you will also find the third and final -- and much-anticipated -- installment of the three-part series on navigating a family law appeal, by Shannon McLin, Esq. and Erin Pogue Newell, Esq. I have no doubt that family law attorneys across our State will benefit greatly from this series in their day-to-day practices by garnering a greater understanding of and appreciation for the important elements of a successful appeal.

I hope you enjoy this edition of the Family Law Commentator as much as I have enjoyed editing it; and I hope to meet you at one of our Section’s upcoming meetings.
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Family Law Commentator
Fall 2022
It’s Time to Revisit Belcher: Taking the Final Step Toward Contractual Autonomy in Prenuptial Agreements

By Brian Tackenberg

Invoking Lord Byron, the Florida Supreme Court explained in Belcher v. Belcher, 271 So. 2d 7 (Fla. 1972), that “[w]omen [were] made to be loved—not to be understood.” Consistent with that appreciation of relations between men and women, the court held that a husband could not contract away his “obligation to pay alimony, suit money and attorney’s fees during a separation prior to dissolution of the marriage” and that “the law of [Florida] makes a husband responsible for the support of his wife while she is married to him.” That was 50 years ago. A different time.

But the Belcher rule—founded wholly upon a “perceived need to protect women”—still governs today, exactly half a century later. Indeed, the protectionism Belcher imposed (which the Supreme Court of Florida itself has hinted is due for reconsideration) now stands as one of the few remaining paternalistic holdovers from “a time when attitudes about marriage and divorce were vastly different than they are now.”

Over the past 50 years, Florida law has evolved from a state of tightly policing every aspect of the institution of marriage, to a jurisprudence that empowers individuals to direct their domestic relations how they see fit through contract. Following Florida’s past evolutionary path leads to a single, inescapable conclusion: the paternalistic dictates of Belcher have no place in today’s society, and the Florida Supreme Court should revisit and overrule Belcher.

The Evolution of Nuptial Agreements in Florida

Prior to 1970, Florida courts rejected nuptial agreements without exception. Hard stop. Florida adhered to the then-majority rule, which held that “agreements to facilitate or promote divorce [were] illegal as contrary to public policy.” This continued, next page
anti-contract policy arose out of the Florida’s general abhorrence to the concept of divorce.

Given that marriage was “of vital interest to society and the state” under Florida law, the state was deemed a third party to “every divorce suit,” and its interests were deemed to “take precedence over the private interests of the spouses.” So in Florida’s earliest days, parties could not even agree to get divorced—let alone agree to how the state would adjudicate their divorce if they sought one.

But Florida’s public policy was not set in stone. In 1970, the law began to “cautiously evolve” towards enforcement of marital agreements. That initial evolutionary step came in Posner v. Posner, 233 So. 2d 381, 385 (Fla. 1970), a decision in which the Supreme Court of Florida held that antenuptial agreements “should no longer be held to be void ab initio” on public policy grounds. The court based its precedential shift on similarly shifting societal views towards divorce, explaining that “[w]ith divorce such a commonplace fact of life, it is fair to assume that many prospective marriage partners … might want to consider and discuss … —and agree upon, if possible—the disposition of their property and the alimony rights of the wife in the event their marriage, despite their best efforts, should fail.”

Posner placed Florida at the cutting edge of this evolutionary transition, and—in today’s parlance—the state would have been deemed an “early adopter” in the realm of contractual autonomy in domestic relations. It was in the wake of this tidal shift—indeed just two years prior all prenuptial agreements were deemed to violate public policy—that the Florida Supreme Court addressed a much thornier issue in Belcher: whether a husband could “contract away his future obligation to pay alimony, suit money and attorney’s fees during a separation prior to dissolution of the marriage.” The court held that a husband could not.

As the supreme court recently acknowledged, Belcher was based on a “perceived need to protect women,” which, “under the historical line of cases since shortly after Florida became a state in 1845,” dictated that the court reject any contractual effort to withhold pre-dissolution support. The paternalism that animated the Belcher decision was apparent from the face of the opinion and was especially noticeable in the court’s discussion of the husband’s argument for enforcing a pre-dissolution waiver of support:

The husband rends his double knit garments in perplexed agitation that the wife should be permitted to accept the $200,000 fruits of her agreement (a home, stocks and insurance if he dies) and then to impeach the implicit terms of an agreement stating that he should not be compelled to comply with support upon separation, out of his remaining $3 million. To him she seems to be saying at this later time, “Yeah, but what have you done for me LATELY?” Perhaps a husband must consider (notwithstanding today’s ‘women’s lib’ for extended ‘equal’ rights for women) that classic observation of Lord Byron in his Pearls of Wisdom: “Women are made to be loved—not to be understood.” Someone has said, ‘We call them ‘the opposite sex’ because just when you think you’ve fooled her, it’s just the opposite!’

It was upon this paternalistic founding that the supreme court held pre-judgment support obligations could not be waived by contract.

In 1987, fifteen years after Belcher was decided, Florida’s evolution towards contractual autonomy took another major step forward in Casto v. Casto, 508 So. 2d 330 (Fla. 1987). There, the supreme court held that “even unreasonable nuptial agreements regarding post-dissolution property and support, if freely executed are enforceable.” Indeed, this expansion of contractual power regarding post-dissolution support was unprecedented in Florida jurisprudence, restrained only by the fact that such post-dissolution agreements could be voided under certain circumstances.
As Judge Farmer later explained while specially concurring in *Balazs v. Balazs*, 817 So. 2d 1004 (Fla. 4th DCA 2002), the *Casto* decision amounted to a watershed moment in Florida’s evolution towards greater contractual autonomy: “*Casto* was a landmark case that ‘clarified’ the legal landscape on nuptial agreements. *Casto* established the quaint notion that contracting parties to marital agreements will be held to their bargains—even if the bargain is a harsh one—so long as the agreement is free and voluntary and not tainted by fraud or overreaching.”

He explicitly questioned the continued validity of *Belcher*, critiquing the very foundation upon which *Belcher* was built:

“[I]t should need no citation of authority to recognize that the holding in respect to the inability to contract away the right to attorney’s fees before dissolution of marriage in *Belcher* represents our legal past and is a product of a time when attitudes about marriage and divorce were vastly different than they are now.”

Ultimately, Judge Farmer concluded that *Belcher* was no longer good law and “surely part of the legal landscape ‘clarified’ away by *Casto*.”

In *Lashkajani v. Lashkajani*, 911 So. 2d 1154 (Fla. 2005), the supreme court continued the renunciation of its paternalistic past, and addressed an issue related to *Belcher*: whether prevailing-party attorney’s fee provisions in prenuptial agreements concerning litigation over the validity of the agreements themselves, are enforceable under Florida law.

While concluding that such prevailing party fee provisions are enforceable in prenuptial agreements, the court expressly stated that it was not yet addressing the continued validity of *Belcher*—explaining that “we need not, and do not, decide today whether provisions in a prenuptial agreement concerning pre-dissolution support may be enforced.”

Despite the doubt that *Lashkajani* casts on the continued validity of *Belcher*, district courts have since continued to apply *Belcher*’s bar to waiver of temporary support. But those decisions are based on the continued validity of *Belcher*—with at least one court interpreting the supreme court’s restraint in *Lashkajani* as an endorsement of the continued validity of that case.

*Belcher*’s continued validity should not be viewed as unshakeable. The supreme court hinted in *Lashkajani* that *Belcher* will be due for reconsideration when the court is given a jurisdictionally-appropriate vehicle to do so. And the Second District—stating that it was “aware that perceptions have changed since *Belcher* was decided that may require a review of existing legal principles”—has already certified a question of great public importance to the Florida Supreme Court on the continued validity of *Belcher*. Unfortunately, the parties did not pursue further appellate proceedings in that case; so the question was never answered.

**Where Do We Go from Here?**

“The law is not static. It must keep pace with changes in our society, for the doctrine of stare decisis is not an iron mold which can never be changed.” The “common law may be altered when the reason for the rule of law ceases to exist, or when change is demanded by public necessity or required to vindicate fundamental rights.”

The justification for revisiting *Belcher* is palpable. *Belcher* was patently predicated on “the perceived need to protect women,” and the decision itself—in rejecting the husband’s contention that his wife was empowered to waive pre-dissolution support—erroneously disregarded as irrelevant what it described pejoratively as the “‘women’s lib’ [movement] for extended ‘equal’ rights for women.”

In the past 50 years, however, equality between spouses has evolved to become the norm. Contractual freedom has concurrently expanded as a means through which to implement that
equality. After all, “recognizing more contractual elements of marriage,” permits “more personal decision making,” and the goal of “individual fulfillment” at the core of marriage equality exists “at odds with extensive state regulation of marriage. . . .” Thus, as one scholar has put it, “the onset of contractual freedom between spouses is seen as necessary for marriage to be free and equal.”

Belcher “is a product of a time when attitudes about marriage and divorce were vastly different than they are now.” Since it was decided, Florida courts have all but erased the anti-contractual paternalism that Belcher rested upon. Indeed, Florida law has continuously evolved to allow both parties to enter a marriage on equal footing, granting each party the power to contract as they see fit in furtherance of that equality. That 50-year trend is best exemplified by the supreme court’s decision in Casto, in which the court held that parties (regardless of sex) possess contractual autonomy and have the power to enter whatever form of marital agreement they wish, as long as they enter such an agreement with open eyes.

Belcher’s protectionism fundamentally conflicts with Florida’s aim of empowering each party to control their own fate. And Florida is not alone in its evolution toward contractual autonomy. Several other state appellate courts have already held that parties may waive temporary support in an antenuptial agreement. Florida should do the same.

Of course, “liiit is no small matter for one [cl]ourt to conclude that a predecessor [cl]ourt has clearly erred.” But “when our common law rules are in doubt”—and they certainly are here given that Belcher was written to correct a concern that no longer exists—it is appropriate for the supreme court to revisit its prior decisions, taking into account “changes in our social and economic customs and present day conceptions of right and justice.”

The only thing standing in the way of revisiting Belcher would be the citizenry’s reliance upon the policy enunciated therein. As the supreme court has stated, “once [the court has] chosen to reassess a precedent and [has] come to the conclusion that it is clearly erroneous, the proper question becomes whether there is a valid reason why not to recede from that precedent . . . [and] [t]he critical consideration ordinarily will be reliance.”

But the reliance hurdle is easily overcome here. A decision reversing Belcher would have only one effect: expanding the contractual rights that individuals entering antenuptial agreements possess. Such a change in the common law would not invalidate any previously-entered contractual terms; nor would it undermine the intent of the agreements that parties have entered. To the extent any parties actually relied on the policy announced in Belcher, their reliance would have only resulted in the absence of a clause waiving temporary support. And, in the off chance any parties included temporary-fee-support waivers in their agreements despite Belcher, reversing that precedent would do no more than allow the parties’ intent to dictate.

Overturning Belcher would not, however, allow the “sheer autonomous willed choice of the parties” to dictate whether a clause waiving temporary support would be enforceable. While vacating Belcher would further contractual autonomy, it would not make contractual autonomy absolute. There are “a whole range of equitable ‘saves’ [under Florida law] that infuse contract law with public-law-like commitments to fairness.” These equitable “saves” ensuring fairness can be found in Casto and its progeny. They would continue to apply when temporary support is at issue.

Conclusion

Belcher is a paternalistic holdover from a prior era. It stands in stark contrast with our current era, in which the Florida Supreme Court has endorsed ever-expanding contractual autonomy—including
over marital relations. *Belcher* is a roadblock standing in the way of that evolution, and it should be revisited as soon as the court is provided with a jurisdictionally-appropriate vehicle to do so.

**Brian Tackenberg** is a Florida Bar board-certified appellate lawyer at Crabtree & Auslander, P.A., in Key Biscayne, Florida. Crabtree & Auslander is a boutique appellate firm comprised of four board-certified appellate specialists, handling litigation in both Florida and federal appellate courts, as well as trial support throughout Florida. Brian began his legal career as a staff attorney for Florida Supreme Court Justice Barbara J. Pariente. Prior to clerking, he received his law degree from the University of Florida College of Law in 2013, graduating magna cum laude and attaining membership in the Order of the Coif. While in law school, he was a member of the Florida Law Review.

### Endnotes

1. Belcher, 271 So. 2d at 12.
2. *Id.* at 9.
3. *Id.*
4. Lashkajani v. Lashkajani, 911 So. 2d 1154, 1157 (Fla. 2005).
8. *See Underwood v. Underwood*, 12 Fla. 434, 442 (1868) (“No decree of divorce from the bond of matrimony can be entered by the court upon the mere consent or agreement of the parties of record.”) (Westcott, J., concurring).
9. Lashkajani, 911 So. 2d at 1156.
10. *Id.* at 384. The supreme court’s recognition was not entirely dispassionate, however, and the court went out of its way to express its concern about the new no-fault divorce paradigm emerging on the West Coast: “This court can take judicial notice of the fact that the ratio of marriages to divorces has reached a disturbing rate in many states; and that a new concept of divorce—in which there is no ‘guilty’ party—is being advocated by many groups and has been adopted by the State of California in a recent revision of its divorce laws providing for dissolution of a marriage upon pleading and proof of ‘irreconcilable differences’ between the parties, without assessing the fault for the failure of the marriage against either party.” *Id.*
11. *See Allison A. Marston, Planning for Love: The Politics of Prenuptial Agreements*, 49 Stan. L. Rev. 887, 897-98 (1997) (“Until 1970, prenuptial agreements providing for the disposition of assets upon divorce were unenforceable in the United States. . . . The bellwether case came from Florida. . . . Other courts and states followed suit, and prenuptial agreements that include divorce provisions are now generally enforceable in all states.”).
13. *Id.* at 11.
14. Lashkajani, 911 So. 2d at 1154.
15. Belcher, 271 So. 2d at 11.
16. Belcher, 271 So. 2d at 12.
17. Lashkajani, 911 So. 2d at 1157 (citing *Casto*, 508 So. 2d at 334).
18. Casto, 508 So. 2d at 333-34.
20. *Id.* at 1005.
21. *Id.*
22. Lashkajani, 911 So. 2d at 1158.
23. *Id.*
24. *See Parbeen v. Bari*, 47 Fla. L. Weekly D641 (Fla. 4th DCA Mar. 16, 2022) (“[A]n agreement of the parties that waives or limits the right to request temporary support and attorney’s fees to a spouse in need in a pending dissolution action is a violation of public policy.”) (quoting Khan v. Khan, 79 So. 3d 99, 102 (Fla. 4th DCA 2012); Nishman v. Stein, 292 So. 3d 1277, 1281 (Fla. 2d DCA 2020) (“a spouse’s claim for temporary attorney’s fees under section 61.16 cannot be contracted away or waived before entry of final judgment in marriage dissolution proceedings.”); *Ortiz v. Ortiz*, 227 So. 3d 730, 732 (Fla. 3d DCA 2017) (“Parties to a marriage cannot contract away or waive temporary support and attorney’s fees before a final judgment is entered.”); Khan, 79 So. 3d at 1012 (“This appeal is controlled by *Belcher v. Belcher*, 271 So. 2d 7 (Fla.1972), which states the governing law with respect to agreements including limitations or waiver of temporary support and attorney’s fees in dissolution actions.”).
25. *See, e.g.*, Lord v. Lord, 993 So. 2d 562, 565 (Fla. 4th DCA 2008) (explaining that Lashkajani did not address Belcher’s bar on waiving of temporary support and therefore holding that “Florida’s long-standing policy against enforcing waivers of pre-dissolution support remains intact”).
29. Lashkajani, 911 So. 2d at 1154.
30. Belcher, 271 So. 2d at 12.
34. *Balazs*, 817 So. 2d at 1005 (Farmer, J., concurring specially).
35. *See Beal v. Beal*, 88 P.3d 104, 113 (Alaska 2004) (“Interim support is a type of alimony which can be subject to a prenuptial agreement provision precluding the award of alimony.”); *In re Marriage of Pendleton & Fireman*, 24 Cal. 4th 39, 54, 5 P.3d 839 (2000) (determining that prenuptial agreement that waived alimony did “not violate public
It's Time to Revist Belcher
CONTINUED, FROM PAGE 15

policy” and could properly bar a claim for temporary support; *Musko v. Musko*, 697 A.2d 255, 256 (Pa. 1997) (holding that prenuptial agreement precluding a claim to “money or property or alimony or support” included alimony pendente lite is subject to enforcement); *Darr v. Darr*, 950 S.W.2d 867, 871 (Mo. Ct. App. 1997) (holding that antenuptial agreement denying temporary alimony was not unconscionable); *Clanton v. Clanton*, 592 N.Y.S.2d 783, 784 (N.Y. App. Div. 1993) (holding that antenuptial agreement renouncing all claims to support, including maintenance pendente lite is enforceable where wife is capable of self-support).


37 *Dempsey*, 635 So. 2d at 964 (quoting *Hoffman v. Jones*, 280 So. 2d 431, 435 (Fla.1973)).

38 *Poole*, 297 So. 3d at 507.

39 *Halley*, supra note 33, at 15.

40 *Id.*
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QDROs: Solutions to Retirement Plans Refusing Division Dates in the Past

Emphasis on TIAA-CREF and Similar Plans

By Timothy C. Voit, Voit Econometrics Group, Inc.

Some plan administrators for 401(k)s and like retirement plans are revising their guidelines to the extent that they are no longer accepting or approving Qualified Domestic Relations Orders (QDROs) with a historical division date, such as the parties’ date of filing of the action for dissolution of marriage (for purposes of defining an alternate payee’s share in a QDRO). Rather, a number of plan administrators are only dividing the accounts as of the “Date of Transfer.” This shift poses a problem for attorneys and their clients in Florida given that in many instances, courts typically use the date of filing for valuation purposes in equitable distribution cases, although, Courts have discretion to use alternative valuation dates.

Accordingly, the family law practitioner may have to account for the possibility of a 401(k) or similar plan disallowing a date of filing or other agreed-upon date in the past to be used in a QDRO. For example, the practitioner might consider addressing this possibility by including a provision in a marital settlement agreement providing that “if a plan will not use the date of filing, or an agreed upon “date in the past”, an investment expert shall compute the former spouse’s share as of the closest date of distribution or segregation of the account to determine the former spouse’s share as of the most current date. The spouse with the 401(k) or TIAA-CREF account shall provide all necessary statements to the expert through the most current date at issue.”

And for those attorneys preparing QDROs that are not equipped to accurately perform these calculations, it could create a potential liability issue due to inaccurate amounts being ultimately distributed to the detriment of one spouse or the other. This article addresses the issues (and the potential solutions) based upon my 30 years of experience in preparing QDROs for Florida attorneys.

Recently, TIAA-CREF, a large custodian of funds managing retirement plan assets for several colleges and universities, announced that it will not accept a valuation date other than the date of transfer. TIAA-CREF accounts are comprised of individual contracts and importantly, while some TIAA or CREF contracts allow for an immediate distribution, some contracts may not.

For Florida QDROs dividing TIAA-CREF retirement accounts you can use the date of filing for an effective date in the MSA/FJ, but you CANNOT use the date of filing in the TIAA-CREF QDRO. We have a solution.

Historically, it has been in Florida to include language in settlement agreements that a spouse is awarded 50% of the other spouse’s account as of the date of filing, usually plus or minus gains and/or losses to the date of distribution. Typically, a plan administrator for a 401(k) would allocate shares or units of the underlying investments (e.g., mutual funds) to a separate account for the alternate payee, subsequently adjusting the awarded amount for gains and/or losses going forward to the date of distribution.
Investment gains/losses are inherent in the division of a 401(k) account when including an “as of” date in a QDRO, simply because a proportionate share of the underlying investments (funds) equal to the amount awarded are being transferred. Whether the shares are transferred based on a value determined as of the date of filing or the date of segregation, the ultimate distribution will be adjusted because the shares will begin to fluctuate in value on the date they are placed into the separate account.

A QDRO may order a plan administrator to award a flat dollar amount as of the date of segregation when the plan receives the QDRO. Yet, from the date of segregation to the date of distribution, gains and/or losses will still be present because of the allocated shares regardless of the effective date. The value of those shares or units as of the date of distribution then dictates whether gains or losses apply and if so, to what extent.

Even if you state in the parties’ marital settlement agreement, final judgment, or QDRO, that the spouse’s share is NOT to be adjusted for gains and/or losses, there may be no getting around some change in value because of the plan’s policy to transfer shares. This occurs between the date of segregation, the latest valuation date of the plan for splitting an account, and the date of distribution, or more specifically, the date of valuation for purposes of distribution. This is why practitioners should advise the alternate payee client of the potential that there may be some difference in the amount awarded and the amount received.

As previously stated, TIAA-CREF’s announcement that it is no longer accepting QDROs with a date in the past as the valuation date, poses a problem for Florida family law attorneys, in that someone (not the plan) will have to calculate the value of the date of filing balance, to be consistent with the case law here in Florida, and bring that date of filing value up to date (or an anticipated transfer date). Calculations like this, similar to calculating marital and premarital portions of 401(k)s, require an expert with investment knowledge to know exactly how to allocate gains/losses, and to understand the performance of the various stock and bond funds. Because account statements are not always available, contribution rates might be called into question to exclude post-marital contributions, and loans on retirement accounts may be erroneously applied. Thus, an investment expert is required to fill in the gaps even going so far as to consider investment behavior.

One solution to this issue is to award a flat dollar amount to the former spouse (alternate payee in a QDRO); however, one party will be at a disadvantage given the volatility in the market. Yet another solution would be that, upon the onset of a divorce, the parties allocate their 401(k) investments to the most conservative investments in the plan, e.g., money market fund, to avoid the market volatility and preserve each party’s share until the divorce is over.

**DIFFERENT DISTRIBUTION PERIODS AMONG DIFFERENT COLLEGES OR UNIVERSITIES USING TIAA-CREF**

One issue worthy of mentioning is that the individual colleges and universities using TIAA-CREF have different distribution policies. Just because one university using TIAA-CREF allows for an immediate lump-sum distribution, a TIAA-CREF account derived from a different university may not allow for a lump sum distribution and may require the plan participant (and alternate payee) to wait until a certain age (e.g., age 50) for distribution.

It cannot be taken for granted that simply because an account balance exists with TIAA-CREF that an immediate distribution is possible. The reason for this is that TIAA-CREF offers each college or university prototype plan documents to choose from - some permit immediate distributions upon termination of employment or divorce, while others specify an age as to when they allow a direct distribution.

continued, next page
QDROs CONTINUED, FROM PAGE 19

For example, the University of Florida may have a different distribution policy than Florida State University despite the fact that they both use TIAA-CREF. Therefore, if an immediate distribution is desired (or needed), it is best to check with TIAA-CREF or the sponsors of the plan, i.e., the colleges or universities, as to when an alternate payee can expect to receive a distribution. The practitioner may also want to look into the distribution policy, for liability purposes, so the client knows what to expect.

TIAA-CREF does not dictate the distribution policy of the plan in question, only the college or university. Different schools have different distribution policies; therefore, it is advisable not to assume a certain college or university can make an immediate distribution.

If a spouse is expecting to pay off a debt, pay off the mortgage on a house, or buy a new home, it is best to determine if each of the employers will allow for an immediate lump-sum distribution. In this scenario, the practitioner should determine how the individual plan interprets or defines the term “immediate” as it relates to a lump sum distribution.

An “immediate” lump-sum distribution is interpreted differently upon plans given the long-term time horizon of retirement accounts. “Immediate” to one 401(k) administrator could mean within a few months; but, to another, “immediate” may mean within the next year depending upon the distribution policy of the plan. Some plans will not even make a distribution until a certain age of the plan participant.

It is best NOT to assume a distribution from any retirement account can be made right away. It is advisable to contact the plan administrator to verify when a distribution can be made after a QDRO is entered.

Making general assumptions about retirement plans is dangerous, especially if a spouse is being assigned an amount from a defined contribution plan to pay off debt or to fund an alimony claim. Some QDRO malpractice cases generally arise from an erroneous distribution, incorrect effective date in the past (no longer viable with TIAA-CREF), or the death of a participant spouse.

Lastly, a word on when gains and/or losses would apply. When a retirement account is being divided as a marital asset, generally gains and/or losses apply. This was addressed in the Hoffman v. Hoffman case some years ago in Florida. A spouse must take the good with the bad; and, as the court pointed out in Hoffman, retirement plans are assets of fluctuating value. Cases have been lost on this very issue. Knowledge is power and lack of knowledge when it comes to QDROs could get family law practitioners sued. In one case, an attorney hired another attorney to prepare a QDRO; and, when an erroneous distribution was made, each attorney pointed the finger at the other - one claiming the QDRO was drafted incorrectly and the QDRO attorney blaming the family law attorney for a poorly worded settlement agreement. Know that as family law practitioners, even if you are not drafting the QDRO, you are not totally immune to a lawsuit when things go wrong when drafting the QDROs.

So, when do gains and losses apply? If the retirement plan, namely 401(k)s and other defined contribution plans, is being divided by itself, gains and losses would apply to the date of segregation that the plan receives the QDRO and creates a separate, sometimes temporary, account for the alternate payee. As previously mentioned, it is common for a plan administrator to allocate
shares of the funds at issue equal to the amount awarded. Rarely would a plan liquidate an account and pay cash. So, if the spouse is not comfortable with his/her share being subject to market volatility, perhaps to cover yourself as the attorney and suggest to them that he/she may want to allocate their awarded share to the most conservative investment in the plan, e.g., money market fund, until they elect to transfer their share to an IRA of their own or elect to receive a direct distribution.

Gains and/or losses would not apply if the amount awarded serves as an offset against another marital asset of fixed value (e.g., fishing boat), keeping in mind the transfer of shares and the fluctuation in value thereafter.

In summation, with TIAA-CREF and certain other plans, attorneys will now have to retain outside professionals with the expertise required to calculate a "date of filing" value currently, without including contributions that were made after the date of filing. A professional with knowledge of investments, mutual funds, and other various securities, can provide marital values, even when statements are not always available.

Tim Voit is the author of Retirement Plan Benefits & QDROs in Divorce (500pgs) whose firm, Voit Econometrics Group, Inc., specializes in the preparation of QDROs and advising on valuation issues involving pensions, 401(k)s, and investments. Mr. Voit is a regular speaker for CLE credits related to QDROs and financial analysis in divorce and has testified as an expert in state and federal courts.

In addition, Mr. Voit is the author of Federal Retirement Plans in Divorce - Strategies & Issues (250pgs), and has been retained by Lawyers Mutual in the past to correct poorly drafted QDROs, calculate present values, or reverse transactions on behalf of attorneys. Mr. Voit has appeared in Forbes and Reuters, regarding QDROs and retirement plan valuations, and has appeared in BusinessWeek and Newsweek in the past. Tim Voit is retained to consult on appellate briefs as it relates to QDROs and retirement plans in divorce. Tim Voit is a Certified QDRO Specialist and member of the American Association of Certified QDRO Professionals.

Questions and inquiries can be directed to Tim Voit at inquiry@vecon.com or by visiting www.vecon.com.

Endnotes
1  Section 61.075(7), Florida Statutes.
2  Hoffman v. Hoffman, 841 So.2d 695 (Fla. 4th DCA 2003).
2022 Leadership Retreat and Fall Meetings
Coral Gables, Florida – August 24-27, 2022
Applying Co-Parenting Applications to High Conflict Cases

By William D. Slicker, Esq.

Luckily, “high conflict” family law cases are a relatively small percentage of all divorce and paternity cases. Such “high conflict” cases typically involve one or more parties with narcissistic tendencies, mental health issues (diagnosed or otherwise), or substance abuse issues. Moreover, the litigation of these cases are characterized by, and often prolonged due to, deceitfulness, argumentativeness, an inability to compromise, shifting blame to the other party, and violation of court orders. And when a high conflict case involves parental responsibility and time-sharing with minor children, a family law practitioner’s resourcefulness in establishing and promoting a productive and positive co-parenting dynamic can be critical.

Increasingly, courts across the nation are ordering parties in high conflict family law cases to utilize co-parenting applications, such as Our Family Wizard or Talking Parents, for their communications with each other. Ease of access and a wide variety of features make such applications readily employable in high conflict cases. For example, these co-parenting applications include a shared calendar feature, which allows the parties to share and view their time-sharing schedules as well as other important school and extracurricular events, and medical and dental appointments in their children’s schedules.

Additionally, all co-parenting applications include a message board for the parties to communicate with one another about parenting issues; and, once a communication is exchanged, a record of that message is saved securely on the application’s cloud server. Certain applications include tools to monitor the tone of the parents’ communications, such as Our Family Wizard’s ToneMeter feature, which suggests changing angry or aggressive messages prior to them being sent to the other parent. Importantly, messages that have been sent cannot be edited or deleted; and may readily be printed out for use as evidence in court.

Another helpful feature of such applications is an address book in which the addresses and phone numbers of the child’s extended family members, friends, emergency contacts, and medical providers may be listed. An education file can be used to share the names and contact information for the child’s teachers, school administrators, and academic performance within the applications. And common to all platforms is a child information section, where vital information about the child from medical conditions, medications, social security numbers, and clothing sizes may be listed and shared by both parents.

Yet another common and useful feature of these applications is an expense register so if a party is ordered to split uncovered medical or other expenses, such as daycare, such expenses can be listed, a pro-rated responsibility of each parent calculated, and the reimbursing parent may pay his or her share directly through the application. In short, the plethora of features can help families in high-conflict situations to establish and promote meaningful co-parenting.
relationships that are characterized by true shared parental responsibility, transparency, and accountability.

Unfortunately, even with the best tools at their disposal, parties in many high conflict cases may still find ways to foment conflict. For example, while co-parenting applications such as Our Family Wizard, Talking Parents, and others can help the parties to communicate in a secure and tone-appropriate manner, the parties may still be unable to agree on issues related to parenting. One or both parents may even fail to obey the court order to sign up for the co-parenting application. Others will sign up, but refuse to use the application or terminate the program altogether. And some people will refuse to use scheduling features of the program, which may hinder time-sharing or frustrate the other parent’s involvement in the child’s extracurricular activities. And still other parents may refuse to open the messages sent by the other party.

In more severe cases, one or both parents may use co-parenting applications to harass or pester the other party. Such harassment may become so egregious that it may be grounds for a restraining order.

Consequently, family law practitioners should endeavor to be attuned to the nature of the conflict between the parties to a family law case, so that they may anticipate and plan appropriately for violations of court orders or agreements regarding co-parenting applications. To begin, when called upon by a court (or in the mediation process) to craft a proposed order or stipulation requiring the use of such co-parenting applications, the attorney should be sure to include specific language that addresses use of the program, including but not limited to: who will be responsible for registering for the account; who will be responsible for payment and renewal of the program; the timeliness of responses to messages; what information to include in the shared calendar and information folders, when to upload such information, and who will bear the responsibility for uploading that information; and prohibiting the use of the program for abuse and harassment of the other party. The developers of these applications will often provide standard language to be included in such orders or stipulations for the practitioner’s use and reference.

Additionally, attorneys should be aware of and take advantage of the applications’ tools for legal practitioners, such as Our Family Wizard’s attorney access portal or Talking Parent’s subscription to access communication records.

In summation, family law practitioners involved in high conflict cases should be aware of the availability of co-parenting applications such as the ones referenced in this article and familiarize themselves with the various features that can be useful in such cases. Likewise, attorneys in high conflict family law cases should recognize that, while helpful, such tools are not a cure-all to the ailments of a family experiencing transition; and certain circumstances may require thought and resourcefulness in anticipating and addressing misuse of the program.

William D. Slicker served as a law clerk to the Honorable Steven H. Grimes at Florida’s Second District Court of Appeal and as a law clerk to the Honorable Warren H. Cobb at Florida’s Fifth District Court of Appeal. He has received the Florida Bar President’s Pro Bono Award for the Sixth Circuit, Ms. JD Incredible Men Award, the St. Petersburg Bar Foundation’s Heroes Among Us Award, the Community Law Program Volunteer of the Year Award, and the Florida Coalition Against Domestic Violence Lighting the Way Award.

Endnotes
Applying Co-Parenting Applications

CONTINUED, FROM PAGE 25


9 Wilcoxon v. Moller, 132 So.3d 281 (Fla. 4th DCA 2014).


15 Co-parenting applications are not limited to those specifically referenced in this article or the cases cited herein.
Fair Is A Four-Letter Word

By Ned I. Price, Esq.

No family law mediation passes without one or both of the parties emphasizing that they simply want to be “fair.” In fact, the word “fair” is used in everyday discourse without the purveyor of the word having any objective frame of reference. This article attempts to make a case as to why the words “fair” and “reasonable” as used in the family law mediation context (or really in any conversation) should at worst be eliminated from the English language and at best should be limited in their application.

Parties presumably come to the mediation conference with the purest of hearts and the best of intentions. In Florida, family court judges are required to refer parties (pure of heart or not) to mediation prior to trial without much opportunity to waive the process entirely. Each party’s emotional construct is such that an objective view toward the family dynamic and an appropriate disposition of the issues may appear impossible. In addition, any attempt by either party to take an objective view towards his or her own situation is all too often impeded by their attorney, who consciously or subconsciously identifies with their client, thereby exacerbating a situation already fraught with emotion. Given that reality, the words “fair” and “reasonable” are moving targets as to their meaning and application. In essence, what is “fair” or “reasonable” is like beauty; it is in the eyes of the beholder.

DEFINITION OF “FAIR”:

The phrase “beauty is in the eyes of the beholder” in its current form is attributed to the Irish author Margaret Wolfe Hungerford in her 1878 romantic novel titled “Molly Bawn.” So too are the words “fair” and “reasonable” in the eyes of the beholder and, as such, they necessarily result in subjective interpretations. Just like the word “beauty,” the definitions of “fair” and “reasonable” are moving targets, incapable in most instances of generating a consensus as to their meaning.

In the guise of preparing ourselves and our clients for a mediation mindset, let us break it down to the etymology of the word “fair.” According to the *Merriam-Webster Collegiate Dictionary*, the word “fair” implies a proper balance of conflicting interests or “just,” “equitable,” impartial. The *Cambridge Advanced Learner’s Dictionary* defines “fair” as “treating someone in a way that is right or reasonable, and not letting personal opinion influence his or her judgment.” Black’s *Law Dictionary* defines “fair” as “just, equitable, even-handed, equal as between conflicting interests.” As one can see, the definition of “fair” begs the need for a more definitive definition, especially when the definitions are as subject to interpretation as is the word being defined. In other words, the definition of “fair” is as equally subject to interpretation as is the word “reasonable” or any other word that is contained within the definitions as set forth in each respective lexicon.

A party to any mediation conference in a family law matter is never disinterested or free of bias or prejudice. The definition of “fair” or “reasonable,” given any fact pattern, is not what either party or his or her attorney believes it to be, but what is ultimately contained in the decision of the trier of fact or the settlement agreement between the participants in any dispute. As such, there exists at least three differing perceptions of what is fair or what is reasonable in family court disputes, to
wit: 1) the Petitioner, 2) the Respondent, and 3) the judge.

Any attempt to define the word "reasonable" goes no further in providing solace to any objective observer. The Merriam-Webster Collegiate Dictionary defines "reasonable" as “being in accordance with right reason, moderate, fair.” 6 Black's Law Dictionary defines "reasonable" as "fair, proper, or moderate under the circumstances." 7

The definition of "reasonable" is defined by the equally ambiguous term "fair." In like sense, the word "fair" is often defined by the equally ambiguous term "reasonable." As the old story goes, a person once asked me what "fair" means. I responded by saying, “Your guess is as good as mine.” As demonstrated above, the English language, in this situation, employs circular definitions to define terms, which are themselves subject to various interpretations in any given setting or context. In other words, the words “fair” and "reasonable" are defined by essentially the same words but are nonetheless a part of each other’s definition.

APPLICATION OF “FAIR” AND “REASONABLE” IN MEDIATION OR IN INITIAL ATTORNEY/CLIENT INTERVIEW:

At the outset of any mediation conference, it should be made clear to the participants by the mediator that the word “fair” is a four-letter word. Better yet, this is a subject that should be discussed in the initial attorney/client meeting. The word “reasonable” is also considered as being equivalent to the real "F" word. It should be explained to the parties that what he or she believes is fair and reasonable might well be totally different than the other party’s interpretation or even that of the trier of fact. As such, resorting to subjective beliefs as to what result might be “fair” and “reasonable” has no real application in the mediation context. More clearly stated, the attorney or mediator cannot enlighten the parties by use of the words “fair” or “reasonable.”

It should be explained to the parties that judges or triers of fact apply imperfect laws, enacted by imperfect legislative bodies, and interpreted by imperfect courts. 8 As previously stated, there are typically three different perceptions of “fair” or “reasonable” as viewed by the petitioner, respondent and the judge; i.e., three different human beings bringing with him or her three different life experiences and viewpoints in defining what he or she believes is “fair” and “reasonable.” These imperfect judges use their discretion to adjudicate the facts, apply imperfect laws, and render imperfect judgments. Parties face a higher risk when they delegate decisions to what the judge might think is fair versus what either party thinks is fair. Any use of non-definitive terms, such as, “fair” and “reasonable” should always be prefaced by the user with the qualifier “in my not so humble opinion.”

No mediation participant will find peace or contentment by focusing on what he or she feels is unfair, reasonable, or unreasonable. True peace for a party in any dispute comes from attaining closure, accepting it, and being able to move forward in life, not only financially, but more importantly, emotionally.

Time for a limerick:

There once was a judge named Blair.  
Who always thought he was "fair."  
His rulings were long,  
And not ever wrong,  
Except in the eyes of the pair.

LIGHTHEARTED APPLICATION AS TO WHAT’S “FAIR” OR “REASONABLE”:

“The world isn’t fair, Calvin.” “I know, Dad, but why isn’t it even unfair in my favor?” 9 Such is too often the attitude of a party in mediation when confronted with discussions concerning the fairness (or lack thereof) of the justice system or the world at large. It is not unusual for mediation participants to feel let down by the judicial system when their expectations as to “the bottom line”

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are not met. Such an attitude arises because of “unreasonable” expectations frequently fostered by a party’s attorney or by their friends or family, especially in light of the wide discretion afforded to family law judges in divorce cases. Skewed perspectives in the mediation context have often been met with the admonition “if you are here looking for justice, you are in the wrong place.”

A light-hearted vignette that should bring the point home is as follows: “Mr. Smith, I have reviewed this case very carefully . . . and I’ve decided to give your wife $275.00 per week,” said the divorce judge. “That’s very fair, Your Honor,” the husband replied, “and every now and then, I’ll try and send her a few bucks myself.”10 Another light-hearted application of the word “fair” goes something like this: “For every $1.00 that a man makes, a woman makes $.70. That’s not fair. Why is the man even left with $.30?”11 The point to be made is the differing interpretations of what is “fair” or “unfair,” “reasonable” or “unreasonable.” As previously stated, “fair” and “reasonable” are completely subjective terms and, as such, are not often realistic goals in and of themselves in a divorce setting. “Reality” contemplates attempting, albeit unsuccessfully, to take an objective look at one’s own situation and obtain the result which allows one to move forward in life not only financially but as previously stated emotionally.

Time for another limerick:

| The past is the past. |
| It should not long last. |
| The present is now. |
| It’s important to learn how |
| To move forward and be happy fast. |

THE “REASONABLE PERSON” STANDARD OF APPELLATE REVIEW IS BASED ON A FICTIONAL PERSON:

In family law appeals, the standard of appellate review regarding trial court decisions predicated solely upon findings of fact is “abuse of discretion.” Since such determinations are based on how a trial judge exercises his or her discretion, the “reasonableness test” on appeal is used to determine whether such discretion was or was not abused by the trial court. Considering the circular definitions of fair and reasonable, and the incredibly subjective nature of the parties’ ideas of fair and reasonable, it is somewhat ironic that the appellate standard relies on the “reasonable man.”

The “reasonableness test” provides that “if reasonable men could differ as to whether the trial court’s decision was correct, then its decision was not unreasonable and there was no abuse of discretion” to warrant a reversal by the reviewing court.12 In other words, the trial court’s findings of fact and resulting decision will only be reversed upon a finding by the reviewing court that reasonable persons might take a contrary view. In essence, when a particular case is reversed on appeal based on the “abuse or discretion” standard, the appellate court judges are merely applying their definition of what they believe is reasonable as compared to the trial judge’s definition.

This irony of the “reasonable person” referenced in the abuse of discretion standard of review is predicated upon an “illegal” fiction.13 To explain, Justice Oliver Wendell Holmes, Jr. referred to the “reasonable person” as an illegal fiction, nondemocratic in scope, and unrelated to the average person who might very well be other than reasonable. The “reasonable person” standard of review is predicated upon the assumption that the reasonable person is the average person, and that each person owes a duty to behave as would a reasonable person under like circumstances. Who or what is the “reasonable” person, and is any adjudication of any set of facts in any way reasonable? Although answers to these questions are elusive, the legal system marches on and does the best it can.

Special notice should be taken that the word “reasonable” is used throughout Chapter 61 of
the Florida Statutes to “definitively” set forth the statutory foundation regarding family law matters. Statutory language using such non-definitive terms is the reason why the law is imperfect. As previously noted, laws using such non-definitive terms such as “fair” and “reasonable” are promulgated by imperfect legislators who enact those very laws, which are interpreted by imperfect courts, and then perhaps are reviewed by imperfect (or “unreasonable”) appellate judges. Such a reality should be the subject of an early discussion with each participant in any family law mediation.

To sum it up, the following limerick says it all:
The reasonable man does not exist.
On any person’s contact list.
Each party has his own “clear” view.
What a reasonable man would tend to do.
Their view no doubt is always the best.

IN ANY MEDIATION CONTEXT, DOES IT EVEN MATTER WHAT “REASONABLE” OR “FAIR” MIGHT MEAN:

Any party’s definitive statement that he or she is being “reasonable” or “fair” is not what really matters in the context of a family law mediation or settlement conference. The questions that should be addressed directly as well as indirectly should focus more on exploring an interest-based path toward resolving conflict and steering away from focusing on what either party feels is reasonable, which is inherently subjective in nature and no doubt polarizing. The facilitator or peacemaker, which the legal system refers to as a mediator, would be much more productive in resolving disputes by focusing on what the judge might consider as “reasonable.” Taking a proactive risk-based approach tends to steer the parties away from their polarizing, self-serving declarations of what is reasonable.

Some of the questions that a mediator might ask the parties in any mediation conference may be:

A. What might be fair or reasonable to the other side?
B. What might the judge feel is reasonable given the facts?
C. What questions could I ask to find out?
D. What am I doing that is adding to the conflict?
E. What might be a middle ground for resolution of the conflict or disagreement?
F. How can I change my behavior or attitude to help me resolve the conflict?
G. What is preventing me from moving forward or letting go?
H. What is the cost to me, both tangible and intangible, if the conflict or dispute is not resolved?
I. What would it take for me to let go, move forward in life, and reach out to the party on the other side of the dispute?
J. What is preventing me from taking “the high road” and coming to a middle ground no matter how uncomfortable that may be to me?

Discussing such questions in mediation with one’s client shifts the focus from what a party feels is reasonable or fair to a more resolution-focused dynamic. By integrating such an approach in any conflict resolution conference might very well “bear fruit” and go a long way toward accomplishing a peaceful resolution so that all parties can attain closure. Consuming oneself with the past will not give you peace in the present or in the future. Who knows, cultivating such an approach might very well result in both parties experiencing the elimination of a huge burden lingering in his/her mind and heart.

DENOUEMENT

The words “fair” and “reasonable” have no practical application in any mediation. The parties (and each attorney) should be cautioned at the start of every mediation not to use profanity, including, but not limited to, any “F” word, which we now know includes the word “fair.” In like

continued, next page
Fair Is A Four-Letter Word

CONTINUED, FROM PAGE 33

sense, respect for the process mandates that
the words “fair” and “reasonable” be avoided, for
they lack any objective meaning. They are junk
words. As Roshani Chokshi articulated in the book
Aru Shah and the Song of Death, “fairness (and
reasonableness) is like a multifaceted gem. Its
appearance can vary, depending on the angle of
the holder.”

It would be most appropriate at this point to end
with a limerick which goes as follows:

Each party had a view,
As to what the judge might tend to do.
Each knew what was fair.
But the judge didn’t care,
’Cause his view was different than the pair.

Ned I. Price practiced trial law for twenty-eight
(28) years with an emphasis on family law. He is
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Mediator primarily mediating family law issues on
a full-time basis for approximately fifteen (15) years.
He received his Master’s Degree in philosophy from
the University of South Florida in 1976 and his Juris
Doctorate from Stetson University College of Law
in 1978.

Endnotes
1 See Florida Statutes Section 44.102(2)(c) requiring referral
to family mediation programs unless there is history of
domestic violence and at the request of a party.
2 Margaret Wolfe Hungerford, Molly Bawn, J.B.Lippincott,
1st ed. (1878). The origins of the phrase “beauty is in the eyes
of the beholder” can be traced back to the 3rd Century B.C.
in ancient Greece. William Shakespeare wrote in his Love’s
Labours Lost (1588) that “beauty is brought by the judgment
of the eye” and Benjamin Franklin, in his Poor Richard’s
Almanac (1741), posited “beauty, like supreme dominion, is
but supported by opinion.” David Hume, in his essays Moral
and Political (1742), penned “beauty in things exist merely in
the mind which contemplates them.”
Gluck’s article primarily deals with how the courts engage in
statutory construction and discussing the various approaches
to the application of the laws to a specific fact pattern. Any
discussion of activist versus textualist interpretations of
statutes by the judiciary is better left to another day.
9 Bill Watterson was a cartoonist and the creator of The
Calvin & Hobbes Cartoon. Calvin & Hobbes appeared in
newspapers from 1985 until Watterson’s retirement in 1995.
10 Origin of this quote/humor is unknown.
11 Origin of this quote/humor is unknown.
12 Canakaris v Canakaris, 382 So.2d 1197 (Fla. 1980); Cargile-
Schrage v Schrage, 908 So.2d 528 (Fla. 4th DCA 2005).
13 Holmes, Jr., O.W., The Common Law, 1st ed., London:
MacMillan, (1882).
14 Cloke, Kenneth, MEDIATION AND MEDITATION: THE
DEEPER MIDDLE WAY, Mediate.com, Everything Mediation,
March, 2009.
15 Chokshi, Roshani, Aru Shah and the Song of Death,
Disney Hyperion, (April, 2019).
Welcome to the final part of this three-part series on feeling your way through a family law appeal, in which we have identified and discussed issues we’ve encountered while handling family law appeals, from identifying the appealability of the trial court’s decision and applicable standards of appellate review, to best practices for composing a persuasive appellate brief and presenting oral argument. This final article discusses requesting appellate attorneys’ fees and costs in a family law appeal.

The term “family law matter” is identified by the Florida Rules of Appellate Procedure as: “A matter governed by the Florida Family Law Rules of Procedure.” Family law matters are unique concerning the parties’ entitlement to appellate attorneys’ fees and costs because section 61.16, Florida Statutes, ensures that both parties have similar opportunities to secure competent legal counsel by placing them on as equal footing as is possible regarding their financial abilities to pay for adequate legal representation and costs.

Specific to appeals, the statute provides:

The trial court shall have continuing jurisdiction to make temporary attorney’s fees and costs awards reasonably necessary to prosecute or defend an appeal on the same basis and criteria as though the matter were pending before it at the trial level ... In determining whether to make attorney’s fees and costs awards at the appellate level, the court shall primarily consider the relative financial resources of the parties, unless an appellate party’s cause is deemed to be frivolous.

§ 61.16(1), Fla. Stat.

The proper vehicle for requesting temporary attorney’s fees and costs to prosecute or defend an appeal is to file a motion for temporary appellate attorneys’ fees and costs in the trial court under subsection 61.16(1), Florida Statutes, and rule 9.600(c) of the Florida Rules of Appellate Procedure.

After the appellate court enters an opinion, however, the trial court loses authority to award temporary appellate attorneys’ fees and costs, and a party’s entitlement to appellate attorneys’ fees must be established by rule 9.400(b). A prevailing party may also obtain an award of appellate costs, irrespective of section 61.16, pursuant to rule 9.400(a).

Rule 9.400(b) requires, among other things, that a motion for appellate attorneys’ fees be filed in the appellate court no later than the time for service of the reply brief. A motion for appellate costs, on the other hand, must be filed in the lower tribunal “no later than 45 days after rendition of the court’s order.”

Where a party seeks appellate attorneys’ fees and costs under section 61.16 and rule 9.400(b), the appellate court will typically grant the motion

continued, next page
as to fees and costs conditionally and direct the trial court to determine the relative financial positions of the parties, as those considerations are evidentiary matters best suited for determination by the lower tribunal. An appellate attorney will generally include both fees and costs in a rule 9.400(b) motion based on section 61.16, as the failure to request costs may result in a waiver of entitlement to appellate costs under that statute.7

Where the appellate court has conditionally awarded fees and costs under section 61.16, the requesting party need not file an additional motion for appellate costs under the prevailing party provision of rule 9.400(a). Otherwise, a party must request appellate costs in accordance with the requirements of rule 9.400(a).

Whether temporary appellate attorneys’ fees and costs are awarded under rule 9.600(c) or an award is made at the conclusion of the appeal pursuant to rule 9.400, the requesting party must be prepared to present evidence to the trial court on remand to establish their entitlement, including their own need and the non-requesting party’s ability to pay appellate attorneys’ fees and costs, and all the relevant circumstances surrounding the litigation, including such factors as

- the scope and history of the litigation,
- the duration of litigation,
- the merits of the respective positions,
- whether the litigation is brought or maintained primarily to harass, and
- prior or pending litigation.8

Once entitlement is established, the requesting party must present evidence regarding the reasonableness of the amount of appellate attorneys’ fees requested.

While section 61.16 is one of the more common grounds of entitlement to appellate fees and costs in family law appeals, there are other grounds for entitlement to fees or costs that may be available to the parties depending on the circumstances of the case. For example, shifting attorneys’ fees provisions in marital settlement agreements, which may be based on the prevailing party or the defaulting party, are matters of contract and generally are strictly enforced.10 An experienced appellate attorney will identify the available grounds of entitlement to appellate attorneys’ fees and costs and file the appropriate motion or motions in the proper tribunal(s).

As we’ve noted in our prior articles, the likelihood of receiving a trial court decision that requires appellate review in a family law case is very high. The chances that your client will also be in difficult financial circumstances is also, unfortunately, high. In such cases it is crucial to understand the ins and outs of requesting and obtaining awards of appellate attorneys’ fees and costs in family law matters.

Shannon McLin, B.C.S. is the founder of Florida Appeals a boutique appellate law firm with six appellate lawyers and two appellate paralegals. While Florida Appeals has physical offices in Orlando and Ft. Lauderdale, remote video technology enables the firm to advise family lawyers cost effectively throughout Florida.

A significant part of Shannon’s work takes place in trial courts, where she often serves as additional counsel of record for trial support purposes. When engaged to join a trial team, Shannon assists lead counsel with strategy, analysis, legal research and briefing significant issues with a focus on preserving error for appeal. She also testifies as an expert on appellate issues and attorney’s fees.

Shannon is Board Certified by The Florida Bar in appellate practice and is AV rated by Martindale Hubbell. She has consistently been named by Florida Trend as a Florida Legal Elite and as a Florida Super Lawyer in appellate practice. She is a Charter Member of the Appellate Practice Section where she served on the Executive Council and as the section delegate to the Council of Sections. She also served on The Florida Bar’s Appellate
Court Rules Committee and the Appellate Court Certification Committee where she held the positions of Vice-Chair and Chair respectively.

In addition to her service to the appellate bar, Shannon is active in the family law arena. She currently serves on the Marital and Family Law Section’s Executive Council and she co-chairs the Section’s Appellate Committee. She has also served as a guest editor of the Commentator.

Erin Pogue Newell began her legal career as an associate appellate attorney at a boutique appellate firm, where she handled civil and criminal appeals at the state and federal levels, covering a variety of issues ranging from: negligence, to wrongful death, products liability, and other tort issues, to contract and coverage disputes, to attorneys’ fees awards, to family law issues. Ms. Newell has presented oral argument in all of Florida’s District Courts of Appeal and the United States Court of Appeals for the Eleventh Judicial Circuit.

Ms. Newell graduated Magna Cum Laude from Manhattan College (Riverdale, NY) in 2006 with a Bachelor of Arts in English and Secondary Education. After teaching high school English for several years, she attended St. Thomas University School of Law (Miami, FL) where she earned CALI Book Awards in Legal Research and Writing, Torts and Constitutional Law, and graduated Cum Laude in the top 10% of her class in 2012.

During her time at STU law Ms. Newell served as Editor-in-Chief of the Intercultural Human Rights Law Review, Research Assistant for Professor of Law Leonard D. Pertnoy, Vice President of the International Law Society, and a member of the Mock Trial and Moot Court teams, where she earned top oralist honors and competed in national and local competitions. Ms. Newell also interned at the Eleventh Judicial Circuit of Florida, Criminal Division, for the Honorable Judge Sarah Zabel.

Ms. Newell is an attorney volunteer on the Covid-19 Pro Bono Legal Response Project and has participated as an attorney volunteer on additional Disaster Legal Services through the Florida Bar Young Lawyers Division. Ms. Newell is a member of the Appellate Practice Section of the Florida Bar, and a member of the Broward County Bar Association. Ms. Newell has also been consecutively selected to the Florida Rising Stars list in Appellate practice.

Endnotes
2 See Emmel v. Emmel, 671 So. 2d 282, 286 (Fla. 5th DCA 1996).
3 Kasm v. Lynnel, 975 So. 2d 560, 2008 Fla. App. LEXIS 1870 (Fla. 2nd DCA 2008).
4 Fla. R. App. P. 9.400(a) (“Costs shall be taxed in favor of the prevailing party unless the court orders otherwise.”): see, e.g., Marlin v. Marlin, 953 So. 2d 13 (Fla. 4th DCA 2007) (considering whether the former husband was the prevailing party on “the significant issues” on appeal for purposes of an award of appellate costs irrespective of F.S. 61.16); Perez v. Fay, 198 So. 3d 681, 682 (Fla. 2d DCA 2015) (finding the mother was the prevailing party on the significant issues in the appeal, and thus entitled to appellate costs under Fla. R. App. P. 9.400(a), in a custody dispute, irrespective of F.S. 6116).
6 See Rados v. Rados, 791 So. 2d 1130 (Fla. 2d DCA 2001).
7 See, e.g., Youngblood v. Youngblood, 91 So. 3d 190 (Fla. 2d DCA 2012) (finding the trial court should not have awarded the wife appellate costs or “suit money” over the husband’s objection because she did not move for an award of appellate costs or “suit money”).
8 Rosen v. Rosen, 696 So. 2d 697, 700 (Fla. 1997).
9 Sierra v. Sierra, 505 So. 2d 432, 434 (Fla. 1987) (“[T]he necessity and the reasonableness of an award of attorney’s fees must be supported by competent substantial evidence. The party who is going to suffer the financial detriment of payment of the fees must be provided an opportunity to be heard.”).
10 See Sachet v. Sachet, 115 So. 3d 1069 (Fla. 4th DCA 2013) (finding an attorneys’ fees provision in a marital settlement agreement was not enforceable in that instance because it was not a “prevailing party” provision and neither of the parties had “defaulted”).
Effect of Disability on a Spouse’s Income: A Vocational Expert’s Perspective

By Devin Lessne, MA, MS, CRC, CDMS, ABVE/F, IPEC, CVE, ICVE and Beth Leitman, MA, CRC, CVE, IPEC – Vocational Expert Services, Inc.

Evaluating wage-earning capacity in cases involving a spouse who has disabling conditions is a unique and complex process. A spouse’s disabling conditions add several variables to a vocational evaluation. For example, the occupational base (i.e., the number of jobs that are suitable for a spouse) can be greatly impacted when physical and/or mental limitations exist. Therefore, the spouse’s disability and its impact on the world of work must be considered by the vocational expert throughout the vocational analysis.

A disabling condition may have varying effects on a person’s functional capacity. While the medical records may indicate a condition exists, not all disabling conditions limit an individual’s functional capacity so that they are unable to work. A vocational expert thus determines the impact a disabling condition has on functional capacity. For example, the severity of migraine headaches may be mild and rare for one individual, which would have a minor impact on functional capacity. However, if a migraine headache is frequent and severe, that condition can reduce functional capacity until the individual is unable to work.

When disabling conditions are present, obtaining medical information becomes a necessary part of the evaluation process. Medical records are reviewed and used to address questions of work-related restrictions as well as the ability to function due to ongoing disabling conditions.

However, the process of gathering records is often cumbersome, with several issues to overcome. One issue is identifying who is responsible for gathering the medical records. This could be the vocational expert, attorney, or spouse. The timeliness of obtaining records from medical providers is another issue to consider, as it can impact how quickly a vocational evaluation can be completed. Additionally, the providers will require either a subpoena or completed Health Insurance Portability and Accountability Act (HIPAA) form before they will release records.

With the review of the medical files, it may become apparent that different doctors have different opinions. The vocational expert can give opinions regarding suitable jobs based on the various opinions of the doctors. This could be provided whether the medical opinions were reconciled, or two separate medical opinions were used. Another area that may arise is that of combined limitations, which can erode the occupational base even further. For example, a spouse may have two separate limitations, such as being able to use one’s hands only occasionally and having migraine headaches on an occasional basis. While neither of these conditions may erode the occupational base completely on their own, combined they could create a situation where a spouse is unable to work.

The task of obtaining and reviewing medical records from the providers can be very
time-consuming. However, it is an important part of the process. An accurate vocational profile cannot be created without medical records; information that impacts the ability to work certain jobs may not be available alternatively. Additionally, an understanding of the size of the occupational base is critical for the vocational expert and depends in part on the spouse’s functional limitations.

The vocational profile, which assists in determining the occupational base that is present for a spouse, is developed by the vocational expert after medical records are obtained and reviewed. The vocational profile contains data regarding variables such as an individual’s age, education, past and present work experience, volunteering, and personal hobbies. This completed vocational profile helps to provide a more thorough picture of the individual with regards to their relationship with the world of work. When a spouse’s disability is a factor, the vocational evaluator must include the spouse’s Residual Functional Capacity (“RFC”) in the vocational profile. An RFC is the quantified functional capacity that remains after the disabling condition and is expressed as what the individual can do, despite his or her limitations. These included limitations may be regarding physical or mental health, such as how much weight an individual can lift or carry or if they need additional time to complete a work task. Limitations in functional capacity are documented by medical or psychological practitioners. If the limitations are not documented or are ambiguous, an independent medical evaluation may be necessary to establish quantified physical and mental limitations.

After a vocational profile has been created, a vocational evaluation can occur. A vocational evaluation is a sequential vocational analysis of the hierarchy of the return to work. First, the vocational expert determines if the spouse can return to past work within his or her residual functional capacity. If returning to past work is not possible, a Transferable Skills Analysis (TSA) will identify skills that can transfer to other jobs. If no job matches are identified by the TSA, the vocational expert will examine entry-level jobs and possibly recommend a rehabilitation plan. A rehabilitation plan may include the time, cost, and details of training programs and potential employment outcomes for the spouse with disabling conditions. The vocational expert considers the entire vocational profile when matching potential jobs that are suitable for the spouse.

Next, the vocational expert will identify jobs that are suitable to the spouse’s vocational profile. A Labor Market Survey (“LMS”) is created based on the spouse’s vocational profile. The purpose of the LMS is to collect current information from local employers about the availability of jobs, wages, and job requirements. Factors such as education, work experience, skill level, and physical and mental function may all be considered when surveying job requirements. The results of the LMS provide support for a vocational opinion on the employability and placeability of a spouse with disabling conditions.

A spouse with no physical or mental limitations may be highly employable. As limitations are added to the vocational profile, the spouse has less capacity to perform a full range of work. Generally, the more severe the physical and mental limitations are, the higher the erosion of the occupational base. Evaluating a spouse’s earning capacity can therefore be much more complex when the spouse has disabling conditions. Additional contributing factors include, but are not limited to, the time and cost to gather and analyze medical records, reconciliation of differing medical opinions, and the occurrence of combined limitations. However, when dealing with spouses with disabilities, all these factors need to be considered throughout the vocational evaluation process.

Devin Lessne MA, MS, CRC, CDMS, ABVE/D, IPEC, CVE, ICVE

Devin Lessne started in the rehabilitation field early in life working for Rehabilitation Services, Inc continued, next page
Effect of Disability on a Spouse's Income CONTINUED, FROM PAGE 39

a company founded by Mr. Lessne’s parents in 1974. Devin Lessne’s first experience in the rehabilitation field was assisting his father in running Rehabilitation Services sheltered workshop in Miami. As time went on, he assisted his father in outreach focusing on the Americans with Disability Act.

In 2015, Mr. Lessne created Vocational Expert Services, Inc. Under Mr. Lessne’s leadership, Vocational Expert Services has obtained a corporate nationwide contract with the Social Security Administration (SSA) and is an approved vendor for the State of Florida Division of Vocational Rehabilitation (DVR)

Mr. Lessne is accepted as a Vocational Expert by the Social Security Administration Office of Hearing Operations, the State of Florida Office of the Judges of Compensation Claims as well as the United States Department of Veterans Affairs.

He is an affiliate of the Florida Bar Association Family Law Section, and a patron of the Orange County Bar Association. Mr. Lessne serves on the board of the Florida Rehabilitation Association and is the Central Florida chapter president of the International Association of Rehabilitation Professionals.

Beth Leitman, MS, CRC, CVE, CDMS, IPEC

Beth Leitman received her master’s degree in Professional and Rehabilitation Counseling with a Vocational Rehabilitation Specialization from New Mexico Highlands University. She earned certifications as a Certified Rehabilitation Counselor (CRC) and Certified Vocational Evaluator (CVE) via the Commission on Rehabilitation Counselor Certification (CRCC). Additionally, she received her International Psychometric Evaluation (IPEC) certification via the American Board of Vocational Experts (ABVE). She has been accepted as a Vocational Expert by the Social Security Administration and approved as an assistant vocational evaluator for the Florida Division of Vocational Rehabilitation. Ms. Leitman has a passion for helping others with experience working in the mental health and rehabilitation fields for more than 10 years. She is a member of American Board of Vocational Experts (ABVE) and Vocational Evaluation; Career Assessment Professionals (VECAP).
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