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Articles and cover photos to be considered for publication may be submitted to
Sarah Kay, Vice Chair of the Commentator, at Sarah@mbc-lawoffice.com.
MS Word format is preferred for documents, and jpg images for photos.
Dear Section Members,

The year has started off with much activity! First, the Family Law Section is very proud to announce its donation of $25,000 to the One Orlando Fund, to assist the victims and their families in the aftermath of the Pulse nightclub terror attack in Orlando in June. In July, we approved a sponsorship of $2,500 to assist the Florida Chapter of the Association of Family and Conciliation Courts (FLAFCC) in putting on their 13th Annual Conference scheduled for September 28-30, 2016 in Orlando. We also selected five (5) active Section-member recipients for scholarships to attend the Section’s 2016 Leadership Retreat!

In anticipation of the Section’s Leadership Retreat, Chair-Elect, Nicole Goetz, Treasurer, Abigail Beebe, and Secretary, Amy Hamlin, and I all attended the 2016 Section Leadership Conference in Tallahassee on July 22, 2016, where we joined leaders from all sections of the Bar in a day-long seminar moderated by the Chair of the Council of Sections, Kevin Johnson. The conference was informative, with presentations from Patrick “Booter” Imhoff, the newly installed General Counsel of The Florida Bar, (replacing the wonderful Paul Hill), our own Scott Rubin on behalf of the Board of Legal Specialization in his role of Chair of that committee, and Bill Schifino, our new Bar President, among others. Attorney Brittany Maxxey discussed the need for section liaisons to the Diversity and Inclusion Committee, and the Family Law Section is excited to be part of the changes to come! We are also reaching out to the Young Lawyers Division, to connect with young marital and family lawyers who want to expand their work in leadership within our Section.

Our very own 2016 Section Leadership Retreat was held from August 7-9th at the Casa Monica Hotel in St. Augustine, in conjunction with the Fall meetings. What a turn out! Retreat Chair Andrea Reid of Isaacs & Reid, P.A. in Boca Raton could not have done a better job of implementing this year’s theme of inclusivity! Attendees from all over the State brought their excitement, willingness to engage, their desire to be active and involved, and, most importantly, their families! I think we may have had the largest Amazing Race group in St. Augustine trekking through the age-old city searching for treasure, building great teams, and making lasting memories. Many thanks go to Ms. Reid for a job well done.

In September, we will be heading to Seattle for the annual Out-of-State Retreat, which will be held from the 7th to the 11th. We are delighted to be joining our Retreat with that of the Florida Chapter of the American Academy of Matrimonial Lawyers, led this year by our very own Section member and frequent speaker, Natalie S. Lemos of the South Miami firm Leinoff & Lemos, P.A. The retreat is packed with fun activities and offers the opportunity to mix and mingle, see the Seattle sights, learn some things about the Hague you might not know, and just get away from the daily grind for a few days. Join us, if you can! Retreat Chairs Douglas Greenbaum and Nicole Goetz have done an amazing job of planning wonderful things for all of us to do!

Our website – familylawfla.org – has been revamped, and, while we are excited about its fresh new look, we understand that it may have some kinks to work out. Please share with us via our Section Administrator, Gabrielle Tollok, your praises and problems by emailing her at GTollok@flabar.org.

Over the next months, you will see some changes in the Section’s on-line newsletter, too, as we work toward improving our technology and access to information and education for all members!

Laura Davis Smith  
Section Chair

Visit the Family Law Section website:  
www.familylawfla.org
Comments from the Chair of the Publications Committee

Welcome to another year of the Commentator. The Publications Committee is looking forward to working with Laura Davis Smith as we explore her theme of unity and inclusion. We hope to continue to provide you with helpful articles, charts, tips and useful information to assist you in your practice, while also enhancing our “Technology Corner” and featuring new authors and topics. I welcome your feedback, questions and ideas for articles for our upcoming editions. Please e-mail me directly at julia.wyda@brinkleymorgan.com. Thank you to our guest editor, Sarah Sullivan, for all her work in making this first edition of the year possible. I wish the Section and its members another productive and successful year!

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Over a year ago, Amy Hamlin and I stepped down from our roles as Publications Co-chairs after serving in the committee’s leadership for several years. But, I love to write, and to read what others are writing, so I couldn’t help but volunteer to be the Guest Editor for this season’s Family Law Commentator. You just can’t keep me away! I must thank Publications Chair and author of one of this edition’s articles, Julia Wyda, for her leadership and gentle way of holding me accountable—that is no small task! I also thank Tenisia Hall, Vice-Chair of the Commentator, for her keen editing insight and her feedback. This edition is truly a collaboration—and a measure of the best we can be as family lawyers when we work together as a team. To say that the practice of family law is swiftly changing would be a gross understatement. As our society’s burgeoning needs grow more complicated in our hectic 24/7 world, expectations that family lawyers become masters of many topics becomes necessity. This issue of the Commentator reflects new emerging topics in family law (such as “Bitcoin Basics” by Julia Wyda and Yueh-Mei Kim Nutter) as well as reflection on issues that continue to evolve within our practices (“The Hearsay Rule in Guardian Reports” by Anastasia Garcia). Our resident expert in all things collaborative, Robert Merlin, provides us with a review of Florida’s new Collaborative Law Process Act. Attorney Merlin’s grit and determination in taking the Collaborative Law Process Act from concept many years ago to reality in this last legislative session, is a metaphor and example for us all. The realization of the Act embodies that when we are certain of the right path we must stay the course—even through many bumps, unexpected detours and inclement weather.

Mental health recurs as a constant theme in family law cases and we are fortunate to have the expertise exhibited in articles “1 in 17” by Eddie Stephens and Dr. Michael O’Hara as well as “Discernment Counseling” by Dr. Barbara Winter. The Family Law Section’s mental health professionals and affiliates are one of our greatest strengths! Self-care, professionalism and innovation are featured in articles “The Refundable Non-Refundable Retainer” by Mark Baseman, “Technology Corner” by Jack Moring and “Pre-Breakfast of Champions” by Brian Moskowitz. Once we have ethically secured our client’s engagement, we should be mindful of ensuring our top performance by engaging in relaxation and renewal—all the while pushing our practices to innovate to meet our clients’ needs. I must acknowledge and thank my students, Elizabeth White and Lisa Wright for their willingness to read, edit and provide feedback from their unique student perspective. This issue is full of great nuggets and I hope you enjoy your reading time!
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Florida Proceedings after Dissolution of Marriage, Twelfth Edition
This manual examines what comes after the final judgment, including practical analysis for deciding what action can be taken effectively and the procedures to follow. Also addressed are registration, enforcement, and modification of foreign judgments in Florida, the Child Support Enforcement Program, and the Uniform Interstate Family Support Act. Highlights of the new Twelfth Edition include: • Points addressing the appeal of extraordinary writs in family law cases • Additional explanation regarding child support modification • An author rewrite on the property rights concerns

Adoption, Paternity and Other Florida Family Practice, Eleventh Edition
Adoption, Paternity and Other Florida Family Practice covers areas of marital and family law beyond dissolution of marriage, including adoption, paternity, rights and disabilities of minors, temporary custody proceedings, and change of name. The manual complements the other manuals in The Florida Bar’s family law series.

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Collaborative Law Process Act Passes

By Robert J. Merlin, Esq., Coral Gables, FL

The Collaborative Law Process Act was passed by the Florida Legislature on March 4, 2016 and was signed into law by Gov. Rick Scott on March 24, 2016. This article explains the Act and how it will affect the practice of Family law in the future.

The Collaborative Process is an alternative dispute resolution method that is mostly used for family law matters, although it is also used to help parties resolve their differences in other types of disputes as well. In the Collaborative Process, each party retains the services of a specially trained attorney. In Florida, most Collaborative matters also include a neutral mental health professional who acts as a facilitator to help the parties stay on task and not get bogged down with the emotional baggage that they bring to the negotiation table. When there are financial issues that cannot be easily resolved, a neutral financial professional, such as a forensic accountant or a financial planner, is also included in the professional team. The parties meet together with the Collaborative professionals to identify issues that need to be resolved, as well as, to brainstorm about potential ways to resolve those issues. The professionals help the parties choose the best resolution for each issue, without dictating to the parties how they must resolve their differences.

There are a number of aspects of the Collaborative Process that are unique as a dispute resolution method. Some of the most unique characteristics of the Collaborative Process are:

- The attorneys may not represent the parties in contested litigation over the subject matter of the Collaborative Process. The Collaborative Process is voluntary and either party may elect to terminate the Process at any time, but if the Process is terminated, both parties must retain new litigation counsel or they can represent themselves in litigation. A Collaborative attorney can never represent her or his client in contested litigation of the issues that were the subject of the prior Collaborative matter.
- The entire process takes place outside of the judicial system, except for the ratification of the parties' final agreement.
- The Process is transparent, which means that documents and information are voluntarily exchanged between the parties. There is no need to serve formal discovery requests, to seek judicial intervention to obtain discovery or to subpoena the records of third parties. All of the records are accessible by at least one of the parties, so a party obtains the documents and they are provided to the other party and the professionals.
- The Process is privileged. No participant in a Collaborative matter can be forced to testify about anything that happened during the Collaborative Process, except in limited circumstances such as if a child or elderly person is endangered. Any of the parties or the professionals can stop another party or professional from testifying about what happened during the Collaborative Process.
- A mental health professional is used as a crucial part of the professional team and the Process. That person, who does not provide therapy to either of the parties, serves as a protector of the process and ensures that the parties and other professionals are focused on resolving all of the parties' differences.
- The parties, the professionals and the Process are governed by a written contract, called a Participation Agreement, which is signed by all of the participants in the Collaborative Process. The Participation Agreement identifies the subject matter of the Process, the parties and the professionals. The Participation Agreement also sets forth how all of the participants will conduct themselves during the Process.

The Florida Collaborative Law Process Act is based upon the Uniform Collaborative Law Rules/Act (UCLA) that was created by the Uniform Law Commission of the National Conference of Commissioners on Uniform State Laws. The Act was originally created in 2009 only as proposed statutes, but it was amended in 2010 to include a mirror image of the proposed statutes in the form of rules to enable each state to choose which part of the UCLA would be enacted as legislation and which part would be enacted as state rules. The purpose of the UCLA is to regulate the use of the Collaborative Process as an alternative dispute resolution method and to create uniformity of its use throughout the country.

The Florida Collaborative Law Process Act creates a new part III of Florida Statutes Chapter 61 by creating new Florida Statutes §§61.55-58. The Act recognizes the Collaborative Process as a unique non-adversarial process, which is limited to matters continued, next page
that fall within Florida Statutes Chapters 61 and 742. New Florida Statutes §61.55 specifically provides:

The purpose of this part is to create a uniform system of practice for the collaborative law process in this state. It is the policy of this state to encourage the peaceful resolution of disputes and the early resolution of pending litigation through a voluntary settlement process. The collaborative law process is a unique non-adversarial process that preserves a working relationship between the parties and reduces the emotional and financial toll of litigation.

Florida Statutes §61.56 contains definitions of various terms that are used in the Collaborative Process, including the definitions of a Collaborative Law communication and a Collaborative Law Participation Agreement, and it specifically limits the scope of a Collaborative matter under the statute to matters that arise under Florida Statutes Chapters 61 and 742, such as marriage, divorce, dissolution, annulment, parenting plans, alimony, child support, parentage, relocation and pre-nuptial agreements.

Florida Statutes §61.57 describes how a Collaborative Law matter begins, concludes and is terminated. The Process begins, regardless of whether an action is pending at that time, when the parties enter into a Collaborative Participation Agreement. While the vast majority of Collaborative matters begin before an action is filed in court, the Act specifically recognizes that an action could be pending in which the parties choose to place the litigation on hold so they may utilize the Collaborative Process to resolve their differences. If that happens, the litigators can continue to represent the parties in the Collaborative Process, but if the Process is terminated and the parties return to litigation, the parties must retain new litigation attorneys. The original attorneys who left the litigation process to enter the Collaborative Process are disqualified from returning to the litigation process.

The Act prohibits a judge from ordering a party to participate in the Collaborative Process over that party’s objection. This is different from mediation in which the parties are usually ordered by the judge to participate. It is anticipated, however, that more judges are going to discuss the possibility of staying pending litigation to enable the parties to try to resolve their differences through the Collaborative Process.

The Act recognizes that the Collaborative Process concludes when the parties sign a written settlement agreement, when part of the disputed issues are resolved and the parties choose to litigate the balance of their differences, or when the Collaborative Process is terminated. The Process terminates when a party gives notice to the other party that the Process is concluded; when a party begins a new action or returns to pending litigation without the consent of the other party; if a party discharges his or her Collaborative attorney; or the attorney withdraws and that party does not replace the attorney with a new attorney who signs the Participation Agreement. The Collaborative Process may be terminated with or without cause by a party. The Collaborative Process will not be terminated if, with the consent of the other party, a party asks a court to ratify all or part of a written resolution of a Collaborative matter.

Florida Statutes §61.58 empowers the parties and the Collaborative Professionals to determine which, if any, portions of the Collaborative matter will be confidential. That section also describes the extent of the privilege against disclosure that applies to the Collaborative Process. Generally, the privilege against disclosure applies to Collaborative matters. The privilege belongs to all of the parties and the Collaborative professionals, which means that each of the parties and the professionals can invoke the privilege to avoid being compelled to testify in a deposition or in court and they can each object to any other participant in the Collaborative Process from testifying. The privilege can be waived, either orally or in writing, but all of the parties and the professionals must waive the privilege.

There are certain limitations to the privilege, such as if there is a threat to inflict bodily harm or to commit an act of violence or a crime. The privilege does not apply if the Collaborative communication is contained in a written agreement signed by all of the parties, which enables the agreement to be submitted to a judge for ratification; if a Collaborative communication is sought or offered to prove or to disprove a claim or complaint of professional misconduct or malpractice against one of the Collaborative professionals that arose out of the Collaborative matter; or if the communication is being sought or offered to prove or to disprove abuse, neglect, abandonment or the exploitation of a child or an adult, unless the Department of Children and Families is a party to the process or otherwise participates in the process. Even if the privilege would apply, a court is empowered to order the disclosure of a Collaborative communication if the party seeking the disclosure of the communication can demonstrate that the evidence is not otherwise available, the need for the evidence substantially outweighs the interest in protecting the confidentiality, and the communication is being sought or offered in a proceeding involving a felony, an action seeking to rescind or reform a contract arising out of the Collaborative Process, or in an action in which a defense is being asserted to avoid liability under a signed Collaborative agreement. The mere fact that a disclosure or admission is made as a result of it being excepted from the privilege does not make that evidence or any other Collaborative
communication discoverable or admissible for any other purpose.

The enabling language of the Florida Collaborative Law Process Act provides that the Act will not take effect until thirty (30) days after the Florida Supreme Court adopts rules of procedure and professional responsibility that are consistent with the Act. The purpose of the delayed effectiveness of the Act is to ensure that the Act takes effect in conjunction with rules that govern the use of the Collaborative Process in Florida. Proposed rules, which have been prepared by The Florida Bar Family Law Rules Committee, will be presented to the Florida Supreme Court in the near future. The Rule of Procedure will include the procedures for attorneys to follow when the Collaborative Process is initiated during the pendency of the litigation of an action under Florida Statutes Chapters 61 or 742 and when the Collaborative Process is subsequently terminated and the matter returns to the litigation process. The rule addresses how the discharge or withdrawal of a Collaborative attorney is to be handled, how to handle interim agreements that are entered into by the parties during the Collaborative Process and how to handle emergency orders. The Rule of Professional Conduct will include the requirements of a Collaborative Participation Agreement, the disqualification of a Collaborative attorney, how to handle a case in which a governmental entity is involved as a party and the required disclosure of information. The proposed Rule of Professional Conduct also requires the Collaborative attorney to assess the appropriateness of the Collaborative Process for the party and the issues that will be addressed. This includes a requirement that the potential Collaborative attorney explain to the potential new client the benefits and risks of the various choices that the client has to handle the matter: litigation, the Collaborative Process, mediation and other dispute resolution methods. The purpose of this provision is to ensure that a client makes an informed decision when deciding how to handle her or his family matter. Finally, the proposed Rule of Professional Conduct requires the Collaborative attorney to use her or his reasonable efforts to screen for coercive or violent relationships. This is to be done before the Collaborative Process starts and throughout the Collaborative Process. If an attorney reasonably believes that a coercive or violent relationship exists, the Collaborative Process cannot be initiated or continued unless the party or perspective party requests to begin or to continue the Collaborative Process and the attorney reasonably believes that the safety of the party or perspective party can be protected during the Process. Collaborative attorneys will need to hold themselves to this higher professional standard.

Domestic violence and coercive relationships are prevalent in our society. It is my hope that the Florida Supreme Court will eventually require that all attorneys screen for coercive and violent relationships before representing clients in family law and domestic relations cases. I think that with proper training, family attorneys will be able to provide better services to our clients and to protect children if we are aware of the existence of coercive or violent relationships between our client and another party.

The Collaborative Process is a respectful, private and often economical way to help families preserve relationships rather than destroy them, putting the best interests of

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the children first. The Florida Collaborative Law Process Act will inform the public and family professionals that there are alternatives to the frequently destructive, costly and time consuming litigation process. As President Abraham Lincoln said, “Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often the real loser – in fees and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough.”

The Florida Legislature has recognized that the Collaborative Law Process is a unique non-adversarial dispute resolution process. I believe that every family attorney will be talking to their potential new clients about the Collaborative Process being an alternative to the standard litigation model, even if the attorney does not personally represent clients using the Collaborative Process. It could even be a violation of the existing Florida Rules of Professional Conduct for an attorney not to discuss the Collaborative Process with a potential new client.4

I am hopeful and confident that more and more family attorneys in Florida are going to promote the use of the Collaborative Process. The new Florida Collaborative Law Process Act is going to facilitate that trend, a trend that has been a long time coming and one that the public will embrace.

Bob is a partner in Robert J. Merlin, P.A. in Coral Gables, Florida specializing in Marital and Family Law, especially Collaborative Family Law. Bob is Florida Bar Board Certified in Marital and Family Law and he is a Florida Supreme Court Certified Family Law Mediator. He is involved in local, statewide and international organizations that are dedicated to the Collaborative Process and he teaches the Collaborative Process to other professionals. Bob has been intimately involved in the creation and passage of the Florida Collaborative Law Process Act and the rules of procedure and conduct that have been presented to the Florida Supreme Court for adoption.

Endnotes
3 At the time of the writing of this article, the Family Law Rule of Procedure had been approved unanimously by the Florida Bar Board of Governors, but Rule of Professional Conduct was still being worked on with the Bar staff and the Board of Governors’ Rules Committee. The rules will be submitted to the Supreme Court for adoption once they are approved by the Florida Bar Board of Governors.
4 The comments to Rule 4-2.1 of the Florida Rules of Professional Conduct include the following, “[W]hen a matter is likely to involve litigation, it may be necessary under rule 4-1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation.”
Bitcoin Basics for the Family Law Practitioner

Written by Yueh-Mei Kim Nutter, Esq. and Julia Wyda, Esq.

Bitcoin was first introduced in 2009 by Satoshi Nakamoto, a pseudonym for an unknown individual. Since its introduction in 2009, there are now approximately 14,000,000 bitcoins in circulation. Despite the growth and prevalence of bitcoins, no government entity has established definitive standards for Bitcoin regulation and taxation.

If you think Bitcoin only applies to a select techy few engaged in surreptitious or nefarious activities, think again. Bitcoins are now being used by more and more people to purchase items on the internet, purchase merchandise at brick-and-mortar stores, transact business and even, buy houses. There are now sites like CoinMap.org that offer visual ways to locate stores accepting bitcoins, and new businesses continue to be added to these sites.

As Bitcoin popularity has increased, it has ushered in the growing use of digital and virtual technology to deprive a spouse of marital assets and income.

What Exactly is Bitcoin?

Bitcoin is a virtual currency, existing solely in electronic form. What makes Bitcoin different from other virtual currencies is its adoption of peer-to-peer networking and cryptography. As the first cryptocurrency, Bitcoin is entirely decentralized. It was created in response to growing concerns about the level of control governments have over traditional currencies. By allowing other developers to review and update the code, Satoshi Nakamoto ensured that no particular user could ever control the Bitcoin network. Bitcoin can only operate if all users agree on the protocol, which creates a strong sense of community, strengthening the idea that people control Bitcoin, not the government. It derives its value solely from public perception and the open marketplace, making it far different from traditional currencies, which governments regulate and value using monetary policy.

People obtain bitcoins by either “mining” for them or purchasing them. In the mining process, miners are paid in bitcoins for executing complex computations after they download a software program that allows them to connect to the Bitcoin network. The Bitcoin algorithm is programmed to release bitcoins in deceasing amounts up to a total of 21 million bitcoins. Once this number is reached, no more bitcoins can be created. The miners’ work ensures that no users are spending their bitcoins more than once, which creates a system of self-regulation. For those purchasing bitcoins, they can be purchased from an online Bitcoin exchange, through peer-to-peer transfers or as payment for a product or service.

Once bitcoins are obtained, people can then spend the virtual currency in two ways: (1) run a program on their own personal computer or (2) use an account on a website that holds their Bitcoin “wallet.” Not all of these websites that hold wallets can be trusted, as recent articles have revealed that some of these websites have actually wrongfully taken the contents of account holders’ wallets and left them with very little recourse in the world of cyberspace. The wallets use sets of encrypted keypairs—a public key and a private key—for security. These keys are relevant to how spouses can hide wealth in divorce planning and in later dissolution actions. The public key provides or receives payments while the buyer or seller retains the private key. The public key acts as an address and provides information that a Bitcoin user can access, but only a Bitcoin user’s private key can actually approve transactions. Though the public key is traceable, it does not contain any user information. Therefore, by using solely the public key for transaction records, the owners of the addresses remain anonymous. Other than an account number, no personal information is recorded in the Bitcoin ledger. Nor is personal information made available by cross-referencing account numbers. This makes transferring bitcoins a lot like exchanging cash, except that it is being done over the internet, allowing bitcoins to be transferred to anyone, anywhere in the world at any time nearly anonymously.

The United States has yet to clearly state whether Bitcoin users may use bitcoins as currency. In United States v. Ulbricht, which is the well-continued, next page
Bitcoin Basics
from preceding page

known “Silk Road” case, the court found Bitcoin was money for the purpose of satisfying a criminal charge of money laundering. The Internal Revenue Service, on the other hand, classified Bitcoin as property, which will be discussed further below. 28

Bitcoin Issues in Your Family Law Case
As briefly referenced above, Bitcoin can be used by spouses to hide wealth. Spouses can transfer the currency between online wallets to friends, family and/or areas outside the legal jurisdiction. These transactions will be virtually without record. The only indication you or your client may possibly have of some type of virtual currency mischief, may be a possible initial withdrawal from a checking, savings or other account possibly used to purchase bitcoins and then a lack of recorded activity afterward to account for that amount. Make sure you consider digital and virtual currencies while engaged in the discovery process. Specifically include digital and virtual currencies in your requests for production and supplemental interrogatories.

A problem area to be aware of involves a spouse who owns a business and was compensated in Bitcoins without any invoice. There would be no record of the transaction. 29 You would want to start with the website for the spouse’s business to see if it openly advertises the acceptance of bitcoins. 30 If the site does not, you can go to directory websites such as SpendBitcoins or BitPay to see if the business is listed as a company accepting bitcoins for payment. 31 If you find that the company does accept bitcoins, you may want to prepare a corporate request for production, in which you request all documents regarding all virtual currency assets in the company’s possession, custody or control, including, but not limited to, all documents related to wallets, offline or “cold storage” (this refers to keeping a reserve of Bitcoins offline, not present on the web server or any other computer), websites/web services wherein the company stores or holds virtual currency asset and all documents evidencing any transfers of virtual currency made by the Company to and/or from any third party during the marriage. You will also want to request all documents demonstrating, indicating or listing all public IDs or public and/or private keys the company has used to transact any business in virtual currency. If you think the company may be mining Bitcoin, you will want to request all documents related to the purchase of equipment or software of any kind used to mine virtual currency, as well as all documents related to the amount of virtual currency the company acquired, owned or held at any time through mining. These are just a few of the documents you want to specifically request.

If bitcoins are a substantial enough issue in your case, work with a specialist or expert from the beginning. Use your expert to understand virtual currency transactions. Get very familiar with new terms and technology, like blocks, block chain, wallet, and mining, among many others. Figure out how to subpoena information in the block chain. Have an idea of how the spendable balances of the wallets are calculated and how and where those balances can be spent. Then move swiftly when filing the court action to seek temporary injunctions precluding any transactions in the wallets upon filing the case. Note that discovery, enforcement of discovery orders and collecting on a judgment awarding bitcoins becomes more problematic with overseas companies or parties. Countries encouraging and welcoming Bitcoin innovation and growth are Estonia, South Korea and Finland, all led by a current booming growth in China. Another issue to be aware of is tax evasion. 32 Bitcoin has great potential for facilitation of tax evasion. There are two basic ways bitcoins can generate income: (1) bitcoins can be sold at higher values than the original purchase price, generating a net gain for the seller; or (2) bitcoins can be received by merchants as payment for goods and services and therefore be taxable as if the merchant had received more traditional currency, like dollars. 33 However, because of the anonymity provided by Bitcoin, individuals may choose not to report Bitcoin-related income and instead evade taxes. 34 Pursuant to IRS Notice 2014-21, “if the fair market value of property received in exchange for virtual currency exceeds the taxpayer’s adjusted basis of the virtual currency, the taxpayer has a taxable gain…” 35 In addition, pursuant to IRS Notice 2014-21, a taxpayer who receives virtual currency as payment for goods or services “must, in computing gross income, include the fair market value of the virtual currency, measured in U.S. dollars, as of the date that the virtual currency was received.” 36 If you represent a spouse who is not involved with bitcoins, but whose husband or wife is, you should advise him or her of this potentiality so your client can make a better informed decision as to the signing and filing of any joint tax returns, as well as the future use
of Innocent Spouse Relief, and advise your client to seek the advice of a tax attorney certified before the United States Tax Court.

Stay Informed

Cases involving substantial and complex Bitcoin issues require careful evaluation of the complexity, litigation fees, costs and the likelihood of fully collecting the benefits of any favorable court order. Family law practitioners should get informed about Bitcoin and continue to learn about developments in the area of cryptocurrencies. For example, a number of alternative cryptocurrencies, sometimes referred to as altcoins, have now been created. Taking inspiration from Bitcoin’s code, some of these alternative cryptocurrencies have formed distinct communities that continue to push their development. There are some that use the same hashing algorithm as Bitcoin, such as Peercoin, Devcoin, Terracoin and Bytecoin, while others use a scrypt algorithm, such as Litecoin, Novacoin, FeatherCoin and WorldCoin.

Case law is also developing. In Florida, the recent case of Florida v. Espinosa, Case No. F14-2923 (Fla. 11th Cir. Ct. July 22, 2016), is an interesting read. There, a Miami judge dismissed charges against a Florida-based bitcoin seller after he was indicted on illegal transmission and money laundering charges. The court found that bitcoin is not a form of money within the confines of Florida’s legal system. Some attorneys have suggested that this case may lead Florida’s legislators to finally address Bitcoin and consider its potential for abuse.

With all of these recent developments, family law practitioners should be encouraged to learn as much as possible about Bitcoin so they can identify, respond and protect their client as much as possible when cryptocurrency issues arise.

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Endnotes

5 Alice Huang, Reaching Within Silk Road: The Need for a New Subpoena Power that Targets Illegal Bitcoin Transactions, 56 B.C. L. Rev. 2093 (November, 2015).
6 Id.
7 Id.
8 Id.; see also IRS Notice 2014-21.
9 Id.
10 Id.
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12 Id.
14 Id.
17 Id.
18 Id.
19 Id.
20 Id.
21 Id.
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25 Id.
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35 IRS Notice 2014-21 (citing Publication 544, Sales and Other Dispositions of Assets).
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The Refundable Non-Refundable Retainer: Ethical Considerations Involving Non-Refundable, Advance Payment Retainers

By Mark Baseman, Esq., Tampa, FL

One of the more frustrating aspects of practicing family law is the frequency with which clients simply refuse to pay for services rendered. The typical solution is to require an advance payment of fees to be held in trust until such fees are earned by the law firm. Many firms take this solution one step further by designating such payment as a “non-refundable retainer” against which fees (and sometimes costs) are billed until a subsequent retainer is requested.

This non-refundable retainer arrangement is common for reasons beyond those expressed above. For one thing, a non-refundable retainer is generally deposited directly into a firm’s operating account, bypassing the trust account and avoiding the headaches that come with the need for careful trust accounting procedures. For another, a non-refundable retainer is often treated as “earned” the moment it is paid, allowing the firm to use these funds immediately for payroll and other expenses.

Despite the ubiquity of these non-refundable, advance payment retainers, practitioners are often unaware of the ethical gray area into which such fees fall. This article briefly addresses these concerns and provides practical advice intended to help avoid potential ethical violations that may otherwise result from these non-refundable retainers.

Rule 4-1.5

The first step in assessing this issue is to acknowledge that the type of retainer discussed herein (the non-refundable, advance payment retainer) is different than the retainers discussed within the Florida Bar’s Rules of Professional Conduct. Without this understanding, a lawyer might simply rely on the comments to Rule 4-1.5, which state that:

A lawyer may require advance payment of a fee but is obliged to return any unearned portion . . .

A lawyer is not, however, required to return retainers that, pursuant to an agreement with a client, are not refundable.

This comment seems to create a blanket rule that anything designated as a “non-refundable retainer” automatically becomes the property of the law firm when paid. The language of the Rule itself, however, casts doubt on this conclusion in that it defines a “retainer” as follows:

A retainer is a sum of money paid to a lawyer to guarantee the lawyer’s future availability. A retainer is not payment for . . . for future services.

This statement appears in the definitions section of the Rule, along with the definition of an “advance fee” as “a sum of money paid to the lawyer against which the lawyer will bill the client as legal services are provided.”

The Rules therefore treat these terms as mutually exclusive, suggesting that a particular payment cannot be both an advance fee and a retainer.

Given this, it is wrong to conclude that the comment to Rule 4-1.5 above applies to non-refundable, advance payment retainers. Accordingly, one must look elsewhere to determine whether and when such retainers are truly non-refundable.

Bain v. Weiffenbach

There appears to be only one Florida case that sheds light on whether a non-refundable, advance payment retainer is ethical: Bain v. Weiffenbach, 590 So. 2d 544 (Fla. 2d DCA 1991). In Bain, the Second District reviewed an order granting the defendant/lawyer’s motion for summary judgment in a case where the plaintiff/former-client sought recovery of the remaining balance on a “non-refundable retainer.” The trial court granted summary judgment in the lawyer’s favor because the contract explicitly provided that the former-client’s payment was non-refundable.

The Second District reversed, finding that the classification of the payment as “non-refundable” was not determinative and that there were issues of material fact that needed to be addressed.

In reaching its conclusion, the Court relied heavily on an ethics opinion from the Florida Bar (Opinion 76-27). The Court drew a distinction between a traditional “non-refundable retainer” and a “non-refundable retainer which is in part a prepaid fee.” In the former case, the retainer need not be refunded no matter what work the lawyer has performed. In the latter case, in contrast, a factual analysis is necessary to determine whether a portion of the retainer must be refunded lest the attorney be guilty of charging an “excessive fee.” Such analysis requires consideration of, among other things:

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* The amount of work performed;
* The benefits obtained by the client; and,
* Whether the attorney forewent additional employment opportunities to represent the client.

Because Bain involved a non-refundable retainer that was, at least in part, an advance payment of fees, this factual analysis was necessary and, therefore, the trial court erred by awarding summary judgment in the lawyer's favor.

At least two other jurisdictions have cited approvingly to Bain. In *In re Nat'l Magazine Pub. Co.*, a United States Bankruptcy Court distinguished the type of non-refundable, advance payment retainer discussed herein from the classic retainer in part by adopting the reasoning in Bain.⁴ That court cautioned in dicta these non-refundable retainers may be counter to public policy because they “inappropriately compromise the right to sever the fiduciary services relationship with the lawyer.”⁵

Similarly, in *Utah State Bar v. Jardine*, an attorney, Mr. Jardine, was suspended for, among other things, charging an excessive fee characterized as a non-refundable retainer.⁶ Jardine charged the client a $5,000 non-refundable, advance payment retainer. Jardine performed some work before it was determined that the client was incompetent and a subsequent attorney appointed on her behalf requested a refund. Jardine refunded $2,000 but kept the remaining $3,000. The Ohio Supreme Court agreed that even though Jardine had performed some work on the case and provided the client with “peace of mind” as a result of his efforts, the fee was in violation of the rules of professional conduct. In defense, Jardine pointed to an ethics opinion consisting of similar language to that used in Bain, suggesting that because he had done some work and obtained some results he could not be sanctioned. In response, the Supreme Court of Utah explained that designating an advance payment as non-refundable can “never supersede” the prohibition on charging an excessive fee.⁷ Implicitly, the court found that Jardine should have known this and that his conduct therefore could not be excused.

Bain and these related cases are illustrative because they show that a non-refundable retainer is never definitively immune from reimbursement so long as a portion of the payment is understood to be an advance payment of fees. At the very least, in such cases a trier of fact must consider whether, all circumstances considered, the unreturned portion of the retainer is “excessive” under the applicable rules.

**Opinion 93-2 of the Florida Bar⁸ and Subsequent Commentary**

After Bain, the Florida Bar retracted Opinion 76-27 and issued Opinion 93-2 (the “Opinion”) which largely tracks the language of the former opinion. While the Opinion is focused primarily on accounting practices, it also addressed certain issues relevant to determining the appropriateness of non-refundable, advance payment retainers.

First, the Opinion explains that, traditionally, a “true retainer” was one paid by a client in return for a lawyer's agreement to accept employment and to not accept employment from adverse parties. A true retainer was paid without the expectation that specific legal services would necessarily be rendered. Instead, the true retainer was like “an option contract,” giving the client the right to employ the attorney in the future. The Opinion explains that a true retainer is earned when paid and need not be refunded even if no work is performed.

The Opinion acknowledges that a modern retainer, however, is often a synonym for a “fee.” In that context, the Opinion explains that where the client and the attorney agree in writing that such fee will be non-refundable, the retainer—even though it is arguably an advance payment of fees—need not be deposited into the attorney’s trust account. Notwithstanding this, the Opinion explains that such a retainer/fee may, under certain circumstances, be refundable. For example, in a situation where the client fires the attorney, dies, or otherwise no longer needs the attorney’s assistance, keeping all or a portion of the retainer may violate the ethical rules against charging “excessive fees.”

The Opinion ends by setting forth the general rule that an attorney is not insulated from the prohibition on charging an excessive fee merely because he or she designates a retainer as “non-refundable.” Effectively, as long as a portion of a non-refundable retainer is meant to compensate a lawyer for future fees, the lawyer can never determine with certainty that the client is prohibited from obtaining a refund.

**Excessive Fees**

The Rules define an excessive fee as one that a “lawyer of ordinary prudence” would conclude exceeds a “reasonable fee . . . for the services provided to such a degree as to constitute clear overreaching or an unconscionable demand by the attorney.”¹⁰ In assessing whether a fee is excessive, the following factors should be weighed:

(A) the time and labor required, the novelty, complexity, and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
(B) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;
(C) the fee, or rate of fee, customarily charged in the locality for legal services of a comparable or similar nature;
Conclusion and Practical Suggestions

Public policy favors the ability of a client to terminate the attorney/client relationship for any reason, at any time without penalty. From this perspective, it is not difficult to see why the non-refundable, advance payment retainer might violate this basic premise.

Ultimately, the applicable rules and authorities fail to provide any concrete answer as to when it is in an ethical violation to refuse to refund the unearned portion of the type of non-refundable, advance payment retainer discussed in this article. At the very least, a practitioner who charges such a retainer must understand that an “excessive fee” analysis applies. With that in mind, we can draw the following conclusions with reasonable confidence.

1. A non-refundable, advance fee retainer is not automatically non-refundable, regardless of the language of the engagement contract. That said, the engagement contract needs to be as specific as possible, and the client must agree without ambiguity that the retainer is understood and intended to be non-refundable;

2. The engagement contract should state that the client understands that the retainer is not only meant as an advance payment of fees, but also to retain the future services of the attorney and that in exchange, among other things, acceptance of this retainer will prevent the attorney from accepting other work;

3. No matter what the contractual language states, if the client terminates the lawyer’s services with a substantial amount of retainer remaining, the lawyer must determine whether the fee appears to be excessive given the circumstances and, if so, refund all or a portion of the fee. Once again, if the attorney has performed minimal or no legal work, if no results have been obtained, and if the attorney did not actually turn away work as a result of the engagement, it is a realistic possibility that a portion of the unearned fee will be determined to be excessive and in violation of the Rules of Professional Conduct;

4. The amount of the retainer matters. If your accounting or business practices make it difficult to refund a non-refundable retainer, consider taking smaller retainers to avoid the perception that an unused balance constitutes an “unconscionable” excessive fee;

5. Charging an initial non-refundable retainer may be more justifiable than charging a subsequent non-refundable retainer, given that the authorities seem to acknowledge that there may be an intangible value in retaining an attorney at the start of one’s case; and,

6. When in doubt, you should at least refund a portion of the client’s non-refundable retainer, but keep in mind that the portion you keep will still be subject to evaluation under the excessive fees test.

When it comes to ethical issues related to a client’s money, most attorneys would rather be safe than sorry. Ideally, this article has shown you that there is a significant gray area in Florida as to the appropriateness of charging non-refundable, advance payment retainers. Given this, and the fact that family law attorneys are no strangers to bar complaints from unhappy former clients, the prudent attorney should seriously weigh the costs and benefits of utilizing this billing practice at least until the rules become more clear.

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Endnotes
1 It is worthwhile to note that the non-refundable retainers discussed in this article are different than agreements to pay a “bonus” in domestic relations matters dependent on the outcome of the case. Such bonus arrangements have been unequivocally determined to violate the prohibition against contingent fees in domestic relations cases set forth in Rule 4-1.5(f)(3)(A). See also, King v. Young, Berkman, Berkman & Karpf, P.A., 709 So. 2d 572, 574 (Fla. 3d DCA 1998) (holding that agreement to pay bonus in divorce case if the matter settles or results in a final judgment of divorce was void and unenforceable).
2 FL ST BAR Rule 4-1.5(e)(2)(A) (emphasis added).
3 FL ST BAR Rule 4-1.5(e)(2)(C) (emphasis added).
5 Id.
7 Id.
9 After Opinion Number 93-2, the rules committee added language to the comments of what is now Rule 5-1.1, stating that: Advances for fees and costs (funds against which costs and fees are billed) are the property of the client or third party paying same on a client’s behalf and are required to be maintained in trust, separate from the lawyer’s property. Retainers are not funds against which future services are billed. Retainers are funds paid to guarantee the future availability of the lawyer’s legal services and are earned by the lawyer upon receipt. Retainers, being funds of the lawyer, may not be placed in the client’s trust account.
10 FL ST BAR Rule 4-1.5(a)(1).
11 FL ST BAR Rule 4-1.5(b)(1).
1 in 17: Antisocial Personality Disorder (ASPD) in Family Court

By Eddie Stephens, Esquire and Dr. Michael O’Hara Jr., Psy.D.

STEPHENS: Antisocial personality disorder (ASPD) is a personality disorder defined in the Diagnostic and Statistical Manual of Mental Disorders (DSM) as a pervasive pattern of disregard for, or violation of, the rights of others. An impoverished moral sense or conscience is often apparent, as well as a history of crime, legal problems, and/or impulsive and aggressive behavior.

Approximately 3% of males and 1% of females in the United States suffer from this disorder. As with any psychological disorder, the stress of a divorce often magnifies harmful consequences that accompany the behaviors associated with this disorder.

For every 17 divorce cases an attorney handles, 1 of the parties will be affected by this disorder. When an attorney comes across 1 of the 17, it is important for that attorney to have an understanding of the psychopathy in order to navigate the many obstacles this scenario presents.

O’HARA: Managing our conflicts with others over wishes, ideas, work, or property is difficult. Helping others in high conflict divorce, as part of our professional endeavors, can be rewarding but very complex. This can become exacerbated when one or both of those in conflict have severe personality problems, and research indicates this is the case in 60-80% of high conflict divorces. What do we do about those who – because they are preoccupied with self-determination and completely indifferent to the feelings of others – habitually resort to violence, coercion, exploitation, deceit and manipulation to express their power for its own sake?

Over the last several decades, the behavioral sciences have advanced our understanding of these very troubled people. More and more, we are able to accurately conceptualize, assess and diagnose individuals with ASPD, even going so far as to reliably predict what their conduct will be.

Unfortunately, because of changes in terminology, emphasis on different traits by different researchers, and decisions about collecting epidemiological data, we still do not have a unified name for people with this disorder. In fact, the terms antisocial personality disorder, psychopathic personality (or “psychopath”), and sociopathic personality (or “sociopath”) are all still used interchangeably throughout the literature.

In the late 1880s, the term psychopathy – literally meaning “suffering souls” – was coined to describe “moral insanity” or possessing a “morally deprived” orientation. The term sociopathy gained recognition in the mid-20th century to denote both the sociocultural determinants of this tendency and the damage done to society by these individuals.

Today, ASPD refers to the most dangerous personality disorder, and it comprises a cluster of interpersonal, emotional, lifestyle, and antisocial traits and behaviors. This personality type can be divided into two subtypes: a relatively nonviolent manipulative type, or the more explosive, actively predatory and violent offender type. What differentiates the psychopathic personality from all other severe personality disorders is the absolute inability to emotionally invest in others.

I prefer the traditional term “psychopathic” personality disorder to the contemporary term “antisocial” personality disorder, because many with this “antisocial” personality formation are not in constant conflict with the law or even in obvious conflict with social norms. Furthermore, many with the DSM diagnosis of ASPD are not characterologically psychopathic.

What’s essential when working with psychopathic individuals, or with those in close contact with them (such as ex-spouses or family members), is to understand the degree of their psychopathy—to discern whether these traits arise only under certain situations, or whether there is an overall severe chronic disturbance.

STEPHENS: People with this illness may seem charming and can exude charisma. They are likely to become irritable and aggressive. Due to their manipulative tendencies, it is difficult to separate the true things they say about themselves from the false. However, when they lie, they are fearless, because they have no regard for the consequence. Humans often have a reluctance to commit perjury, and if they do, a learned jurist is trained to sense that reluctance. Psychopaths do not have this reluctance, and so
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it can be problematic for traditional jurists to be able to identify the lying psychopath.

O’HARA: In the field of psychotherapy, the term “countertransference” is used to describe the therapist’s feelings for the patient, which are generally believed to be an important source of information in diagnostic and treatment considerations.

I know this may sound cynical, but if your first impression of a client or opposing litigant during mediation or a deposition is how extremely likeable they are or other unusually positive feelings, then you may want to proceed with caution. This is because the psychopath’s charm and charisma are designed to disarm, manipulate, and deceive. Some psychopaths have developed quite sophisticated lies that have worked well for them, and they have had the time to hone the skill. They rely on the notion that most people assume others can be trusted, and psychopaths use this to their advantage. That is why it is so crucial to obtain multiple sources of external verification to corroborate the psychopath’s claims. It is important to detect this propensity in your client and/or the opposing litigant so that you are better prepared to either protect your client from himself or to impeach the credibility of the opposing party in court.

STEPHENS: The psychopath/sociopath will quickly try to learn the system. The high-functioning afflicted will often try to manipulate the system to their advantage by filing motions and attempting to direct the strategy of the case or to drain your client’s resources by filing motions that advance their agenda.

The most effective litigation tool to protect your client is an in-depth and detailed deposition of the afflicted. A psychopath/sociopath will lie. Low functioning psychopath/sociopaths will say things to suit their egos at the moment. Higher functioning afflicted may have a more elaborate fabrication that fits with their “theory of the case.” In any event, a detailed temporary relief deposition early in the proceedings will be useful to establish the lack of credibility once the case gets moving.

Your client might be surprised at the extent a psychopath/sociopath is willing to fabricate facts during their testimony. The purpose of the discovery deposition is not to prove they are lying. It is to fully document the afflicted’s current version of facts and lock them in to their testimony. This way, once their version of events changes, or you can contradict their testimony, the afflicted’s lack of credibility can be properly presented to the trier of fact.

The most useful tool a family law attorney has to demonstrate to the Court is the ability to impeach the afflicted individual’s previous sworn testimony.

O’HARA: Most people’s idea of how a psychopath behaves comes solely from Hollywood’s depiction of them in movies. Most people also are not aware of the multiple purposes for which depositions can be used, particularly as it plays into the longer strategy of the case. Perhaps it would be helpful to warn your client that you expect, and are prepared for, the psychopath to lie during his or her deposition, and that one of the main purposes of the deposition is to have the psychopath commit to claims now so that, when the story changes, the deposition can later be used to question his or her credibility.

STEPHENS: The rules of civil procedure provide a number of other tools to help reveal and deal with antisocial characteristics, such as social investigations, use of a guardian ad litem, and psychological testing.

O’HARA: The use of tools such as psychological testing and social investigations will greatly assist in determining the degree of severity of the person’s psychopathy.

It’s been my experience that determining psychopathy solely by psychological testing and interviewing is challenging because you are at the mercy of the examinee’s self-report in the interviews and test taking. When a social investigation is used in addition to the clinical interviews and psychological testing, the psychologist has multiple sources of information from which to determine psychopathy, including document review, collateral contact interviews, etc. These multiple sources of information better equip the trained psychologist to highlight for the Court particularly disturbing family events from multiple vantage points, as opposed to just the psychopath’s.

STEPHENS: George Bernard Shaw once said: “I learned long ago, never to wrestle with a pig. You get dirty, and besides, the pig likes it.” Your best ally in this situation is your opposing counsel. Opposing counsel is in the best position to inform the afflicted of the possible consequences of their behavior and decisions. However, if opposing counsel does not recognize the issue, or adopts the personality of the client, engaging in lengthy attempts of resolution is often a tactic used by the afflicted to drain resources that may be necessary to properly present the case.

It is important to realize that some people are so self-destructive they will never reach an agreement. If your client does not have the resources to make a competent presentation in Court if needed, the afflicted will have a significant advantage.

O’HARA: The psychopath does not have a drop of milk of human kindness. In fact, they derive sadistic glee in manipulating and overpowering others. They are preoccupied with manipulating or being manipulated.
Typically the psychopath is convinced they can make anything happen and that everyone else is selfish, manipulative, and dishonorable. This unfortunately places them at a significant advantage with regard to competing interests, particularly because other people are not aware of this approach until it is too late.

A few times over the years I have had family law colleagues refer patients to me to help them through the difficult task of extricating themselves from a psychopathic spouse or family member. Usually in these cases, the patient is bewildered or overwhelmed by the chaos they find themselves in at the hands of their predatory other person. They are compelled to search for an understanding of how things came about. How could someone who professed to love you act so violently, so manipulatively, so deceitfully, and so callously? The reason why patients are appropriately confused is because they are using prosocial norms and moral reasoning to make sense of things. This does not even begin to explain the ordeal they are going through, because the psychopath doesn’t use these same norms and moral reasoning in their actions.

The therapy in these situations needs to focus on assisting the injured person to process and understand his or her feelings and losses, and to begin setting limits and boundaries that protect from further harm. They must understand that, rather than attempting to change the psychopath, the most they can hope for is to prevent the psychopath from inflicting further damage to them, and that the only way to accomplish this is by removing the psychopath from their lives and letting him or her move on to someone else. Ideally, patients will come to understand that the sooner they can have this person removed from their lives, the sooner they can begin to recover and begin creating a more normal life again.

**STEPHENS:** Ultimately, it is important to ascertain whether you are litigating against someone with these tendencies. A psychopath is likely to engage in self-destructive behavior under stress.

Typically, the best approach to take is one of damage control (i.e., attempting to mitigate the damage and further loss) and to adapt a “protect and preserve” strategy. Your client may even need professional therapy to help understand and perhaps undo some of the manipulative devices and issues relating to post traumatic stress.

Engaging with a psychopath is not fair because the afflicted is not restricted by “rules of ethics” or a moral compass and is, therefore, able to inflict much more “damage” than would occur in a normal contested case. The end result of this type of circumstance is rarely a fair family law settlement. Our adversary system is based on the fact that human beings have a conscience and, because of that, they should exhibit normal human reactions to stress, guilt and doubt. When those reactions are easily masked and concealed, the assistance of a forensic psychologist may be your only recourse.

**Dr. Michael O’Hara** obtained his B.A. in English Literature at the University of Florida (Gainesville, FL) and his Psy.D. in Clinical Psychology at Carlos Albizu University (Miami, FL). He was trained in psychodynamic and child-centered play therapy and family systems at a large outpatient child-guidance clinic in Miami in the 1990s. Dr. O’Hara has been in private practice in Jupiter, FL since 2000 in general clinical psychology, with a specialty in forensic psychology in the area of high conflict families in Family and Matrimonial Law since 2003.

**Eddie Stephens** is a partner at Ward Damon located in West Palm Beach, FL. Mr. Stephens was admitted to the Florida Bar in 1997 and is Board Certified in Family and Marital Law. After starting his career as an attorney for the Palm Beach County Property Appraiser’s Office, Stephens has developed a successful family law practice focused on highly disputed divorces. Through hundreds of hearings and dozens of trials, Stephens has honed his practice by making straightforward arguments that bring opposing sides closer together in order to find a successful resolution.
Drowning in a Sea of Data – Resources to Help You Stay Afloat!

By Jack Moring, Esq., Crystal River, FL

It seems that the pace of technological advances – new apps and software, updated hardware, etc. – continues unabated. In the face of such onslaught, how do you keep abreast of the “newest and best”? Judging by the rise of specialty “niche” websites dealing exclusively or primarily with legal technology issues, it is evident that more and more of us are looking for reputable and objective sources that do the hard work of separating the wheat from the chaff. Here are a few that have been around for a while and have scored generally favorable ratings (and some awards) for their content.

Apple-centric sites:

**iPhone J.D.** (iphonejd.com) – the “oldest and largest website for lawyers using iPhones and iPads.” It’s been around since late 2008. If you’re looking for information on any law-related app, chances are you will find a review of it on this site (314 have been reviewed as of early September 2016). There are also reviews of hardware and accessories. Better still, there is an exhaustive index of all content on the site and a search function.

**The Mac Lawyer** (maclawyer.com) – South Carolina family lawyer Ben Stevens runs this site. A Windows user for years, he made the switch to Macs in 2005. There are numerous in-depth articles focusing on making the switch from a Windows environment to an Apple environment. There are also app reviews, software and hardware reviews, and even recommended legal-tech podcasts. Ben also has several articles on virtualization (running Windows apps on a Mac; integrating Macs in a Windows environment). Though new entries are not as frequent as those on iphonejd.com, the wealth of information on the site will have you adding it to your favorites.

General sites (including Windows-platform and Android info):

**The Cyber Advocate** (thecyberadvocate.com) – Highlights of this site include monthly reviews of the newest apps, articles on marketing, e-discovery, cybersecurity and ethical considerations in the use of technology. This site is a ready reference on most every technology topic.

**Future Lawyer** (futurelawyer.typepad.com) – Pinellas County attorney Rick Georges runs this site, posting frequently on “future technology for the lawyer of today.” Rick’s posts indicate a clear preference for Android over iOS (one recent post even queries whether Apple has “jumped the shark”). Rick’s posts also cover wearables, popular culture and fairly frequent doses of humor.

**ABA** – the Legal Technology Resource Center of the American Bar Association is a one-stop shop, with an ever-expanding legal tech buyer’s guide, free webinars, the ABA blog (Law Technology Today), and various reports, surveys and other resources. Add them to your Twitter account to get regular updates (the most recent being an e-mail encryption buyer’s guide).

**TFB Resources** – The Florida Bar’s Practice Resource Institute page has a growing Knowledge Base and focus areas dealing with technology, finance, marketing, management and new practice. Recent “Hot Topics” have dealt with cloud computing and cybersecurity. There are over one hundred downloadable forms for use in law office operation and management. There is even a link to The Florida Bar Podcast, a recently launched monthly program (the most recent deals with web-based practice management software).

**Podcasts:**

And speaking of podcasts, there are several devoted to technology, most of which, like The Florida Bar Podcast, can be found on the Legal Talk Network. Chief among the offer-
ings there is Law Technology Now, back after an almost three-year hiatus. Recent episodes have dealt with a variety of issues, such as new trends in legal research, how artificial intelligence will impact the legal industry, and how firms and lawyers can improve productivity. New Solo is a podcast aimed primarily at new attorneys or attorneys new to solo practice. Many of the podcasts deal with technology issues, the most recent dealing with using Apple devices in your practice, with special guest Jeff Richardson, the founder of iPhone J. D. You can find these and more podcasts in your favorite podcasting app.

So, there you have a few sites that should help you in parsing the many offerings available so that you can become a more effective, more technologically astute lawyer.

In closing, allow me the indulgence of shamelessly promoting our Section’s own Technology Committee, chaired by Sarah Kay and Eddie Stephens. The Committee is working on a new animated video promoting board certification. Look for it in the near future. Also, we are looking into a way of archiving past issues of the Commentator on the Section’s brand new website (familylawfla.org), so that they are accessible to Section members only, yet one more way of enhancing the value of membership in the Section.

If you have a technology-related question or issue, feel free to e-mail me (jmoring@moringlaw.com) and who knows, your question may well form the basis of a future column.

Jack Moring is a Board-Certified family lawyer in Crystal River, where he practices with his wife, Patricia. He is also a certified family mediator and serves as attorney-ad-litem for children in dependency court and as guardian-ad-litem for children in both dependency and family court.

ANNOUNCEMENTS

Laura Davis Smith was named the 2017 Miami Family Law Lawyer of the Year by America’s Best Lawyers.

Roberta G. Stanley was named the 2017 Ft. Lauderdale Family Law Lawyer of the Year by America’s Best Lawyers.

Sonja Jean’s baby, Andrea, will celebrate her one-year birthday on November 9, 2016.

Bonnie Sockel-Stone is now an AAML Fellow.

Elisha Roy was accepted and is participating in Leadership Palm Beach County Engage Class of 2017.

Congratulations to all!
The Pre-Breakfast of Champions

By Brian M. Moskowitz, Esq, Boca Raton

What do Ben Franklin, Oprah Winfrey, Steve Jobs, Margaret Thatcher and LeBron James have in common? They have a consistent morning routine that they follow before they start their day. They do not start their day and hope they have time for themselves after dealing with everyone else’s priorities and urgencies…they take “me” time first thing in the morning. They each have a different morning routine which proves that what you do isn’t as important as doing something and doing it consistently.

I don’t know about you, but in my law practice, the days can get pretty stressful and hectic as I respond to everyone else’s self-proclaimed urgencies and priorities. After giving everything you have to everyone else, what’s left for you at the end of the day? Unfortunately, for most people the answer is nothing. That’s why setting aside time in the morning is the guaranteed way to have time for yourself.

After speaking to hundreds of people and reading dozens of books and articles about morning routines, I learned there are five actions that most successful people take every morning before they start their day. Not every person does all five, but these five were the most common:

1. Drink water.
2. Meditate.
3. Read.
5. Exercise.

**Drink Water**

When you wake up after a night’s sleep, your body is dehydrated. Drinking water when you first wake up is the best way to rehydrate your body and kick start your metabolism. Adding lemon to your water gives your immune system a boost and provides a steady flow of natural energy. So instead of waking up and reaching for that quick, temporary jolt of energy from coffee or an energy drink, why not try a glass of lemon water? As an added bonus it will freshen your morning breath!

**Meditate**

Meditation and mindfulness are hot topics right now. The Florida Bar Journal’s April 2016 issue, “Special Issue: Mindfulness,” focused solely on meditation and mindfulness. The American Bar Association recently published “The Anxious Lawyer: An 8-Week Guide to a Joyful and Satisfying Law Practice Through Mindfulness and Meditation.” The University of California, Berkeley, School of Law even offers a course now to first year students called “Sustainable Lawyering: An Introduction to Mindfulness for 1Ls.”

Stress-related ailments and complaints account for 75-90% of all doctor’s visits, and meditation is a simple, fast way to reduce stress. A quick Google search will result in dozens of different ways to practice meditation. There are also countless apps you can download onto your phone to guide you through meditation. The type of meditation you practice or the length of time you meditate are not as important as getting started. Just five minutes of silence and focusing on your breath is a great way to begin.

And to erase that concocted, and often inaccurate, image in your mind of who meditates, consider Mark Divine, a Former Navy Seal Commander who practices and trains Special Operations Force candidates on meditation and mindfulness.

**Read**

Bill Gates, Mark Zuckerberg and Elon Musk read every single day. We could all learn something by reading every day – and reading discovery documents, motions and case law do not count!

What inspires you? What captures your imagination? What do you want to learn about? Imagine spending 15-30 minutes every morning focused and reading what makes you happy? Instead of reacting and responding to emails first thing in the morning, how much better would you feel if you took the time to read something for yourself? Don’t worry, the emails will still be there waiting for you.

**Journal**

Is that voice in your head constantly chattering on and on with thoughts and ideas? Get them out of your head and onto paper. Expressing your thoughts by writing in a journal is proven to reduce the stress in your daily life. How would you feel if you relieved your mind of the burden of carrying all those thoughts around day in and day out? Instead of sending that nastygram email to opposing counsel, which will only result in a return nastygram, try writing it in your journal and lowering your stress level.

You can also use a more structured approach to journaling. There are numerous journals you can buy that will guide you through a series of questions to focus you on different areas of your life such as expressing gratitude, cultivating your relationships, and achieving your goals, as
well as helping you capture and re-
member all the amazing things that
happen in your life.

Exercise

We all know the benefits of exer-
cise. With the best of intentions, have
you ever told yourself you’re going
to exercise when you get home after
work? And have you ever come home
from work so exhausted and drained
from the day that you negotiate with
yourself and then justify why it’s okay
to skip your workout? I know I have.

When is the guaranteed time that
you can exercise before the pressure
and exhaustion of the day take their
toll? That’s right, the morning. You
can lift weights, you can walk, you
can run, you can do yoga, you can do
anything, but just do something in
the morning to get your body moving.

What does your morning routine
look like? Mine is constantly evolving
and I’ve even added some of the ideas
from this article. The one constant
is that I take time for myself every
morning…and yes, the emails have
always been there waiting for me
when I got to work.

Brian M. Moskowitz, Esq. is the
founder of the Law Offices of Brian M.
Moskowitz and is licensed to practice
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to practicing law he is Certified in
Neuro Strategies (Neuro-Linguistic
Programming) and is the President
of Attorney Revolution, LLC which
provides coaching and consulting
services to lawyers and law firms.

Endnotes

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Unshackling Guardians Ad Litem from the Constraints of Florida’s Hearsay Rule

By Anastasia Garcia, Coral Gables

Commentators, courts and state legislatures have reached an almost universal consensus recognizing the pivotal role played by Guardians Ad Litem (“GALs”) in the administration of justice by protecting vulnerable children. The GAL’s role has been alternatively described by the courts as “important,” “vital,” “critical,” “crucial,” “integral,” and “essential.” Since 1974, the appointment of GALs to safeguard the interests of minor children “has proliferated.” GALs now play a central role in the family and juvenile courts of every state.

Pursuant to Florida Statute §61.403 (“Florida’s Family GAL Statute”), GALs are appointed as agents of the Court, serving as the next best friend of a child, and as an investigator and/or evaluator in proceedings pursuant to Chapter 61. In their investigative capacity, GALs are entrusted to assess the allegations that impact the child raised by the parties, review pleadings, depositions and other filings, interview the child, the parents, and any other person having information concerning the child’s welfare, and review any pertinent documents possessed by such persons, including the child or parents’ medical and mental health records.

The GAL may “make written or oral recommendations to the court [and] shall file a written report which may include recommendations and a statement of the wishes of the child.” In performing this investigative role, the GAL is said to function as the “eyes and ears of the Court.”

The family courts’ need for an unbiased and independent third-party to champion the interests of the minor child and serve as the court’s “eyes and ears” in gathering, reviewing and presenting the relevant facts is the product of an unfortunate truth: In family cases, a GAL is crucial because the acrimony and distrust between the parents is so prevalent that it often times prevents the parents from perceiving and acting in the best interest of their children.

In such cases, the GAL “serves a vital role … [by rising] above the fray of the contending parties to ensure that the interest [of their minor children] are ‘represented and protected.'”

We have to examine, however, the effectiveness of a Guardian if this unique set of eyes and ears is silenced when the GAL is prevented from informing the Court of what was seen and heard during its investigation. Unfortunately, that is precisely what is transpiring in family courts throughout Florida. The hearsay rule is routinely successfully deployed by whichever parent is unsatisfied with a GAL’s conclusions and recommendations to prevent the admission of the GAL’s report into evidence and to preclude the GAL from testifying regarding the statements made to the GAL during the investigation. This makes no sense in light of the fact that hearsay evidence is admissible when a social investigation is completed pursuant to Florida Statute 61.20

Florida’s District Courts of Appeal have consistently held that the hearsay rule is applicable to a GAL’s report and to any testimony by the GAL based on, or regarding, out-of-court statements made to the GAL during the investigation. For instance, in Scaringe, the father appealed a final order granting the mother sole parental responsibility. The GAL appointed in the case testified during the final hearing as to matters that were hearsay, and the GAL’s report, which contained hearsay, was admitted into evidence. The Second District Court of Appeal reversed, holding that, while section 61.403(a)(5) mandates that a GAL file a written report, the report was not automatically admissible, and the hearsay rules still applied. The Court then went on to conclude that, “when a guardian attempts to testify to hearsay statements and a valid hearsay objection is raised, that objection should be sustained.”

These Court holdings have effectively eviscerated Florida’s Family GAL Statute because, “[b]y necessity, the [GAL’s] report will usually contain hearsay.” GAL reports commonly contain important information gathered from various collateral sources—family members, teachers, and treatment providers who provide invaluable insight to the court.

Given the impracticality of having all of these collateral sources appear in court, much of this invaluable information simply will not be available to the Judge if an ordinary hearsay objection is all that it takes to thwart

continued, next page
Unshackling Guardian Ad Litem
from preceding page

the GAL from carrying-out his or her essential function.\textsuperscript{23}

As noted by the Court in Scaringe, the root cause of the current predicament is the legislature’s failure to expressly exclude GAL reports and testimony from the application of the hearsay rule.\textsuperscript{24} In contrast, Florida Statute §61.20, which authorizes the trial court to order a social investigation and study,\textsuperscript{25} specifically provides that “[t]he court may consider the information contained in the study in making a decision on the parenting plan, and the technical rules of evidence do not exclude the study from consideration.”\textsuperscript{26} However, the underlying social investigation must “be conducted by qualified staff of the court, a child placing agency pursuant to s. 49.175, a psychologist pursuant to chapter 490 or a clinical social worker, marriage and family therapist, or mental health counselor licensed pursuant to Chapter 491.”\textsuperscript{27} Conspicuously missing from this list are GALs.

Accordingly, “[d]espite all of the well-intended powers enacted for guardian ad litem, the lack of a statutory hearsay exception has a stifling effect on their ability to protect Florida’s children at the most critical stage of the process—in court.”\textsuperscript{28} It is time to unshackle the GALs from the constraints imposed by the hearsay rule and finally permit GALs to properly perform their critical investigative role laid-out in Florida’s Family GAL Statute. This outcome can be accomplished by amending section 61.403 in order to include language similar to that contained in the social investigation statute—that “the technical rules of evidence do not exclude the [GALs report and testimony].”\textsuperscript{29} Alternatively, the Florida Legislature can borrow from GAL statutes in other states that have already anticipated the hearsay problem and included language aimed at specifically avoiding the evidentiary pitfall suffered by Florida’s Family GAL Statute. For instance, §61.403 could incorporate the language used in Montana’s family GAL statute, which sets forth that “[i]nformation contained in a report filed by the guardian ad litem or testimony regarding a report filed by the guardian ad litem is not hearsay when it is used to form the basis of the guardian ad litem’s opinion as to the best interests of the child.”\textsuperscript{30}

The interests served by the hearsay rule, ensuring that inherently unreliable statements do not come into evidence, is critically important. However, this needs to be weighed against the necessity of a Guardian to bring to light for the Court, details of an investigation from collateral sources who are available to testify. This factor has been considered by some Courts.

Moreover, in balancing these competing interests, the fact that family cases are always heard by a Judge militates heavily in favor of admitting the GAL reports into evidence and permitting the GALs to testify in full regarding their investigations. “Because of the nature family court proceedings, where judges rather than juries predominate, the rules of evidence are often relaxed.”\textsuperscript{31} As one Court aptly put it, “[d]uring a nonjury trial, it is presumed that the court is able to sift the wheat from the chaff and select only the legal evidence.”\textsuperscript{32}

The Florida appellate courts seem overly concerned that trial courts will abdicate their responsibility by simply adopting the GAL’s report and recommendations,\textsuperscript{33} but “properly understood, the guardian ad litem does not usurp the judge’s function; he aids it.”\textsuperscript{34}

Certainly, the hearsay concerns raised by GAL’s report and testimony are no greater than those from social investigations, or “home studies,” as they are commonly called. The Florida Supreme Court has held that the unreliability concerns associated with hearsay in general are greatly minimized in the context of social investigations because “[t]he dangers of faulty perception and narration seem alleviated by the social workers’ special skills and training; falsification seems unlikely; and memory is unimportant if the report is more or less contemporaneous.”\textsuperscript{35} These same factors are present in connection with hearsay statements under § 61.403 because “GALs generally have expertise as lawyers, mental health professionals, or both.”\textsuperscript{36} Presumably, an attorney would be much more qualified than a social worker to identify and ferret-out unreliable information obtained during their investigations on behalf of the courts. If family court judges are capable of properly receiving and considering the investigations and studies conducted by social workers despite their hearsay content, then why would they be any less capable of properly assimilating the GAL reports conducted by lawyers and mental health professionals?

There is a way to address concerns about admitting potentially “unreliable” statements through a Guardian’s testimony. As the current GAL statute requires the filing of a Guardian Report 20 days before a final hearing, if the time required for the filing of a report is largely extended, let’s say to 60 days, any lingering concerns about unreliable statements unduly influencing the courts’ decision-making process can be conclusively laid to rest if there is more than sufficient time for the party questioning the Report to independently confirm the information contained in the Report. If there is an amendment to Florida’s Family GAL Statute to require that the GAL report and a list identifying the witnesses and documents upon which it is based be served on all parties at least 60 days prior to any hearing in which the report will be presented, any source can be deposed or subpoenaed to testify. By providing the
opportunity for cross-examination, which the U.S. Supreme Court has referred to as “the greatest legal engine ever invented for the discovery of truth”, any appreciable risk of unreliability will be eliminated.\(^{38}\)

By adopting the amendments proposed herein, “the legislature can ensure that GALs are not silenced in the very proceedings in which children most need them to speak.”\(^{39}\) Only by unshackling GALs from the stifling and purpose-nulifying constraints of the hearsay rule can GALs finally fulfill their vital mission of serving as the eyes and ears of the Family Court Judges, “instead of merely engaging in what might otherwise be an exercise in futility.”\(^{40}\) Although it is generally recognized that a Guardian’s recommendations will inevitably include hearsay testimony and that by identifying the collateral sources of an interview what was received by the Guardian, it only makes sense to allow the Guardian to provide complete information to a Court just as the person who conducts an investigation pursuant to Florida Statute 61.20 is permitted to provide to the Court.

Anastasia M. Garcia, Esq., is an attorney practicing in Coral Gables/ Miami. She focuses her practice in family law matters including Guardian Ad Litem work. She is also a Florida Supreme Court Certified Mediator and Arbitrator.

**Endnotes**


2 See Perez v. Perez, 769 So. 2d 389, 393 (Fla. 3d DCA 1999) (“Guardians ad litem serve an important role ... by acting as representatives of children and promoting society’s interest in protecting children from the traumas commonly associated with divorce and custody disputes.”).


8 Boumil, et al., supra, note 1, at 44.

9 Id.

10 Fla.Stat. §61.403.

11 Fla.Stat. §61.403(1)-(3).

12 Fla.Stat. §61.403(5).

13 French v. French, 452 So.2d 647, 651 n.2 (Fla. 4th DCA 1984); In re Marriage of Wycoff, 639 N.E.2d 897, 904 (Ill. App. 1994); Chambers, The Ambiguous Role of the Lawyer Representing the Minor in Domestic Relations Litigation, 70 Ill. B. J. 510, 511 (1982).

14 See, e.g., Ford v. Ford, 371 U.S. 187, 193 (1962) (“Unfortunately, experience has shown that the question of custody, so vital to a child’s happiness and well-being, frequently cannot be left to the discretion of parents. This is particularly true where, as here, the estrangement of husband and wife beclouds parental judgment with emotion and prejudice.”); Auclair v. Auclair, 730 A.2d 1260, 1268 (Md. App. 1999) (noting that the courts were imbibed with the power to appoint GALs based on the recognition that children often end up as “pawns in their parents’ fight to prevail on issues such as custody, visitation, or child support”); Perez v. Perez, 769 So. 2d 389, 393 (Fla. 3d DCA 1999) (noting that litigation involving custody and visitation issues “can be particularly acrimonious”, with children, who “are particularly vulnerable to the harms commonly associated with hostility and conflict between parents” at times used as “if in a game of ping-pong where the parent with the greater resources to serve the greatest number of motions wins”); Owens v. Owens, 685 So. 2d 1038, 1040 (Fla. 4th DCA 1997) (noting that the GAL’s investigative function is fundamental “in discovering information relevant to the best interests of a child, which neither parent wishes to disclose or neglects to disclose”); Emile Kruzick & David Zemans, In the Best Interest of the Child: Mandatory Independent Representation, 69 DEN. U. L.R. 605, 610-12, n.7 (1992) (parents in a custody battle typically don’t act in the best interest of their children).


16 See, e.g., Scaringe v. Scaringe, 711 So.2d 204 (Fla. 2d DCA 1998); C.J. v. Dept. Child. & Fams., 756 So. 2d 1108 (Fla. 3d DCA 2000) (trial judge erred in making findings based on the GAL’s report, which was hearsay); Alexander v. Alexander, 2007 Fla. App. LEXIS 2789, at *8 (Fla. 4th DCA Feb. 28, 2007) (finding that the admission of GAL’s report over the mother’s hearsay objection was erroneous).

17 Scaringe, 711 So.2d at 204.

18 Id.

19 Id. at 204-05.

20 Id. at 205.

21 Id. at 204.

22 Boumil, et al., supra, note 1, at 61.

23 Id. at 62.

24 See Scaringe, 711 So.2d at 205.


26 Fla.Stat. §61.20(2).

27 Fla.Stat. §61.20(1).


29 Fla.Stat. §61.20(2).

30 Mont. Code Ann. § 41-3-112 (3).


33 See Roski v. Roski, 730 So.2d 413, 414 (Fla. 2d DCA 1999) (“[W]e have previously cautioned trial judges against abdicating their decision-making responsibility to a guardian ad litem... We strongly encourage trial judges to jealously guard the court’s authority in such matters.”).


36 Boumil, et al., supra, note 1, at 44.


38 Florida v. Freber, 366 So.2d 426, 427 (Fla. 1978) (noting that the prime concern of the hearsay rule is that the out-of-court declarant is not subject to cross-examination).

39 Johnson-Weider, supra, note 29, at 78.

40 Id.
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Discernment Counseling: For Couples on the Brink

By Dr. Barbara Winter PhD, Boca Raton

Not every individual who makes an appointment with a family lawyer is ready to dissolve their marriage. Family lawyers are often asked to refer these individuals to marital counseling. Being informed of available options can make a difference in the life of your client.

Many of the couples who step forward have, at one point or another, engaged in some form of relationship work, whether it be couples or individual therapy, intensive outpatient or inpatient treatment. Yet they still separate. Perhaps the therapy did not work, they have already established a relationship with someone else, or something else such as addiction. Some individuals have a significant level of psychopathology that they cannot sustain a lasting relationship. In most cases they have simply waited too long (an average of six years) and their negative interaction patterns have been established and one or both partners have essentially checked-out. Yet, in many cases, if there is still even the smallest inkling that the connection can be reestablished, reconciliation can occur.

The decision to divorce is one that is considered in households frequently. Numbers of unsatisfied married people are making a decision to dissolve their relationship on a daily basis. According to research, however, divorce does not necessarily make unhappy adults happier. Survey data reveals that approximately 50% of both men and women expressed regret over having divorced. Unhappily divorced men and women were no happier five years post-divorce than those who remain married; two-thirds of those who remained married reported being happy five years later. It seems, then, marriage may be good for some; although, pausing and bettering yourself may be advisable more often than not.

If we look at the pattern, rarely an exclusion in my almost 30 years of practice, that that which attracts us is that which eventually for which we have contempt or at the least dislike. Based on this premise, many marriages, if the right work is done, can avoid termination and rework their dance.

To add to the many recent developments in mental health, the marriage therapy industry has a new method. . . Discernment Counseling. It is the therapeutic equivalent of a “pause”.

Discernment, according to the dictionary, refers to the ability to judge well and to be astute about topics often ignored or overlooked by others. In the area of marital therapy, with its widespread theoretical variations, there may be a lot of wisdom to impart on the couples who walk in our doors but they themselves often have little discernment.

Discernment Counseling, developed by Psychologist William Doherty of Minnesota (see the Minnesota Couples on the Brink Project1), works with mixed agenda couples in order to bring them to a conclusion with ‘clarity and confidence.’ An estimated 30% of couples enter couple’s therapy with a mixed agenda, that is, where one is leaning-out and one is leaning-in. Traditional couples’ therapy is unsuccessful for these couples; effective therapy is impossible unless both partners are in the game, albeit with some hesitation. With Discernment Counseling, couples leave with having made one of three decisions— divorce, commit to a six-month reconciliation period with couple’s therapy, or stay right where they are. For the majority of couples, the latter is not an option. As such, this process is intended to move things along, for better or for worse.

As you are aware, having heard countless narratives on how and when the decision to divorce occurred, there is no best time to make that final decision. That decision becomes even that much more complicated when there are others in the picture who are being effected, most typically children, young or old, and sometimes aging parents.

Discernment Counseling is not therapy. It is not couples counseling, nor is it divorce therapy. Couples will not see a change in the dynamics of the relationships, although there may be revelations and observations both you and your therapist may have that can help. Couples will be able to determine if, in fact, their problems are solvable.

Discernment counseling is a brief time-limited process, typically done in five or less 1.5-2 hour sessions; some time is spent together and some is spent in individual work with their therapist. The goal is to get couples unstuck and help them move on.

With Discernment Counseling, couples will gain: (1) the clarity and confidence to make a decision, (2) 

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Discernment Counseling  
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awareness and understanding of each person’s contributions and dynamics in the relationship and (3) a deeper knowledge of how the marriage has progressed through its stages and how they came to the brink of divorce.

There are times when neither appropriate Discernment Counseling nor couple’s therapy is the most relevant choice for a couple on the brink and other options are preferred. Discernment Counseling is not appropriate when there is the presence or danger of domestic violence or sexual abuse, when one spouse is coercing the other to participate, or when at least one partner has made the decision to divorce.

The basics of the work, done both in individual segments and in joint sessions, is to encourage the leaning-out partner to re-consider therapy and to get the leaning-in partner to effect changes in their behavior to no longer sabotage what they are attempting to fix. It is so often that this has become the process: the pursuer, as they have become, ends up alienating the other partner in their attempt to get close.

While the process is different, the goal is essentially not that different than early stage Emotionally Focused Therapy (EFT) for Couples, a state-of-the-art therapy based on attachment theory, where we attempt to engage the withdrawer and soften the behaviors of the pursuer. In fact, Discernment Counseling is considered to be a great lead in to EFT (also a relatively short-term evidence-based therapy).

At the end of the day, many relationships can be saved. If we fail to pause, we invariably take ourselves into our next relationship often with a repetition of the pattern that we have in our current relationship. Discernment Counseling is an available option for these couples that are uncertain and on the brink.

For more information or to find a qualified counselor, please visit discernmentcounseling.com.

Dr. Barbara Winter is a psychologist, sexologist and certified sex addiction therapist. She is EMDR certified and has training in Discernment Counseling, EFT for couples and hypnosis. She is a qualified parenting coordinator and family court mediator. Her practice in Boca Raton for almost 30 years has focused primarily on sex and relationship therapy, trauma recovery and behavioral addictions. You can visit her website at www.drbarbarawinter.com for more information about her practice. She is also on Facebook (https://www.facebook.com/Barbara-Winter-PhD-FAACS-PA-190292804355247/?ref=aymt_homepage_panel), Twitter (https://twitter.com/DrBarbaraWinter) and LinkedIn (https://www.linkedin.com/in/barbarawinterphd?trk=hp-identity-name) posting resources and support that can help others with their relationships, in and out of the bedroom.

Endnotes
1 http://www.cehd.umn.edu/fsos/projects/mcb/lawyers.asp
2 Id.
“Yes Virginia, There IS A Child Custody Order:” Statutory Nomenclature, Change for the Sake of Change, and Unintended Consequences

By Luis Insignares, Esq., Fort Myers

Like the historical Saint Nicholas, child custody orders used to be real things. In Florida it was common to have one parent in a divorce, separation, or paternity suit designated as the “primary residential” parent, with the other parent exercising “visitation” with his or her child(ren). The first parent “had custody,” in common parlance, the other did not.

Frequently, a judgment or order would award the second parent “liberal visitation.” C.f., Buhler v. Buhler, 83 So.3d 790, 791 (Fla. 5th DCA 2011) (“[w]hen the parties were initially divorced, the final judgment did not set out a specific visitation schedule; instead, it provided for liberal visitation”). Or the parties themselves could enter into a “visitation agreement,” c.f., Novoa v. De Socarras, 935 So.2d 40 (Fla. 3d DCA 2006) (concurrence noting “agreed visitation schedule” as set forth in “visitation agreement”), which might be adopted by the court, if, of course, it was determined to be in the best interest of the child(ren).

In its eminent wisdom, or at least as the result of its seemingly annual tinkering with the divorce statutes, in 2008 the legislature passed a 61-page law entitled “An act relating to child custody and support.” Laws of Florida, ch. 2008-61, despite using the term “custody” in its very title, in that same title (itself over a page long) stated that the law “defin[ed] the terms “parenting plan,” “parenting plan recommendation,” and “time-sharing schedule”, [and] delet[ed] definitions of the terms “custodial parent” and “noncustodial parent.” So, after many long years of usage, the concept of “custody” was replaced with “time-sharing.” Similarly, visitation (oops, “time-sharing”) was to be set, not in a visitation agreement or provision, but in the “time-sharing schedule” set forth in a “parenting plan.”

The problems posed by the legislat-ed changes were not necessarily only ones of learning a new vernacular. For example, although these terms were changed in the divorce portion of Chapter 61 (Part 1) and many other places throughout the statutes, Part 2 of Chapter 61 is the Uniform Child Custody Jurisdiction Enforcement Act (emphasis supplied; “UCCJEA” hereinafter). Being a uniform act, and one centered on concepts including “child custody determinations” and “child custody orders,” those UCCJEA terms of art could not be changed, such that we now have one portion of Chapter 61 purporting to do away with the concept of child “custody,” codified right next to a uniform act which is in fact built upon that very concept.

Besides introducing a totally unnecessary conflict in statutory language within Chapter 61, where none had previously existed, this change in nomenclature may have had other unintended consequences. “Custody” is a very generalized concept used in any number of legal scenarios, not just divorces and separations directly covered by Part 1 of Chapter 61, which also indirectly covers some other situations (for example, the paternity statutes cross-reference and effectively incorporate the divorce/separation standards for parenting plans and time-sharing). For example, when a parent’s parental rights are waived in order to allow an adoption, a court’s adoption judgment necessarily affects rights to custody of the adopted child. Custody rights are also adjudicated in Chapter 39 proceedings to terminate parental rights. Yet, in none of these “other” scenarios is custody determined as part of a “parenting plan,” nor is “time-sharing” ordered.

And that can be a problem. One possible unintended consequence of the Chapter 61 Part 1 nomenclature change is found not in the statutes passed by the legislature, but by the rules promulgated by the Supreme Court.

When the legislature made all those nomenclature changes (taking out "custodial parent" and putting in "parenting time" and "parenting plans," etc.) to the statutes, the rules committee apparently felt they had to change the rules of appellate procedure as well, such that the rule on family law interlocutory appeals is now written in terms of allowing immediate appeals in family law mat-
Child Custody Order from preceding page

ters when a temporary order affects “the rights or obligations of a party regarding child custody or time-sharing under a parenting plan.” See, Fla.R.App.P. 9.130(a)(3)(C)(iii)b (emphasis supplied). This amendment has arguably effected a substantive change, if the qualifier “under a parenting plan” is held to apply to both the “child custody” and “time-sharing” subjects which precede it, and are conjoined in the disjunctive. If that is the case, then the rule is now much narrower than it once was, because there are potentially many “custody” orders which do not originate from a “parenting plan.” Compare, Department of Health and Rehabilitative Services v. Honeycutt, 584 So.2d 192 (Fla 5th DCA 1991) (citing text of prior appellate rule and stating that it included interlocutory appeals of custody orders in all family law matters including adoption). While the addition of a simple comma after the term “child custody” in Rule 9.130 would do much to remove such uncertainty, for the time being the fact remains that no such comma is present.

If that missing comma should become important, however, we still have the common law to possibly come to the rescue. While the law is very far from clear, there is an arguable case for common law certiorari immediate review, when a custody order does not originate from a parenting plan. There are numerous analogous cases supporting the argument that a parent or other person having custody will have an irreparable damage warranting immediate certiorari review if custody is temporarily changed outside the ambit of a parenting plan. See, e.g.:

The writ of certiorari may also be used to review some nonappealable, nonfinal orders entered in child custody matters. See V.J.V. v. Dept. of Children & Families, 14 So.3d 1290 (Fla. 5th DCA 2009) (quashing order in dependency proceeding that required Department of Children and Families to begin proceedings to return child to adoptive parents in Guatemala when trial court departed from essential requirements of law in several material respects); In re J.P., 12 So.3d 253 (Fla. 2d DCA 2009) (quashing order granting grandparent’s motion to intervene as party in dependency proceeding); M.H. v. Dept. of Children & Families, 13 So.3d 1099 (Fla. 3d DCA 2009) (quashing order entered in dependency proceeding granting paternal grandmother visitation of child who had been released to mother’s custody); Karam v. Karam, 6 So.3d 87 (Fla. 3d DCA 2009) (quashing order that dismissed wife’s petition for custody of child during dissolution proceedings when order departed from essential requirements of law under Uniform Child Custody Jurisdiction and Enforcement Act). For a comprehensive list of cases in which courts have reviewed orders in dependency cases, see S.P. v. Florida Dept. of Children & Family Services, 17 So.3d 878 (Fla. 1st DCA 2009).

Valeria Hendricks, Florida Appellate Practice, Sec. 11.4 (The Florida Bar 2014) (emphasis supplied).

Of course, it’d be nice not to have deal with such potential problems, caused by an arguably unnecessary change in statutory terminology. But that proverbial ship has sailed. And if the legislature’s recent track record is any indication, it is not returning to harbor any time soon.

Luis E. Insignares is a Board Certified Marital and Family Lawyer and is a former member of the Executive Council of the Family Law Section of the Florida Bar. He has written or co-authored dozens of articles, chapters and papers for The Florida Bar Journal, The Florida Bar Continuing Legal Education division; the Lee County Bar Association; and he was past editor of this publication, The Family Law Commentator.
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