

FAMILY LAWYER

Fall/Winter 2015

MAGAZINE

High-Stakes Divorce

Exclusive: Interviews with Leading Attorneys

Hamm v. Hamm: the “King Kong” of Cases

Tax Traps in High-Asset Cases

High-Stakes Valuation Issues

Mediating High-Conflict Cases

Finding Financial Fraud

Reexamining Relocation Laws

Throwing Your Marketing Money Away?

Mitigating the Risks of the Cloud



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HANDLING HIGH-STAKES DIVORCE CASES

At some point in their careers, most lawyers dream of landing a case that will set precedents, attract peer or media attention, make their reputation, or make them a lot of money. Some family lawyers will spend months or years seeking the “Moby Dick” of divorce cases: one case that will accomplish all four goals. A lawyer who has had one or more such cases might offer their colleagues who are still chasing their own “Great White Whale” these words of caution: “Be careful what you wish for, because you just might get it.”

High-stakes – including high-net-worth and high-conflict – cases are not for everyone. The rewards may be greater, but the risks and challenges are also greater. If you’re wondering what it takes to land and successfully represent these kinds of clients, be sure to read “High-Stakes Divorce: Q&A with Leading Attorneys” (starting on page 6). We asked six prominent family law attorneys with extensive experience in high-stakes divorce cases to share some of their best advice; since each of these attorneys could probably write a book on the topic, we’re also offering the full interviews for this article as free podcasts at www.FamilyLawyerMagazine.com/articles/high-stakes-divorce-interviews.

This issue has a special focus on high-stakes divorce, including an insider’s view of “Hamm v. Hamm: the ‘King Kong’ of Divorce Cases”, which discusses Harold Hamm’s role in the growth of Continental Resources. Other high-stakes articles include: “The Gentleman Advocates: Bernard Rinella and Donald Schiller”, “Settling the Divorce Pre-Suit for High-Stakes Clients”, “The Ins and Outs of Representing High-Net-Worth Clients”, “3 Valuation Issues in High-Stakes Divorce”, “Avoiding Tax Traps in High-Asset Cases”, and “Mediation vs. Litigation for High-Conflict Divorce”.

Our goal is to offer information and advice that will help you achieve excellence – both professionally and personally. As always, this issue offers a broad range of articles, including:

- Warning signs that your client or their spouse may have committed financial fraud within their marriage.
- Mitigating the risks of the cloud – is your clients’ information really safe when synced across mobile devices, emailed back and forth, and stored online?
- Information about the AICPA/AAML 2016 National Divorce Conference.
- The 15 signs that you’re throwing your marketing money away.
- How to get potential referral sources to like and trust you enough to send business your way.
- An examination of relocation laws across the U.S.A. – including why some states are still using outdated laws that favor the parent seeking to relocate.
- The effects of secondary traumatic stress on family lawyers: how listening to your clients’ traumatic stories can and does affect you.
- Five simple rules to improve your health – body, mind, and spirit.
- Family law case updates from significant cases across the U.S.A.

For resources and referrals, check our “Professional Directory” (starting on page 76). I also invite you to visit our website at www.FamilyLawyerMagazine.com, where you’ll find hundreds of articles, and where you can sign up to receive our bi-monthly eNewsletter.

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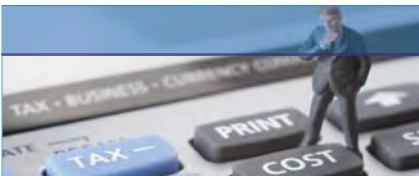
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FAMILY LAWYER MAGAZINE

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High-Stakes Divorce: Q&A with Leading Attorneys

We asked six prominent family law attorneys known for their expertise in handling high-stakes divorce to share some of their best advice with our readers. The following are excerpts from the in-depth interviews, which are available as free podcasts and transcripts at www.FamilyLawyerMagazine.com/articles/high-stakes-divorce-interviews.



Stephen A. Kolodny, Managing Partner, Kolodny Law Group, Beverly Hills CA

Mr. Kolodny is a preeminent family lawyer who has represented extremely-high-stakes divorce clients over his almost 50-year career. He is the Co-Chair of the National Family Law Trial Institute, which has trained more than a thousand family lawyers.

www.kolodnylawgroup.com

What are the risks of taking on high-stakes divorce cases, and how do you mitigate those risks?

I was hired a couple of years ago to assist in a malpractice case against a lawyer for settling a case in litigation – a settlement the wife didn't like for various reasons. The stakes were astronomically high: \$110 million. We were able to get a defence verdict or award on each and every point the wife raised. Family law attorneys understand what it takes to try a case to conclusion in a family law court, and what the weaknesses of those cases are. Providing for mandatory arbitration can also help to mitigate the risk. Almost everyone in Los Angeles has modified their arbitration agreements to require the arbitrator to follow the state's evidence code and case law – which means the arbitrator can't make a willy-nilly decision because they feel sorry for someone. Of course, malpractice insurance is necessary – but in some cases involving

hundreds of millions of dollars, there simply isn't enough insurance.

What options have you suggested in creating settlement agreements that are unique to high-asset or complex child-custody cases?

Your organization alerted me to a company providing disability insurance for the support payments in the event that the payor becomes disabled in the future. We had been using life insurance to replace the support obligations that would be lost in the event of death for many years, but the disability insurance is a fabulous idea.

Several years ago, I created the concept of putting together an annuity with bonuses along the way for not filing modification proceedings in paternity cases where one party didn't want to have contact with the mother of their non-marital child. The mother would receive extra payments periodically every few years as an incentive not to modify, which would run up legal fees and risk public exposure of their non-marital child.

Another idea was to reduce rather than eliminate alimony payments in the event that the supported spouse remarried. Reducing the support by 50% for the first couple of years after remarriage, and then reducing it down to 25% before finally terminating encouraged the recipient spouse to get married, and significantly reduced the payor's support obligation. Those are the kinds of ideas we've come up with over the years that are a little bit out of the box.



**Joy M. Feinberg, Partner,
Boyle & Feinberg, Chicago IL**

One of Illinois' top-rated divorce attorneys, Ms. Feinberg is a frequent speaker and writer who has received numerous prestigious honors from her peers. She became president of the USA Chapter of the IAML in 2014. She regularly represents individuals with wealth – entrepreneurs, top executives, and affluent families.

www.boylefeinbergfamilylaw.com

What personal characteristics and professional experience do you need to be successful at handling high-stakes divorce cases and clients?

You need to have an understanding of human nature, and certainly a very evolved sense of what the law is, and what is possible in the case. You need to understand the real goals of your client – stated or not stated – and be able to create a strategic plan for how to achieve those goals. You must also have a really good understanding of finance and tax issues.



**Alton L. Abramowitz, Partner,
Mayerson Abramowitz & Kahn,
New York NY**

Recognized by his peers as one of the leaders of New York's matrimonial bar, Mr. Abramowitz is a past-president of the AAML, and currently serves on its National Executive Committee. He is also a diplomate of the prestigious American College of Family Trial Lawyers.

www.mak-law.com

Do you have strategies for settling high-profile cases to help maintain your clients' privacy and dignity?

A few years ago, I handled a divorce involving a very well-known movie-star wife and her husband, who was also an actor and a director. In negotiating the settlement, we worked out an agreement that, rather than proceeding to a divorce through the courts in the United States, we would fly one of them down to the Dominican Republic where they would both agree to

What do you need to bring to the game to win a high-stakes case?

You need to bring the respect that comes from many years spent in the courtroom and from everybody knowing your reputation: that you're not somebody who's going to back down easily; that you're going to make sure you have all the facts; and that you'll use the best professionals. You need to understand the tax strategies that could bring an added benefit to asset division. Not considering tax consequences can spell disaster.

If you have a reputation for being thorough, honest, and somebody who knows where you're going in a case at all times, then you are going to be taken seriously, as will your client's case. If you end up in the judicial system as opposed to private mediation, the judges treat the high-end cases much differently than they do the average type of case. They understand that at any given moment they could be in the newspaper, or that the case could go up on appeal – on either temporary issues, or after the trial is over. They're very cognizant that there's a lot to be dealt with here, and you'd better bring your very best game. Choosing experts who are competent, intelligent, and qualified to support your case is also extremely important.

jurisdiction. The divorce took place within 48 hours, under the radar, with no press involved. Our co-counsel in the Dominican Republic picked the client up at the airport, put him in a very small boutique hotel so that he wouldn't be seen around town, and took him to the courthouse early in the morning. They were the first case on the docket so there weren't a lot of people around. As soon as the case was over, they whisked the client back to the airport and he flew back to the United States.

In New York, our matrimonial case files in the courthouse are sealed for 100 years after the judgment of divorce is signed; nobody other than the clients or their counsel can go into the clerk's office and ask to see the file. We try to make sure that nobody leaks the papers to the press, and we ask clients to be very careful not to talk about any of their relationships or the divorce itself on their social media pages. Anything they say on

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Hamm v. Hamm: the ‘King Kong’ of Divorce Cases



What role did Harold Hamm play in the growth of Continental Resources, and how much of the enhanced value of the company can be attributed to external factors?

By Robert J. Bartz, Family Lawyer

The divorce case of *Hamm v. Hamm* was referred to by media commentators as the “King Kong” of all divorce cases. It’s a story that has been well-documented and chronicled in literally hundreds of media articles. The main issue of this divorce case was the enhancement in value of Continental Resources, Inc., which grew from approximately \$10 million in 1988 (when the parties were married) to a company with a market cap of approximately \$28 billion on the first day of trial (August 4, 2014). The Hamm interest of 68% was worth \$19 to \$20 billion at that time.

Oklahoma courts recognize that if either spouse’s skill, efforts, labor, or funds result in the enhancement in value of separate property during

marriage, then the enhanced value of that property is subject to division in dissolution of marriage proceedings. The foundation of Oklahoma law relating to the issue of the non-owning spouse’s interest in the other’s separate property is established in the much cited Oklahoma Supreme Court opinion in *Thielenhaus v. Thielenhaus*, 1995 OK 5, 890 P.2d 925. *Thielenhaus* held that when a spouse brings his or her separate property to a marriage, any increase in value occurring during the marriage is subject to property division in a divorce proceeding, if the appreciation is shown to be the result of the efforts, skill, or funds of either spouse. The growth in value is considered marital property and is subject to equitable division by the Court. 890

P.2d at 931. The burden of showing that the appreciation in value is marital property lies upon the non-owning spouse. *Id.*

From 1988 to the fall of 2005, Harold G. Hamm was sole or majority shareholder, president, CEO, and Chairman of the Board of Continental Resources, Inc.; all the ultimate power positions of the company were concentrated in him. Today, he continues to hold all these positions except that of president.

His ex-wife, Sue Ann Hamm (who has since reverted to her maiden name, Arnall), claimed that the lion’s share of the enhancement of value of Continental’s stock since 1988 was attributable to the “skills, efforts, or funds” of Harold Hamm – which made

the enhanced value marital property. She argued that he was the driving force behind a number of strategic decisions that positioned Continental for its success: such as the shift from natural gas to a heavy emphasis on crude oil, the emphasis on exploring the Williston Basin and the Bakken formation, and the decision to go public at a time when the results from the Bakken play were still undecided. Arnall also presented evidence of Hamm's hands-on management style that pervades the company's history. Hamm, however, argued that he had relatively little to do as a personal influence on the enhancement of Continental's value. Rather, he assigned the cause of the incredible growth to external forces such as the rise in the price of oil and the availability of new technology.

There is a dearth of published case law in Oklahoma discussing the effect of an owning spouse's role in the success of a separately-owned business. However, Arnall's attorneys cited a number of cases from other equitable-division jurisdictions to support her argument that a substantial portion of the growth of Continental since 1988 should be attributed to Harold Hamm's efforts, skills, and/or funds during that period.

Enhancing the Value

Here is a brief discussion of the key cases regarding enhancing the value of a separately-owned company.

Innerbichler v. Innerbichler

In *Innerbichler v. Innerbichler*, 752 A.2d 291 (Md.App.2000), the husband co-founded a "fledgling" business over a year before the parties' marriage. He owned 51% and his co-founder owned 49%. He submitted an application for "8(a) certification" from the U.S. Small Business Administration. At the time of marriage, the company still operated from the co-founder's kitchen and did not have a separate place of business until several months after the marriage. The 8(a) certification was received in April 1984 and the company began growing rapidly thereafter. In 1996 the

company earned \$47 million in revenues, followed by \$51 million in 1997. The parties were granted a divorce in 1998. A major issue was how to treat the corporate stock for purposes of division.

The husband argued that the stock was non-marital. He argued that events prior to the marriage had laid the groundwork for the after-marriage appreciation; that he was not solely responsible for the company's success; and that there were many external factors that led to the increase in value, such as the 8(a) status and the dramatic increase in defense spending during the Reagan Administration. He maintained that his was just "a classic case of being in the right place at the right time." (752 A.2d at 304.) On the other hand, substantial evidence pointed toward the husband as the "architect" of the company's success. He was always president and CEO, and his co-founder reported to him. Corporate documents, testimony at trial, and the husband's testimony before a committee of Congress all verified that he was in control of the company's day-to-day affairs and had authority of final approval on all matters concerning the operations of the company. He admitted that he was the company's "quarterback" and that he had done a "good job of listening to my people and taking that company where it should have gone." (752 A.2d at 297-298.)

It was held that his 51% share of the company's increase in value was marital: "... we are satisfied that the record clearly supports the court's decision to treat all of TAMSCO's appreciation as marital; TAMSCO's value soared after the marriage, while the husband was at the helm and shepherded TAMSCO's growth. Despite the husband's assertion that the corporate success resulted from the efforts of others and from a variety of factors not related to his skills, such as "the expanding defense industry during the Reagan administration ...," the court, as fact-finder, was not compelled to accept the appellant's version of events." (752 A.2d at 307.)

Schorer v. Schorer

In *Schorer v. Schorer*, 501 N.W.2d 916, 923 (Wis.App.1993), the husband owned 448 shares of stock in a family business that he inherited from his father. Under the husband's leadership, the business appreciated in value during the marriage. The trial court held that the husband was the "decision maker" and the person at whom the "buck stopped," and considered the entire value of the 448 shares to be marital. The appellate court affirmed: "The record substantiates that William was the chief executive and manager of the company and was a *hands-on owner*. He testified that during the course of the marriage he worked long, hard hours, sometimes six or seven days a week, building the business from a tiny operation into a multimillion-dollar company. Indeed, he acknowledged on cross-examination that the value of the business, built up over the years of his marriage to Deborah, was *due to his own hard work and the hard work of his employees*, and that he was the one *principally responsible for the success* of the companies. On this record, we see no error in the court's inclusion of the stock in the marital estate." (501 N.W.2d at 922)[emphasis added].

Parry v. Parry

In *Parry v. Parry*, 933 So.2d 9 (Fla. App.2006), the husband was executive vice president and general counsel of a publicly traded Fortune 500 corporation. One issue was whether the increase in appreciation of certain stock the husband had been issued was due to market forces. The court said: "... Ingrid argues that the evidence showed appreciation due to market forces, not Tim's efforts. However, Tim presented the testimony of a financial expert with impressive credentials in accounting, public service, the business world, and specifically the health-care field. The expert testified that the appreciation in value of HMA's stock was not passive but rather was due in part to Tim's work as a senior officer of the

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15 Signs You Are Throwing Your Marketing Money Away

Stop pouring your marketing money down the drain and start looking into the most effective ways to market your family law practice.

By Dan Couvrette and
Martha Chan, Marketing
Consultants to Family Lawyers



Our firm offers a free, half-hour marketing consultation to family lawyers interested in using our marketing services. During this initial consultation, we ask a lot of questions before making any recommendations. Having talked to hundreds of family lawyers annually for more than 19 years, we have learned that the majority of family law firms need help with marketing their practice – yet, for various reasons, they do not seek it. Of the firms who do spend money on marketing, many of them end up basically throwing their money away. Here are 15 warning signs that your family law firm may be at risk of doing the same.

1. You respond to emails that guarantee you'll be on page one of Google.

Almost every month, if not every week, you receive spam emails from companies offering SEO (Search Engine Optimization) services that will put your law firm on Page One of Google search results. These companies often charge “one low fee”, and promise

results within a few months – plus a guarantee! Most family lawyers who talk to these companies do not know what SEO is, let alone how complicated and nearly impossible it is for their 15-page website to get on the first page of Google.

Google does not give out the formula to beat its secret and ever-changing algorithm to any company so they may achieve and guarantee such success. Don't be dazzled by what you read in these emails and commit to even a short contract.

2. You respond to emails guaranteeing you thousands of visitors through a pay-per-click campaign, or a listing on a directory.

We have several clients who had previously been unable to resist such tempting offers and wound up spending tens of thousands of dollars while receiving little in return. You might be

surprised to learn that some of these service providers are well-known major companies – not fly-by-night operations.

We have reviewed the online reports these companies offer, and have contacted them to inquire why the traffic was not even 5% of what was promised to our client. The standard reply is that they do not promise anything, and only provide estimates. Secondly, when asked what percentage of the budget was actually spent on buying the ads versus the fees for managing the pay-per-click campaign, two of these service providers stated that it was “industry standard” to not disclose such information.

There was one client whose report indicated a large volume of calls from the pay-per-click campaign, yet our client had no recollection of this. A closer look revealed that all phone calls made to our client's office were under 10 seconds in duration. When this issue was raised with the provider, the duration of phone calls on the reports immediately became

much longer, and a reporting error was cited!

3. You do not check your marketing results even when they are measurable.

Not all marketing efforts produce specific and measurable results, and you may be doing it more for branding purposes. But, if you can measure your results (and these reports are available online), you should definitely review them. If they seem too confusing, or you don't have the time to properly review them, it is well worth hiring someone to analyze them.

4. You pay thousands of dollars every year for website hosting.

We cannot imagine why so many law firms are okay with paying thousands of dollars every year to have their website hosted. (By comparison, our firm charges a few hundred dollars per year.) Imagine the amount of marketing you can do with a few thousand extra dollars a year!

5. Your website is not mobile-friendly.

These days, more people are accessing the internet from their mobile devices than from desktop computers. This trend has been developing for years, and as a result, responsive websites have become increasingly popular. ("Responsive" and "mobile-friendly" are not the same thing: you can have a mobile-friendly site without redesigning your entire website.)

If your website is not mobile-friendly, mobile visitors are likely to leave for competitors whose websites are. Furthermore, in April of this year, Google announced it was favoring websites that were mobile-friendly when displaying search results. So if your site isn't mobile-friendly, then there is not much point to spending money on SEO, pay-per-click, and online listings.

To learn more about this, and to test if your website is considered mobile-friendly by Google, read this article: www.familylawyer magazine.com/articles/is-your-website-smartphone-friendly.

com/articles/is-your-website-smartphone-friendly.

6. You do not add fresh content to your website regularly.

Google likes websites that add fresh content on a regular basis. The majority of law firm websites are stagnant – and some of them have not been touched since they were built! This is bad for SEO purposes.

7. You pay to have mass-produced blog posts to be added to your website.

Many family law firms think they have #6 beat by paying to have blog posts automatically added to their website "on their behalf". The problem is that these blog posts are manufactured by someone who does not know you, they do not showcase or represent your knowledge and personality, and they are irrelevant to the law firm's current and prospective clients. Why throw your money away in this manner when you could use it to create highly unique and relevant content

for an entire year using podcasts and videos? You wouldn't even need to write a single word.

8. You do not have a website.

This is 2015. If you still do not have a website, and you are spending money on marketing, you are definitely throwing your money away.

9. You cannot be found online even when your name is Googled.

Even someone who is referred to you will be Googling your name before calling you. If you cannot be found online, and you have no social presence (LinkedIn, Facebook, Twitter, or a blog), it won't make a good first impression with the prospective client – and may cause your prospect to call a competitor who does have a good online presence.

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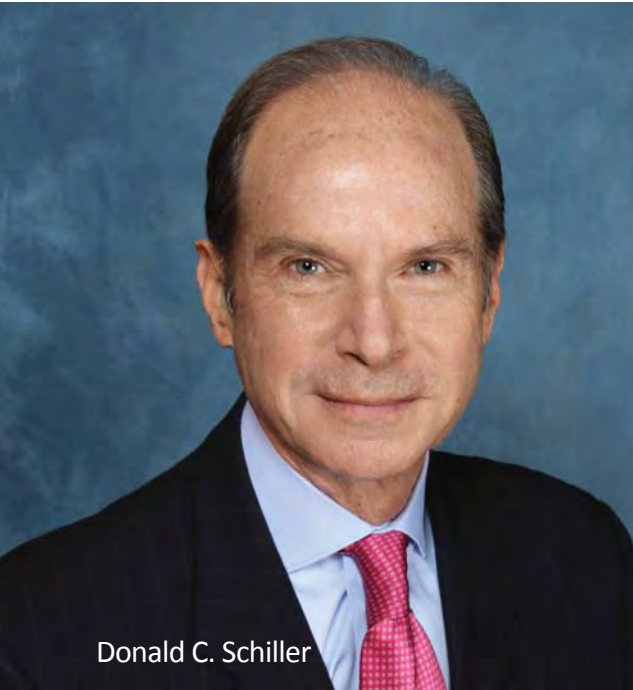
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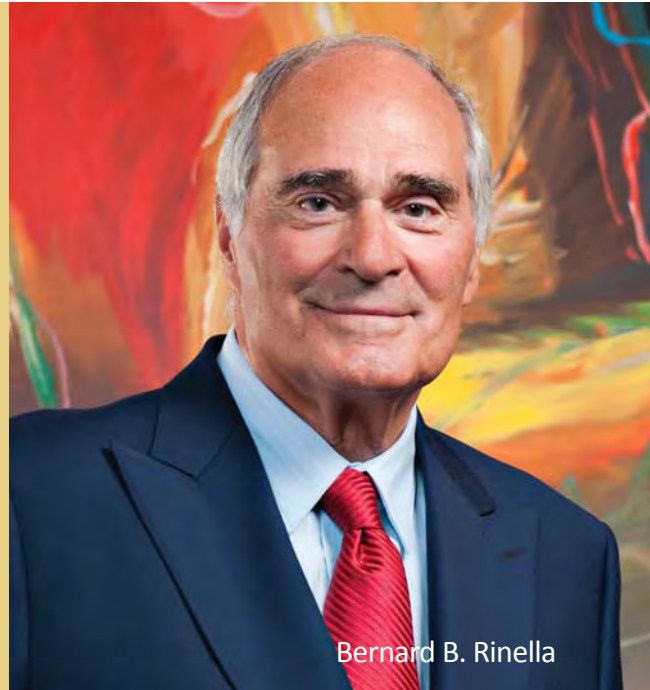
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THE GENTLEMEN • ADVOCATES

Two highly respected and successful family lawyers, Bernie Rinella and Donald Schiller, discuss how to earn trust and respect from judges, other attorneys, and high-stakes divorce clients.



Donald C. Schiller



Bernard B. Rinella

What are the key factors that contribute to the respect you've both received from other family lawyers?

Rinella: Don and I have more than 100 years of combined experience in the family law field. We've always treated opposing counsel and colleagues with respect; you earn respect by being respectful. Our body of work is one of the key factors in how we have earned the respect of our colleagues – including our contributions to the legal profession, our work within committees, and our positions of authority throughout the legal community – whether it be local, state, or national. The other keys to earning respect are: preparation, experience, reasonableness, and knowledge.

Schiller: It's important from the very beginning to maintain the highest degree of integrity. You must keep your word if you want people to trust you. Even if things get bad, if you've given your word, you shouldn't change it. Consider helping lawyers who practice in your community; if they call to ask questions because you're more experienced, let them pick your brain a little bit. Help them through CLE programs and show that you want to help the profession as well as advance yourself.

Is it possible for a family lawyer to have a successful career without ruffling the feathers of opposing counsel from time to time?

Schiller: It's inevitable that you will upset opposing counsel sometimes. Lawyers are competitive people: we

tend to identify with our clients, and sometimes we all take it a little bit too far. Our main loyalty is to our client. Of course, we're also loyal to the profession and the justice system, but our job is to represent and do what's best for our client – and do it ethically. If opposing counsel knows you're pursuing strategies that may be harmful or upsetting to their client, but you're doing so ethically, they'll understand. They'll be mad at you for a while, but on reflection, they'll know that they would have done the same. Never try to be confrontational. It doesn't get you anywhere; a settlement is better than a trial, and to attempt to irritate or agitate opposing counsel is a very foolish thing. You want

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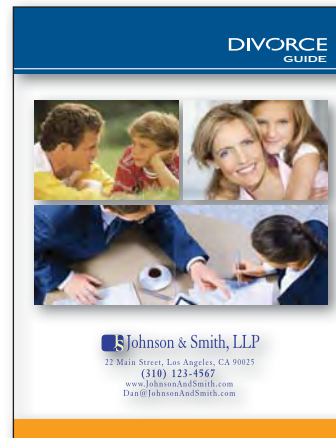
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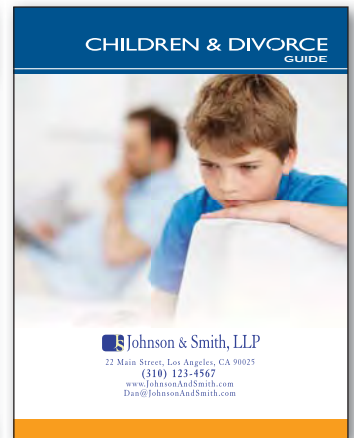
Professionally written and designed, these *Divorce Guides* can help you generate new business and referrals. These 32-page, full-color magazines offer useful articles to help your clients prepare and recover from divorce; at the same time, they promote your firm with contact information on the cover and a full-page profile of your firm inside. All ten are available as PDFs, and the *Comprehensive Divorce Guide* is also available as a printed magazine.

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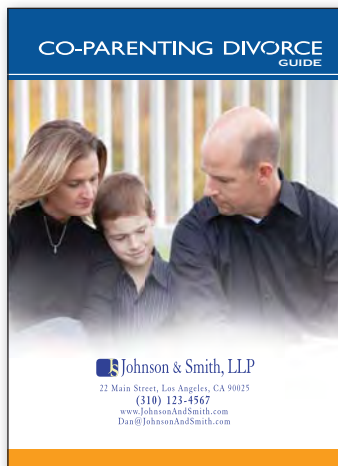
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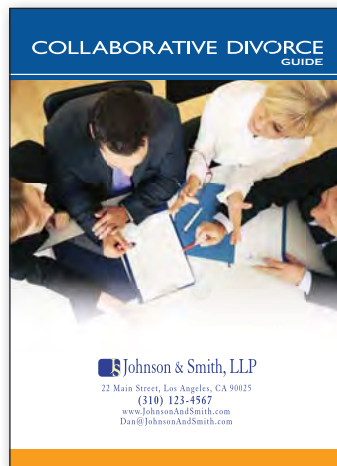
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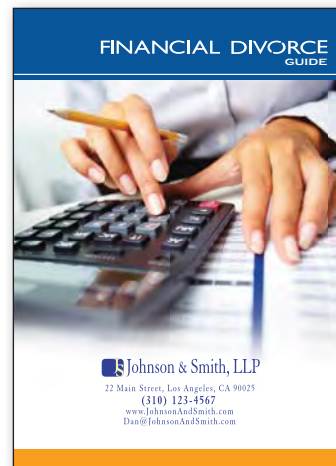
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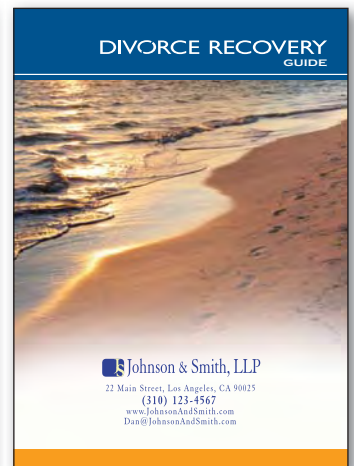
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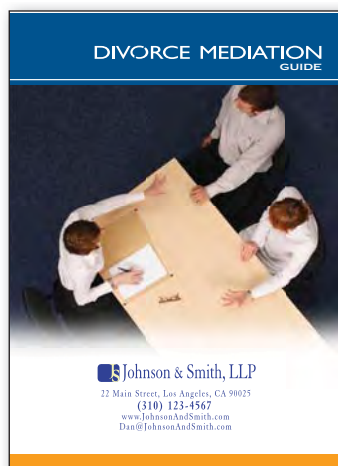
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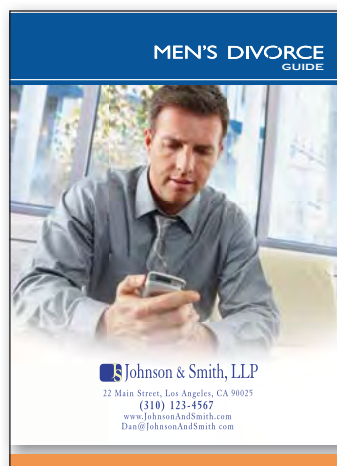
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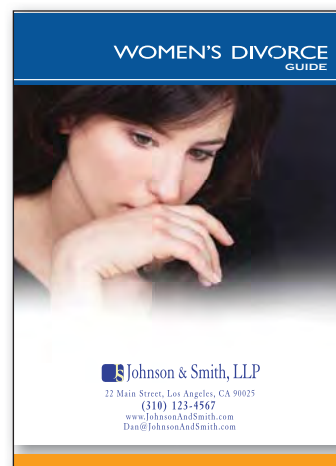
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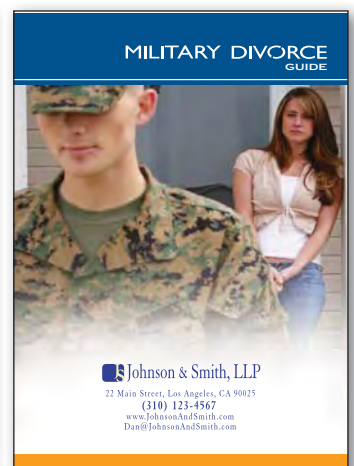
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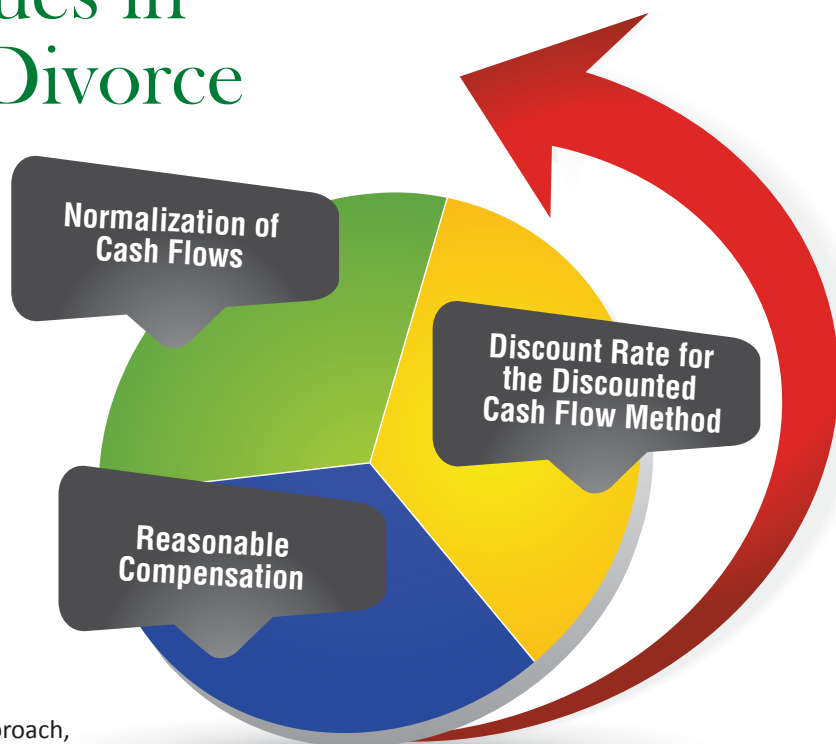
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3 Valuation Issues in High-Stakes Divorce

By Shannon P. Pratt and
Alina V. Niculita, Valuers

Deciding whether to normalize the stream of cash flows and what discount rate to use made a difference of roughly \$190 million in one case.



We were recently involved as consulting valuation experts in a high-stakes divorce case. The subject of the valuation was the husband's 1% partnership interest ("Subject Partnership Interest") in a large, privately-held professional practice organized as a partnership ("Partnership") with about 100 partners.

The amounts in dispute were indeed high stakes:

- The Partnership valuations ranged between \$8 and \$10 billion;
- Several valuation experts offered values ranging from \$10 million to about \$200 million for the 1% Subject Partnership Interest;

Because the husband was both an employee and an owner of equity in the Partnership, he received annual amounts from the Partnership that consisted of a combination of salary, benefits, return on capital, and distributions that ranged from a few hundred thousand to tens of millions of dollars.

To estimate the value of the Subject Partnership Interest, we used the discount cash flow method of the

income approach, discounting a stream of future cash flows back to the present using a discount rate based on the cost of capital.

There were several issues in dispute in this case, but two items accounted for most of the difference in the values between roughly \$10 million and \$200 million for the 1% Subject Partnership Interest:

1. **Normalization of cash flows and reasonable compensation.** Whether or not to normalize the stream of cash flows forecasted to be received in the future by the husband from the Partnership by subtracting from it an annual reasonable compensation amount.
2. **Discount rate for the discounted cash flow method.** What is the appropriate discount rate to be applied to the normalized stream of cash flows after the subtraction of a reasonable compensation amount.

Normalization of Cash Flows

In valuation literature, "normalization" is the process of adjusting the reported levels of economic income on the

financial statements of the company subject to valuation. The adjustments may involve either adding back items of expenses or subtracting items of income – usually from pre-tax income, in which case the result is "adjusted pre-tax income" or "normalized pre-tax income."

Although family law courts are generally familiar with and accept normalization within the capitalization method, the use of normalization is not restricted to the capitalization method: all valuation methods need to use properly adjusted economic income figures as inputs.

The purposes of the adjustments include:

- Providing a foundation for developing future expectations about the subject company;
- Presenting financial data on a consistent basis over time;
- Making the best estimate possible regarding the ongoing earning power of the company.

The ultimate purpose of normalization of economic income is to estimate the ongoing earning power of the subject entity or interest that is expected to prevail in the future under normal business conditions.

Reasonable Compensation

One of the adjustments commonly considered as part of the normalization process is the adjustment of owners' compensation to market levels.

Depending on whether the valuation subject is a business or an interest in a business, the main reason for normalization of owners' compensation is to estimate either:

- The true earnings of the company (as compared to the reported earnings); or
- The true return on capital (as opposed to return on labor) for owners who are also employees in the business.

The adjustment for an employee/partner's compensation is performed in two steps:

1. Determine market-level replacement compensation (also called replacement cost or reasonable compensation). This is done either using various databases or sources of comparable compensation, or by using consulting experts from the specific industry when the industry is very specialized, and there is not a lot of public data about it.
2. Using the cost of replacement model, the difference between the sums paid to the partner (regardless of the label given to the payments or category assigned by the partnership) and the cost of his replacement by a non-partner is either added back to pre-tax profit if the partner's compensation has been over-stated, or deducted from the pre-tax profit if his compensation has been under-stated.
3. If the employee/partner of a partnership is paid a smaller amount in comparison to a non-partner employee, then the reported profits of the business will be overstated.

Making the adjustment for reasonable replacement compensation results in the identification and recognition of the actual profits of the partnership – basically resulting in a lower value for the business, all else being equal. On the other hand, if the owners are paid above-market levels of compensation, then the adjustment for market compensation results in a higher value for the business, all else being equal.

How much to adjust the earnings base to reflect discrepancies between compensation paid and value of service performed depends on the purpose of the valuation. In this case, the reasonable compensation adjustment was needed in order to distinguish between the two components of earnings received by the partner: return on labor (compensation for services) and return on capital (return for being a partner in the firm).

Discount Rate for the Discounted Cash Flow Method

A basic principle of the income approach in business valuation is that the discount rate must match the economic income being discounted. The choice of the discount rate is driven by the definition of economic income used in the numerator. The discount rate used in the analysis must be appropriate for the definition of the economic income in the numerator and for the class of capital (or other type of investment) to which it applies. We cannot overemphasize how important it is that the discount rate developed must be matched conceptually and empirically to the definition of economic income being discounted. Also, the discount rate must reflect the degree of risk of the investment.

Lessons Learned

Beyond the technical issues in the valuation, we learned two other lessons

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Professional Athletes & Divorce

By Tim Voit, Financial Analyst

As an attorney for the spouse of a professional athlete, be cautious when the other side claims there is only one retirement plan. A missing retirement plan could result in hundreds of thousands of lost dollars for your client.

When representing the soon-to-be former spouse of a professional athlete, it's advisable to request all documentation available regarding the retirement benefits of the athlete spouse, since it is very likely that he or she may be a participant in two or more retirement plans – depending on the leagues in which the athlete played (i.e., minor versus major league, NFL v. MLB), as well as the number of clubs or organizations played for. Missing even a single retirement plan could result in hundreds of thousands of dollars being lost for your client.

Since it is not uncommon for professional athletes to squander their fortune, the attorney for the non-player spouse should consider protecting their client's share of the retirement benefits – which can be done with a QDRO. Pensions and even 401Ks cannot be squandered like non-retirement monies because of the terms and conditions of the plan, and the distribution restrictions.

Some retirement plans are overlooked or undisclosed because many sports teams have more than one retirement plan. The attorney needs to look at benefits that may have accrued not only while the player is (or was) a professional, but also while they were on a minor league team.

In baseball, given its free agency, the athlete may ultimately have major and minor league benefits upon retirement – and the benefits may be derived from several teams. For example, a player for the Cincinnati Reds would not only have retirement benefits under the Major League Baseball Pension Plan and the Major League

Baseball Players Investment Plan – both of which are under the MLB Benefit Plan, and for which all baseball players accrue benefits – but the Cincinnati Reds Retirement Income Plan and the Cincinnati Reds 401(k) plan. If that athlete retires and joins the coaching staff of a baseball team, then he will also participate in the MLB Pension Plan for Non-Uniform Personnel.

The NFL does not have a minor league system in place, but it has several different retirement plans. For example, the Bert Bell–Pete Rozelle NFL Player Retirement Plan, with benefits commencing as early as age 45; the NFL Player Supplemental Disability Plan; and the NFL Second Career Savings Plan, where the NFL matches \$2 for every \$1 of player contributions. There is also the NFL Annuity Program, a deferred compensation program.

Each sport generally has an association for their officials that may offer retirement plans as well.

As an attorney for the non-player spouse, you may need to dig deeper if the other side suggests that there is only one retirement plan. ■



Tim Voit is a nationally-recognized expert in QDROs and pension valuations in divorce. He is the author of Retirement Benefits & QDROs in Divorce (CCH, 2004), Federal Retirement in Divorce – Strategies & Issues, as well as more than 100 articles and CLE programs. www.vecon.com



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Avoiding Tax Traps in High-Asset Cases



Four issues many attorneys overlook in high-asset divorce cases.

By David Sarif, Family Lawyer, and Laurie Dyke, Forensic Accountant

Experienced divorce attorneys realize that high-asset divorce cases involve unique issues with potentially significant tax implications. In high-asset cases, one word in the right (or wrong) place of an agreement or court order could have implications that benefit (or hurt) your client to the tune of millions of dollars. Below are four unique issues many attorneys overlook in high-asset divorce cases.

1. Pay Attention to the Title

Most family law attorneys know that transfers between spouses pursuant to a divorce are non-taxable events per IRS §1041. However, assets that need to be transferred in a divorce may be titled in the name of another

legal entity, such as a business or Trust. Most commonly, these assets include cars and real estate, but they can be anything: furniture, artwork, or even animals. Any time a legal entity other than the individual parties themselves is involved in an asset transfer, there is the potential for significant tax ramifications that must be carefully analyzed.

2. All Assets Are Not Created Equal

Investment accounts that hold securities, mutual funds, and bonds may be divided in a divorce; you must take care to transfer the assets in a way that will not result in unequal income tax burden on the parties when the assets are sold. Stocks that are purchased over time may each have a different tax basis and,

therefore, different unrealized gains or losses – which may result in significantly different capital gains taxes. For example, married couple John and Jane purchased 500 shares of Apple stock in January 1981 for \$34.50; the stock has split several times since then, resulting in 28,000 shares today with a cost basis of \$.61/share. They purchased another 500 shares in January 2013 for \$555/share; the stock split 7:1 in 2014, resulting in 3,500 shares with a cost basis of about \$79/share. If the current stock price is \$125/share, the 28,000 shares resulting from the original purchase in 1981, will have unrealized gains of \$124.39 per share and the 3,500 shares

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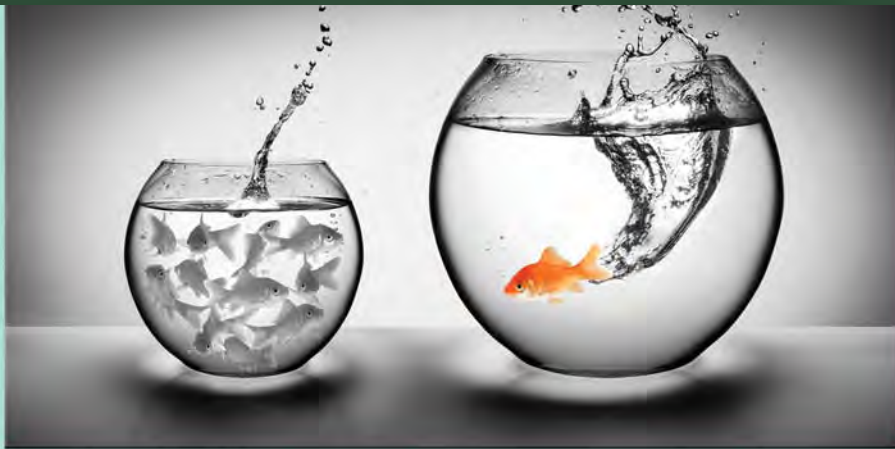


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At Trial, Words Matter

By Roger Dodd and Patricia Kuendig, Family Lawyers

The negotiated contract...

The exploitation agreement...

How do you simplify your case's "story" into one unified theme – and set it apart from all the other cases on the judge's docket? The key is word selection.

Whether your trial is to a jury, an arbitrator, or judge, it is imperative that you get your "story" across to the fact finder to win. The factual complexities of family cases create a harsh environment in which to locate, encapsulate, and communicate that story. To the uninitiated, a family case might seem commonplace or easy. After all, everyone knows that the court should take into consideration the children's best interests, right? However, anyone who has been faced with the task of packaging a family law case knows the challenges of developing an apt, simple, and concise story that represents years of a complex personal and financial relationship.

For example, consider a relationship with 22 years of interactions, multiple children, two people who thought they would love each other forever and started with nothing, yet built a business and amassed a small fortune. Now add in a falling out of long-time business partners complete with fraudulent conduct, or other criminal concerns, mixed in with even more multi-layered emotional aspects of trying to guide offsprings to adulthood. It is like trying a construction defect case, a criminal conspiracy case, and a breach of fiduciary duty case all at the same time.

How do you simplify that story into one unified theme – and set it apart from all the other cases on the judge's docket? The key is word selection. Winston Churchill famously said: "If I had more time, I would have written a shorter letter." Taking the time to select

a few words carefully will help you to convey the desired message for your case.

Lawyers who fail to create a concise, compelling narrative for each family law case will leave fact-finders to view a complex, fact-intensive odyssey as just another run-of-the-mill case: something they've heard a thousand times before. If you fail to make your case unique, then the judge is likely to dispense cookie-cutter justice.

We must use words to create the perfect narrative – but which words to choose? As Mark Twain said, "The difference between the right word and the almost right word is the difference between lightning and a lightning bug."

Newly-developed neuroscience posits that the brain performs amazingly fast and predictable unconscious associations when stimulated by the right word or image(s). In addition to free-associating or brainstorming words, try letting your mind go to the background music when considering a phrase – then see the picture evoked by that music. We have recently begun experimenting with this, and we have noticed that certain words evoke similar music in most people.

Here are some examples.

1. **"We will show that the client's husband is a Machiavellian genius whose feral malevolence is covered in a thin veneer of culture and education."** Will a judge instantly buy that sentence, or is it too driven by lawyer-speak? If it is, then the judge's brain is likely to involuntarily,

immediately, and predictably reject the statement – and the lawyer who gives it. No one wants to be manipulated by a lawyer spouting pretentious phrases.

How about this: “The husband lurked for 22 years to achieve his goals.” No fancy words or long sentences – just an immediate, mental image. Lurked. Do not think about it; just let your mind go there. What picture comes up in your brain? Is it a bright, sunshiny day? Or is it dusk with shadows? Can you see the face clearly? Is a child or a woman at risk, or perhaps both? Is he about to do good or evil? All of our brains go to similar images, pictures, and feelings – involuntarily, instantly and predictably. That is lightning, not a lightning bug.

2. **“We will demonstrate that consistency and stability for the children should take precedence over the mother’s desire to relocate to another state.”**

You could simply state that these children are stable in their environment, but what image does this bring to mind? What music do you hear? Anything?

What about this: “Relocating the children will burst the safe bubble built around them since birth.” Are you hearing a lullaby being sung by one of your parents? Perhaps a fireplace in a cozy, protected home? These words also set up your chapters of argument and cross examination because you can “construct” their bubble factually.

3. **Word selection can be very effective when you “label” a person or piece of evidence.** For instance, a prenuptial agreement is a legal term. If your client benefits from one, try labeling it “the negotiated contract” or even “the marriage promise.” On the other hand, if your client wants to set such an agreement aside, perhaps it could be labeled “the surprise document” or the “exploitation agreement.” There are a myriad of other examples; choose the right one for your case and your judge.

Spending a little extra time on your choice of words can have a significant

impact on the outcome of your trials. In the wise words of T.S. Eliot: “Only those who will risk going too far can possibly find out how far one can go.” Your clients deserve it. ■



Roger J. Dodd is a Fellow of the AAML, the IAML, and the American College of Family Trial Lawyers. He has been Board Certified by the National Board of Trial Advocacy in Civil Trial Practice for more than 21 years, and he has been listed in Best Lawyers for more than 20 years. www.doddlaw.com



Patricia Kuendig’s primary office is in Park City, Utah. She is also licensed in Florida and Georgia where she maintains active cases. She has been included in Super Lawyers as a Rising Star in the area of Family Law for the last seven years. www.doddkuendig.com



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When a child resists contact with one of the parents, best practice requires an assessment of the family dynamics and an intervention that treats the entire family.

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– Hon. Marjorie A. Slabach (ret), Board of Directors president, Overcoming Barriers.
www.overcomingbarriers.org

When negotiating pension division on divorce, an attorney must know the answers to the following six questions.

- What is the payment amount? Clients always want to know how much they’re going to be receiving – and you need to know the answer in order to figure out how to equalize or equitably divide a marital estate.
- When will the payments begin? Without the answer to this question, you won’t know if the cash is available immediately or at some future date.
- Will the payments be made periodically, or as a one-time lump-sum? Your client will want to know whether he or she can expect a lump sum or a regular monthly check in the future.

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- What happens if someone dies? Many attorneys forget to ask this question, which can create a serious problem. If your client isn't the employee, you want to make sure that that he/she continues to receive the money he/she expects if the employee dies.
- How much does survivor protection cost? You want to make sure that the cost of the protection doesn't eat up the benefit that the non-employee spouse receives. Both you and the client should think the insurance is money well spent.
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With the answers to all six questions, you can increase your chances of creating a divorce settlement agreement that will work into retirement – and have happier clients as an added bonus.

– *Andrew K. Hoffman (FCA, CFP®, CDFA™).*
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A detailed lifestyle analysis... accurately represents the customary lifestyle expenses of the parties for an average period of time.

When there is a claim for spousal support, a comprehensive lifestyle analysis is a critical component to settling the case.

A detailed lifestyle analysis – the marital standard of living established during the marriage – accurately represents the customary lifestyle expenses of the parties for an average period of time. These ordinary expenses are the typical categories found on a financial affidavit or statement; they are the expected or routine/commonly practiced/habitual expenses of the marriage. Ordinary expenses vary widely: some clients have planes, boats, or multiple homes commonly used by the couple or family during the marriage, others stay in five-star hotels regularly. Generally, extraordinary expenses have a special purpose: they were not a routine expense during the marriage. They likely would not be included in the average monthly lifestyle figure, but they might be identified in the analysis if they speak to the level of spending a family had in a particular time period. Regardless of whether your client is the monied or the non-monied spouse, a well-documented lifestyle analysis helps both parties and their counsel determine a fair settlement – including spousal support.

– *Cathleen Belmonte Newman (CDFA™, MBA), president, F4 Financial Inc.* www.f4financial.com

Give talks to targeted audiences to demonstrate your knowledge and create a new stream of potential clients.

Divorce attorneys face a consistent challenge in finding new clients. Many rely on word-of-mouth and advertising – both of which are important – but to really see your practice soar, get in front of groups. Giving talks to targeted audiences is a great way to demonstrate your in-depth knowledge of divorce and position yourself as a leader in your field. If you have trouble finding appropriate speaking venues, try creating your own: you could offer a divorce workshop on your own, or in cooperation with a financial expert and a mental-health professional to cover all the bases. Education is key to a successful outcome in divorce, and you'll attract clients with the depth and breadth of your knowledge. You'll also become known as someone who is out to make a difference for people in your community, which can help to set you apart from your competition.

– *Ginita Wall (CPA, CFP®, CDFA™), co-founder, Second Saturday Divorce Workshops, www.SecondSaturday.com*

If alcohol is a concern in your client's child-custody case, monitor sobriety during visitation periods.

When an alcohol addiction is involved with a divorce case, custody battles often become complicated and difficult. Make sure the ex-spouse is conducting safe and sober visitations with your client's children by monitoring alcohol consumption. Commonly used EtG urine testing for alcohol consumption is outdated, unreliable, and inconvenient – plus there is no way of knowing whether or not the ex-spouse is sober in real-time with EtG testing. Alcohol monitoring technology has moved forward with the advent of handheld mobile-breath systems. Use mobile Breathalyzers and monitoring software to get real-time breath test results during visitation to ensure child safety. Real-time results will allow you to act quickly and remove children, in the event of a positive breath test, from a possibly dangerous situation. Mobile breath systems give your client the ability to ensure safe visitations. Documented proof of alcohol sobriety or consumption can create custody opportunities.

– *Shelby Hendrix, Soberlink. www.soberlnk.net*

Address life and disability insurance during – not at the end of – the divorce process.

Life and disability insurance planning should be an integral part of your process, not an after-thought. Start by obtaining third-party verification of existing policies and preliminary underwriting approval as part of your discovery and interrogatories. Use a standardized formula that incorporates taxes and investment return when calculating the amount of coverage needed, and make certain that the policy you select has a guaranteed level premium payment period equal to or greater than the duration of the underlying obligation. Discuss the tax implications of various ownership

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The Must-Attend Family Law Event of 2016



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Carole Gailor and Sharyn Maggio, Co-Chairs of the AICPA/AAML 2016 National Divorce Committee, talk about some of the many benefits of attending this biennial conference.

What is the AICPA/AAML National Divorce Conference?

The AICPA/AAML National Divorce Conference is a joint project of the American Institute of Certified Public Accountants and the American Academy of Matrimonial Lawyers. The conference was conceived as a forum to provide the most advanced, highest-level continuing education (CPE) and continuing legal education (CLE) on complex financial and divorce litigation-related issues common to divorce lawyers, accounting professionals, business appraisers, consultants, and others. The conference is intended to provide a dual perspective on a broad range of divorce-related issues.

How does this conference differ from other family law conferences?

What makes the AICPA/AAML National Divorce Conference unique is that it is geared towards lawyers, CPAs, business valuers, and other financial professionals who work in divorce-related fields. Divorce lawyers work closely with these professionals in their divorce cases on a routine basis. This conference provides useful, cutting-edge information on

multiple advanced topics. Many of the speakers are nationally-recognized divorce lawyers and accounting, financial, or business valuation professionals who have been paired to provide a comprehensive, dual perspective on the issues. This conference also provides a national venue for networking between legal and accounting professionals who share common interests in divorce-related fields.

Who would you recommend attend this conference?

The National Divorce Conference is the most prestigious, advanced, substantive conference for divorce lawyers, accounting professionals, consultants, business appraisers and others whose practices involve divorce-related matters and whose cases frequently involve clients with substantial wealth and financially complex marital estates facing potential divorce litigation. The conference offers presentations on advanced financial issues in divorce, and litigation issues common to both divorce lawyers and financial professionals. The conference is heavy on substantive take-away information and tools that lawyers and

financial professionals can use in their daily practices.

This is an opportunity for accounting and financial professionals to make contact with the divorce lawyers who make the decisions in their firms regarding hiring of these professionals – and the place for divorce lawyers to connect with the best financial and business valuation professionals. The quality, experience, and expertise of the accounting and business valuation professionals is of major importance to divorce lawyers. The National Divorce Conference is the best place to meet the practitioners in the field. ■

The 2016 National Divorce Conference will be held May 19th-20th at the Sheraton Hotel in New Orleans, LA. www.cpa2biz.com

Carole Gailor is a Board Certified Family Law Specialist and managing member of Gailor, Hunt, Jenkins, Davis & Taylor, PLLC in Raleigh, North Carolina.

Sharyn Maggio is a CPA and partner with the accounting firm of Marcum LLP, New Jersey.

Romancing Your Referral Sources

How to get potential referral sources to like and trust you enough to send business your way.

By Mark Powers & Shawn McNalis, Practice Advisors



Attorneys constantly ask how they can jump-start a relationship with a potential referral source they've just met. They're often stymied about two things: how the process of developing a new business relationship works, and how to go about it without appearing desperate.

Essentially, what they want to know is this: How can I get potential referral sources to like and trust me enough to send their business, without actually looking like I need their business?

The answer is pretty simple. People are people, and the way to cultivate them is to court them – the same way you courted your current spouse or romantic partner. You focus on them, learn about their likes and dislikes, and find common ground on which to base a relationship.

The Cultivation Process

At your first meeting with a new potential referral source, however brief, say something like, "Why don't we get together in the near future for lunch – I'd like to learn more about your business." Or perhaps, "I'd like to get together sometime soon to learn more about what you do."

The emphasis on them is key: no one wants to get together with you just to hear a commercial about you. People are interested in talking about themselves first, and learning about you second.

At this first meeting, try to get a business

card, a phone number, or an e-mail address. Getting contact information is critical to continuing the relationship. Put that information in your database as soon as possible, along with any background information you've gleaned from the conversation.

If you missed the opportunity to extend an invitation to get together at your first meeting, having their contact information gives you a second chance. You can send a short handwritten note that says you enjoyed meeting them and will call soon to see if they'd like to get together. Or, for less formal personalities, you can send an email with the same message. Calendar this call like an upcoming appointment.

When you arrange to meet again, there are a number of possible venues. You might invite the person to have lunch, meet for coffee, have a drink after work, have breakfast before going to the office, meet for an early morning walk (if they are interested in exercise), have dinner together, meet at a bar event (if they are a colleague), or meet at your home. The place doesn't matter so long as it is convenient for them, comfortable, and quiet enough to hold a conversation. No matter where you do it, spending time together in person is key to the information-gathering process that begins when you first meet someone, and continues throughout the relationship. In fact, the more you know about a person, the stronger you can build the relationship.

To learn the facts about someone, you have to ask questions. Similar to a courtship, learning the hobbies, passions, and interests of your potential referral sources gives you a way to get to know them and a wealth of excuses to connect and cultivate them further.

Here's an example: If the person raves about his or her love of travel at your first encounter, you can send an email the following week about something travel-related you saw on the Internet – perhaps a link to a great travel website, or an article about the top 10 travel destinations. In this email you can also say you'll call to invite the person out to lunch.

By listening carefully and leveraging what you've learned, you've navigated the relationship to the next step by offering information that's interesting and opened the door to a second meeting.

The kinds of questions you can ask to gather information are the same questions you'd ask anyone when first meeting them. For instance, you could ask about the person's family:

- Did you grow up around here?
- Do you have family in the area?
- Are you married? What does your spouse do?
- Do you have kids? How old are they? What school do they go to? Are they active in sports?

Or you could ask questions about hobbies, passions, and interests:

- What do you do in your spare time? (Ask

further questions about whatever their interests are: sports, cooking, reading, gardening, photography, painting, the theater, etc.)

- Do you enjoy travel? (Ask questions about where they go, how they get there and what they do and see once they are there)

Once you piece together your potential referral source's background information, you can use that to initiate activities they'd be interested in. You can send them a book about a topic they mention; you can give them tickets to the theater if you know they love going to plays; or you can invite them to a game if you know what sports they like. There are any number of things you can do to connect if you listen closely enough to the clues they give you.

Next, you want to ask questions related to their business or profession, such as:

- Where did you go to school or receive your training?
- What kind of services do you provide?
- Are you looking for more clients/customers/patients?
- In case I know of anyone, what kind

of people do you like to work with?

Of course, in all of these conversations you will naturally provide information about yourself. And once you've shared information about your practice, the people you work with, and how you help them, the potential referral source will often start voluntarily sending clients to you. Generally speaking, it will take three to five meetings for enough trust to develop for this can happen. If it doesn't happen, you can be more direct and say something like, "I'd like to explore building a business relationship with you." Or, "I'd enjoy working with your clients if you have any who need my services."

All of the above is well within the bounds of ordinary social behavior and are things you have already done at some point in the course of your social life – you're just behaving in a more strategic way. You'll know you've mastered the art of cultivating new referral sources when you move three to five people from being acquaintances to becoming actual referral sources every year. ■



Mark Powers, president of Atticus, Inc. and Shawn McNalis, Practice Advisor Trainer, are the co-authors of How Good Attorneys Become Great Rainmakers; Time Management for Attorneys; and Hire Slow, Fire Fast. Both are featured writers for Lawyers Weekly and a number of other publications.
www.atticusonline.com



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By Sean Ditzel

Consider these five tips for networking outside your own comfort zone to maximize and grow your referral base.

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A Wholistic Approach to High-Conflict Divorce Mediation

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The Gentlemen / Cont. from page 12

to work together for the benefit of the clients, and to make it easier for both of you to resolve the case.

How do you gain the judges' respect?

Rinella: If you can comport yourself appropriately in a judge's courtroom, it buys respect. We try to assist judges – some of whom will not have the experience that we have – to make the case run more smoothly. It doesn't take long for judges to learn which lawyers they can trust and whose word is their bond. Show respect for the judge: you may oppose or feel that you have a better position than what the judge is suggesting, but you must show respect for the court.

Schiller: Part of earning the judge's trust and respect is being prepared. You can't just hip-shoot cases in court: judges won't trust you because they know you aren't a reliable source of information. It's important to become the authority on what's happening in the case, and to know all the details and facts as well as the law. When the court asks questions, one of the lawyers might know the names of the children, or what grade they're in, and the other might not. If you're well-prepared, you're a reliable source of information – and the judge will listen more carefully to your arguments than someone else's. And be honest: if the judge asks you a question, don't try to weasel out of answering it honestly.

What do you need to do to gain your client's respect?

Rinella: You have to educate clients from the get-go as to how a judge would likely rule if their case ended up in court. Clients need to be told what is equitable and attainable. Too often, clients try to shoot for the moon and you must instruct them that their goal is not attainable. Obviously, we will argue vigorously for our clients, but there's a point of no return. Once you go too far and are sucked in by your client's emotions, then you're not doing them

any favors: you have misled your client by saying you could accomplish the impossible. You gain a client's respect by being straightforward and honest.

Schiller: The idea of giving your client reasonable expectations from the very beginning can't be emphasized enough. Some lawyers are so anxious to get a client that they over-promise; they're never going to be able to deliver on that promise, so they're laying a foundation for failure. Showing that you really care and are working hard on the case is very important. Many lawyers work very hard for their clients, but the clients don't know it. If lawyers don't keep their clients informed as to what's going on, all the clients see are the bills. However, if you continuously send the clients copies of motions that are being filed or orders being entered; answer their phone calls the same day or in no longer than 24 hours; and if you've given them reasonable expectations and they see that you're meeting those expectations – they will respect and send other clients to you.

What does "winning" in a divorce case mean for each of you?

Schiller: For me, winning is meeting a client's reasonable expectations. If the client asks what to expect, or is talking about all kinds of things that are not achievable, you have to tell that client what an achievable goal is – and winning is achieving that goal. You might ask for something greater than the goal, and you may appear to lose because you didn't get all that you asked for, but the client knows that you achieved the actual goal.

Rinella: When I take on a case, I suggest a strategy to the client, and we try to follow it throughout the case. The client knows there's an agenda when we meet, and knows we are at a particular stage. A win can become a loss if the case goes on too long: the client may win, but end up losing because of the cost and the emotional damage that has been done.

Schiller: A very well-respected, now deceased judge at a federal court here in Chicago, Abraham Lincoln Marovitz,

once said, "You can disagree without being disagreeable." If you school your clients in that, and you remember it yourself, it will go a long way in making sure cases that are competitive are not disagreeable. ■

This article has been edited for space. To read or listen to the entire interview, go to www.familylawyermagazine.com/article-category/gentlemen-advocates.



Bernard B. Rinella is the Managing Partner of the firm Rinella & Rinella, the oldest family law firm in the State of Illinois. Mr. Rinella's leadership and experience have been

acknowledged with numerous awards and honours by his peers, including being voted the American Academy of Matrimonial Lawyer of the Year in 2004. www.rinellaandrinella.com



Donald C. Schiller is Senior Partner at Schiller DuCanto & Fleck, the largest family law firm in the USA. In 2011, the Illinois Chapter of the AAML honored him with

the prestigious Judge Samuel Berger Award, which is given to lawyers who exemplify integrity, courtesy, and knowledge of family law. www.sdfllaw.com

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Settling the Divorce Pre-Suit for High-Stakes Clients

When dealing with a high-net-worth and/or high-profile client, the lawyer should explore and discuss the roadmap for – and benefits of – settling the divorce out of court.

By David L. Hirschberg, Family Lawyer

For many high-stakes clients, discretion and privacy is of the utmost importance. The breadwinning spouse is often concerned that their financial disclosure, net worth, and details regarding their income will become available to the public through the court file, including being visible to business competitors. Moreover, the parties are often concerned about their private affairs becoming known to the public, potentially jeopardizing their social status, and in the case of a high-profile client, becoming local and/or national news. Therefore, when dealing with a high-net-worth and/or high-profile client, the lawyer should explore and discuss the roadmap for – and benefits of – a pre-suit settlement.

Assessing the Issues

During their initial consultation with a high-net-worth/high-profile client, a lawyer should assess whether the issues require a case to be filed immediately. For example, if there are urgent

child-related issues that require a client to come before the court, then the case likely cannot be negotiated and settled pre-suit. Perhaps the client is in need of immediate injunctive relief for protection against a spouse's intentional secreting or divesting of marital funds, again requiring a case to be filed immediately. However, in many instances, all issues of the case – including parenting and economic – can be negotiated and settled pre-suit in accordance with the following practice procedure.

Contacting the Other Side

After receiving a commitment from the client regarding proceeding on a pre-suit basis, the lawyer should send an introductory letter to the opposing party or the opposing party's attorney (if one has been retained). This letter should be cordial in nature, advising that the client has elected to proceed on a pre-suit basis in an effort to resolve the dissolution matter amicably and collaboratively without the

need for any litigation, if possible. The letter should also outline how the case would be settled "behind the scenes," including suggesting the methodology of exchanging discovery and a timeline for the case to be ready for a meaningful mediation/settlement conference. Finally, depending on whether he/she is representing the income-earning spouse or the impecunious spouse, the lawyer should consider requesting a cut-off date for the determination of marital assets and liabilities. In Florida, for example, the cut-off date for determining assets and liabilities to be identified or classified as marital or non-marital assets and liabilities is the earliest of the date the parties enter into a valid separation agreement, such other date as may be expressly established by such agreement, or the date of the filing of a petition for dissolution of marriage. When representing the income-earning spouse on a pre-suit basis, it is especially important to reach a written agreement at the



outset concerning the cut-off date; this will avoid a situation where the parties are continuing to accumulate marital assets or liabilities when they could have otherwise filed the petition.

Methodology for Exchanging Financial Discovery

Once both parties have committed to the pre-suit process, the lawyers should devise a plan and methodology for exchanging pertinent financial information and documents. This may involve each party retaining their own forensic accountants, or in some cases, hiring a neutral forensic accountant. Having professionals from both sides meet at the outset can often prove helpful with identifying the economic and valuation issues, compiling a list of documents to be exchanged, and establishing a deadline by which those documents will be exchanged. In cases where both forensic experts are familiar and trusted, they may be authorized to communicate directly with each other to streamline the process and reduce

the expense to the clients. Moreover, an early professionals meeting can also prove useful with putting in place an agreement regarding the payment of temporary support and/or maintenance of the financial status quo – an important factor in keeping the parties civil and out of court. Finally, the lawyer should consider having the parties and professionals sign a confidentiality agreement regarding the maintenance and use of the information obtained through discovery in the case.

Resolving Contested Parenting Issues

Even if the parties cannot agree on a parenting plan/timesharing schedule that is in the best interests of their children, in most instances the case can still proceed pre-suit. In fact, when dealing with sensitive child-related issues – particularly those that concern a party's moral and psychological well-being – most high net-worth/high-profile clients prefer to proceed on a pre-suit basis in order to avoid airing their

“dirty laundry” to the world. When dealing with sensitive parenting issues, the lawyers should agree to a forensic investigation by a well-respected psychologist in the community. Tailored to the issues of the case, the investigation can be conducted simultaneously with the ongoing financial discovery process. The psychologist could recommend a timesharing schedule as well as perform any necessary evaluations of the parties. In stipulating to these types of pre-suit investigations, the lawyer should consider preserving by agreement the admissibility of the final report of the forensic psychologist. This way, should the pre-suit process breakdown, the work of the forensic psychologist will be admissible before the court – avoiding the time and expense of starting the evaluation process over.

It's Settled – Now What?

Once the parties have executed the global settlement document pre-suit,

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It's Time to Reexamine our Relocation Laws

Today, the majority of courts consider the best interests of the child – including the importance of a relationship with the noncustodial parent – in determining relocation applications. However, some states are still using outdated laws that favor the parent seeking to relocate.

By Sheryl J. Seiden, Family Lawyer

Relocation presents courts with the difficult dilemma of permitting a child to relocate to be with one parent despite the toll it may take on his or her relationship with the other parent. These cases present some of the most difficult issues that matrimonial practitioners and family law judges grapple with.

In New Jersey, N.J.S.A. §9:2-2 prohibits a child who is a native of the state from being removed from the state without the consent of both parties, or permission of the Court upon “cause shown”. In a traditional parenting case, the law in NJ is dictated by the well-known NJ Supreme Court case of *Baures v. Lewis*, 167 N.J. 91 (2001), which created a

presumption favoring relocation. The parent seeking to remove the child initially bears a two-pronged burden of proving: (1) that there is a good-faith reason for the move; and (2) that the move is not inimical to the child’s best interest. (*Baures*, 167 N.J. at 111.) In determining whether the moving party has satisfied his or her burden, the Court needs to examine the factors enumerated in *Baures*.

A Pro-Relocation Position

A dissection of *Baures* reveals that there were three primary reasons that the Court ultimately embraced a pro-relocation position. The first reason was that in 2001, technology had evolved

to make it relatively easy for people to connect with their children from afar. Although technology has continued to advance since the *Baures* decision, these advancements cannot replace physical parenting of a child.

The second reason was based on social-science data that concluded that what is good for the custodial parent is also good for the child – and that so long as the child had regular communication with the noncustodial parent, the child’s interests were served. These conclusions were based upon studies opined upon by Dr. Judith S. Wallerstein, which were never challenged in the *Baures* case.

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Mediation vs. Litigation for High-Conflict Divorce

A practicing mediator and retired judge explains why mediation may be a better option than litigation for high-conflict cases.

By Judge Michele Lowrance (Ret.), Mediator

Many people wrongly assume that the only way to resolve a high-conflict case is to go to court. Although there may be certain cases that absolutely cannot be settled without court intervention, mediation and collaborative law often present much better avenues for resolving high-conflict divorce issues than litigation.

If I did not have firsthand experience in successfully mediating high-conflict cases, I might still believe that difficult divorce cases require a judge to make the final decisions. Fortunately, there are several ingredients that make it possible to resolve a high-conflict divorce through mediation. First and foremost, you need some points of leverage: the parties need to be worn out from litigating, have already spent a lot of money, and have used up much of their resources.

Mediation presents a better alternative to litigation for high-conflict and high-asset cases because it offers a non-adversarial setting. High-net-worth cases involve so much information that

it's not practical to rely on the court to resolve every issue. Each time you go to court to solve a problem, you further polarize the parties and their chances of settling become progressively smaller.

There is conflict in mediation, but the conflict is contained so it can't be blown out of control. If you go to court, you're lighting a match without knowing the direction of the flames. High-conflict cases involve so many assets and issues to be resolved that once something catches fire you may never regain enough control to refocus the case. On the other hand, a good mediator is able to combine all of the individual issues into the single goal of producing a settlement agreement.

Mediating a high-conflict divorce case requires specific skills, including: being non-confrontational, knowing when to stop the parties if they fixate on an injustice (real or perceived) done to them, and understanding the different ways of asking questions to help the parties problem-solve. Mediating

difficult cases is somewhat intuitive – but it also requires a formulaic approach for communicating with high-conflict people.

Mediating Through Hostility

High-conflict cases usually involve two people with deeply-embedded hostility, whose modality of dealing with stress is attack. If they engage in litigation, they're likely to develop layers upon layers of conflict and mistrust. The result is a negative relationship in which the spouses are unable to trust each other enough to agree to anything. They become habituated to conflict to a point where they begin to seek it as a way to cope with their anxiety.

The mediator should assign extra time to a case involving two high-conflict individuals; it may take much longer than average to resolve because the clients need a forum to completely unload all of their animosity, distress, and complaints. High-conflict clients need to know they are being fully

heard by the mediator and the opposing side before they can move towards resolution. Unless they get their anger validated, it is difficult to deflate their aggressive energy.

In order to make progress, the mediator must look for leverage to persuade each party to bring his or her “best self” to the table. Whether it’s a pending court date or the fact that their house is in foreclosure as a result of mounting legal fees, once the clients realize they have something to lose, they are more likely to begin focusing on the bigger picture rather than continuing to attack each other.

If one of the clients is generating most or all of the conflict, the mediator must resist the temptation to confront the difficult client head on; instead, asking what they don’t like about the situation and what they would like to see done differently can be an effective way to communicate with them. The mediator should try to engage the problem-solving side of a high-conflict client’s brain, which can break their pattern of attacking the other side or otherwise creating drama.

Changing a High-Conflict Client’s Perspective

High-conflict individuals often benefit from counselling, but it can be challenging to convince them to participate. Counselling can help clients consider alternatives to their contentious communication style, motivate them to achieve a resolution, and help them cope with the divorce.

The easiest way to convince separated or divorced parents to seek counselling is to emphasize the protection of their children as the goal. Framing the issue from the perspective of how it can hurt their children provides parents with a higher objective and discourages them from attacking each other. Many clients don’t realize that everything they do to their ex-spouse affects the children, so divorce professionals should help them recognize that parental conflict bleeds right down to the kids. Once clients understand the full impact of their poor communication

skills, they are usually more willing to agree to therapy.

After spending almost 20 years on the bench, I am all-too-familiar with the long-term damage to children in high-conflict divorce cases. I remind my clients that any pain they inflict on their ex will be felt by their children as well; if they can’t transmute the conflict, they will transfer it to the children. This may not work for clients with serious personality disorders, but for most people, hearing that they may be harming their children usually helps them to control their desire for revenge and access their higher selves.

In most cases, the problem isn’t that high-conflict clients are bad people or bad parents: they just have more limited coping skills – perhaps from their family of origin – and need help reframing their perspective in order to work cooperatively for the good of their family. ■



*Michele Lowrance is currently a mediator at JAMS in Chicago. She was a Domestic Relations Judge in the Circuit Court of Cook County from 1995 to 2014; prior to that, she spent 20 years as a domestic relations lawyer. She is the author of *The Good Karma Divorce* (Harper Collins, 2010) and co-author of *the Parental Alienation 911 Workbook* (Parental Alienation 911, 2012). www.jamsadr.com/lowrance*

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The Advantages of Divorce Co-Mediation

By Ellen Barron Feldman and Brian James

Divorce co-mediation is a viable alternative to litigation for clients who want to avoid the rigidity, stress, and confusion associated with traditional negotiation tactics. www.familylawyermagazine.com/articles/advantages-co-mediation

Need to Know / Cont. from page 26

arrangements with your clients, and secure the coverage prior to the divorce being finalized. Be sure the beneficiary designations on existing policies have been updated. And finally, make certain that both parties are able to verify the status of the policy securing the obligation post-divorce.

— *John P. Canavan (ChFC, CLU), Alimony Protection Group.*
www.alimonyprotection.com

Provide clients with modern tools to help them cope with the challenges of divorce.

There are many apps for smartphones that can help clients focus on moving forward – legally, financially, and emotionally – and support their children during the divorce process. The savvy attorney will ascertain where a client’s areas of weakness are, and be armed with a toolbox of relevant resources. Some clients learn best by reading books or articles, but other – perhaps younger – clients might be accustomed to using a smartphone as their go-to device for gaining knowledge and assistance. Some apps designed to help divorcing people use therapeutic techniques such as mood tracking, journaling, and quizzes; relaxation and meditation apps can help your stressed-out clients to manage their divorce-related emotions and focus on the tasks at hand. ■

— *Linda Bortell Psy.D. and Gitu Bhatia Psy.D.* www.divorceworksmedia.com

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Finding financial



By Peggy L. Tracy, Certified Fraud Examiner

There are warning signs that your client or their spouse may have committed financial fraud within their marriage. The greater the number of red flags, the more likely that fraud has occurred.

During divorce, feelings of grief, rage, and betrayal can lead to an intense mistrust of the other spouse – which may make someone believe that their spouse is hiding assets or engaging in other financial misbehavior. How common is marital fraud? In “How to Take a Financial Pulse: Is that Deadbeat Really Broke?” (Fraud Magazine, Sept. 2011), Certified Fraud Examiner (CFE) and former FBI agent John Elliott stated: “The financials of 97% of the people I’ve investigated were untruthful in some respect.” Given those statistics, you owe it to your clients to learn how and why it might occur during divorce.

Hidden or missing assets and misrepresentation of family income are two common areas of money manipulation that, if left undiscovered, can lead to a disproportionate share of the assets going to one spouse. Concealment is the cornerstone of fraud, and a divorcing spouse may convince otherwise honest relatives and friends to assist with concealing marital assets by telling them that their ex is racking up debts or emptying bank accounts.

During divorce, forensic accounting professionals can trace funds through the various accounts of the marriage, determine the actual income of the family, verify claims of co-mingling marital and separate assets, or determine the validity of a potential claim for dissipation of marital assets.

High-net-worth marriages are especially prone to money manipulation for the simple reason that the monied spouse’s financial position gives him/her more choices and strategies to hide assets. Executives may have various contracts dealing with employment, deferred compensation, stock options, restricted stock, executive vacations, and death and disability plans, to name a few perks that go along with top management. Business owners and partners also have ample opportunities to hide both income and assets from the lawyers as well as their spouses – unless someone has the financial skills to discover all the hiding places for that particular partnership or corporation.

When the high-powered marriage of Jan Bobrow and former Ernst & Young Global chief executive Richard Bobrow broke up in 2002, Jan was

awarded just over \$14 million – or 60% of the couple’s net worth. Judge Steve Nation of Hamilton Superior Court, IN, issued an opinion that greatly increased the value of Mr. Bobrow’s partnership share of the firm. Because this case went to trial, we got an inside peek into how courts look at dissipation and employment perks for top management and partners. However, most of the notorious, high-profile cases settle before they go to trial and secrecy reigns.

Red Flags

The following is a partial list of red flags that could help you determine whether a fraud examination is warranted:

1. The story about the divorce and the family’s finances keeps changing.
2. You catch your client’s spouse in an outright lie.
3. Transparency is not a term in the spouse’s vocabulary.
4. Items that are requested repeatedly are not turned over in a timely fashion.
5. You receive documents with missing pages or months that might be incriminating.

6. You have direct evidence that your client's spouse is concealing material facts.

The strongest red flag for marital fraud is that the other spouse will not turn over documents in a timely fashion – and when he/she finally provides them, potentially incriminating documents or pages are missing.

If you observe any of these six signs in your own client, you should proceed with caution if you decide to continue with the engagement – and expect opposing counsel to be hiring a forensic specialist to perform an investigation.

Puzzle Pieces

In most cases, the major breadwinner is the spouse most likely to engage in fraud. If you suspect the other spouse of committing marital fraud, you can hire a forensic accountant and/or CFE and subpoena the missing records; the financial expert can assemble the puzzle to see whether your suspicions were correct.

If you're really not sure whether fraud has taken place, the expert can prepare a cost/benefit analysis showing whether it is worth the cost to pursue the alleged fraud. A financial expert can spend between 20 and 150 hours investigating a case, and there is no correlation between hours spent and financial remedy; the financial benefits can range from zero dollars to more than \$1,000,000.

Sometimes, clients are simply mistaken because they're unable to read brokerage statements or tax returns correctly – or they may have listened to a spouse boast about money that may never have existed in the first place.

The Fraud Triangle

During the 1940s at Indiana University, Dr. Donald Cressey created the "Fraud Triangle" hypothesis to describe a new type of criminal: the white-collar fraudster. Similar to the idea of a three-legged stool (which cannot stand without all three legs), Dr. Cressey theorized that there are three elements that

must be present for a person with no criminal history to commit fraud:

1. Perceived Opportunity. The person believes he/she can commit the indiscretion without being caught.
2. Pressure. This is the motive, usually of a social or financial nature. This is a problem the perpetrator believes he/she cannot share with anyone.
7. Rationalization. This takes place before the indiscretion. The rationalization is necessary so the individual can maintain his/her self-concept as an honest person caught in a bad set of circumstances.

Trusted persons can become trust violators at any point during the marriage: some start lying and cheating soon after the wedding, others don't start until decades into the marriage, and, fortunately, others never go down this road. However, when someone sees him/herself as having a problem that he/she can't share, then applies a rationalization to the thought of committing a dishonest act to secretly resolve the issue, he/she is on the path to immoral or illegal behavior.

Dissipation Issues

Dissipation occurs when one spouse essentially wastes marital assets without the knowledge or consent of the other. There are many legal definitions of what constitutes dissipation, but they all involve minimizing marital assets by hiding, depleting, or diverting them. Some examples include:

- Money spent on extramarital relationships (hotels, trips, gifts, etc.);
- Gambling losses;
- Transferring or "loaning" cash or property to others;
- Selling expensive assets for much less than they're worth;
- Spending down business cash account;
- Excessive spending, including hobbies;
- Residence falling into foreclosure;
- Destroying or failing to maintain marital property;
- Leaving valuable work tools out to rust or be stolen.

If there has been an intentional dissipation of marital assets, the innocent spouse may be entitled to a larger share of the remaining marital property. In my experience, the more specific the dissipation item, the easier it becomes to prove; examples include someone paying for their extramarital partner's college tuition, condo, or car.

Special Challenges

There are many special challenges lawyers and financial professionals face in working on cases that involve fraud. Many lawyers/professionals are not well-versed on what marital fraud looks like and how to proceed when confronted with evidence. In addition, marital financial schemes can become very complex: I have investigated the use of shell entities, trusts, wire transfers, and overseas accounts to attempt to move money out of the marriage.

Aside from dissipation, you can discover other types of fraud during divorce by reviewing key documents. There are forgeries and questionable documents, tax fraud, mortgage loan fraud, and insurance fraud – but the majority of divorce fraud is centered within the framework of misappropriation of assets.

Establishing the paper trail is key to possibly recovering assets or income. A clear paper trail will show you whether the asset is still in existence, or whether it has been depleted and is not recoverable. Think of it as peeling an onion: for every layer you uncover, there will be another layer underneath until you finally hit your target. ■



Peggy L. Tracy (CFP®, CDFA, CFE) is the owner of Priority Planning, LLC in Wheaton, IL. A Certified Fraud Examiner and Certified Divorce Financial Analyst®, she has conducted more than 100 marital fraud investigations. She focuses on forensic accounting for matrimonial lawyers and divorcing clients.
www.priorityplanning.biz

The Ins and Outs of Representing High-Net-Worth Clients

The added pressures and unique challenges of high-net-worth cases can be significantly different depending on which spouse you are representing.

By John B. Chason, Family Lawyer

Many divorce cases pose significant challenges to family law practitioners, including emotionally-charged issues and difficult opposing parties or counsel – on top of our fundamental task of helping our clients navigate through a time of transition and uncertainty. In a divorce case involving a large community estate, there can be added pressures and unique challenges not experienced in a more typical case. These challenges can also prove to be significantly different depending on whether you are representing the “in-spouse” or the “out-spouse” in a high-net-worth case.

In general terms, the “in-spouse” refers to the one who has access to the documents and knowledge about the parties’ finances. If the large community estate is the result of the ownership of a business, for example, the in-spouse is the one who works at or maintains contact with the managers of the business.

The “out-spouse” refers to the one with less knowledge about the finances and less access to information and documents. Their experience with the parties’ finances might be as limited as being given an allowance each week or a credit card with a monthly spending limit. Obviously, there are varying degrees of being the in or out spouse, but for the sake of discussion, let’s assume a relatively extreme disparity in terms of access to information.

Representing the Out-Spouse

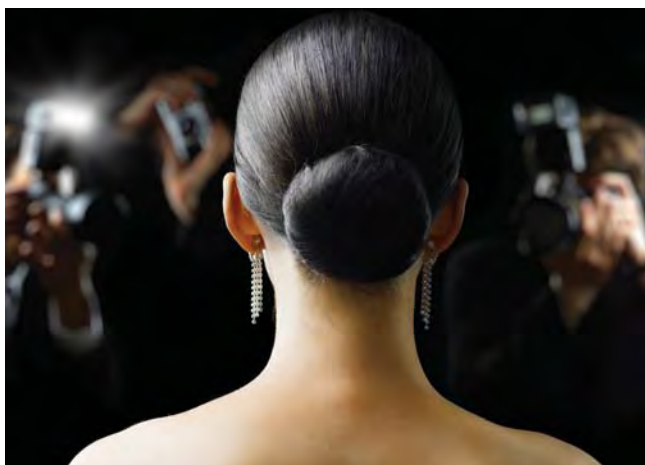
Perhaps the largest challenge the family law practitioner faces in representing the out-spouse is the need for financial information. We rely on our clients to tell us how much money their spouse earns, how much money is in various types of accounts, what retirement plans and insurances exist, the cost of the children’s school and activities, and so on. No problem, you say to yourself and your client; you will serve discovery requests, including some broad Request for Production of Documents.

However, once you receive discovery responses, your client may have no idea if the responses are truthful and complete. You contemplate sending a Meet and Confer Letter, but realize that you don’t know what might be missing. And no, you cannot send a letter that says “As to your client’s response regarding bank account statements, are those really, truly all of the accounts she has?”

Cont. on page 50



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Had her opinion been contested, the subjectivity of the data Dr. Wallerstein used could have jeopardized the studies. Furthermore, the social science relied upon in *Baures* is now more than 20 years old; since the decision, new studies seem to suggest that the involvement of the noncustodial parent in the life of a child plays a significant role in the child's development.

The third reason was that the case law of seven other jurisdictions evidenced a liberal trend in relocation cases. The Court was particularly focused on the fact that other states had reduced the burden on the custodial parent seeking to relocate; now, nearly 15 years later, the law in most of these other jurisdictions has changed. In two of those states (Colorado and Minnesota), the law has changed. In four of the other states (California, New York, Tennessee, and South Dakota), the law has hardened, making it more difficult to relocate. The law has remained unchanged in only one of the seven states (Wisconsin).

Old Case Law Favored Relocation

In rendering the *Baures v. Lewis* decision, the Court relied upon the Colorado Supreme Court's decision in *In re Marriage of Francis*, 919 P.2d 776 (1996), which created a presumption that generally permitted a custodial parent to relocate with a child. The three-part test established in *Francis* to be applied in Colorado relocation cases was abolished by legislation on September 1, 2001 – just four months after the NJ Supreme Court decided *Baures v. Lewis*.

Thereafter, in the case of *In re Marriage of Ciesluk*, 113 P.3d 135 (2005), the CO Supreme Court confirmed that *Francis*, 919 P.2d 776 (1996) was superseded by statute, and the Court would now rely on Dr. Braver's study – which is contrary to Dr. Wallerstein's social science research.

In deciding *Baures*, the Court was also particularly interested in the California Supreme Court's decision in *In re Marriage of Burgess*, 913 P.2d 473 (1996), where the Court abandoned a

prior hostile approach toward relocation, which the Court interpreted as a trend in favor of relocation. Approximately three years after *Baures* was decided, in *In re Marriage of LaMusga*, 88 P.3d 81 (2004), the CA Supreme Court limited the presumption in favor of relocation by holding that the detrimental effect of the relocation on the noncustodial parent's relationship with the child has a bearing on the child's best interest.

At the time that *Baures* was decided, the NJ Supreme Court also took note of the fact that its sister State of New York had lessened the burden on custodial parents seeking to relocate in *Tropea v. Tropea*, 665 N.E.2d 145 (1996). However, over the last 19 years, the standard in NY for relocation continues to remain a difficult one to overcome for the custodial parent, as the lower courts in New York place an onerous burden on the custodial parent seeking to relocate.

In *Baures*, the Court also cited the South Dakota case of *Fortin v. Fortin*, 500 N.W.2d 229 (1993) in its opinion in support of the state's presumption in favor of removal. While the presumption of the statute as favoring removal in *Fortin* has not been overturned, the law in South Dakota is a best-interest analysis. (See *Brosnan v. Brosnan*, 840 N.W.2d 240 [2013]). Since *Fortin*, other cases have been distinguished from it, and the SD Supreme Court has changed custody from the custodial parent to the noncustodial parent based on the custodial parent's relocation, where it found that relocation was not in the child's best interest. (See *Berens v. Berens*, 689 N.W.2d 207 [2004].)

In adjudicating *Baures v. Lewis*, the Court also referenced Tennessee law, citing the case of *Taylor v. Taylor*, 849 S.W.2d 319 (1993) for creating a "strong presumption" in favor of relocation of the child and the custodial parent. (*Baures*, 167 N.J. at 224.) Since its 1993 decision in *Taylor*, the TN Court seems to have hardened with regard to what is considered to be a reasonable purpose for the relocation, as the case law thereafter limited the custodial parent's right to relocate. More recent case law suggests that the term "reasonable

purpose" has been interpreted to mean "significant purposes." (See *Webster v. Webster*, 2006 Tenn. App. Lexis 685 [Tenn. Ct. App. Oct. 24, 2006].) While the NJ Supreme Court relied upon *Taylor v. Taylor*, 849 S.W.2d 319 (1993) in deciding *Baures v. Lewis*, the decisional case law rendered and statute enacted after *Taylor* evidence that once the noncustodial parent refutes the presumption favoring relocation, the standard becomes one of a best interest analysis.

In *Baures*, the Court also relied upon the Supreme Court of Minnesota's decision in *Auge v. Auge*, 334 N.W.2d 393 (1983) and *Sefkow v. Sefkow*, 427 N.W.2d 203 (1998) – concluding that MN had a presumption in favor of the custodial parent seeking to relocate, and the noncustodial parent had the burden to show that the relocation would endanger the child, or that it was meant to frustrate the noncustodial parent's relationship with the child. However, in 2006, *Auge v. Auge* was overruled by statute whereby the presumption in favor of relocation was eliminated.

In adjudicating *Baures v. Lewis*, the Court considered the Wisconsin case of *Long v. Long*, 381 N.W.2d 350 (1986) in support of the belief that courts were easing the burden on custodial parents. While WI continues to be very liberal in its presumption of relocation, there were two dissenting opinions in *Long v. Long*, 381 N.W.2d 350 (1986), both of which recognized the difficulty on the noncustodial parent in relocation cases and emphasized that a best-interest test was more appropriate than the liberal presumption created by the statute. One of the dissenting opinions expressed concern about the harm to the child in granting relocation based on social-science research; this concept has not yet been used to challenge the current law in WI recognizing the presumption in favor of relocation, but stay tuned.

Focus on the Child's Best Interests

The precedents the NJ Court relied upon in *Baures v. Lewis* can be challenged: most of the case law has been overruled or distinguished, and the trend in other states is to recognize the difficulty that

relocation poses for the non-custodial parent. Today, more than half of the United States place the burden of proof on the parent seeking to relocate. More than half do not specify a presumption, and 20% specifically state that they do not have a presumption in favor of or against relocation. Nearly 75% of states have statutes on the issue of relocation, and another 84% of states consider the best interest of the child as part of the analysis when determining a relocation application. One-fifth of the states even define relocation based on the number of miles that the child would be moved – either from the non-custodial parent's residence, or the child's prior residence. Approximately one-third of states require that the parent seeking to relocate provide a specific amount of notice to the other parent.

The NJ Supreme Court recognized and adopted a prior liberal trend permitting relocation nearly 15 years ago, but that trend has shifted. Although the courts have previously examined the relocation from the perspective of the custodial parent, and other courts from the perspective of the non-relocating parent, the more recent trend has been for courts to consider the relocation based on the child's perspective. It is for this reason that a majority of states focus on the best interests of the child in determining relocation applications. ■

Note: Ms. Seiden prepared a detailed analysis of this topic for the NJ Family Law Symposium in January 2015. To read it, go to: www.ccfamlaw.com/wp-content/uploads/2015/02/Relocation-Article-January-2015.pdf



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Divorce Pre-Suit / Cont. from page 33

the dissolution of marriage case is ready to be filed with the court, requesting therein that the court simply ratify the settlement agreement and dissolve the parties' marriage.

As further protection to the client's privacy concerns, a lawyer should consider stipulating with the other side to filing the case in a different venue within the state. Many states have certain densely populated venues in which reporters and paparazzi are monitoring the recently filed cases. Although traveling to a different venue within the state creates an added expense, it may offer an extra layer of privacy protection for the client.

Finally, different states have requirements regarding what documents must be contained in the court file; this could include the final settlement agreement as well as the parties' financial affidavits. Considering agreements and financial affidavits contain extremely private information, a lawyer should explore whether there is case law in their state that permits keeping these documents out of the court file. Otherwise, the lawyer should file the appropriate motion with the court to seal the court file, preventing any unauthorized person from viewing and copying such sensitive and private information.

The Benefits of Settling Pre-Suit

Contested litigation places an emotional and financial strain on the entire family, including the children.

Proceeding on a pre-suit basis offers parties the opportunity to resolve their differences amicably while maintaining the privacy of their information and personal affairs. Although resolving a high-net-worth case on a pre-suit basis may not generate the same legal fees as bitterly-contested litigation, it provides the lawyer with an opportunity to serve the true desires and goals of their client, thereby converting a well-connected client into a referral source for years to come. ■



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When High-Profile Clients Come Knocking

By David Sarif

Cases involving high-profile clients may involve unique challenges, complexities, and potential pitfalls that attorneys must be aware of in order to ensure proper representation, a positive result, and a happy client.

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Valuation Issues / Cont. from page 15

from this case:

- In high-stakes divorce valuations, it is important that the parties have experts of equal caliber. So if the other party hires a nationally-known expert, you would best serve your client by also hiring a nationally-known expert.
- Try to hire the best expert at the beginning of the case, because it may not be possible to hire additional experts later in the process. In this case, the client was "stuck" with the experts originally hired and could not bring in additional experts at trial or at the appeals. ■



Shannon P. Pratt, CFA, ARM, ABAR, FASA, MCBA, CM&AA, is the founder and Alina V. Niculita, CFA, ASA, MBA, is the president of Shannon Pratt Valuations, Inc., a national business valuation firm located in Portland, OR.



Dr. Pratt has more than ten books in print on various business valuation topics, including valuations for marital dissolution purposes, and he has testified in court on hundreds of occasions. Ms. Niculita manages valuation engagements at Shannon Pratt Valuations, and has contributed to several business valuation books. www.shannonpratt.com

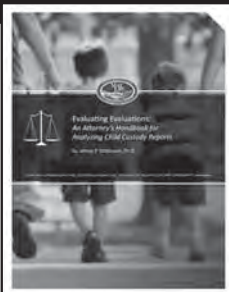
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Mitigating the Risks of the Cloud

By Dr. Asaf Cidon, Software Engineer



The cloud makes storing files, communicating promptly with clients, and working on the go much easier – but is your clients’ information really safe when synced across mobile devices, emailed back and forth, and stored online?

As the usage of mobile devices booms, the cloud is revolutionizing the way lawyers work. According to MyCase, 77% of lawyers use smartphones for work-related functions, more than 50% use tablets, and 56% use web-based storage. That’s a lot of work being done away from firm-sanctioned computers and firewalls – and, no doubt, a lot of sensitive client data.

On one hand, the cloud makes storing files, communicating promptly with clients, and working on the go much easier; on the other hand, is your clients’ information really safe when synced across mobile devices, emailed back and forth, and stored online? The simple answer is: probably not. But it can be – if you take the right precautions to ensure security in the cloud. The most important precaution to consider is end-to-end encryption.

Much of the fear of the cloud stems from worries about hackers pilfering sensitive information from (what may seem like) the ether. This fear, however, is unfounded; while the random hacker does pose some threat, the vast majority of security breaches occur due to employee negligence. For instance, let’s say you’re working on a high-profile divorce case. It seems natural to sync

your files to your smartphone to make sure they’ll be at your fingertips when your client calls at any hour. This kind of up-to-the-minute counsel certainly keeps your clients happy, and your efficiency enhances the time you’re able to devote to the case. But, if you leave your smartphone in a cab or have it stolen at an airport, your sensitive client files are suddenly easily accessible to anyone – and with 4.5 million smartphones lost or stolen in 2013, the odds are good that if it’s not you losing your phone, it’s one of your colleagues. Lost or stolen devices pose one of the highest security risks to businesses, but the world today is mobile, so professionals need to be, too.

Mobile AND Secure

Fortunately, there are ways to be mobile while maintaining the utmost security, enabling you to keep sensitive files consistently protected. End-to-end file level encryption allows you to integrate an extra layer of security into your existing workflow. For example, there are programs that work within cloud-based storage platforms to encrypt files before they ever reach the cloud. This means that in the event of a security breach, your files will appear unreadable. The proper encryption technology

separates the keys from the content – meaning that not only do malicious actors not have access to your files, neither do the parties handling the storage or security. With this kind of encryption, your sensitive briefs, tax documents, or case files will appear as an incomprehensible jumble to anyone who’s not supposed to see them.

Encryption also helps mitigate the cloud’s double-edged sword of productivity and problems: file synchronization. Syncing files duplicates them across mobile devices. So even if files are secured at rest on the cloud, they’re unencrypted on devices – unless they’re encrypted at the file-level, which isn’t the default for most cloud storage providers. As a lawyer, you’re likely accustomed to reading between the lines of contracts, but the truth is you won’t find many caveats about this risky workflow, and making sure to employ file-level encryption is the only route to ensuring maximum protection.

The other elephant in the room is email. For all of email’s popularity – not to mention its preference among clients – it is not a secure form of communication. (Just ask President Obama.) This can pose considerable issues for the legal community, but, again, encryption presents a solution. When

documents are encrypted, you can rest assured when you're emailing them that you're sharing them with intended colleagues and clients, and no one else inadvertently.

Teamwork

Finally, knowing how others on your team are handling client information is also an important step to ensuring security. Auditing the files you store in the cloud lets you keep tabs on when files are opened, moved, or modified (and by whom). If an unfamiliar user suddenly accesses your files, you'll know and be able to stop them before they do any damage. Similarly, revoking access to files is crucial when working in a fast-paced environment. If a co-counsel is taken off your case, or you work with summer associates or paralegals who come and go, you probably don't want them retaining access to your case files. After all, with so much work being done from home and from mobile devices, just because an associate no longer comes to the office doesn't mean her passwords, downloads, and files still aren't saved on her laptop at home. Cloud-based storage solutions can let you revoke users' access with the touch of a button, denying any further access.

As clients themselves are more and more mobile, their expectations are equally mobile, and the cloud helps lawyers deliver. The only solution that guarantees mobile security is to embrace the cloud – and implement the safeguards necessary to protect your and your clients' security. ■



Asaf Cidon is the co-founder and CEO of Sookasa, a cloud security and encryption company that enables safe adoption of popular cloud services such as Dropbox to store sensitive information. Asaf previously worked at Google and in the Israeli intelligence. He holds a Ph.D. and MS in Electrical Engineering from Stanford University and a BS in Computer Engineering from the Technion. www.sookasa.com



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When representing the out-spouse, a big part of the discovery plan should involve hiring a forensic accountant at the outset of the case. A reputable forensic accountant will have input into the discovery requests you serve and help inventory the documents that come back as a result. Their analysis of the parties' finances can help you and your client determine if the other side's financial story checks out.

In most high-net-worth cases – just as in most divorces in general – one or both parties will experience a change in lifestyle during and after the divorce. Two households cost more than one, and although these parties might have significantly more money than your typical client, most do not have access to sufficient funds to support two households identical to the lifestyle they enjoyed during marriage.

When representing the out-spouse, the biggest and most delicate challenges include the management of

expectations as to the amount of support likely to be received, and realistically assessing how much they can afford to spend on housing and lifestyle during and after divorce. It is important to have this conversation early so that your client doesn't move out of the marital residence and sign a one-year lease for a \$10,000 per month rental home they can't afford.

The court often criticizes the out-spouse for the way they have chosen to spend money during the post-separation period, when all they have been doing is simply maintaining their marital lifestyle. To avoid this, advise your out-spouse client early about expenses and money management, or direct them to other resources or a professional for this advice.

However, simply advising the out-spouse to live frugally doesn't solve the issue. If they continue living the marital lifestyle post-separation, the court might find them to be unrealistic and greedy – but if they slash their expenses, the court might order lower

spousal support based upon their reduced needs. Therefore, when advising your client to be realistic about their new, post-divorce lifestyle, you must carefully weigh how your client's post-separation expenditures will be viewed by the court.

Lastly, family law practitioners must advise their clients who receive spousal support that they must save some of the money they receive to pay taxes on this support. Clients are often overwhelmed by the dissolution process and are not thinking about the fact that the order for support addresses taxability and deductibility.

Representing the In-Spouse

Numerous challenges also exist when representing the in-spouse. Often the biggest challenge for the wealthy in-spouse is surrendering control over certain aspects of the other party's life – particularly how they spend money. The in-spouse will insist they want to be free of their mate – only to turn around and bombard you with calls and emails about how the other side is making terrible financial decisions. They will tell you that the out-spouse is out of touch with reality if they think they can afford to buy them out of the summer house or keep the kids in private school.

You must help your client accept their new reality: they can no longer dictate how their spouse spends their money. They cannot prevent the out-spouse from asking the court to buy the summer house from the community even if the in-spouse knows that they will never qualify for a mortgage, and so on. You need to help your in-spouse client let go of their desire to control their ex-spouse's finances or they will be paying attorney fees to both sides to have pointless battles over the poor choices that they believe their ex-spouse is making.

From the beginning of your representation of the in-spouse, it is essential to inform him or her of the duty to maintain records and data, and to disclose financial information. In addition to

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Ins and Outs / Cont. from page 50

preparing timely and complete financial disclosures and discovery responses, make sure that your client understands that he or she has a duty to augment and update this information as things change or opportunities develop.

Of course, we must advise all of our clients about the disclosure obligations. However, this can be a special concern when representing the wealthy in-spouse for a couple of reasons. First, they are more likely to have significant changes to their financial picture and to receive financial opportunities. Second, the courts appear more inclined to financially punish those individuals who can afford to pay sanctions and who, because of their actual or assumed financial savvy, are expected to “know better.”

When you begin your representation of a wealthy in-spouse, much of the communication might come from individuals other than the client. You may get calls and emails from business

managers, attorneys, employees, and other trusted representatives of the client. Since this type of communication could create issues with regard to the attorney-client privilege, speak with the client directly regarding the issues in their case, and limit your communications with these third parties. The communications you send to any third party are most likely the subject of discovery from the other side, so regularly remind your client to limit the information they share with third parties in order for their confidential and privileged information to stay protected.

More Potential Complications

This is just an overview of some of the difficulties often encountered in representing clients in high-net-worth cases. Of course, all clients and cases are unique, requiring your utmost care and professionalism. High-net-worth cases often involve more moving parts than typical cases, and so the family law practitioner taking on these cases must be more alert to potential complications

and difficulties from the commencement of the case. ■



John B. Chason is a Certified Family Law Specialist at Feinberg Mindel Brandt & Klein. During his 20 years of practice, Mr. Chason has handled a wide variety of

cases, including parties with complex custody and financial issues. Mr. Chason was named a Super Lawyer® in 2015. www.fmbklaw.com

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social media will be turned around on them because the press is looking for negative things to say about high-profile people, since that's what sells newspapers.

Early on in a case, we will often ask for a confidentiality agreement to try to ensure nothing gets out about the case so the clients can deal with one another on a level playing field without trying to use the leverage of negative publicity to extract an unfair settlement.

Can you tell us about an “outside of the box” option you’ve suggested to settle a high-conflict case?

One of my favorite situations was where my client, the wife, was very, very attached to the golden retriever and insisted that she keep the dog. The husband, on the other hand, was equally insistent that he keep the Hamptons house. The wife was very upset by that, because the dog “loved the beach.” The ultimate creative solution in that case was that the husband agreed that whenever he went out to the house in the Hamptons for the weekend, he would bring the dog along as his guest.

“You can get one big client, but if you aren’t competent and it goes badly, word is going to get out. Doing a good job over and over is probably the most important aspect of getting any client – especially a wealthy one.”



**Randall M. Kessler, Founder,
Kessler & Solomiany Family
Law Attorneys, Atlanta GA**

Mr. Kessler has more than 25 years' experience in family law matters. He has taught at Emory Law School's Trial Techniques Program and John Marshall Law School, and has lectured for the ABA and the AAML; he has also served as the Chair of the Family Law Section of the ABA.
www.ksfamilylaw.com

How do you keep the stress of a high-conflict case from bleeding into your personal life?

That's a very tough issue. I once did a seminar for law students, and someone asked, “How do we not take the cases home with us? How do we forget about it at the close of a business day?” The answer that came to me was, “You can't.” If you were going through a divorce, would you want to hire a lawyer that stops at 5:00 p.m.? If clients are going to pay us \$700 an hour, then their case should be important to us, and maybe we should take their calls at home. I minimize the stress by sharing the burden and responsibility with others in my office. The work can be stressful, but it's the price you pay to be in the profession.

Landing a multimillion-dollar client is a dream for many family law attorneys. What do you need to be successful in landing and then handling these kinds of cases?

Be careful what you wish for! High-wealth clients can pay, but representing them is ten times harder. I don't celebrate when someone gives me a \$25,000 retainer; I say, “That's a lot of responsibility.”

To land high-net-worth cases, you need to do a really good job on every case, and you need to act honorably. Of course, there is a marketing aspect – you have to get the word out and let people know that you exist. What works for me may not work for somebody else. Some people like fishing and they join a fishing club; some people are on boards for charitable organizations; some people enjoy going to sporting events, and others prefer country clubs. The best way to land a new high-net-worth client is to think about how you landed your last one – or to ask other lawyers how they've attracted those kinds of clients – and then do that over and over.

However, none of that works unless you're really comfortable with your job and know what you're doing. You can get one big client, but if you aren't competent and it goes badly, word is going to get out. Doing a good job over and over is probably the most important aspect of getting any client – especially a wealthy one.



David Griffin, Partner, Rutkin, Oldham & Griffin, Greenwich CT

Mr. Griffin has dedicated his 30-year career to assisting clients through divorce. A Fellow of the AAML

and IAML, he has presented at both groups' annual as well as chapter meetings.

www.rutkinoldham.com

What do people with high profiles and substantial assets look for when they're choosing a divorce lawyer? Is the firm as important as the lawyer?

They are looking for a particular skillset and personality profile: they want an experienced lawyer who understands the complexities of a high-stakes case, can find and organize the information, and then create a successful strategy based on that information.

These clients want a lawyer who speaks their language and can interact with other members of their team – such as an estate-planning team. They particularly want a lawyer who will protect the client's proprietary and business information as well as their personal

and family's privacy – not only in the case, but also with regard to media interactions.

High-profile clients need their lawyers to be available at odd hours. We really do feel that we're a 24/7 operation; that's important to our clients, because frequently they're world travellers, they're in different time zones, or they just have work patterns that aren't traditional.

A high-stakes client needs the right lawyer and firm. They need a lawyer who can manage the particulars, but complex cases often need a team to manage everything that's at stake. For example, the lawyer needs to be able to assemble a team that might include an excellent business-valuation expert. If it's a high-stakes custody case, you might need a forensic custody evaluator on your team – someone who can give insights as to what an appropriate parenting plan for children would be.

Finally, we frequently find that a lifestyle analyst – someone who can analyze how the family functioned in the past, and what kind of a settlement is going to be necessary to maintain a certain lifestyle in the future – is an important part of the team.

High-stakes clients want a lawyer who speaks their language and can interact with other members of their team.



Stacy D. Phillips, Founder, Phillips Lerner, Los Angeles CA

A Certified Family Law Specialist who has won multiple awards as a

family law practitioner, Ms. Phillips is a sought-after commentator, author, philanthropist, and advocate for children and families. She has represented a wide variety of high-profile clients during her more than 30 years of practice.

www.phillipslerner.com

What are some of the creative suggestions you've made that are unique to high-net-worth cases?

Most of the innovative ideas I have suggested have to do with the divorcing couple's finances. In one case, one spouse was a prominent and accomplished wealth advisor who agreed to manage the other's money. In another instance, the husband took all of the couple's real estate assets and created a REIT, which he then sold. The result

was that both parties emerged independently wealthy from the divorce.

What have you learned about the expectations of high-asset divorcing people that has served you well over the years?

My clients often have teams of advisors involved in their lives. These professionals can serve as objective, unemotional advisors who assist in my handling of the case; at other times, they are overly protective of their client (our mutual client), which is not at all productive. Some clients expect to be left alone, which is not to their advantage as I require full access. Some clients expect to call their own shots, which can be detrimental to the case's outcome. I have found that just because someone is talented in one area doesn't mean they are talented in all areas. Even sophisticated, high-net-worth individuals can be naïve in matters outside their field, which is why they retain my services in the first place. I have learned to manage unrealistic expectations of all sorts! ■

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sional standards of conduct, ethics, reliability and diligence. The firm's outstanding work has been recognized by Martindale-Hubbell's Bar Register of Preeminent Lawyers, and as the "Best of the Best" in 2012, 2013, and 2014, by the readers of the Oklahoma Magazine. M. Eileen Echols, managing attorney and chief litigator, is a former family law judge, twice named "Outstanding Family Law Judge" for the State of Oklahoma by the Oklahoma Bar Association's Family Law Section. David W. Echols is a Fellow in the American Academy of Matrimonial Lawyers and has been an AV rated attorney by Martindale-Hubbell for more than twenty years. Both are Lifetime Charter Members of the Rue Ratings "Best Attorneys of America", and have been recognized by their peers as Oklahoma SuperLawyers. They both have been adjunct professors of family law and are frequent lecturers on topics of family law to Oklahoma lawyers.

The firm's other members pictured below are also excellent attorneys and have been recognized in their own right. Jonathan D. Echols graduated first in his law school class at OCU. He has been selected to the Oklahoma SuperLawyers Rising Stars list since 2011. Amy L. Howe has been selected to the Oklahoma SuperLawyers Rising Stars list since 2013. In 2014, she was named to The National Trial Lawyers "Top 40 Under 40", and the National Academy of Family Law Attorneys "Top 10 Under 40". Lindsey W. Andrews was recipient of the 2013 Journal Record Leadership in Law Award from the Oklahoma County Bar Association. Benjamin P. Sisney, who, prior to joining the firm, clerked for United States District Judge Gregory K. Frizzell in Tulsa, Oklahoma. Ashley D. Rahill is the newest attorney to join our firm. She was a recipient of the Oklahoma Bar Association's President's Award in 2012, and graduated from the OBA's Leadership Academy in 2014.



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By Dr. Frank Lipman and
Danielle Claro

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Eat Smallish Fish, Not Big Fish

The bigger and older the fish, the more mercury it's likely to contain. Why is there mercury in fish at all? Power plants that burn coal release mercury into the air, which settles in the water. Tiny plankton absorb it. The plankton are eaten by little fish. The little fish are eaten by big fish. Mercury for everyone. Stay away from really big fish like swordfish and tuna and think more along the lines of wild flounder and salmon. Mercury not only messes with your body's ability to energize cells and hold on to certain important minerals, but is also linked to an increased risk of Alzheimer's. Really tiny fish, like black cod (also called sable), canned sardines, and anchovies, are lowest in mercury, so eat them freely. To find BPA-free canned fish (and fish that's also low in mercury), go to www.vitalchoice.com.

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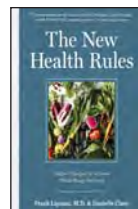


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This article was excerpted with permission from The New Health Rules by Frank Lipman, M.D. and Danielle Claro (Artisan Books, Copyright © 2014). Photographs by

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Frank Lipman, M.D., is a pioneer and global leader in the field of health and functional medicine. In 1992, he founded New York City's Eleven Eleven Wellness Center, where

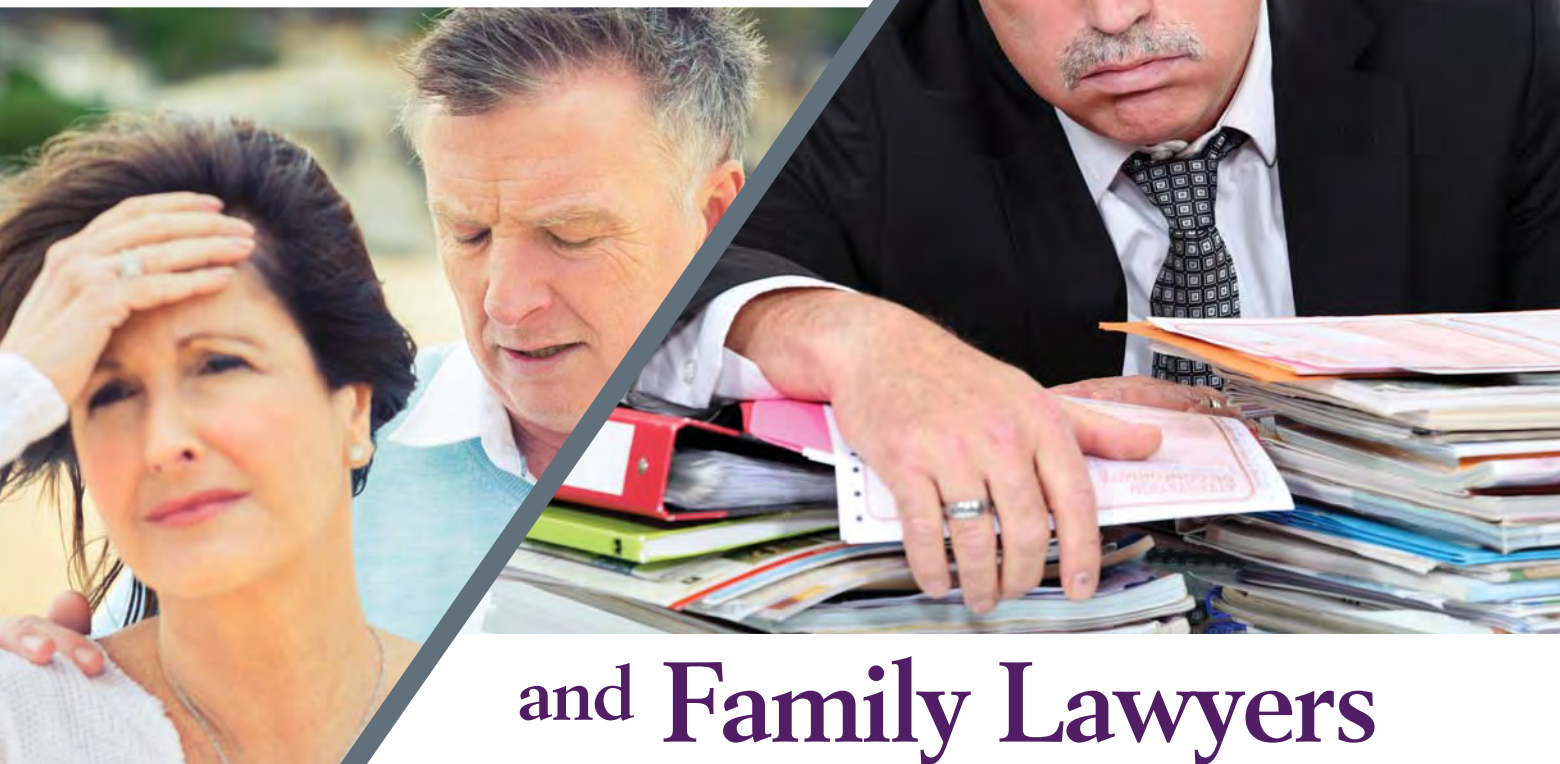
his brand of healing has helped thousands reclaim their zest for life.



Danielle Claro is a writer, editor, and long-time yogi who was founding editor-in-chief of the indie magazine Breathe and special projects director at Domino magazine. She's

currently deputy editor of Real Simple.

Secondary Traumatic Stress



and Family Lawyers

Practicing family law is stressful, and we now have some validation that listening to our clients' traumatic stories can and does affect family lawyers.

By Cindi Barela Graham, Family Lawyer, and Dr. Lynn Jennings, Professional Counselor

Secondary Traumatic Stress (STS) is the indirect exposure to trauma through either a firsthand account or narrative of a traumatic event. For example, hearing a client recall, in vivid detail, the beatings by her husband which has left her face scarred and paralyzed can cause STS. Hearing that account coupled with seeing the physical evidence of the pictures of the client's face immediately after the beatings causes yet even further stress for the family lawyer. Hearing accounts related to children is even more traumatic.

STS is an occupational hazard to a

range of professionals including family lawyers, and there is a general consensus in the literature that it has negative associated effects. Some research argues that it is wrong or improper for a practitioner to have feelings of sympathy and sorrow for their clients' suffering with the caveat that practitioners need to understand their limitations in helping alleviate the pain suffered by their clients. However, compassion is also necessary for the establishment of the lawyer-client relationship, so it can be a fine line that needs to be recognized and adhered to.

How STS Affects Family Lawyers

Dr. Charles Figley (1995) distinguished STS from other types of stress as that resulting from a deep involvement with a primarily traumatized individual. STS effects or symptoms are cumulative and permanent. The more accounts a professional hears of the abuse or trauma, the more it begins to affect them. The effect can be presented as a lack of sleep, poor eating habits, hypervigilance, abuse of alcohol or drugs, relationship issues, and detachment issues.

Cont. on page 60

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While boundaries are helpful for any professional to establish with their client, hearing about a traumatic event, coupled with the professional's desire to assist their client, still impacts and exposes the practitioner to the effects of STS.

Symptoms of STS

The initial indicators are changes in sleep and eating habits. As it progresses, sufferers may experience hypervigilance or a heightened sensitivity to interactions with others or things going on around them. People with STS often have a harder time winding down and have a decreased ability for separating their professional work from their personal lives. STS can lead to paranoia and feelings of helplessness. Disassociation, withdrawing from society, and isolation are often common; increased drug and/or alcohol use as a coping mechanism is common as well.

Becoming increasingly argumentative with family members or needing time alone after coming home from work or after a trial are potential symptoms of STS. That said, any time we deal with psychologically trying events, time alone to process what we have experienced does facilitate the compartmentalizing of work-related stress from our personal lives.

Minimizing the Effects of STS

Communication is key. Family members will likely notice the effects of STS in the lawyer before the lawyer notices them himself. Educating the family about STS can aid in minimizing the negative effects it causes.

By implementing daily self-care practices that allow them to process their feelings, family lawyers can minimize the negative effects of STS. Self-care practices include getting adequate sleep, exercising, healthy hobbies, eating a healthy diet, minimizing alcohol use, practicing healthy spiritual activities such as meditation or prayer, along with maintaining a

balanced lifestyle between work and home life.

Family Lawyers Can Help Each Other Deal with STS

Many family lawyers have said: "My friends are lawyers, but my best friends are family lawyers." Recognizing STS within themselves will help family lawyers recognize it in others. Collaboration and mentorship can be helpful, and discussing and debriefing with each other following particularly traumatizing events – such as a hotly-contested trial – can be very therapeutic for family lawyers. Having friends in related fields who are not lawyers can help to balance perspectives: for example, having good relationships with mental-health care professionals, accountants, or other experts you may use in the presentation of your case can help minimize the effects of STS as these professionals have insight to the cause of the stress. The different perspectives of these professionals can also help normalize the feelings caused by the trauma.

The Long-Term Effects of STS for Family Lawyers

STS is similar to Post-Traumatic Stress Disorder (PTSD). Normal PTSD symptoms, such as dissociative episodes (flashbacks, splitting of personalities), intrusive memories in dreams, abnormal eating and sleeping patterns, hypervigilance, and detachment can be indicators that STS is present.

STS becomes a part of a person's life to the degree that they ignore how this type of long-term stress impacts them. It can be nearly impossible to treat without medical and psychological intervention, along with a good diet, exercise, and good stress-management techniques. STS can have potentially fatal effects such as a heart attack, stroke, suicide, and even violence, as well as other stressor-related issues if not treated.

We know that practicing family law is stressful, and now we have some validation that listening to our clients' traumatic stories can and does affect

us. No matter how hard we try to stay neutral or try to maintain a professional view of our cases, we cannot help but be affected by stories of physical or emotional brutality.

To help us be better practitioners to our clients and better partners in our personal relationships, we need to recognize the effects STS can have on us. We all need to maintain a healthy balance between work and our social lives. STS reminds us that we need to take care of ourselves – both physically and mentally – so that we can be the best we can – both in and out of the courtroom. ■



Cindi Barela Graham is Board Certified in Family Law and has been named a Texas Super Lawyer every year since 2008. She currently serves as a director to the Texas

Academy of Family Law Specialists and is on the Board of the Texas State Bar's Family Law Section.



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Related Article

Mindfulness-Based Stress Reduction to Help Your Deal With Stress

By Dr. Mel Borins

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Hamm v. Hamm / Cont. from page 9

company. (933 So.2d at 15.) See also Lynn Curtis, *Valuation of Stock Options in Dividing Marital Property Upon Dissolution*, 15 J. Am. Acad. Matrim. Law. 411, 412 (noting that: “These high level executives have a direct bearing on the success of the company, so in a very real sense, the increased value of the company’s stock is directly attributable to their efforts”).

Mayhew v. Mayhew

In *Mayhew v. Mayhew*, 519 S.E.2d 188, 193 (W.Va.1999), the husband worked at the business every day from early morning to 7:00 or 8:00 p.m., and on Saturday until midafternoon. He ate dinner at the company. He and the wife participated in social and civil activities on weekends so as to become more visible in the community and thus increase sales. For the first two years, he allowed the company to retain his salary. Under these circumstances, it was held to be error for the trial court not to have ruled that “the extraordinary time and effort spent at the corporation by Mr. Mayhew” caused active appreciation.

Berrie v. Berrie

Similarly, in *Berrie v. Berrie*, 600 A.2d 512 (N.J.Super.1991), the appellate court reversed a trial court’s determination that the increase in the husband’s business was passive. The company, which had originally been founded by the husband, went public the year after the parties’ marriage. The husband, however, had retained a block of shares that kept him as the controlling shareholder. He was the CEO and had stated publicly that he controlled the company. Likewise, the documents filed with the SEC stated that the husband could elect all directors, amend the certificate of incorporation, and approve a merger or similar corporate transactions. He made the decisions as to corporate dividends. He also received by far the highest salary in the company. In its decision, the appellate court rejected the husband’s

argument that the enhancement of the stock value was passive, much like a managed portfolio: “Defendant further suggests that in no case can one person’s effort be determinative of the value of a public corporation. We reject this thesis. There is no question that a single person’s effort can influence the growth and success of a sole proprietorship, joint venture, partnership or a close corporation. As the organization grows, however, the

question becomes more one of fact, depending upon how closely the individual is identified with the business entity.” (600 A.2d at 516.)

External Market Forces

In marital dissolution cases involving a separately-owned business, the owner-spouse will often argue that external factors such as “market

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“Triage” for Self-Represented Litigants

By Justice Bryan E. Mahoney



All too often, self-represented litigants are seen as a problem for judges and a headache for court administrators. To help address the challenges faced by both these litigants and the judges hearing their cases, Alberta Family Justice Services has implemented a program to assist and guide the litigant through the process.

The number of self-represented litigants (SRLs, known as “Pro Se” litigants in the USA) is growing at a rate beyond which the courts can service their needs. Despite being advised to consult a lawyer, there are those who cannot afford one and others who choose to represent themselves for different reasons. To be sure, the SRL is a permanent feature in the justice system – particularly family justice.

As long as individuals have the right to take their disputes to court and represent themselves, judges and the court system have a responsibility to provide opportunities for them to meaningfully present their case without a lawyer. All too often, however, the SRL is seen as a problem for judges and a headache for court administrators.

Research reports that the family law SRL thinks that the system does not care about them. They complain about

feeling like a nuisance and being poorly treated by the family justice court system. The complexity and the formality of the process is confusing and in turn frustrating. For them, the stress and anxiety of trying to complete forms, file and serve documents, obtain dates, communicate with the opposing party, and get ready for a hearing takes its toll. Costs run up, delay occurs, and income is lost. Harm to vulnerable persons like children occurs when family law decisions are not made in a timely and cost-effective way because parties have no one to advise them.

One frustrated SRL reported that trying to navigate the justice system without a lawyer is the hardest thing he’s ever done. Although he received some help from the court’s Family Law Information Center, he found that agency was supporting a system that is archaic and a vortex of confusion, delay, and expense.

Judges report being equally frustrated. A recent Alberta survey found that judges believe that there are additional challenges in cases involving at least one SRL. They state that a settlement before trial or before the end of trial is less likely in cases where there is at least one SRL. They also feel that an SRL generally achieves worse outcomes in matters involving claims for parenting, child support, spousal support, and the division of property.

The Canadian Judicial Council, in a recent report addressing access to justice and the SLR, stated that judges, the courts, and other participants in the justice system have a responsibility to promote opportunities for all persons to understand and meaningfully present their case, regardless of representation. The report called for the court process to be open, transparent, clearly defined, simple, convenient, and accommodating.

To address these challenges, Family Justice Services (a part of the Ministry of Justice) in Calgary, Alberta has created an early neutral evaluation model to help meet the needs of an SRL in family law matters.

The Problems

Some of the recurring SRL problems that our court regularly encounters are:

1. **Lack of early or any summary legal advice.** An SRL has little or no access to summary legal advice – except that

6. **Frustration.** With no proper intake, no summary legal advice, no ADR or social agency diversion, and inadequate facilities, an SRL loses wages and wastes expenses in coming to court where nothing meaningful is accomplished. All of the initial fears, wrong documents, wrong court, procedural faults, inadequate advice, confusion, expenses, and delays result in disappointment and anger.

The Solutions

In an effort to meet the needs of the family law SRL and address some of the above problems, Alberta Family Justice Services has implemented an early neutral evaluation project. The model deals with parenting and financial support issues. It is mandatory for parties who want to file a parenting or support application and who are not represented by a lawyer; parties with lawyers can access the services on a voluntary basis. Here is a brief step-by-step description of the SRL program.

Step One: Intake

When an SRL enters the courthouse and seeks to file a family law application, he or she is directed to an intake counter to speak with an intake counselor. This counselor completes a family violence screening, assesses the SRL's needs, provides any required legal or non-legal referrals, and discusses the SRL's options for resolving their family law issues.

Judges believe that an SRL generally achieves worse outcomes in matters involving claims for parenting, child support, spousal support, and the division of property.

offered by joining a long line-up in the corridor outside the courtroom, just before court commences, waiting to talk with duty counsel.

2. **Incomplete court documents.** An SRL files incomplete court documents with no legal advice or effective intake or counter assistance.
3. **Uninformed of Alternative Dispute Resolution (ADR) options.** An SRL ends up in court before a judge without being advised of alternative dispute resolution services or related social agency programs dealing with such issues as domestic violence, housing, support calculation, or immigration.
4. **Inadequate court preparation.** An SRL may appear before a judge in court before their matter is properly prepared to be addressed. This wastes their time and judicial/staff resources trying to figure out what is being asked for. Lists grow longer, matters get needlessly adjourned, and very little gets accomplished.
5. **Inadequate facilities.** There is no adequate counter, reception, or interview facilities to handle the volume of SRLs that need intake services and advice.

For an SRL with matters within the court's jurisdiction (some parties need other agency help), the intake counselor assists them with completing the required documents to start their court application. Once the documents are filed, the date is set for a caseflow conference. The counselor advises the SRL of the requirement to serve the other party with the court documents.

Step Two: Caseflow Conference

The SRL is required to attend a caseflow or mediation-type conference on the scheduled date. At the conference, the caseflow coordinator may do anything that could have been done by the intake counsellor plus any of the following:

- mediate a settlement leading to a consent order;
- explore options for resolution outside of the court process;
- refer the matter to an early neutral evaluation process where the parties require the expertise of a lawyer.

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forces” are the cause of the business’ enhanced value. Hamm argued that he merely experienced the good fortune of increases in the price of oil. Arnall argued the case law in other jurisdictions that take the position that the existence of external forces will not preclude the owning spouse’s management from being the cause of the business’ growth where the spouse’s efforts have positioned the company to prosper in good times or survive in bad times.

Middendorf v. Middendorf

In *Middendorf v. Middendorf* (696 N.E.2d 575 - Ohio 1998), the trial court divided the increase in value of the husband’s one-half interest in a stockyard. On appeal, the Ohio Supreme Court affirmed, rejecting the husband’s argument that the increase was passive: “Passive forces such as market conditions may influence the profitability of a business. However, it is the employees and their labor input that make a company productive. In today’s business environment, executives and managers figure heavily in the success or failure of a company, and in the attendant risks (e.g., termination, demotion) and rewards (e.g., bonuses, stock options) that go with the respective position. These individuals are the persons responsible for making pivotal decisions that result in the success or failure of the company. There is no reason that these factors should not likewise be relevant in determining a spouse’s input into the success of a business. (696 N.E.2d at 579.)

Nardini v. Nardini

In *Nardini v. Nardini*, (414 N.W.2d 184 - Minn. 1987), the business in question was a fire-suppression company that was worth several hundred thousand dollars at the time of the divorce. Nearly all the company’s worth was held to be marital: “Although the parties cast their differences in terms of the extent to which the efforts of

each enhanced the value of the business, there is no dispute that the present value of the stock of Nardini of Minnesota is attributable to the efforts of the marital partners over the course of more than 30 years of marriage. Certainly, the business did not prosper of its own accord... Given the nature of the assets of the business in 1949 and of the corporate assets today, the increase in the value of the business cannot be reasonably attributed to market conditions. There can be little doubt that more than 35 years of essentially prosperous and mildly inflationary economic conditions provided a favorable climate in which a budding business could grow and flower. But a business, like a garden, must be tended if it is to flourish...[W]ere it not for the personal efforts contributed by the spouses, the investment would have withered and died...”

Harold Hamm’s Role in Continental’s Growth

Arnall argued that the presence of external market forces (such as commodity prices or the existence of new technology) did not prevent Hamm from being credited with Continental’s growth because it was attributable to his guidance, management, and decision-making in positioning the company to take advantage of such external forces. “The mere presence of favorable economic conditions....does not guarantee a finding that the appreciation is passive...” (1 Turner, *Equitable Distribution of Property*, §5:22.) Arnall argued that a very substantial proportion of Continental Resources’ enhancement in value since 1988 was attributable to Hamm.

Hamm played a pivotal role in making the strategic decisions that brought Continental to where it is today – such as the decisions to focus on crude oil, to employ newer technology, to explore the north central portion of the United States (particularly the Bakken), to acquire a commanding position in leasehold ownership in those areas, and to go

public at a time when its success was not assured.

At the trial, Arnall argued that Hamm took substantial economic risks during the history of the company, including personally borrowing funds and guaranteeing corporate loans. While it was true that economic factors in recent years were favorable to Continental’s growth, the key decisions either directly made by or championed by Harold Hamm gave Continental the ability to take exceptional advantage of those favorable conditions, as was reflected in Continental’s performance substantially above that of its peer group companies. Furthermore, although Continental benefited from a talented group of upper-management personnel, the role of Harold Hamm in selecting and leading such personnel entitles him to a large amount of the credit for his management team’s performance. ■



Robert Bartz oversees the litigation division of the law firm of Barber & Bartz, counsel of record for Sue Ann Arnall. His practice focuses on complex commercial litigation and handling domestic matters involving high-net-worth marital estates. Mr. Bartz has a Martindale-Hubbell AV preeminent rating, and he is a Fellow in the Litigation Counsel of America. www.barberbartz.com

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Significant Family Law Case Updates

ARIZONA

Milinovich v. Womack

By Katherine Scott, formerly of Rusing Lopez & Lizardi, PLLC, since relocated to Washington, D.C.

A parent's short-term investment receipts may be includable in gross income for determining child support. In *Milinovich*, the father had a previous monthly gross income of about \$166,667 before he ended his career as a professional athlete and had a monthly child support payment of \$2,901. When his employment contracts terminated, the father used lump sum payments to create two short-term retirement accounts meant to support his monthly living expense, from which he began withdrawing about \$35,000 to \$40,000 per month. The father claimed his new gross monthly income was about \$5,000 and sought a downward modification in child support. The mother claimed his gross income must include the withdrawals. The Court of Appeals agreed, finding the father's "unique investment strategy" to use short-term retirement accounts to meet "ongoing living expenses" warranted treating the withdrawals as gross income. It remanded the case to the trial court to make findings as to whether it could use a gross income greater than the Guidelines' \$2,000 presumptive limit, and to recalculate child support. Arizona Court

of Appeals. 702 Ariz. Adv. Rep. 10 (CA 1, 12/23/14).

CALIFORNIA

In re Marriage of Davis

By Janine Frisco and Julia Kline of Brandmeyer, Gilligan & Dockstader, LLP

In *In re Marriage of Davis*, an appeals court affirmed the trial court's holding that a husband and wife separated five years prior to wife vacating the family residence. The court found that wife communicated intent to end the marriage, moved to a separate bedroom and contemporaneously separated the community finances. Husband, relying on *In re Marriage of Norviel* (2002) 126 Cal.Rptr.2d 148, argued that separate residences are a prerequisite to a legal separation. The appeals court disagreed that *Norviel* was dispositive, and affirmed the trial court's decision. The California Supreme Court granted review in February 2014, and is awaiting oral arguments to decide whether, as a matter of law, parties may live separate and apart while living under the same roof. 163 Cal. Rptr. 3d 695 (2013) review granted and opinion superseded, 317 P.3d 1183 (Cal. 2014).

IRMO M.A. and M.A.

By Erik C. Jenkins of Jenkins PC

This published support case out of San Diego highlights what can happen to orders made by a family law commissioner who improperly handled a challenge for cause under CCP 170.3(c)(4).

In a child support case involving multiple hearings in DCSS court, father was made to pay attorney fees under FC 2030 and child support. Father challenged the court commissioner alleging bias under CCP 170.3. Essentially ignoring the challenges, the court commissioner went on to make orders including an award of child support to mother. The court also prevented father from presenting arguments at the support hearing and stated it would not accept further motions for disqualification.

The court of appeal strongly criticized the commissioner's actions. In chastising the trial court, the court of appeal noted that once a challenge for cause is made, the commissioner has limited ability to act in the underlying proceeding. (Citing CCP 170.3(c)(1)). The appellate court clarified that a trial court cannot simply ignore the statement. The court of appeal went on to say that in making rulings in the face of a challenge for cause, the commissioner exceeded her powers and her orders from that point forward were invalid. The appellate court reversed and remanded actions taken by the court from the time of the valid 170.3 filing forward. (2015) (4th district, division one (filed February 24, 2015)).

FLORIDA

Brandon-Thomas v. Brandon-Thomas

By Susan Savard and Richard J. West of West Green & Associates, PL

The parties, Danielle and Krista, were legally married in Massachusetts in October, 2012, and relocated to Florida. During the marriage, Krista delivered a child. Marital difficulties arose, and a Petition for Dissolution of Marriage was filed in Florida by Danielle in October, 2013. The trial court dismissed the Petition, relying on the Defense of Marriage Act, 741.212 Florida Statutes, which provides that same sex marriages entered into in any jurisdiction are not recognized for any purpose in this state and prohibits the state, its agencies, and its political subdivisions from giving effect to any same sex marriage or claim.

The Second District Court of Appeal examined the constitutionality of this provision of the Defense of Marriage Act and held that consistent with the Full Faith and Credit Clause of the United States Constitution, the trial court's dismissal of the Petition must be reversed.

The Full Faith and Credit Clause requires the states to recognize judgments rendered in the courts of sister states and prevents one state from selectively enforcing the laws of the others. If a judgment of another state is in violation of a legitimate public policy of a sister state, full faith and credit is not required. The Due Process Clause, however, requires that persons who are similarly situated may not be classified and treated differently, and limits state authority to enact measures that impinge on fundamental rights.

Strict scrutiny analysis is not required here as sexual orientation is not a protected class. Likewise, dissolution of a same sex marriage is not a fundamental right. Only a rational basis for the classification is required,

and the state must only have a legitimate purpose for the statute at issue.

Heterosexual marriages validly performed in other jurisdictions are recognized and dissolved in Florida. Common law marriages deemed valid in other jurisdictions are also recognized and dissolved in Florida, despite the fact that Florida has not recognized common law marriages within this State since 1968. The public policy to preclude same-sex marriages is seemingly contravened when prohibiting dissolution of same-sex marriages would serve to increase the number of same-sex marriages in Florida. Permitting same-sex marriages in Florida and dissolving them within this State are separate and distinct issues.

Access to the courts and Florida's strong public policy to protect children by determining custody matters in accordance with the best interests of the child were also addressed in the opinion.

At the time of this writing, the opinion was not final and the time for rehearing had not yet expired. ____ So.3d ____, 2015 LEXIS 6051 (Fla 2nd DCA, April 24, 2015).

GEORGIA

Evans v. Sangster

By Stephanie Wilson of Stern & Edlin Family Law, PC

Mother and Father divorced in 2010, when their child was 2. The parties' separation agreement allowed for "reasonable" paternal grandparent visitation in the event of Father's death. Upon Father's death from cancer in 2012, Mother denied the paternal grandparents' efforts to visit with the child. The paternal grandparents filed a petition, seeking grandparent visitation. Subsequently, Mother's new husband, Jason Evans, filed a petition for stepparent adoption of the child. The paternal grandparents moved to intervene in the adoption action, and

same was granted by the trial court. Thereafter, the grandparent visitation case and the stepparent adoption action were consolidated, and a final trial took place, resulting in two orders. The first order set forth a final visitation schedule to allow the paternal grandparents to continue to have parenting time with the child. The second order granted the adoption petition of Jason, but denied the request that the child's last name be changed to his last name of Evans.

On appeal, Mother argued that the court failed to give deference to her wishes in crafting the grandparent visitation schedule, and the court awarded visitation to the paternal grandparents in excess of the minimum allowed by law. The Georgia Court of Appeals rejected Mother's claims, finding that her wishes were given deference by the court in the creation of the parenting plan, but that O.C.G.A. § 19-7-3(d) states that Mother's wishes "shall not be conclusive". Additionally, the Court found that Georgia law sets no maximum limit on grandparent visitation. Both Mother and Jason claimed that the lower court should have granted Jason's adoption petition prior to granting the petition for grandparent visitation, as the effect of same would have been to extinguish the paternal grandparents' right to seek visitation with the child. Again, the argument was rejected by the Georgia Court of Appeals. Contrary to what Mother and Jason argued, the court was not under the obligation to hear the adoption proceeding within 120 days of its filing date, as such time requirement applies to uncontested adoptions only. Finally, Jason appealed the court's refusal to allow the minor child's surname to be changed to his last name of "Evans". The Court of Appeals of Georgia reversed the lower court's decision, citing O.C.G.A. § 19-8-18(b), which provides that once the court is satisfied that the prerequisites for an adoption exist, it shall enter a decree of adoption, naming the child as prayed for in the petition.

330 Ga. App. 553, 768 S.E.2d 278 (Ga. Ct. App. 2015).

Lowry v. Fenzel

By Steven Kirson of Kessler & Solomiany, LLC

Lowry v. Fenzel provides a useful reminder to both divorcing parties and their advisors of the importance of changing beneficiaries and account titles when the case is over. The Court of Appeals reviewed a ruling on claims for various financial accounts based upon the terms of the parties' settlement after the account holder died. The Court affirmed in part and reversed in part.

The decedent and his ex-wife executed a settlement agreement that provided waivers of interest by the ex-wife against the decedent's accounts as follows: "Except as may otherwise be stated in this Agreement, each party shall be entitled to any and all bank accounts, money accounts, investment

accounts, including stock portfolios, in that party's name and the other party shall make no claim whatsoever, legal, equitable, or otherwise to same." The court noted that this specific language, addressing financial accounts, took precedence over a different, more generalized personal property waiver elsewhere in the Agreement. Citations omitted.

The ex-wife's claim, was that accounts titled in the name of the decedent, with a "transfer on death" provision, should go to the ex-wife upon the decedent's death. The Court of Appeals held that the division of property language waived the ex-wife's interest as a beneficiary to the accounts. Thus the ex-wife was not entitled to "transfer on death" accounts that still bore her name as transferee.

In contrast, the Court of Appeals held that jointly-titled accounts did belong to the ex-wife. The ex-wife's waiver did not cover these accounts, only that each party was entitled to

accounts in that party's name. There was no mention of how to dispose of property in joint names in the settlement, so the divorce decree did not affect those accounts. O.C.G.A. § 7-1-813 (a) provides that deposits in joint accounts belong to the surviving party upon the death of the other account holder. This case is a reminder to include all accounts, no matter how titled, and understand how accounts work in the event of death. 2015 331 Ga.App. 603, Court of Appeals of Georgia (2015).

ILLINOIS

In re Parentage of Scarlett Z.-D.

By Jeffrey L. Hirsch of the Gitlin Law Firm, PC

In this parentage case, the Illinois Supreme Court addressed the issue of whether a so-called *de facto*

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equitable parent, or functional parent, has standing to file for custody or visitation. Before the parties married, the mother (a Slovakian citizen) adopted a child from Slovakia. Afterwards, the parties all lived together “as an intact family unit as if they were bound legally.” However, they never married, and no action was ever taken for the de facto father to adopt the child pursuant to Illinois law. Several years later, the relationship ended. The de facto father then filed his petition for a declaration of parental rights alleging, among other theories, that he was the child’s de facto equitable parent. The trial court held that the de facto father lacked standing as a non-parent. The appellate court reversed the trial court’s dismissal and remanded the case for further hearing on the basis that the doctrine of equitable adoption might present a potentially viable theory of standing.

The Illinois Supreme Court unanimously held that the doctrine of equitable adoption does not apply to child custody proceedings. The Court held that equitable adoption is merely a remedy that permits inheritance, but it does not create or alter the actual legal relationship of parties. The Court also rejected the de facto father’s arguments for an equitable claim of standing in the form of a “functional parent-child relationship,” i.e., a relationship with deep emotional bonds such that the child recognizes the person as a parent independent of the legal relationship. The Court noted that the difficulties of the varying public policy considerations of functional parenthood, and the legislature’s superior institutional competence to pursue this debate, suggest that legislative and not judicial solutions are preferable. Because Illinois law does not recognize functional parent theories, the de facto father lacked statutory standing to petition for custody and visitation. 2015 IL 117904 (March 19, 2015).

INDIANA

Jocham v. Sutliff

By *Melanie Reichert and Nissa Ricafort of Broyles Kight & Ricafort, PC*

This year, the Indiana Court of Appeals rendered an important decision that highlights the narrow application of Indiana’s grandparent visitation statute and the limitations placed on courts in such cases.

Under Indiana’s *Grandparent Visitation Act (GVA)*, grandparents are entitled to request visitation rights in limited circumstances: 1) the child’s parent is deceased; 2) the marriage of the child’s parents has been dissolved in Indiana; or 3) the child was born out of wedlock and paternity has been established.

In *Jocham*, K.J. was the child of Kirk and Stephenie Jocham, who divorced in 2008. Stephenie passed in 2011. Kirk remarried and his wife adopted K.J. without notice to Stephenie’s mother, Melba Sutliff. After the adoption was finalized, Sutliff petitioned the court for visitation. The trial court granted Sutliff’s petition, finding that as the parent of K.J.’s deceased mother, she was entitled to seek visitation. Jocham appealed, and the Indiana Court of Appeals reversed.

Since the GVA was enacted in derogation of the common law, the Court indicated that the GVA must be strictly construed and interpreted. While the Court acknowledged the right of a grandparent to seek visitation when the child’s parent is deceased, it determined that Sutliff had no standing to seek visitation as she was no longer legally K.J.’s grandparent. After adoption, all ties between the child and Stephenie (and her family) were severed. The Court implored Indiana’s legislature revisit the notice requirements prior to adoption.

The *Jocham* case serves as an important reminder of the GVA’s inherent limits, and the inability of

Indiana courts to render decisions outside of its strictures – even when best interests warrant. Sutliff petitioned for transfer to the Indiana Supreme Court. Court of Appeals No. 29A02-1406-DR-424.

LOUISIANA

DCFS v. Lowrie

By *Frank P. Tranchina, Jr. of Tranchina & Mansfield, LLC*

In *DCFS v. Lowrie*, the Louisiana Supreme Court held that a legal (presumed) father is entitled to join an alleged biological father in an action for enforcement of child support. The significance of this case lies not in its narrow holding, but in what it foreshadows about the fate of Louisiana’s anachronistic system of “dual paternity.”

Today in family law, biology is king. The legal parent-child relationship exists solely by virtue of a biological connection, and child support is owed solely on the basis of that connection. In such an era, it seems odd that Louisiana continues to recognize dual paternity: to recognize a legal parent-child relationship between both a child and his biological father, and between the child and a man who was presumed the father of the child and did not disavow within the narrow timeframes set out under Louisiana law. In every other state, the legal father is released – from both the duties and rights associated with parenthood – when biological paternity is proven in another man.

Lowrie highlights one of the most significant continuing problems with the dual paternity scheme: it is lauded as good for children. This comes, however, at the price of extreme inequity for others, most notably the legal father. When a biological father is known and is capable of paying support, can the child’s interest in having more money justify holding two men responsible? Judges in Louisiana report that when

a biological father is before them, they frequently ignore the doctrine of dual paternity and order the biological father alone to pay support, because, of course, that result is most equitable.

But in the most egregious Louisiana cases, the child's mother knows the identity of the biological father and refuses to name him, choosing instead to pursue only the legal father for support. The internal policies the Department of Children & Family Services (DCFS) described openly in the Lowrie proceedings permitted and encouraged exactly that.

In the wake of the *Lowrie* decision, however, neither DCFS nor biological mothers may be complacent when it comes to naming a biological father. The decision imposes upon DCFS a duty to investigate allegations in a mother's request for enforcement services – which may even require DCFS to now make diligent efforts to find a biological father for every application it accepts for enforcement services. That obligation is one that DCFS seems ill-funded and ill-equipped to bear, but it is a duty that must exist to prevent inequity, as long as dual paternity exists.

The most substantial question *Lowrie* asks is not whether equity requires the joinder of the biological father when support is sought from a legal father, but whether it's time for Louisiana to abandon a troubled and odd institution in the interest of equity. Has dual paternity simply outlived its utility?

MARYLAND

Baker v. Baker

By Thomas C. Ries and Kevin McKay of Kaufman, Ries & Elgin, PA

In *Baker v. Baker* the Court of Special Appeals of Maryland addressed issues arising from language in the parties' marital

settlement agreement pertaining to their jointly titled investment accounts and a capital-loss carry-forward (CLCF) that resulted from activity in the accounts.

The Bakers' Agreement provided, in part: "Wife hereby relinquishes to Husband any interest she might have in any jointly titled investment or bank accounts." When they divorced, the parties had a CLCF resulting from losses in their joint accounts. Afterwards, wife used approximately 50% of the CLCF to offset gains she realized from the sale of real property. Husband contended that he had the sole right to the CLCF. Wife argued that she had not relinquished her interest in the CLCF because it was "separate and apart" from the joint accounts. The trial court disagreed and held that the Agreement allocated the CLCF to husband.

On appeal, wife argued that the CLCF was a tax asset that, by operation of law, was distributed equally to the parties. The appellate court considered Treasury Regulations and cases from other jurisdictions, and held that a CLCF, when generated by a capital loss from the sale of marital property, is itself marital property, which the spouses can agree to allocate as they wish at the time of a divorce. The appellate court found that the CLCF was "collateral" to the joint account, was not an asset "in" the account itself, and wife had not relinquished her interest in the CLCF. The Court intimated that a different conclusion might have been reached if the Agreement contained broader language i.e., where one spouse's waiver included all interests "relating to," "arising from," or "resulting from activity in" the joint investment accounts. 221 Md. App. 399 (2015).

MASSACHUSETTS

Chin v. Merriott

By Donald G. Tye & Michelle M. Rothman of Prince Lobel Tye, LLP

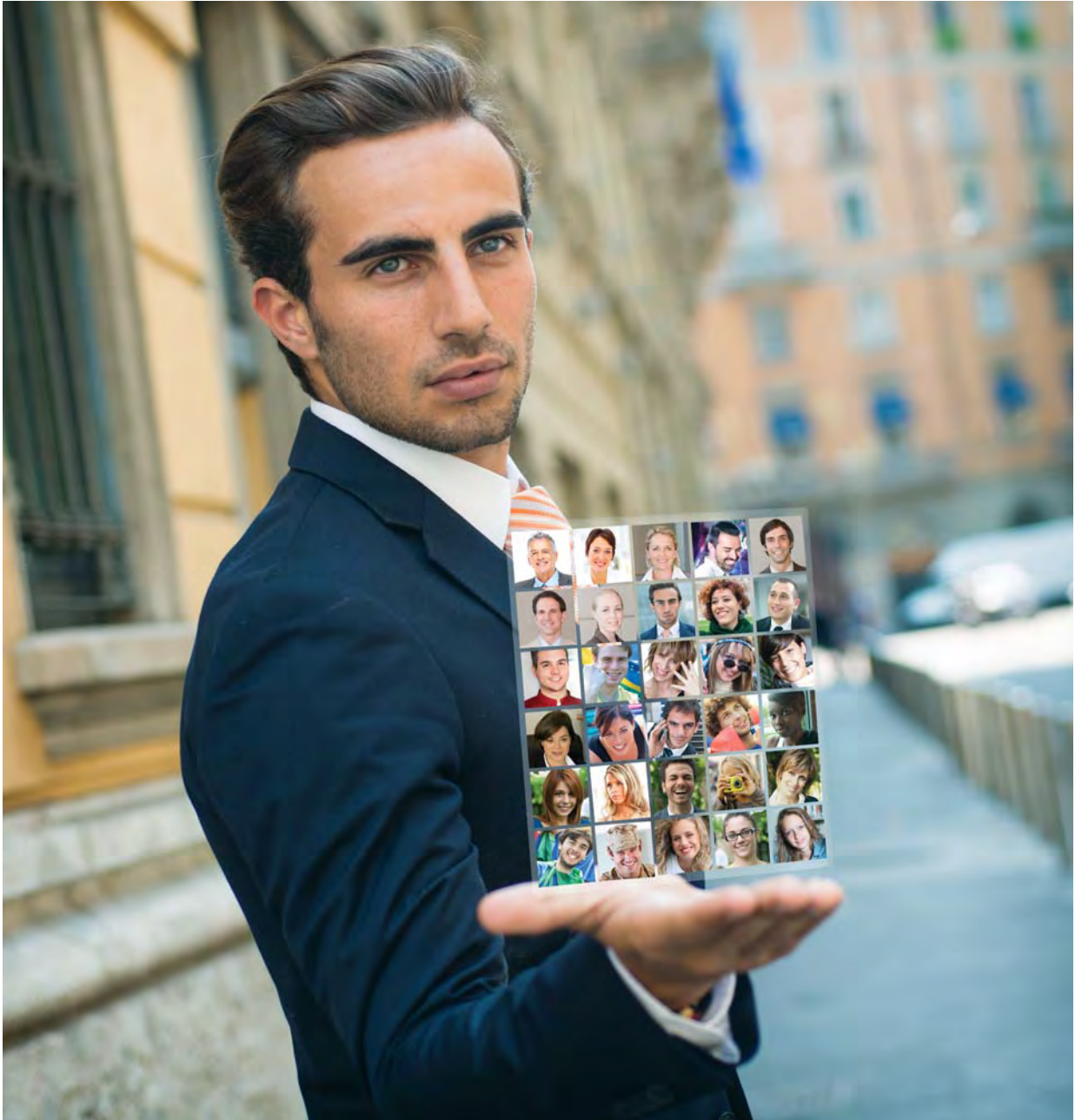
This was a matter of first impression following passage of the *Alimony Reform Act of 2011*, St. 2011, c. 124 (the "Act"), which took effect on March 1, 2012 (codified sections at Mass. G.L. c. 208, § G. L. c. 208, §§ 48-55 and uncoded sections at St. 2011, c. 124, §§4-6). Judgment entered with two other related cases, *Rodman v. Rodman*, 470 Mass. 539 (2015) and *Doktor v. Doktor* (470 Mass. 547) (2015).

The parties married in Massachusetts on November 28, 1998. At divorce, each party had retired. On August 17, 2011, they entered into a separation agreement, incorporated into their divorce judgment. That agreement contained a modifiable provision, requiring former Husband pay former Wife monthly alimony, and that the "alimony obligation shall terminate upon the death of either party or the Wife's remarriage." When divorce judgment entered, Husband was sixty-seven. Husband filed a Complaint for Modification, seeking alimony termination under the Act's provisions regarding termination upon an obligor's attainment of "full retirement age" and cohabitation grounds.

The Court applied a de novo standard to a statutory instruction question. Strictly reviewing the Act's terms, the Court found the legislature's intent "unambiguous" and held the Act's termination provisions based on retirement and cohabitation only apply prospectively to judgments after the Act took effect. Said determination contrasted with the Court's holding that durational limitations may apply retroactively. In order to receive modification of an alimony obligation on grounds other than durational limitations, an obligor whose judgment entered prior to the Act's effective date must prove a material change in the parties' circumstances warranting modification. The Court upheld the lower Court's dismissal of former Husband's complaint. 470 Mass. 527 (2015).

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MICHIGAN

Allard v. Allard*By Scott Bassett of Michigan Family Law Appeals*

In Michigan, premarital agreements are binding and enforceable upon divorce absent fraud, duress, or unconscionability. A premarital agreement may also be unenforceable if “the facts and circumstances have changed since the agreement was executed making its enforcement unfair and unreasonable.” *Rinvelt v. Rinvelt*, 190 Mich App 372, 475 NW 2d 478 (1991). The main issue in Allard was whether the husband’s fault in the marital breakdown because of domestic violence was an unforeseen change of circumstance sufficient to void the premarital agreement.

The Michigan Court of Appeals held that the premarital agreement was valid and enforceable. (Michigan Supreme Court Leave Application is Pending, SC Case No. 150891.) To invalidate a premarital agreement based on one party’s fault in causing the marriage to break down contravenes the agreement’s clear and unambiguous language. Therefore, as a matter of law, the wife failed to show a sufficient change of circumstances that supports voiding the agreement.

The Court of Appeals elaborated that the type of changed circumstances that may void an otherwise valid premarital agreement must relate to the issues addressed in the agreement. Here, the premarital agreement focuses on spousal support and asset division. Domestic violence was not addressed in the agreement. Domestic violence, even if unanticipated when the agreement was signed, will not justify voiding the agreement.

A secondary issue worth noting is the Court’s holding that the statutes authorizing invasion of a spouse’s separate estate based on need or contribution (MCL 552.23 and 552.401) cannot be used to frustrate the intent

of a premarital agreement to place that property outside of the marital estate. If a premarital agreement specifies that certain property is the sole and separate property of one of the parties, that property cannot be invaded by the court and distributed to the other spouse under either statute.

NEW JERSEY

Plotnick v. DeLuccia*By David M. Wildstein of Wilentz, Goldman & Spitzer*

Issue: Should a putative father’s Order to Show Cause, which included a temporary mandatory injunction that required: (1) he be notified when the mother enters labor; (2) he be present at the time of delivery; (3) he be able to sign the child’s birth certificate; (4) the child carry the father’s surname; and (5) a parenting-time schedule be ordered, be granted?

Holding: The court held that although the father would suffer irreparable harm if he was not notified when the mother went into labor or if he was not present at the time of delivery, the mother’s rights outweighed the father’s rights, even more so since they were unwed. Relying on the U.S. Supreme Court case *Planned Parenthood v. Casey*, 505 U.S. 833 (U.S. 1992) it would also be an undue burden on the mother to notify the father or have him present in the delivery room because the order the father sought invades the mother’s privacy and puts her in a more stressful position which could possibly complicate the pregnancy. Therefore, the father’s requested relief to be notified of the child’s birth or to be present in the delivery room was denied. The court also held that the father’s ability to sign the child’s birth certificate and that the child carry the father’s last name at the time of birth does not constitute immediate, irreparable harm and such relief was denied.

Lastly, the court held that the parenting-time schedule was not ripe for review since parenting-time is based on the best interests of the child which cannot be determined until the child is born. The court further noted that such relief is non-emergent and would not have been granted. Opinion by Judge Mohammed, J.S.C.434 N.J. Super. 597 (Ch. Div. 2013).

NEW YORK

Marcilio v. Hennessy*By Leigh Baseheart Kahn of Mayerson Abramowitz & Kahn, LLP*

Policy and equity were the focus of the decision in *Marcilio v. Hennessy*, as the Hon. Matthew F. Cooper held that what appears to be an absolute statutory right to discontinue an action by mere notice is not so absolute. Pursuant to CPLR § 3217(a) (1), a plaintiff may discontinue an action by service of a mere notice “at any time before a responsive pleading is served or, if no responsive pleading is required, within twenty days after service of the pleading asserting the claim.”

In order to avoid the potential roadblocks which may flow from exchanging emotionally charged divorce pleadings, “it became accepted practice for cases to proceed on the summons alone, with the complaint being filed only after the matter had been settled or just prior to trial.” This attempt to avoid a potentially provocative exchange of pleadings did, at times, backfire, since in most matrimonial cases in which a complaint was not served, courts held that the plaintiff retains the right to discontinue the action by mere notice.

However, on occasion “courts have thoughtfully recognized circumstances appropriate to find that a plaintiff who failed to file a complaint had voluntarily and knowingly waived the right to discontinue by mere notice.” Justice Cooper found such circumstances in *Marcilio*: In response to service of

the complaint, the defendant filed a motion for pendente lite relief; the issue of grounds was resolved; a court-appointed forensic psychologist performed a custodial evaluation; the parties entered into a final custody agreement; appraisers were appointed to value marital property; both parties participated in substantial discovery and motion practice; and the trial of the action was “on the horizon.” Justice Cooper further noted that the plaintiff “has repeatedly brought meritless motions and has taken unreasonable positions... intentionally frustrat[ing] the progress of the case.” Under these circumstances, the Court found that it would severely prejudice the wife and children to permit discontinuance.

The *Marcilio* case stands for the proposition that the right to discontinue by mere notice is not absolute, Justice Cooper observing that “discontinuance is often counterproductive and can be used to frustrate the ultimate goal” of the parties, i.e., to dissolve the marital bond and fix the parties’ respective rights and obligations. While nullification of a notice to discontinue is not available simply for the asking, *Marcilio* provides that a party truly prejudiced by a discontinuance by notice is not without a remedy. NYLJ 1202721148092, at *1 (Sup. NY, Cooper, J., Decided March 6, 2015) (Redacted).

OHIO

Gallo v. Gallo

By Scott N. Friedman & Elizabeth A. Johnson of Friedman & Mirman Co., LPA

The husband appealed the trial court’s decision regarding calculation of his income for spousal support, arguing the trial court “double dipped”. Relying on *Heller*, the husband asserted that the court could rely on the future earnings from his closely held corporation to value his business, or to determine his income,

not both.

In *Heller*, the court noted future business income could be treated as a marital asset subject to division, or as a stream of income for support, but not both. *Heller*’s holding was misleading because it appeared as a flat prohibition against double dipping in any case where income producing assets were involved. On a subsequent appeal, the 10th District indicated this was inaccurate. Double-dipping applies in cases where a business is valued on an income-based approach, or in cases involving division of pensions. In contrast, no double-dipping occurs using market or asset based valuations.

Ultimately, the *Heller* decision was incomplete. *Heller* failed to consider R.C. 3105.18(C), and to the extent that it did, it was overruled. A court’s review of the issue of double-dipping must begin with R.C. 3105.18(C)(1) (a) requiring consideration of income derived from a marital asset in establishing spousal support. Further, in addressing double dipping, courts

should carefully consider the division of income-producing assets, and the availability of that income for support. Courts have discretion to avoid unfairness, or to determine that a disparity in income between the parties overrides the unfairness of double dipping. The case was remanded to the trial court to consider the issue of double dipping. 2015-Ohio-982 (10th Dist., 14 AP 179).

OKLAHOMA

Jensen v. Poindexter

By David W. Echols of Echols & Associates

Attorney interviewed unrepresented child about abuse allegations. Attorney filed an application for emergency temporary order, based upon the child’s statements to the attorney, and attorney also filed an affidavit attesting to child’s credibility. Trial Court granted



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the “emergency” temporary custody request. Legal parent moved to disqualify the attorney for making himself a necessary witness to child’s credibility and for harming the integrity of the judicial process. District Court sustained the motion to disqualify client’s attorney. The Oklahoma Supreme Court affirmed. Conducting a forensic interview of the child regarding abuse allegations to advance the client’s interest in obtaining an emergency temporary order is dangerous. The attorney has likely inserted himself into role of forensic interviewer, likely tainted the fact-finding process with improper interviewing techniques, likely established a relationship with the minor child of undue and overreaching influence. As this case demonstrates, the attorney conducting such an interview with a minor child will likely face these allegations, followed by a motion to disqualify the attorney and potential allegations of ethical misconduct. This is the role of a qualified forensic psychologist, upon being appointed by the Court to conduct the evaluation, DHS, or at the direction of a Guardian Ad Litem. 2015 OK 49, ____ P.3d ____.

PENNSYLVANIA

W.C.F. v. M.G.

By *Cara A. Boyanowski of Obermayer Rebmann Maxwell & Hippel, LLP*

Mother and Father were married in 2010 and had a daughter in October 2012. Due to complications between Father and Mother’s extended family members, Mother and child moved from the parties’ apartment in January 2013. Father did not agree with the move and filed a complaint requesting shared legal and physical custody. Mother filed a divorce complaint, seeking to confirm her legal and primary physical custody status with the child. In February 2013, an interim order was entered preserving the

“status quo.” This schedule provided Father with 13 hours of custody per week. After trial, a second order was entered awarding Mother primary physical custody and Father partial physical custody, to include overnights. Father appealed. Although the trial court properly considered the sixteen mandatory factors under 23 Pa.C.S. §5328(a), consistently weighing them in Father’s favor, Mother was awarded primary physical custody, since she was the current primary physical custodian and a change in that status would be disruptive to the child. The Superior Court noted that Mother’s primary custodial status was created unilaterally by her and the “primary caregiver doctrine” should only be utilized when both parents are deemed fit to act as primary custodian. These parents were not viewed equally, as Mother repeatedly brought meritless allegations of injury and sexual abuse against Father, had a rigid parenting style, and was uncooperative. Since the majority of the mandatory factors weighed in Father’s favor and no compelling reasons were set forth to reverse that determination, the custody schedule was deemed unreasonable and the case was remanded back to issue an order consistent with the trial court’s rulings surrounding the mandatory factors. (2015 Pa. Super. LEXIS 231; 2015 PA Super 102) (decided April 29, 2015).

Elonis v. United States

By *Joel Bernbaum of Bernbaum Family Law*

In Anthony Douglas Elonis, *Petitioner v. United States*, 575 U.S. ____ (2015), the U. S. Supreme Court, in an opinion written by Chief Justice Roberts, decided a matter in which a PA resident, Anthony Douglas Elonis, under the pseudonym “Tone Dougie,” posted self-styled rap lyrics containing graphically violent language and imagery concerning his wife, co-workers, and others. Disclaimers that the lyrics were “fictitious” and statements that Elonis was

exercising his First Amendment rights were inserted into the posts. Despite these “disclaimers,” his boss saw his posts as threatening and fired Elonis for threatening co-workers and wife was granted a PFA (protection-from-abuse) order against him.

The FBI monitored Elonis’s Facebook activity, arrested him for violating 18 U. S. C. §875(c), which makes it a federal crime to transmit in interstate commerce “any communication containing any threat . . . to injure the person of another.” Elonis argued the Government was required to prove that he intended to communicate a “true threat.” Elonis was convicted and appealed. The Third Circuit affirmed, holding that Section 875(c) requires only the intent to communicate words and that a reasonable person would view as a threat.

The Supreme Court found in an 8-1 decision, Elonis’s conviction was premised on how his posts would be viewed by a reasonable person, a feature of liability in tort law inconsistent with the criminal conduct requirement. Section 875(c)’s mental state requirement is satisfied if the defendant transmits a communication for the purpose of issuing a threat or with knowledge that the communication will be viewed as a threat. The Court declined to address any First Amendment issues or whether a mental state of recklessness would also satisfy the statute. *Case #: No. 13–983. Decided June 1, 2015.*

TEXAS

In re A.B.

By *Brad LaMorgese of Orsinger, Nelson, Downing & Anderson, LLP*

After a bench trial, the trial court found, by clear and convincing evidence, grounds for termination of the Father’s parental rights under the Texas Family Code. The Father appealed the decision, and the court of appeals reversed and remanded the case for a new trial.

Following this reversal, the case was retried before a jury. The jury made the same findings as the trial court in the previous trial and found that the termination was in the children's best interest. The Father again appealed the order, challenging the legal and factual sufficiency of the evidence to support the jury verdict. The Court of Appeals held that the evidence was still factually insufficient. Both DFPS and Intervenor filed motions for en banc reconsideration, and the Court of Appeals granted the motion and found the evidence was factually sufficient to support termination. On petition for review, the Father argued that the Court of Appeals failed to conduct a proper factual sufficiency review because it analyzed the evidence favorable to DFPS and not the Father and erred when it failed to detail the "conflicting evidence." The Supreme Court held that for years, it has required Courts of Appeals to engage in a thorough review of the entire record when conducting factual sufficiency reviews in parental termination cases. However, this does not give the Court the right to take on the role of a thirteenth juror. Here, because the Court ultimately affirmed the jury's termination findings, it was not required to detail the evidence. Further, the court did execute an appropriate factual sufficiency review. 437S.W.3d 498 (Tex. 2014), *reh'g denied* (Aug. 22, 2014).

WASHINGTON

In Re Marriage of Khan

By Christina A. Meserve of Connolly, Tacon & Meserve

Azad, a United States citizen, and Nishat Khan were married in 2010. Nishat entered the United States on a K1 (fiancée) visa. As part of her application for permanent residency, Azad was required to sign on her behalf an affidavit of support, commonly referred to as Form I-864. Two years later, the parties

separated and Azad petitioned for dissolution of marriage. The husband paid spousal maintenance pursuant to temporary orders for a year and contributed to the wife's moving expenses and attorney fees. At trial in 2013, the trial court awarded an additional three months of spousal maintenance, indicating that it was doing so based on RCW 26.09.090 factors. There is a split of authority nationwide on whether I-864 is enforceable by a maintenance award in a dissolution action or whether the wife was required to bring a separate action to enforce the husband's obligations. The Court of Appeals concluded that nothing in the federal statutes or regulations requires an I-864 obligation to be included in a maintenance award or otherwise enforced in a dissolution action. Thus, the trial court did not err in failing to extend the maintenance payments indefinitely. In a footnote, the Court of Appeals indicated that it was not addressing whether a trial court in the exercise

of its discretion could incorporate the I-864 obligation into a maintenance award. 182 Wn. App. 795 (Division Two, August 2014).

In re Dependency of O.R.L.

By Kent Goodrich Attorney of Brewes Layman, PS

A mother's parental rights were terminated in a dependency action brought by DSHS. Mother claimed the termination order should be reversed because DSHS failed to provide all reasonably available services capable of correcting her parental deficiencies. Specifically, the mother claimed that visitation is a remedial service DSHS failed to provide. The court held that DSHS offered all services under the statutes that were reasonably available and capable of correcting parental deficiencies. DSHS was not required to provide visitation as a remedial service. No. 32320-0-111. 2015 Wash. App. LEXIS 640. ■



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If no settlement is achieved, the casflow coordinator assists the SLR with preparation for court. If, having been served, the other party does not attend, the casflow coordinator may arrange for a court-prepared draft order for the judge's consideration, or arrange for the application to proceed directly to a court hearing without further notice to the other party.

Step Three: Early Neutral Evaluation

If the matter is referred to the early neutral evaluations step, an evaluation officer has the same powers as the casflow coordinator but can also assist the SRL by addressing legal issues that may be too complicated to address through other options. For example, the SRL can obtain help in understanding the law and how it may impact the facts of their case. The office can also provide assistance to define and narrow the court issues and prepare the SRL for either a more structured mediation or a court hearing.

Step Four: Court Hearing

If no settlement is reached, then the next step is a court hearing. Legally trained duty counsel and differently trained family counselors are available outside the courtroom to advise the SRL on the court process and assist in presenting the case. After the hearing, a counselor speaks to the SRL to ensure that person understands the order made by the court, the importance of compliance with court orders, and what is the next step.

Conclusion

This model is intended to assist an SRL at the earliest stage. The moment an SRL appears at the courthouse counter to initiate a parenting or financial proceeding, a counselor is there to help them. The intention is to make every SRL promptly aware of the procedural options and resources available. Resolution through settlement is emphasized at each step of the way by encouraging communication,

mediation, and the use of court-generated consent orders. When there is no settlement, the program assists an SRL to get summary legal advice or help prepare them for court. Once a court order is made, the SRL receives information on the impact of those orders and next steps. The mandatory provision ensures that every SRL is counseled through the system in a simple, efficient, and flexible way, one step at a time. ■



Justice Bryan Mahoney was appointed to the Court of Queen's Bench of Alberta in 2001. He is a member of the Court's Executive Board and for 5 years he served as co-chair of the Court's Family Law Committee. Prior to his judicial appointment, Justice Mahoney practised general litigation for 26 years.

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Avoiding Tax / Cont. from page 20

resulting from the 2013 purchase will have unrealized gains of \$46/share. Let's assume that they have agreed to split the 31,500 shares equally, with each receiving 15,750 shares. If John receives 12,250 shares resulting from the 1981 purchase and 3,500 shares resulting from the 2013 purchase, while Jane receives all 15,750 shares from the 1981 purchase, they will receive equal market value, based on \$125/share. However, the net value (assuming a 20% capital gains rate) will be approximately \$55,000 different: Jane would pay approximately \$55,000 more in capital gains taxes than John if all of the shares were sold at date of transfer.

This is why it's so important to divide investment assets on a pro-rata tax-neutral basis. It's also very important to realize that \$3M market value in an investment account, which may have unrealized gains that will be subject to capital gains taxes, is not equal to \$3M cash or equity in a principal residence, which has unrealized appreciation that will not be subject to capital gains taxes. Simply put, "All assets are not created equal."

3. Understanding Capital Loss Carryforwards

Capital losses in excess of capital gains may not be deductible by taxpayers in the year incurred, but may be carried forward to future years and used to offset future income. These are called "capital loss carryforwards" and generally can be found on Schedule D of the parties' income tax return. Unlike dependency exemptions, allocation of capital losses to individual taxpayers cannot be assigned or transferred pursuant to a divorce. The party who is entitled to use the capital loss carryforward is determined by the Internal Revenue Code (IRC), not by agreement of the parties or order of the court in a divorce. If the assets that generated the loss were held in a joint account, each party is entitled to claim 50% of the loss against future income. However,

if the assets that generated the loss were held in an account that was titled in only one party's name, that party will be entitled under the IRC to claim the loss – even though the assets were technically marital assets for purpose of the divorce. Valuation of the benefit derived by the party entitled to use the loss may be difficult to determine, as it is difficult to predict both future income and income tax rates. However, a capital loss carryforward of \$500,000 attributable to one of the parties could easily result in real tax savings of \$100,000, assuming a 20% capital gains rate. Clearly, this benefit can be valuable and it should not be overlooked.

**In high-asset cases,
one word in the right
(or wrong) place of
an agreement or
court order could
have implications
that benefit (or hurt)
your client to the tune
of millions of dollars.**

4. Net Operating Losses Matter

Similar to capital loss carryforwards, net operating losses (NOLs) can result in future income tax benefits to one or both parties. In general terms, NOLs result from business losses that exceed business income in any given year. These losses may be carried forward to future years and used to offset future income, and they may also be carried back to prior years, resulting in refunds for those prior years. The rules regarding carryforwards and backs of NOLs are complicated and the tax treatment is determined in part by how the parties filed their income taxes during the years they were married (i.e., joint or separate), the proportionate income of the parties, whether the loss was active or passive, and how the entity

that generated the loss was titled. If NOLs exist at the time of the divorce (or if they're likely to occur in the future), and if the NOLs could be carried back to previously filed joint tax returns, then the potential benefit to each party should be reflected in the divorce settlement.

If even one of these four issues is likely to arise in a high-asset divorce case, a prudent attorney should consider engaging a forensic accountant or similar tax expert early in the divorce process. This financial expert can recognize these issues, and help the attorney to avoid the expensive mistakes outlined above. ■



David Sarif is a partner at Naggjar & Sarif in Atlanta, GA. He has been honored as a Georgia Super Lawyers Rising Star, recognized in Georgia Trend Legal Elite, and represents many high-profile clients. He devotes his practice to divorce and family law.
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15 Signs / Cont. from page 11

10. There are bad comments, poor ratings, and inaccurate information about you online.

You are your Google results. You need to spend some of your marketing budget on finding web pages with poor reviews and information about you. We have come across many web pages showing our clients working for their previous employers with old contact information – all unbeknownst to them!

11. You do not have a plan that ensures you get regular referrals.

The majority of family lawyers rely heavily on referrals. A good marketing strategy that nurtures your referral sources and helps you stay top-of-mind with them can prove to be more cost-efficient and effective than chasing after new clients on your own.

12. You have done marketing, but on an ad-hoc basis.

Many family law firms do not create a marketing plan, and so they often end up buying from the most aggressive salespeople who call on them the most often. They might end up doing an online pay-per-click advertising campaign for a while, then switch to Search Engine Optimization, and then try advertising in local publications.

Good salespeople will have prepared a pitch that makes a compelling argument for you to purchase their products or services – and in most cases, what they are selling will

benefit your firm to a greater or lesser degree. Some of them also offer huge discounts with tight deadlines. “If you commit within the next 24 hours, your advertisement will be half-price!” When you assess these offers one at a time – under time pressure and without an overall strategy or goals – you really cannot tell if what they are offering is better than other marketing opportunities.

13. You do not know how effective your marketing campaigns have been.

We have heard this innumerable times during our initial marketing consultations: “I have no idea how much I have spent, on what, and whether it worked or not.” We think of this as throwing your marketing money against the wall, and not bothering to see what sticks.

14. You keep changing your ads and service providers.

Your marketing message needs to be consistent across all of your marketing efforts: your website, firm brochure, blog posts, newsletters, and all the advertisements you may run in multiple publications and on websites. Most family law firms do not have a big enough advertising budget for their ads to suffer from fatigue due to overexposure, so you do not have to keep changing your ad. And if you keep changing your marketing agency or service provider, then you need someone to help you make intelligent choices.

15. You do not have a marketing strategy based on your business goals.

There is a saying: “If you don’t know where you want to end up, just start walking, because any direction will do.”

We recommend that you take the time once a year to plan your marketing for the next 12 to 24 months. Begin the process by looking at your business goals, review what kind of clients you wish to attract, then create a marketing strategy and budget that will move you towards those goals. Because so many family lawyers prefer lawyering over marketing, we suggest that even if you have found a service provider you want to trust your marketing with, you should consider hiring a marketing agency – or designating someone in your firm to coordinate with your marketing agency – so that decisions can be made and acted upon in a timely manner. ■



Martha Chan and Dan Couvrette are marketing experts to family lawyers. They are co-owners of Divorce Marketing Group – a marketing agency dedicated to promoting family lawyers and divorce professionals. They publish Divorce Magazine, Family Lawyer Magazine, and several divorce related websites



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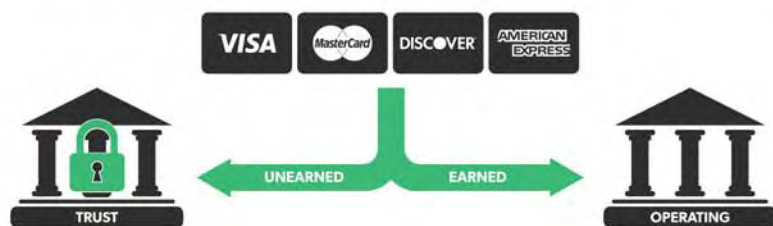


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