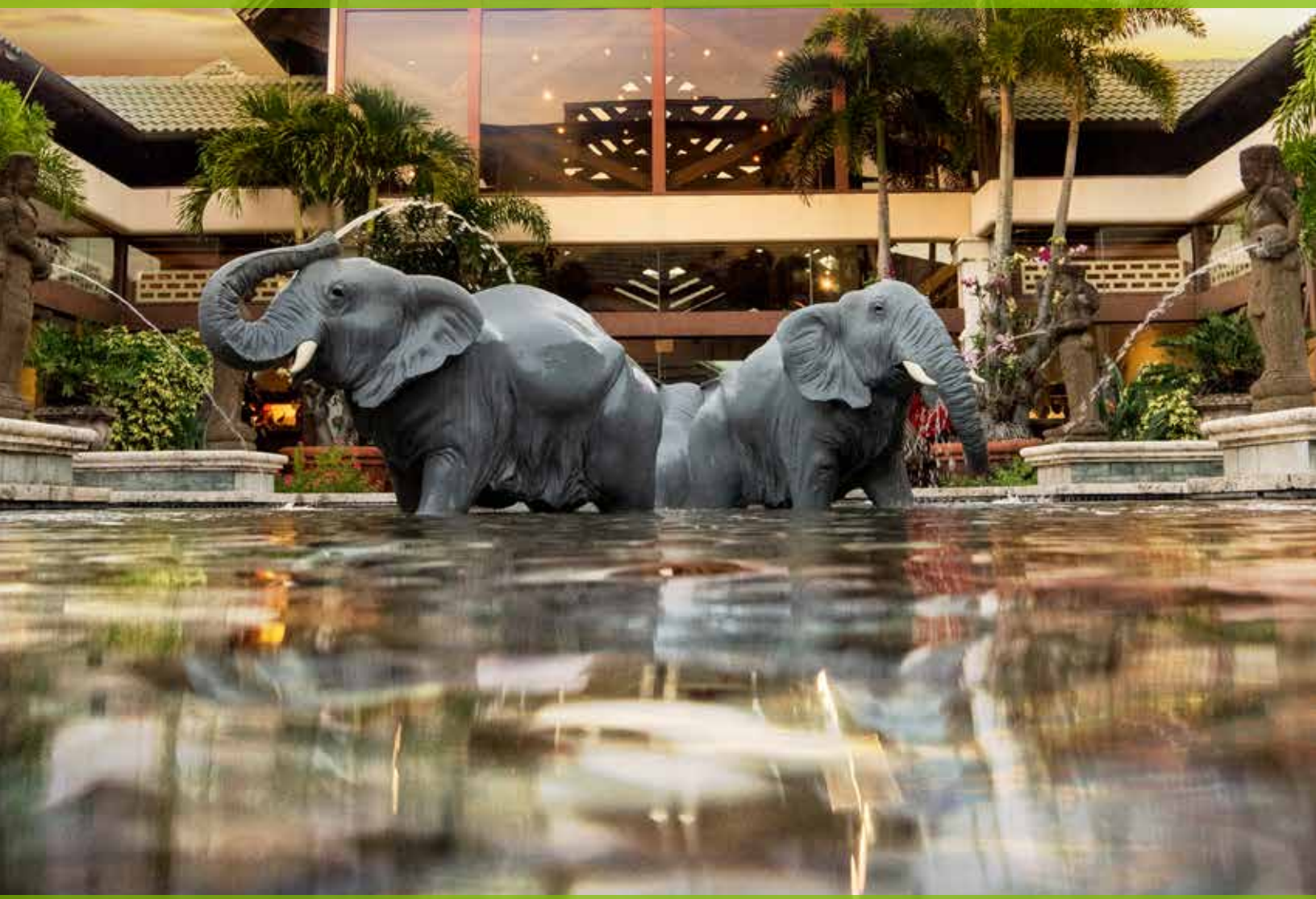
THE FLORIDA BAR FAMILY LAW SECTION

COMMENTATOR

VOL. XLIII, ISSUE 3 | 2025



JERRY L. RUMPH, JR. – GUEST EDITOR MICHAEL MENDOZA & CAROLYN WARE – CO-EDITORS

The Commentator is prepared and published by the

Family Law Section of The Florida Bar

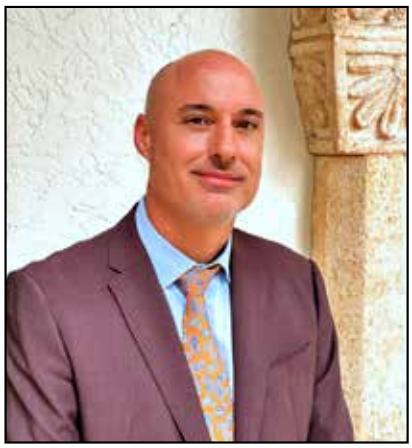
Statements of opinion or comments appearing herein are those of the authors and contributors and not of The Florida Bar or the Family Law Section.
Articles and cover photos considered for publication may be submitted to publications@familylawfla.org
MS Word format is preferred for documents, and jpeg images for photos

ON THE COVER: Photograph courtesy of (c) Loews Hotels

INSIDE THIS ISSUE

Welcome from the Chair

Christopher Rumbold, Fort Lauderdale, 2024-2025 Chair



CHRISTOPHER RUMBOLD

When last we spoke, I was wishing each of you a very happy holiday season, and we were looking forward, with anxious anticipation toward the Marital & Family Law Review Course (MFLRC) and the second half of this bar cycle. I am very pleased to announce, that it was a smashing success by any and all employable metrics. This event is presented annually with our good friends and colleagues at the AAML-Florida Chapter, including, President, **Laura Davis Smith** and Executive Director, **Susan Stafford**. The Family Law Section's Marital & Family Law Review Course Committee is comprised of **Julia Wyda, Jack Moring, Autumn Graham** and **Carolyn Ware** with the tireless devotion of **Willie Mae Shepherd**. We had more than 1900 attendees from all over the State – from the Panhandle to the Keys and everywhere in between. This year's lecturers included: **Natalie Lemos, Caryn Green, Judge Jessica Costello, David Hirschberg, Ronald Kauffman, Elisha D. Roy & Dr. Deborah Day, Shannon Novey, Dori Foster-Morales & Meghan Clary, Charles Fox Miller, David Manz, Judge Fredrick L. Pollack & Jon Johnson, Abigail Beebe**, and **Thomas Sasser**, and separately, written materials were prepared by **Kenneth Gordon, Kristin Kirkner** and **Andrew Salvage**. Please save the date for next year's MFLRC to be held on January 30-31, 2026, at the Walt Disney World, Swan & Dolphin Resort. It was my distinct pleasure to present the Melinda Gamot Award, with **Laura Davis-Smith**, to **Jorge Cestero** and to present the Visionary Award to **Kimberly Rommel-Enright** – both exceptional leaders who exude professionalism and civility in all they do.

We would like to again thank the Sponsors for the MFLRC – Platinum Plus Sponsor – **CBIZ**; Platinum Sponsors – **Annex Wealth Management, Smolin, Bakertilly**, and **EisnerAmper**; Diamond Sponsors –**McCain, Samons & Fiorini**; Gold Sponsors – **Brinkley Morgan** and **O'Shell Daun CPAs**; Silver Sponsors – **SoberLink, Dean Dorton, FAZ Forensics** and **Hawk PI of Florida, Inc.**; Bronze Sponsors – **FAC/CPA, Matthew Lundy Law – QDRO Law, DPA FamilyLegal, Elkhorn Wealth Advisors, VECON – Voit Econometrics Group, Inc., Milestone Reporting** and **Girard & Johnson, LLC**; and *Exhibit Sponsors* – **Grass I Tamayo Group, QDRO Queen, Family Law Software**, and **The Florida Law Weekly**. Please consider these generous entities, next time you are looking for related professional services. Interested in becoming a new or returning Section sponsor? It's simple, just visit our website at https://familylawfla.org/get-involved/sponsors/. Or, call my office at 954.914.7866 and let's chat!

The MFLRC is held in tandem with our Section Meetings and Executive Council Meeting – many of which were standing room only! The work our committees do is so

continued, next page

Welcome from the Chair

CONTINUED, FROM PAGE 3

very important, and I am so pleased by the enthusiasm I saw! Thank you, thank you, thank you, to all our committees and committee members, from the newest member to the Committee Chair and everyone in between. It warmed my heart to see so many new and returning faces willing to sacrifice time at their practices to devote their energies to improving the practice and professionalism of family law. Are you interested in joining a Section committee, or Executive Council, or becoming the next Section Secretary? If so, now is a great time to think about what your leadership goals are for the next bar cycle as applications for Executive Council, Section Secretary and the Legislations Committee, along with the Committee Preference forms and Executive Council forms were due by March 15, 2025. I got my start in the Section by attending a committee meeting and raising my hand and asking, "what can I do to help?" It is that simple.

The Section's annual all-day Live (and virtual) CLE took place on February 21, 2025, in Jacksonville. The "*Consultation to Courthouse Steps*" program was incredible success. I would like to again thank our incredible speakers **John Henderlite**, **Autumn Graham, Lawrence Datz, Elisha Roy, Christie Guerrero, General Magistrate Beth Luna, Ashley Myers, Judge John Guy, Charles Willmott, General Magistrate Deirdre Wallace, Judge L. E. Hutton**, and **General Magistrate Natalie Tuttle.** If you were unable to join us in Jacksonville, the great information and CLE credit are available for after market purchase through the Florida Bar.

The Section's In-State Retreat is being hosted this year by Chairs, **Jamie Epstein, Kristin Kirkner** & **Yanae Barroso** along with **Willie Mae Shepherd** at the iconic W Fort Lauderdale on May 1-4, where we will focus on beachfront Zen. The retreat will include most meals, multiple cocktail receptions, on-site activities, a CLE, a special event at Xtreme Action Park, and dinner at STK954. As you may know, the retreat coincides with the annual Air and Sea Show on Fort Lauderdale Beach – so we will have a front row seat (from the hotel) to the event.

Make this year the year you become an active Section member – consider attending the CLE to get your education on and then join us at the retreat to get your fun on! (Bring your families and your fur babies!).

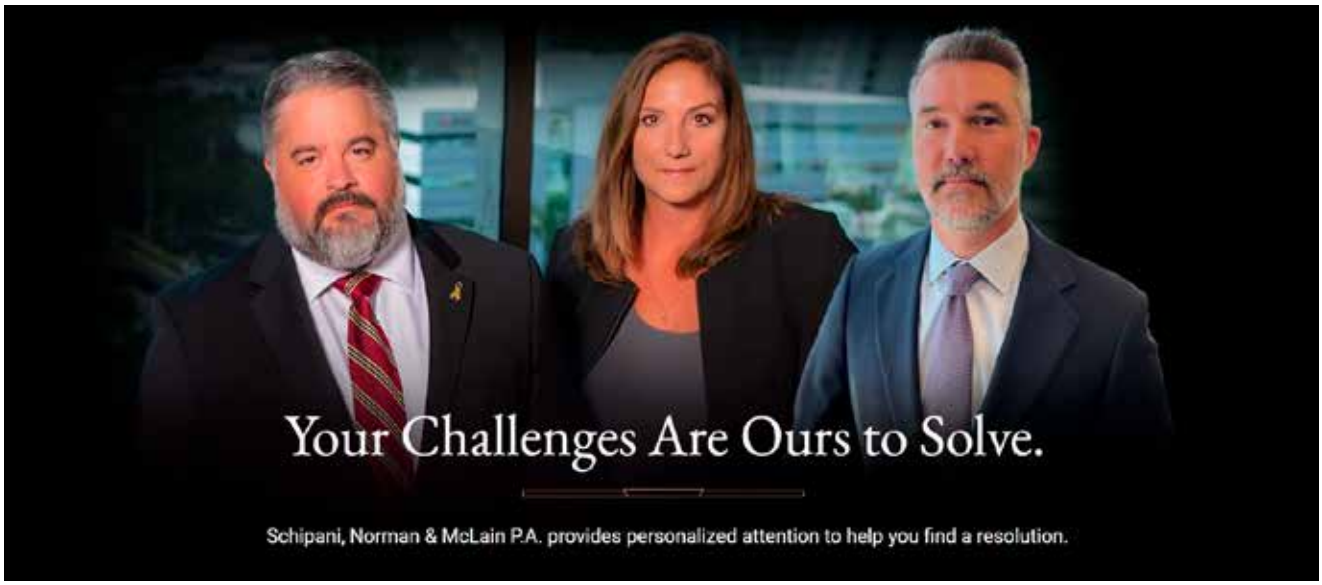
I would be remiss if I did not mention The Florida Bar's upcoming annual convention which will round out this bar cycle and start the next on June 25-28, 2025. Join us at The Boca Raton for our Section committee meetings, Executive Council and the Annual Awards and Installation Luncheon. This, too, is an event not to be missed – selfishly, it will be my last opportunity as Chair to thank each of you for your tireless work over the past twelve months. ☺.

This year, I have tried to lead from a place of kindness. We have picked affordable, dog-friendly venues that provide their food surpluses to local food banks. We gave out "success" stickers, had Zen rooms for yoga and coloring, had tacky shirt contests, provided MFLRC attendees fidget spinners and flamingo pens, and otherwise tried to instill a welcoming spirit in everything we have done. It is a daily decision to choose compassion over enmity. While it is not always easy, it is always worthwhile. The Prophet Mohammad stated, "A kind word

is a form a charity." In the Old Testament, "charity" is often largely represented by the concept of being kind and generous to those in need, particularly the maligned and disenfranchised. Buddha stated, "if you knew, as I do, the power of giving, you would not let a single meal pass without sharing it." In Hinduism, the concepts of kindness and charity are rooted in the practice of giving "dana" and selfless service "seva." These concepts are embedded in the secular world as well. For instance, Albus Dumbledore stated to Harry Potter, "Just like your mother, you're unfailingly kind. A trait people never fail to undervalue." And, when walking my dog the other day, I saw a sign that stated, "In a world where you can be anything, be kind." 🙂. My challenge to each of you (and myself on a daily basis) is to choose to be unfailingly kind, to practice compassion, empathy and charity in everything you (I) do and see the difference it brings in the world. Until next time, I remain yours.

SCHIPANI, NORMAN & MCLAIN, P.A.

FAMILY LAW TRIAL LAWYERS



1605 MAIN ST. STE 1110, SARASOTA, FL 34236 / 941.366.8333

MANASOTALAWYER.COM

Message from the Co-Chairs of the Publications Committee

By Chelsea Miller, Vero Beach, and Anya Cintron Stern, Miami

CHELSEA MILLER

ANYA CINTRON STERN

Spring is here! We have made it through the holiday season; we are revitalized and ready to take on what the coming months have to bring - fully equipped with a breadth of knowledge on Family law, following the Marital and Family Law Review Course. What a great way to start the New Year – reconnecting with our colleagues, learning about recent law changes and revisiting the basics. This issue of Commentator provides our readers with information on a wide range of topics that we will undoubtedly add to our rolodex for the practice of law. It can be said that in-person events help us reconnect with our peers and remind us of the collegiality that we experience in our profession. We always encourage our readers to get involved with the Section – chair a CLE, write an article for FAMSEG, Commentator or the Florida Bar Journal, join one of our substantive committees on children's issues, domestic violence, or equitable distribution. The Section is successful because of its members! Applications for Section leadership and Committee Preference Forms were available through March 15, 2025. We hope that you submitted yours so that Chair-Elect, Aimee Gross, has the opportunity to place you where you would like to be. Thank you to all the authors in this Issue. We continue to welcome articles and ideas for future publications – publications@familylawfla.org.

CO-EDITOR'S CORNER

By Michael A. Mendoza and Carolyn D. Ware

MICHAEL A. MENDOZA

CAROLYN D. WARE

It's hard to believe we are already here with Issue No. 3! We are well into the last half of the bar cycle; and so, we take this opportunity to remind you of our upcoming Section events including In-State Retreat from May 1-4 in at the W Hotel in Fort Lauderdale and Section Committee Meetings coinciding with the Florida Bar Annual Convention in Boca Raton. We look forward to seeing you there.

Though the weather is heating up and it feels like we have skipped to summer in many parts of Florida – all around us Spring has sprung! Spring is the perfect time for a fresh start—both personally and professionally. This time of year offers an opportunity to reflect on the ways we work, the systems we use, and the relationships we foster with our clients. Just as spring cleaning helps clear out the clutter in our homes, it can also be a time to declutter our practice and improve how we serve families during their most challenging times.

We would all do well to refresh and refocus during this season. From streamlining workflows to adopting new technologies, now is the time to take stock of what's working and what could use a little polish. There are excellent programs like Microsoft Co-Pilot, Alexi, or Westlaw's Co-Counsel that can bring a bit of AI assistance to our practices. The legal landscape evolves quickly, and so do the needs of our clients. By updating our tools, knowledge, and approach, we will be better prepared to navigate the complexities of family law and provide the best possible guidance during times of transition.

This time also gives us an opportunity to reassess our goals, both as professionals and in our commitment to our clients. To that end, we challenge each of you to consider taking on a pro bono case, moderate a CLE, or set another new goal and meet it before the bar year is done.

Here's to a season of growth, renewal, and improvement in your family law practice. We hope this issue of the Commentator provides inspiration and resources that help you on your path to self-improvement and commitment to betterment as a professional.

GUEST

EDITOR'S CORNER

By Jerry L. Rumph, Jr., Esq. B.C.S.

JERRY L. RUMPH, JR.

It is great to return as a guest editor of the Commentator, and I appreciate your attention to this issue. In line with Chris Rumbold's focus on mental health during his term as chair of our section, I wanted to create an issue that concentrated largely on the topic of mental health and trauma in the family law context. In this regard, I am honored to have submissions by the Honorable Lauren Alperstein, Circuit Judge, with Ms. Karen Weintraub, B.C.S., and Ms. Makayla Jacmacjian; the Honorable Dina Foster, General Magistrate in the Second Judicial Circuit; Mr. Gerard M. Virga, Jr., Esq.; and Ms. Laura Grossman, Esq. I also have the pleasure of publishing an excellent financial article co-authored by Mr. Hunter Hendrix, Esq., and Jason Soman, CPA.

Judge Alperstein, with Ms. Weintraub and Ms. Jacmacjian, have explored the impact of COVID-19 restrictions and virtual interactions on professionalism. They make a compelling argument regarding the relationship between in-person attorney interactions and professionalism and how attorneys can take steps to be mindful of professionalism in a new virtual world.

Following up on the Office of State Court Administrator and Family Law Section's trauma-informed court programming from the past year, Magistrate Foster offers a discussion on trauma-informed courts when dealing with pro se litigants. Specifically, she raises questions about the judiciary's role in creating a trauma-informed court process for pro se litigants and offers some ideas for how the judiciary can fulfill that role.

Mr. Virga examines the state of the psychotherapist-patient privilege in Florida family law proceedings following Judge Tanenbaum's concurring opinion in Vincent v. Vincent, 319 So. 3d 68 (Fla. 1st DCA 2020). Mr. Virga explains that Judge Tanenbaum challenges the doctrine of "calamitous event" as an exception to the psychotherapist-patient privilege by taking a strict approach to defining the scope of a waiver of a legal privilege and by interpreting the specific statutory exceptions to the psychotherapist-patient privilege set forth in section 90.503, Florida Statutes.

Laura Grossman looks at various real-life attempts by parties to manipulate finances and parenting in Florida family law cases and critiques the judicial propensity to require mediation of temporary issues in family cases when a party is not receiving financial assistance or time-sharing with their children.

Finally, Hunter Hendrix and Jason Soman give a lesson on the intersection of equitable distribution of pre-tax retirement assets and the consideration of penalty-free withdrawals from those retirement assets as a form of income in family law proceedings, particularly when support is at issue, including in situations discussed by Ms. Grossman in her article.

The considerations raised by these articles are important because mental health is important. Our mental health, as practitioners, is always under attack due to (1) stressful, high conflict cases, likely the result of one or both parties' own mental health issues, (2) the effort to balance our client's interests with the Bounds of Advocacy and the best interests of any children involved, and (3) shifting case management obligations, to name a few. This is why I am especially grateful for Magistrate Foster's thoughtful follow-up perspective to the Section's trauma-informed programming because I believe that the judiciary plays an integral part in addressing mental health issues experienced by attorneys, litigants, and other stakeholders, especially children.

Again, thank you for reading this issue, and I look forward to seeing you at the next Section event.

VIRTUAL PROFESSIONALISM IN THE POST-COVID ERA

Judge Lauren Alperstein, Seventeenth Judicial Circuit
Karen Weintraub, Esq., B.C.S
Makayla Jacmacjian, Esq.

1. Pre-Covid Legal Landscape

Prior to the COVID-19 pandemic, family law practitioners relied heavily on in-person court hearings and face-to-face interactions as a cornerstone of their professional practice. By way of example, the Eleventh Floor of the Broward County Courthouse was always buzzing with activity. Every week, from Monday through Thursday, at 8:45 a.m., the "11th Floor log-jam" was a familiar and exciting experience, where attorneys often found themselves standing in crowded hallways waiting for their case to be called.

Although there were complaints about the time spent travelling to and attending motion calendar—when the hearing time was far less than the time spent travelling to court—in hindsight, this time with our colleagues was invaluable. To see and collaborate with one another, negotiate agreements, discuss vacations and family milestones, share courthouse chatter, meet new associates, and simply catch up with fellow colleagues was an integral part of the Broward County family law landscape. These experiences fostered a cohesive network and rapport among our fellow family law practitioners. The ability to negotiate the language of a settlement agreement and draft orders together in person added a layer of efficiency and respect that helped maintain the integrity of the legal process.

Once the Covid-19 pandemic forced the courthouse to shift to virtual proceedings overnight, this opportunity for critical collaboration ended with a screeching halt. The loss of in-person opportunities during and post-COVID highlighted how critical these interactions were to maintain the high standards of professionalism that the family law practice demands. Now, roughly two years later, the fall-out is readily apparent, and immediate steps must be taken, by each one of us, to ensure a return to the professionalism and collaboration of the pre-Covid era. This is not only a necessary component of our legal practice but is mandated by the Florida Bar.

2. The Abrupt Loss of In-Person Communications

The shift to virtual hearings post-COVID has significantly impacted the practice of family law, both positively and negatively, raising concerns about maintaining the high ethical standards outlined in the Florida Rules of Professional Conduct. In-person interactions that once encouraged collaboration and quick resolutions have been replaced by an impersonal virtual environment, where attorneys can more easily "Zoom on" to the next case.

The absence of physical presence and interactions in and outside the courtroom has led to unprofessional attire and behaviors when before a court, as lawyers feel they are no longer required to maintain the same level of decorum or formalities. Additionally, the presence of children and other potential witnesses in the background of virtual court proceedings introduces significant ethical and legal challenges.[1] Florida Family Law Rule of Procedure 12.407 directly addresses this concern by requiring that, in family law proceedings held remotely via communication

technology, "the parties, counsel, and the court must ensure that children are not present or nearby during any remote proceeding or able to overhear any remote proceedings."[2] This rule recognizes that the presence of the children can compromise the integrity of the proceedings and be detrimental to the children involved.[3] Virtual hearings also make it much more difficult to enforce traditional courtroom practices, such as the sequestration of non-party witnesses.[4]

The transition to virtual hearings required judges to make life-altering decisions, such as determining time-sharing arrangements or resolving issues of abuse and neglect, without having the litigants physically present in the courtroom.[5] In-person hearings traditionally allow judges to observe body language, demeanor, and other non-verbal cues that can be critical in assessing credibility and making informed decisions. Adapting to a virtual format means relying primarily on spoken words and limited visual input, which presented unique challenges.

Clients have also faced significant challenges in the virtual court environment, often feeling isolated and unsupported during some of the most stressful moments of their lives. The lack of direct, in-person interaction with their attorneys and the court along with trying to navigate the technical challenges of Zoom hearings that require a stable internet connection has heightened feelings of anxiety and alienation, particularly in emotionally charged family law cases. Virtual hearings have also raised safety concerns, especially in cases involving domestic violence or child abuse, as the absence of a secure, neutral space can leave vulnerable individuals at risk.

Attorneys, too, have faced their own set of challenges. The shift to virtual practice eliminated the informal yet essential opportunities for in-person collaboration and decompression, such as courthouse conversations and time to decompress between hearings. The continuous flow of virtual hearings and meetings has left little time for reflection or recovery, contributing to heightened stress and technology burnout. The loss of camaraderie and support among family law practitioners, coupled with the pressure of navigating unfamiliar digital platforms, has further strained the professional culture that once defined the field.

Despite these challenges, the family law community continues to adapt, working toward solutions that balance the benefits of technology with the irreplaceable value of in-person interactions.

3. Application of the Florida Rules of Professional Conduct to Virtual Hearings

While the Florida Rules of Professional Conduct may benefit from updates to address the nuances of virtual practice, existing rules remain applicable and provide essential guidance in the legal community.

A. Competence (Rule 4-1.1)

Florida Rules of Professional Conduct Rule 4-1.1 emphasizes that competent representation requires legal knowledge, skill, thoroughness, and preparation.[6] In today's technology-driven world, competence extends beyond substantive legal expertise to include understanding and effectively utilizing technology. The comments to Rule 4-1.1 specifically state that attorneys must ***"keep abreast of changes in the law and its practice"*** and understand ***"the benefits and risks associated with the use of technology."***[7] The authors of this article verily believe that additional seminars and trainings regarding the use of technology as it relates specifically to our practice of family law would assist in fostering better compliance with this Rule 4-1.1.

B. Duty of Confidentiality (Rule 4-1.6)

Florida Rules of Professional Conduct Rule 4-1.6 prohibits lawyers from revealing client information without informed consent, subject to limited exceptions.[8] The open and easily accessible

virtual courtroom environment introduces new vulnerabilities that can compromise client confidentiality, such as the risk of inadvertent disclosure during virtual hearings.

C. Diligence (4-1.3)

Florida Rules of Professional Conduct Rule 4-1.3 mandates that attorneys demonstrate reasonable diligence and promptness when representing their clients.[9] This Rule emphasizes the necessity for attorneys to prioritize their clients' interests, maintain steady progress on cases, and avoid unnecessary delays. While virtual tools and technologies have the potential to streamline legal processes by enhancing efficiency and communication, they also present unique challenges. If not managed properly, these tools can inadvertently cause delays, create gaps in communication, or diminish the overall quality of legal representation. Attorneys must, therefore, balance the benefits of technology with the need for thorough, attentive, and proactive client advocacy to uphold their ethical obligations.

4. Moving Forward: Adapting to the Virtual Legal Landscape

As family law practitioners continue to navigate the challenges of the post-COVID virtual environment, it is essential to implement strategies that balance the benefits of technology with the need to maintain professionalism standards. Here are some key recommendations for adapting effectively:

a. **Best Practices for Virtual Hearings:** Lawyers must dress professionally, as if attending court in person, and should remind their clients of the same.[10] Virtual proceedings should be conducted in quiet, distraction-free environments with proper lighting.[11] Lawyers should assure the court that no one else is present in the room with their client or witness and ensure that any children or minors are unable to hear or witness the proceedings.[12] All participants must ensure that their internet connection is stable and use devices with functional cameras, microphones, and speakers, ensuring clear communication and visibility.[13] Lawyers should practice with their clients and witnesses in advance of the hearing to ensure there are not unnecessary delays during the hearing.

A lack of familiarity with virtual platforms often leads to delays and inefficiencies, such as the "I am not a cat" video that went viral in 2022.[14] In that situation, the lawyer was not familiar with virtual "filters" and as such, appeared in a virtual hearing as a cat.[15] Certainly, although comical, this distracted from his ability to properly and competently represent his client in the virtual setting. Thus, lawyers and their clients must understand basic functions such as muting/unmuting, sharing screens, and troubleshooting connectivity issues.[16] Lawyers should test their equipment and internet connection before proceedings.[17] Participants should familiarize themselves with the platform and display their full names, turn on their camera, and announce their roles at the outset of the proceedings. If despite your best effort your technology fails, in good faith, it could possibly be a basis to set aside a hearing or order upon excusable neglect.[18]

A few other "hot tips" for remote hearings: ensure your device has sufficient battery life, with a charger readily available; have stable Wi-Fi or sufficient mobile data; keep phone dial-in information in case of technical issues; be mindful of lighting – position light sources in front of you for clear visibility; and practice using Zoom platform's features and test your set up in advance.

b. **Schedule Adequate Time in Between Virtual Events/Meetings to Reflect and Organize Your Thoughts:** Previously, upon the conclusion of an in-person hearing or meeting, a lawyer commuted or drove back to the office or to the next event. This provided adequate time to reflect upon the event, consider the consequences and plan strategy, moving forward. However, with the advent of virtual events, many of us just "Zoom in" to the next event and schedule these

meetings and hearings back-to-back, with no time in between to regroup, plan, stretch or even take a relaxing breath. Thus, when scheduling, allow sufficient time in between these events to allow you to decompress, take a walk, eat, drink and prepare and plan strategy based upon the outcome of the preceding event.

c. **Rebuild Connections Through Networking:** As social activities have largely returned to in-person formats, lawyers should participate in in-person networking events to maintain professional relationships and encourage collaboration with colleagues. Join local, state, or national bar associations and practice-specific groups to stay informed about best practices, resources, and technological advancements in virtual lawyering.

d. **Schedule Face-to-Face Interactions When Feasible:** Whenever possible, prioritize in-person meetings for mediations, consultations, or collaborative sessions to preserve the human element of legal practice. When appearing in a case, make a point to connect with opposing counsel. Introduce yourself, discuss the matter at hand, and collaborate to strategize the most constructive path forward. Building a professional relationship with opposing counsel fosters mutual respect and facilitates productive case resolution.

e. **Adhere Strictly to Professional Rules:** Apply the Florida Rules of Professional Conduct to ensure ethical standards are met in all virtual proceedings. Stay updated on rule modifications and incorporate them into daily practice to avoid challenges unique to the virtual environment.

In closing, please remember that just because court proceedings may not be in a traditional courtroom setting, all court hearings require the same decorum and professionalism that was expected and demanded in a pre-Covid 19 world.

Endnotes

[1] *See* Shalini Nangia, Julia A. Perkins, Erika Salerno Shadowens of Varnum LLP, *The Pros and Cons of Zoom Court Hearings*, THE NAT'L L. REV. (May 20, 2020), https://natlawreview.com/article/pros-and-cons-zoom-court-hearings.

[2] Fla. Fam. L. R. P. 12.407.

[3] *See* id.

[4] *See* Nangia, *supra note i.*

[5] Helene Stapinski, *Practicing Law in a Post-Pandemic World*, FORDHAM UNIVERSITY SCHOOL OF LAW, https://digital.law.fordham.edu/issue/winter-2022/practicing-law-in-a-post-pandemic-world/.

[6] R. Regul. Fl. Bar 4-1.1.

[7] *Id.* (emphasis added).

[8] R. Regul. Fl. Bar 4-1.6.

[9] R. Regul. Fl. Bar 4-1.3.

[10] The Fla. Bar, *The Florida Bar Recommended Best Practices for Remote Court Proceedings* (July 2022), https://www-media.floridabar.org/uploads/2022/08/TFB-Best-Practices-Guide-For-Remote-Court-Proceedings-2022-Edition.pdf.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] Guardian News, *'I'm not a cat': lawyer gets stuck on Zoom kitten filter during court* case, YOUTUBE (Feb. 9, 2021), https://video.search.yahoo.com/search/video?fr=mcafee&p=youtube+i+am+not+a+cat+lawyer&type=E211US105G91648#id=1&vid=b3d60d0f8c736fa0718f10a769336873&action=click.

[15] The Fla. Bar, *supra* note 10.

[16] *Id.*

[17] *Id.*

[18] *Burke v. Soles*, 326 So. 3d 83, 84 (Fla. 4th DCA 2021) (holding that "[a] claim that the failure to appear was caused by technological diffculties is the type of 'system gone awry' that may constitue excusable neglect").

Calamitous Events and Confidentiality: Untangling the Psychotherapist-Patient Privilege in Vincent v. Vincent

by Gerard M. Virga, Jr., Esq.

GERARD M. VIRGA, JR.

Mental health has become a focused nuance in our society and seems to permeate every corner of our lives. It becomes the focus of litigation in many different facets, including when it becomes apparent that the mental health treatment, or lack thereof, was the precursor to horrible criminal acts, like the mass shooting at Marjory Stoneman Douglas High School in Parkland, Florida, which left 17 dead. In that case, judges, laypersons, and lawyers alike would not have any issue with breaching the wall of privacy that stands between the shooter and a treating mental health professional, if only to attempt to understand "why" such a terrible tragedy happened. Notwithstanding, the psychotherapist-patient privilege is a cornerstone of law afforded to individuals to protect them from having to disclose their confidential communications with mental health professionals, providing patients with a safeguard. But, when does it become appropriate to allow the breach of this safeguard and allow the mental health records of a parent to play a part in a custody battle?

The First District Court of Appeal considered this issue in the case of Vincent v. Vincent, 319 So. 3d 68 (Fla. 1st DCA 2020). Even though the court denied the wife's petition for writ of certiorari, Judge Tanenbaum, in a concurring opinion, took the opportunity to rigorously examine the psychotherapist-patient privilege, especially in light of the common law "calamitous event" doctrine that has emerged in family litigation. This article delves into the legal nuances of Judge Tanenbaum's concurrence, exploring the court's reasoning and its implications for the psychotherapist-patient privilege under Florida law.

In the custody dispute between the Vincents, Ms. Vincent's mental health condition became a focal point. During the proceedings, Ms. Vincent called her counselor to testify about her mental stability and suitability as a parent, thereby intentionally placing her mental health at issue. Consequently, the trial court ordered the production of her mental health records from a recent voluntary hospitalization. Ms. Vincent petitioned to quash this order, invoking the psychotherapist-patient privilege under section 90.503, Florida Statutes. Section 90.503 allows mental health patients to refuse the disclosure of confidential communications or records related to the diagnosis or treatment of their mental or emotional conditions. The goal of this privilege is to protect the sanctity of the psychotherapist-patient relationship, fostering an environment where patients can be open and honest with their therapists. This open line of communication allows patients to seek mental health treatment without the worry of future legal repercussions and be assured that their private conversations will in fact be kept private.

However, the privilege is not absolute. Section 90.503(4)(c) outlines one of the critical exceptions to the privilege:[1] it does not apply

to communications relevant to an issue of the mental or emotional condition of the patient in any proceeding where the patient relies on that condition as an element of their claim or defense. This exception plays a pivotal role in custody disputes, where one party's mental health can directly impact the court's decision regarding the best interests of the child.

In Vincent, the First DCA denied Ms. Vincent's certiorari petition seeking to quash the order for the production of her mental health records. In his concurrence, Judge Tanenbaum emphasized that Ms. Vincent had voluntarily waived her psychotherapist-patient privilege by introducing her mental health as an issue in the custody dispute.[2] Once she called her counselor to testify, she explicitly invited the court to consider her mental health records without limitation, effectively conceding the relevance of those records and opening the door to have her full mental health discovered. The facts in Vincent fell squarely under the exception that the legislature carved out in the evidence code.

Still, Judge Tanenbaum expatiated the importance that a waiver must be a voluntary, intentional relinquishment of a known right. A fundamental aspect of his concurrence involves the distinction between voluntary and involuntary waiver of privilege, with the latter being an impossible form of wavier. This principle is well-established in Florida jurisprudence. For instance, Judge Tanenbaum quoted Thomas N. Carlton Estate, Inc. v. Keller, 52 So. 2d 131 (Fla. 1951), stating that "waiver is the intentional relinquishment of a known right and… may be inferred from conduct or acts that put one off guard and lead them to believe that a right has been waived." This standard was pivotal in Judge Tanenbaum concurring with the majority.

Because one must voluntarily and intentionally waive the psychotherapist patient privilege, Judge Tanenbaum rejected the idea that a "calamitous events" could lead to an involuntary waiver of the privilege as found in cases such as Critchlow v. Critchlow, 347 So. 2d 453 (Fla. 3d DCA 1977); Miraglia v. Miraglia, 462 So. 2d 507 (Fla. 4th DCA 1984); O'Neill v. O'Neill, 823 So. 2d 837 (Fla. 5th DCA 2002); and Zarzaur v. Zarzaur, 213 So. 3d 1115 (Fla. 1st DCA 2017). These cases posited that significant mental health events, ones termed as "calamitous", such as attempted suicide or involuntary commitment, could act as an involuntary waiver of the psychotherapist-patient privilege. Judge Tanenbaum not only firmly rejected this notion but clarified that the statutory framework does not support any type of involuntary waiver.[3] Judge Tanenbaum asserted that judicial interpretation effectively eroded the legislative intent behind the privilege, infringing upon the patient's right to confidentiality in their mental health communications. Mental health is already stigmatized in our society, and the idea of a calamitous event opening the door to public disclosure is a frightening one that may just lead individuals to fear seeking treatment, especially if a party anticipates a legal proceeding or is already involved in one.

Ultimately, Judge Tanenbaum's concurrence has significant implications for how mental health records are treated in custody disputes. While reinforcing the principle that a patient's voluntary decision to introduce their mental health as an issue in litigation can lead to a waiver of the privilege, it also sets forth a strong legal argument that the calamitous event doctrine has no statutory basis and is a clear violation of the legislature's authority "to make or modify" public policy.[4] Judge Tanenbaum's reasoning aligns with the statutory text and prevents the erosion of the privilege through judicial reinterpretation. By adhering strictly to the legislative language, the concurrence sets forth the argument that would ensure that the privilege remains robust, protecting the confidentiality of mental health communications unless the patient chooses to place their own mental health at issue.

For legal practitioners, the concurrence in the Vincent decision amplifies the importance of understanding the subtleties of the psychotherapist-patient privilege and its exceptions. When representing clients in custody disputes, attorneys must carefully consider whether and how to introduce evidence related to their client's mental health. If a client's mental health is likely to be a significant factor in the case, it is crucial to advise them on the potential implications for their privilege and the scope of records that may be subject to disclosure. It is clear that Ms. Vincent's lawyer could have successfully protected some of her records under the privilege and made mistakes by failing to object to the relevance of the records Ms. Vincent did not want admitted. If Ms. Vincent's lawyer had done that, there most likely would have been no need for her to ever seek certiorari relief. This is an instructive illustration to all practitioners to ensure they understand both the legislative intent of the psychotherapist-patient privilege and how case law has applied the privilege, so that they too can avoid potential appellate proceedings.

In conclusion, Judge Tanenbaum's concurrence is a pivotal opinion that strikes a blow to the calamitous event doctrine and details the importance of legislative clarity and judicial restraint in the interpretation of statutory privileges. While balancing these ideas can be difficult in application, especially regarding parenting issues where a court must consider the best interest of the child, it seems a better policy for the best interest of the child for parents to be able to securely seek mental health treatment if needed. By maintaining the integrity of the psychotherapist-patient privilege, Judge Tenenbaum's concurrence upholds a fundamental principle of mental health law, ensuring that individuals can seek treatment with confidence in the confidentiality of their communications. This decision's greatest impact is in the context of family law and custody disputes, but the decision also is diverse in its implications. Finally, Judge Tanenbaum's concurrence reminds us of the legislature's role in establishing the law and exceptions to it, such as found with the psychotherapist-patient privilege, and in limiting judicial interpretation to strict adherence to Florida statutes.

Gerard Virga *is the founding attorney of The Virga Law Firm, which maintains offices throughout the state Florida. A graduate of the University of Florida, he earned his Juris Doctorate from Cumberland School of Law and has since represented thousands of clients in divorce and family law litigation throughout Florida's counties and circuits.*

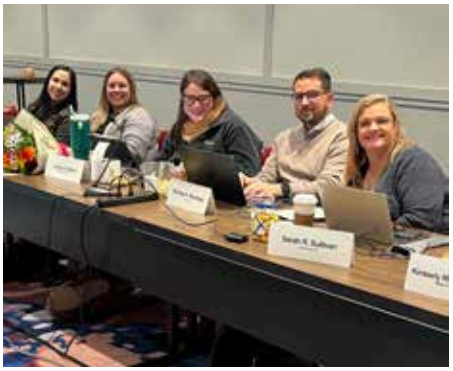
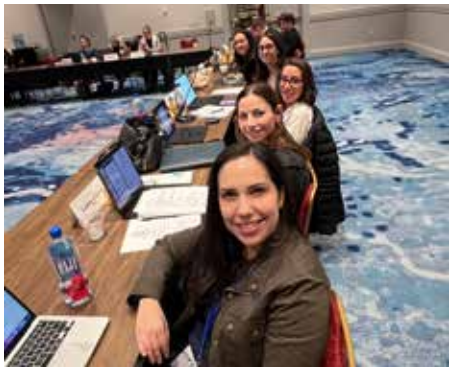
Gerard currently serves on several Florida Bar Family Law Section committees, including Family Law Children's Issues, Family Law Continuing Legal Education Committee, and Family Law Rules and Forms Committee. As lead attorney of the firm, he oversees all operations while maintaining an active litigation practice.

Together with his wife Mary and three children, Gerard participates in community service, regularly organizes fundraising events supporting charitable organizations in Florida's local communities. For more information visit www.TheVirgaLawFirm.com

Endnotes

[1] There are two other express statutory exceptions to the psychotherapist-patient privilege that need not be addressed here.
[2] *Vincent*, 319 So.3d at 69.
[3] *Id.* at 71.
[4] *Id.* at 70.

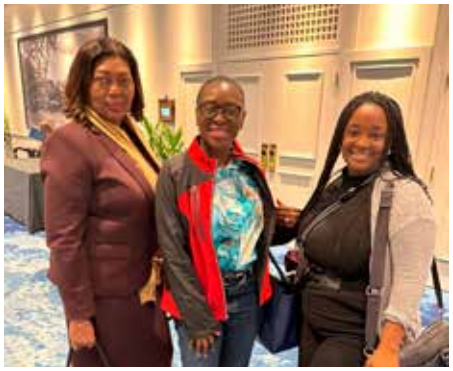
2025 Marital and Family Law Review Course & Section Committee Meetings

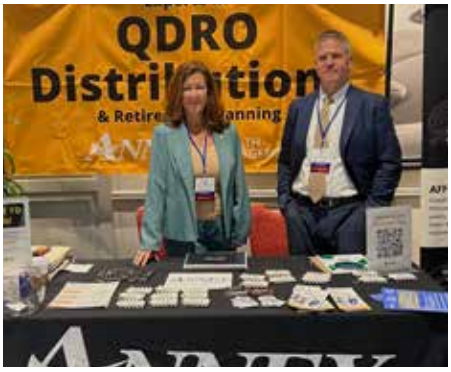


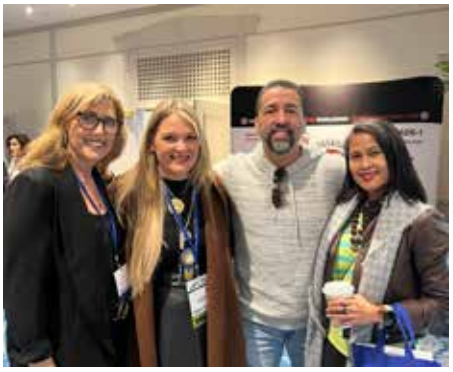



2025 Marital and Family Law Review Course & Section Committee Meetings

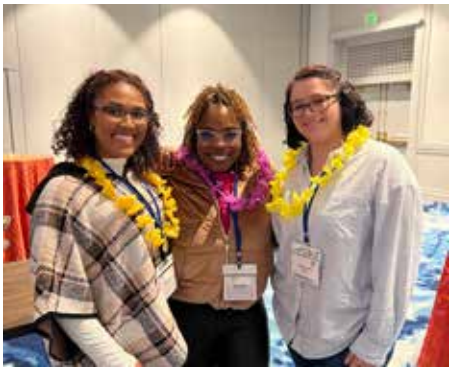





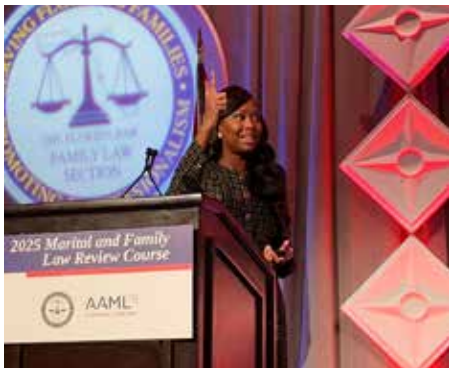


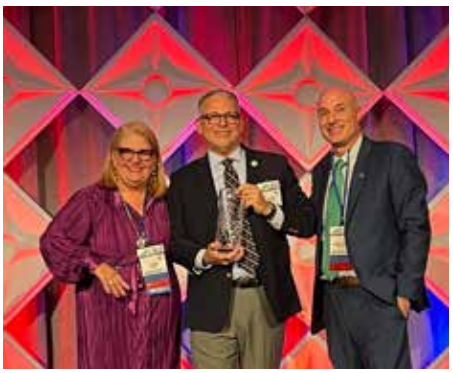

2025 Marital and Family Law Review Course & Section Committee Meetings

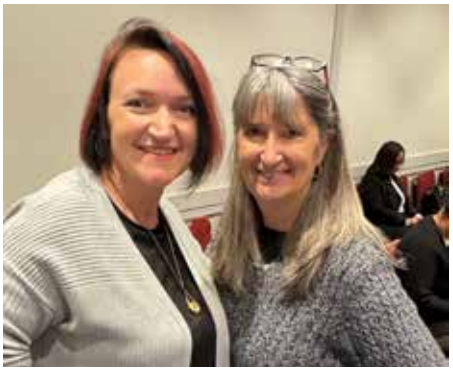


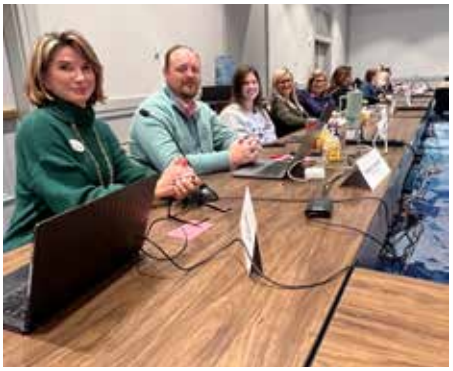


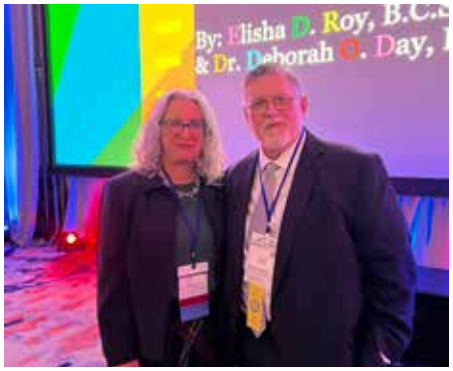


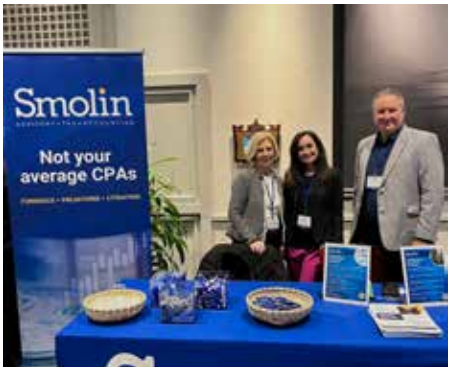


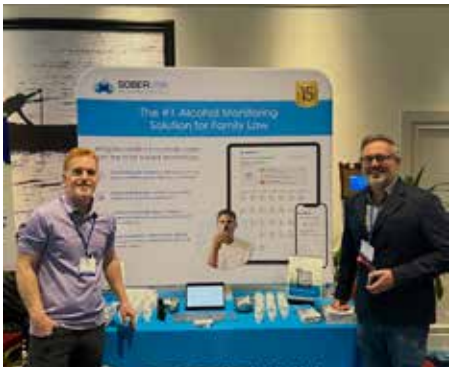

2025 Marital and Family Law Review Course & Section Committee Meetings

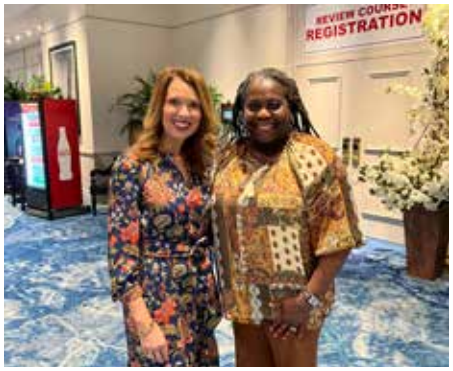












IRC 72(t) – A Source of Income Hiding in Plain Sight?

By Hunter J. Hendrix, Esq., and Jason Soman, CPA/ABV, ASA, CFE, CDFA®

HUNTER J. HENDRIX

JASON SOMAN

Introduction

Amid the typical scrutiny of assets, liabilities, and income, Section 72(t) of the Internal Revenue Code[1] (commonly referred to as "Rule 72(t)") is often overlooked as a potential source of income in dissolution of marriage cases.

This provision of the Code permits early withdrawals from retirement accounts without incurring the standard 10% penalty, potentially uncovering a source of income that is often overlooked. Florida case law underscores the necessity of considering such distributions, making Rule 72(t) a pivotal factor in reaching a financial resolution in family law cases.

In this article, we will explore this often-overlooked source of income and examine the key cases that every family law practitioner should be familiar with.

Understanding Retirement Accounts

Before diving into the nuances of Rule 72(t), it is essential for family law practitioners to understand the fundamentals of the retirement accounts they commonly encounter. There are two general types of retirement plans: "pre-tax"[2] retirement plans, such as IRAs, 401(k)s, and SEP plans, among others; and "post-tax"[3] retirement plans, such as Roth IRAs and Roth 401(k)s.

Pre-Tax Retirement Plans

With pre-tax retirement plans, the account holder generally receives a tax deduction in the year the contribution is made,[4] allowing the funds to grow on a tax-deferred basis. At age 59½, the account holder can withdraw these funds without incurring a 10% penalty[5]; however, such withdrawals are subject to ordinary income tax rates. Beginning at age 73,[6] holders of pre-tax retirement plans are required to take minimum distributions,[7] which are calculated based on the account balance and the holder's life expectancy, ensuring the government collects the deferred taxes.

Post-Tax Retirement Plans

Unlike pre-tax plans, an account holder receives no tax deduction for contributions made to a post-tax plan. However, these contributions grow tax-free and can be withdrawn beginning at age 59½ without incurring a 10% penalty. Additionally, unlike pre-tax plans, account holders are not required to take minimum distributions.

Internal Revenue Code (IRC) 72(t)

Rule 72(t) provides an exception to the 10% penalty for early withdrawals from both pre-tax and post-tax retirement plans made before age 59½, provided the funds are withdrawn as Substantially Equal Periodic Payments (SEPP).[8] These SEPP payments must continue without modification for the greater of five years or until the account holder reaches age 59½.[9],[10]

continued, next page

Determining Substantially Equal Periodic Payments (SEPP)

There are three methods for calculating SEPP payments from a retirement account, all of which require the use of life expectancy tables:[11]

- The Required Minimum Distribution (RMD) Method – The annual SEPP payment under the RMD Method is calculated by dividing the account balance for that year by the applicable number from the chosen life expectancy table for that year.[12] Under the RMD Method, the annual SEPP payment must be recalculated each year, and this recalculation is not considered a modification.
  - » For example, in 2023, if Jim is 49 years old and has an account balance of $1 million, his SEPP under the RMD Method will be $26,954 ($1 million ÷ 37.1 years life expectancy). In 2024, when Jim turns 50, if his account balance grows to $1.1 million, his SEPP for that year will be $30,386 ($1.1 million ÷ 36.2 years life expectancy). This recalculation will occur annually until Jim reaches age 59½, spanning a total of 10½ years.
- The Fixed Amortization Method – The annual payment under the Fixed Amortization Method is calculated by amortizing the account balance over the account holder's life expectancy, using an interest rate not exceeding the greater of 5% or 120% of the Applicable Federal Rate (AFR) published by the IRS for "either of the two months immediately preceding the month in which the distribution begins."[13] This method is similar to a mortgage amortization schedule, where the fixed payment is determined based on the account balance, selected interest rate, and life expectancy.
  - » For example, consider Jim in September 2024. If Jim is 50 years old, has an account balance of $1.1 million, an interest rate of 5.40%,[14] and a term of 36.2 years, his annual payment under the Fixed Amortization Method would be $69,800. Jim can withdraw $69,800 annually for the next 9½ years, until he reaches age 59½.
- The Fixed Annuitization Method - The annual payment under the Fixed Annuitization Method is the most complex of the SEPP methods but shares many similarities with the Fixed Amortization Method. This method, however, uses an "annuity factor" derived from the IRS annuity tables, which is based on the account holder's life expectancy and the chosen interest rate. This method is subject to the same maximum percentage as under the Fixed Amortization Method.
  - » If Jim is 50 years old in September 2024 and has an account balance of $1.1 million with an annuity factor of 16.0745861, his annual payment under the Fixed Annuitization Method would be $68,431 ($1,100,000 ÷ 16.0745861). In this example, Jim can withdraw $68,431 annually for the next 9½ years, until he reaches age 59½.

While the examples above illustrate annual distributions, 72(t) distributions can also be taken on a quarterly or monthly basis. It is important to note that a 72(t) distribution can only be applied to a single retirement account. Therefore, account holders often redistribute their assets among accounts before initiating a 72(t) plan.

Bringing it All Together – Family Law Example

Let's return to the example of Jim. Assume Jim is getting divorced at age 50 and has an annual deficit or financial need of $40,000 ($3,333 monthly). All assume that Jim will receive his $1,100,000 Roth IRA account as part of equitable distribution.

Under the Fixed Amortization Method, using an annual interest rate of 2.0%, Jim's SEPP would be $42,993 per year. Assuming the Roth IRA generates 4.0% in annual dividends and interest, Rule 72(t) allows Jim to withdraw $42,993 annually from his Roth IRA without: (i) incurring the 10% early withdrawal penalty, and (ii) reducing the principal balance of his account.

Year	Beginning Account Balance	Plus After Tax Rate of Return	Less 72 (t) Payment (End of Year)	Ending Account Balance
Year 1	1,100,000	44,000	(42,993)	1,101,007
Year 2	1,101,007	44,040	(42,993)	1,102,054
Year 3	1,102,054	44,082	(42,993)	1,103,143
Year 4	1,103,143	44,126	(42,993)	1,104,276
Year 5	1,104,276	44,171	(42,993)	1,105,454
Year 6	1,105,454	44,218	(42,993)	1,106,679
Year 7	1,106,679	44,267	(42,993)	1,107,954
Year 8	1,107,954	44,318	(42,993)	1,109,279
Year 9	1,109,279	44,371	(42,993)	1,110,657

While the example above demonstrates how Rule 72(t) can effectively offset Jim's financial need, in practice, the viability of using Rule 72(t) as a source of income varies based on several factors. These include the party's age, prevailing interest rates, account balance(s) involved, and whether the accounts are pre-tax or post-tax, as well as the magnitude of the need or deficit to be addressed. Conducting a careful and thorough analysis of the specific facts in your case is essential to determine whether Rule 72(t) is a suitable solution. As discussed below, Florida case law has both accepted and rejected the use of Rule 72(t) in certain appellate decisions.

Case Law Analysis

In Niederman v. Niederman, the Fourth District Court of Appeal upheld the imputation of income to the wife from her retirement accounts, distributed as part of equitable distribution, through the use of Rule 72(t). 60 So. 3d 544, 550 (Fla. 4th DCA 2011). The court reasoned those withdrawals under Rule 72(t) provided a viable method for generating income without depleting the principal, as a reasonable rate of return could sustain the wife's needs over time. Id. This decision highlights the importance of utilizing all available financial resources when determining support obligations, even if it necessitates early access to retirement funds.

At the same time, Florida case law reflects courts are generally reluctant to require the premature depletion of retirement account principal unless the circumstances justify such an approach, ensuring an impecunious spouse receives their equitable portion of the marital estate, while also ensuring these accounts fulfill their intended role as long-term financial safeguards.

In Ritacco v. Ritacco, the Fourth DCA emphasized that the decision to impute income from retirement accounts must consider the practicality of withdrawals. 311 So. 3d 988, 992 (Fla. 4th DCA 2021). While Rule 72(t) offers a mechanism to generate income without incurring early withdrawal penalties, the court noted that it may not always be reasonable or equitable to mandate substantial withdrawals that deplete the account principal. Id. In some cases, the income generated may prove so minimal that it becomes impractical or disproportionately costly. Id.

Practical Considerations for Practitioners

Given the different application of Rule 72(t) in Florida family law cases, highlighting both its potential and limitations as a tool for financial planning in dissolution of marriage proceedings, family law practitioners and retained experts must carefully assess whether Rule 72(t) aligns with their client's financial circumstances and broader equitable distribution objectives. Key considerations include:

- The client's age and proximity to retirement;
- Anticipated returns on investment within retirement accounts;
- The feasibility of preserving principal while meeting support obligations; and
- Balancing long-term financial security against short-term needs.

The use of Rule 72(t) in family law cases offers a nuanced yet powerful tool for addressing the financial needs of divorcing parties. As demonstrated in cases like Niederman and Ritacco, Florida courts recognize the potential of early retirement account withdrawals to generate income without depleting principal, provided the approach is reasonable and equitable. At the same time, courts remain cautious about mandating such withdrawals, reinforcing the principle that the specific facts of each case must be evaluated by courts when constructing equitable distribution schemes, alimony awards, and the relation between the two.

For family law practitioners, leveraging Rule 72(t) effectively requires not only a solid understanding of statutory provisions and appellate case law but also a thoughtful analysis of the client's unique financial landscape. By incorporating these considerations, attorneys can deliver innovative, customized solutions that secure their clients' short- and long-term financial well-being.

In a legal landscape that is increasingly driven by financial complexity, Rule 72(t) stands out

as a strategic option for achieving equitable resolutions. Properly applied, it has the potential to transform the division of retirement assets from a static allocation into a dynamic resource that meets immediate needs without sacrificing future security. Family law practitioners who master this approach can provide exceptional advocacy and guide their clients through the financial intricacies of dissolution of marriage cases with confidence and precision.

Hunter J. Hendrix, *Esq. is a Senior Attorney at Autumn Beck Blackledge PLLC in Pensacola, Florida and exclusively practices Marital and Family Law with extensive experience with business entities and complex financial matters. Learn more about Mr. Hendrix and his firm at* www.autumnobeck.com/staff-profiles/hunter-j-hendrix/.

Jason Soman, *CPA/ABV, ASA, CFE, CDFA® is a Partner at Soman Stewart Business Valuation & Forensic CPAs in Boca Raton, Florida. Mr. Soman specializes in advising legal counsel and clients on issues relating to business valuation, spousal support, and other financial forensic issues in divorce matters. Learn more about Mr. Soman and his firm at* www.ssforensics.com.

Endnotes

[1] Also referred to herein as "IRC" or the "Code."
[2] Also known as "taxable retirement plans" or "tax deferred retirement plans."
[3] Also known as "tax exempt retirement plans."
[4] Subject to various limitations, which are beyond the scope of this article.
[5] There are certain exceptions to the 10% penalty, such as hardship, purchasing a first-time home (up to $10,000) among others, including Rule 72(t) described herein. See full list here: https://www.irs.gov/retirement-plans/plan-participant-employee/retirement-topics-exceptions-to-tax-on-early-distributions.
[6] Previously age 72 for those who turned 72 on before December 31, 2022.
[7] Subject to certain exceptions, which are beyond the scope of this article.
[8] As defined by § 72(t)(2)(A)(iv) of the Internal Revenue Code.
[9] https://www.irs.gov/retirement-plans/substantially-equal-periodic-payments
[10] Other by reason of death, disability, or distribution to a qualified public safety officer under Section 72 (t) (10).
[11] Internal Revenue Service Notice 2022-6.
[12] IRS Revenue Ruling 2002-62.
[13] Ibid.
[14] Represents the maximum of 120% in the two months preceding the distribution: 120% of the AFR was 5.4% in July 2024 and 5.22% in August 2024.

Trapped in the Lobby of Family Court: Denial of Access of to the Courts, A Tilted Playing Field, Disperate Treatment for the Less Pecunious Spouse, and the Negative Impact on the Mediation System[1]

By: Laura Grossman.

LAURA GROSSMAN

"John" is a truck driver earning about $60,000 and he is married to "Susan," a registered nurse earning about $150,000.00. They have two minor children and reside in Florida. After they had a short separation due to Susan's affair, Susan obtained a default divorce by intentionally serving the temporary location at which John no longer resided. She married her paramour, while living with John, who believed they were fully reconciled, and she even applied for legal status for this new Husband. Further, Susan omitted the marital homestead and accounts from her financial affidavit, pleading no need for equitable distribution. The parties "separated" again before John found out about the default divorce. Several months later, Susan relented and agreed to vacate the fraudulent judgment. Angry that her plan was foiled, she withheld their children from John and refused to comply with mandatory financial disclosures. Nearly a year later, Susan produced her compelled financial disclosures. In all this time, the court denied John a hearing on temporary time-sharing, on temporary fees and support, and on a suggestion of perjury against Susan, instead ordering the parties to mediation on all temporary issues, a mediation delayed unreasonably by Susan's continued, blatant refusal to comply with disclosures. In this shocking, yet true, example of denial of access to the court, it is almost lost that the children, the voiceless victims of Susan's manipulations, have not seen their father for nearly a year and may have been told any number of damaging falsehoods about why.

The Florida family court system states its purpose as "resolving family disputes in a fair, timely, efficient, and cost-effective manner."[2] The Florida family court system has also recognized that therapeutic justice, a view that encourages family court judges to improve family functions through the provision of services that resolve some of the trauma and chronic stress that led the family to court in the first place.[3] Accordingly, the Florida family court system has identified a problem and a solution, but it has locked the doors to the judge's chambers so that families like "John's" do not get the decisions that lead to the necessary funding and help as more fully addressed herein.

Courts have read the right of access to the judicial system into both the Fifth and Fourteenth Amendments to the U.S. Constitution, suggesting that the use of judicial bodies as a method of dispute resolution through an orderly procedure is central to the concept of due process afforded by these amendments and that an orderly society cannot be maintained unless all of the people

have access to this means of resolving private disputes.[4] In *Boddie v. Connecticut*, 401 U.S. 371 (1971), Justice Harlan, writing for the majority, held that Connecticut's fee requirement for the filling of a divorce matter violated the United States Constitution's right of due process and access to the courts for the indigent plaintiffs, as it was the only method to obtain a divorce in the state of Connecticut. The Court recognized that it had found previously in *Loving v. Virginia*, 388 U.S. 1 (1967), that marriage involved interests of basic importance in our society.[5] In *Chambers v. Baltimore & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907), the Supreme Court held that the right of access to the courts is fundamental to our system of justice, "conservative of all other rights… ."

Yet, studies show that the majority of lower income citizens who need legal help for prosecuting and defending civil matters in our justice system are unable to secure it.[6] Interestingly, Reginald Heber Smith predicted that our justice system would become increasingly closed to the needs of the poorest in our society in the early 1900s.[7] Indeed, that prediction became a reality, and the reality for those least able to secure the necessary help is becoming a very intentional, systemic problem in our family court system. Alternative dispute resolution by mediation, which should have a positive influence on our system, has instead become a barrier to equal justice under the law for "the less pecunious spouse" within even middle and upper middle-class families as further explained below.

Florida Statute §44.1011 defines "mediation" in relevant part as follows:

> …a process whereby a neutral third person called a mediator acts to encourage and facilitate the resolution of a dispute between two or more parties. It is an informal and nonadversarial process with the objective of helping the disputing parties reach a mutually acceptable and voluntary agreement.

Absent a history of domestic violence that would compromise the mediation, section 44.102, Florida Statutes, requires a court to order mediation for "all or part of custody, visitation, or other parental responsibility issues as defined in s. 61.13" in any circuit where a mediation program has been established and permits referral to mediation in any action where mediation is not required. The average cost of an attorney mediator in Florida for 2024 is $250-$500 per hour.[8] The legislature did attempt to deal with the issue of mediation cost as a barrier to court by diverting part of a civil case filing fee towards a trust fund for the low-cost mediation and arbitration services. The program assesses a minimal fee to each party for the mediation, and makes the service available to parties with combined incomes of less than $100,000.00 annually based upon the parties' financial affidavits.[9] Accordingly, as suggested above, those among the lower middle class or even the "working poor,"[10] i.e., those spending "27 weeks or more" per year working or looking for work but earning below the poverty level, have some avenue for relief through subsidized mediation or the ability to comply with the mediation requirement at lower cost in order to get before a judge if the other party has no intention of mediating in good faith.

Indeed, in many cases, temporary issues not involving physical abuse are not well-suited to mediation or capable of being resolved, such as those cases involving substance abuse, mental illness, neglect of child medical issues, and denial of financial support for basic necessities, which also amounts to child neglect. Significantly, in most Florida family courts, an emergency is narrowly defined as a situation involving potentially "manifest injury" or "death." Accordingly, Florida family courts may not recognize the following situations as an emergency:

- A party's inability to admit that a substance abuse problem or mental health issue represents a clear and present danger to the other spouse, the children, or both;

- A party's intentional denial of access to funds for basic necessities, such as gasoline, food, medicines, or shelter;
- A party's needless withholding of access to children in an act of vengeance.

While persons may differ on whether these issues constitute an emergency, the fear of sanctions for wrongfully labeling something as an emergency has a chilling effect on attorneys and litigants. There is unquestionably a gaping hole in the family law process, one that is depriving many family litigants of access to the courts and denying them of the law's intended status of a "level playing field." In *Canakaris v. Canakaris*, 382 So. 2d 1197 (Fla. 1980), the Florida Supreme Court held that section 61.16, Florida Statutes, was intended to allow the parties to have similar financial wherewithal to secure legal counsel of competent ability. As an example, on the basis Florida's mediation laws, on October 21, 2010, Palm Beach County Family Court Chief Judge, Peter D. Blanc signed Administrative Order No. 5.207-10/10 regarding temporary relief in the Family Division. The order applied to **all temporary relief**, including, not limited to, "support, time-sharing, equitable distribution, residence, fees, and costs." The Order required that no motion for temporary relief could be set for a hearing until a mediation impasse had been reported. Similarly, in Broward, Sarasota, Manatee, and DeSoto Counties, many family divisions require mediation of temporary issues, inclusive of temporary fees and costs, prior to permitting the setting of a hearing. To be clear, however, the blame does not rest squarely on those working in the system, as they are working with severely limited financial resources.

As noted above, denial of access is not restricted to the poorest among us, nor restricted to women. Often, in families where the combined incomes exceed $100,000.00, one party has no direct access to the family's income, has access only to their own minimum income, or has access only to what the earner chooses to provide. Approximately 55% of American married households currently have a single breadwinner.[11] The wife is the primary or sole breadwinner in only 16% of these households and statistically carries more of the household and caregiving responsibilities regardless of whether she is a nonearner, a lower earner, or the primary breadwinner.[12] Although practicing family attorneys see that lack of access to the family income in households with a single earner or a primary earner is a common theme, access to information about money arrangements in households is difficult to come by according to the largest the *International Social Survey Programme Family and Changing Gender Roles* module published in 2012.[13] The most recent information indicates that thirty-four (34) percent of married households do not pool money or only pool some money.[14] Accordingly, there is a relatively high probability of a party to a divorce having no financial access sufficient to hire competent counsel or pay for a private mediator where the household income exceeds $100,000.00. These litigants fall into a gap. They are typically homeowners with a vehicle and other personal property assets and often have at least some income that prevents them from either being deemed indigent for costs or eligible for legal aid services, meaning their financial profile looks good on paper but they lack the liquidity necessary to prosecute and defend family actions.

While "John" is just one of many examples of men who fall into this category, the statistics show that women suffer disproportionately. They have borrowed money to remain "in the game," money that they will likely never recover as they are forced to settle for less than their legal entitlement at mediation or risk bad results in court another half year or more down the line. In some instances, the more pecunious spouse refuses to mediate in good faith, using the mediation itself as a delay tactic to finish the strategy of "starving out" their spouse.[15] In

all of these instances, it is not merely the less pecunious spouse who is suffering, but children, the persons whose "best interests" are supposed to be the focus of the family court process above all else. More common are examples like "June's" below:

June has been married to Jim for ten years. He is an investment advisor for a large brokerage firm. June has a degree in fashion marketing from a good school but is a stay-at-home mother for the last eight years. They have three children, a son age eight, and fraternal twins, age 6. Jim earns about $800K annually in salary, bonus, and deferred income. They live in a $1.8 million dollar home in Palm Beach County. Jim controls 100% of the money and credit and wired money out of their savings when he realized she was filing for divorce. Jim is a serial adulterer who also frequents strip clubs and prostitutes. He is a high-functioning alcoholic who also dabbles in drug use. He "Ubers" from the strip clubs each evening so he will not get stopped for DUI. All of the alcohol purchases, strip clubs, hotels for prostitutes show on the credit card and bank statements. He is physically abusive towards June on occasion and engages in physical punishment of the children that June feels is inappropriately fueled by anger, which may be inextricably intertwined with the substance abuse issue. June's divorce has been pending for ten months. She requested a substance abuse and anger management evaluation as well as supervised time-sharing pending determination for further court intervention. June is seeking temporary legal fees, legal costs, temporary alimony, and temporary child support. Jim retaliated with claims of "alienation" and a request for a Guardian ad Litem, falsely labeling June's claims as a "child alienation tactic." The judge ordered the parties to mediate "the entire case" before they had even exchanged financial records. After a failed mediation, which resulted in no financial relief for the Wife, the Judge set trial for April of 2025 without hearing a single motion filed in the case and ordered the parties to mediate a second time. June's Mother has been paying her legal fees and costs to date.

Identification of problems, such as in "June's" case, necessarily begs the question of solutions, and suggested solutions lead to the inevitable discussion of funding. The obvious solutions are as follows: (1) a legislative carve out of temporary family litigation issues and urgent child issues from mandated mediation requirements; and (2) a legislative prioritization by statutorily mandating expedited hearings for the less pecunious spouse to receive the funds to level the playing field and hearings involving a reasonable perception of child endangerment from a parent's substance abuse disorder, other mental conditions, and/or financial neglect.

In 1998, Floridians passed Section 14 to Article V of the Florida Constitution (a/k/a "Revision 7") which relieved counties of the burden of shouldering the cost of their own court systems in order to equalize the treatment of Floridians within the court system regardless of their location within the state.[16] However, this meant that the court system was funded by the state's general revenue fund, those funds arising out of state sales tax and property tax.[17] Accordingly, the funding for the court system rises and falls with the economy, and historically, the worse the economy, the more Floridians turned to the court system to resolve disputes. Due to the 2008 subprime mortgage crisis, which led to historical levels of foreclosure filings, in 2009, the Florida Legislature tried to stabilize the court system by increasing filing fees and fines, a "solution" which falls disproportionately upon those in need who may not qualify as indigent for costs.[18] Ultimately, the Legislature chose to places those fees and fines into the general revenue stream, which better absorbs the ups and downs of increased court filings than the court system alone. While the equalization of funding through the general revenue system was good in theory, it did nothing to ease the fact that Florida simply does not

sufficiently fund its court system. Currently, the Florida Courts receive only about 0.6-0.7% of Florida's actual budget, less than 1% of its total budget.[19]

According to the Centers for Disease Control and Prevention (CDC), Florida had the sixth highest divorce rate in the nation in 2021.[20] Undoubtedly, then, if Florida truly cares about its families and the best interests of children, it must reallocate more of its budget to its court system generally. However, it is also necessary to carve out the urgent temporary issues from the mandatory mediation that often bring families to the courthouse in the first instance so that families get the decisions, direction, and services necessary to protect and heal the most vulnerable in our population. For these urgent issues addressed above, mandated mediation has only become a strategic tool used by the more pecunious spouse in a litigation strategy that harms the very people the system has recognized most need help and intervention.

Laura J. Grossman *is a Senior Associate at Cabanas Law Firm, P.A. She has been practicing since 1997 and is a Florida Supreme Court Certified Family Mediator and Collaboratively trained. Laura also holds a Master of Science in Mental Health Counseling.*

The summaries in this article are actual pending cases throughout the state of Florida. However, personal details and locations have been omitted to protect the identity of the litigants.

Endnotes

[1] The summaries in this article are actual pending cases throughout the state of Florida. However, personal details and locations have been omitted to protect the identity of the litigants.

[2] *Family Court in Florida*. Florida Office of State Courts Administrator. (n.d.). https://www.flcourts.gov/Resources-Services/Office-of-Family-Courts/Family-Court-in- Florida#:~:text=Family%20Court%20Purpose,efficient%2C%20and%20cost%20effective%20manner.

[3] The problem, Florida Office of State Courts Administrator (2024), https://www.flcourts.gov/Resources-Services/Office-of-Family-Courts/Family-Court-in- Florida/Family-Court-Tool-Kits/Family-Court-Tool-Kit-Trauma-and-Child-Development/The-Problem (last visited Oct 6, 2024).

[4] *Boddie v. Connecticut*, 401 U.S. 371 (1971).

[5] *Id.*

[6] Legal Services Corporation, *Documenting the Justice Gap in America* (September 2005).

[7] Reginald Heber Smith, Justice and the Poor 8, 15 (Patterson Smith Publishing 3d ed 1972) (1919).

[8] Bieber, C. and Sember, B. (2023) Divorce mediation cost in 2024, Forbes. Available at: https://www.forbes.com/advisor/legal/divorce/divorce-mediation-cost/#:~:text=Hourly%3A%20With%20this%20approach%2C%20you,%24100%20to%20%24350%20per%20hour. (Accessed: 02 September 2024).

[9] §44.108, Fla. Stat. (2024).

[10] WHO ARE THE WORKING POOR IN AMERICA? CENTER FOR POVERTY AND INEQUALITY RESEARCH, https://poverty.ucdavis.edu/faq/who-are-working-poor-america (last visited Oct 27, 2024).

[11] Fry, R. (2023) *In a growing share of U.S. marriages*, husbands and wives earn about the same, Pew Research Center. Available at:https://www.pewresearch.org/social-trends/2023/04/13/in-a-growing-share-of-u-s-marriages-husbands-and-wives-earn-about-the-same/ (Accessed: 02 September 2024).

[12] *Id.*

[13] Pepin, J. R. (2022). A Visualization of U.S. Couples' Money Arrangements. Socius, 8. https://doi.org/10.1177/23780231221138719

[14] *Id.*

[15] While some Florida counties use status quo orders to attempt to prevent the use of financial starvation as a strategy in family court, and many of these orders state that the court must provide expedited hearings on enforcement motions, obtaining an "expedited" hearing often does not bear out in reality. Furthermore, some Florida circuits have rightly pointed out that status quo orders violate due process in multiple regards and have accordingly not issued such orders. There are also some counties in which each judge determines whether they intend to use the status quo order in mandated mediation requirements and a legislative prioritization of the obvious need for expedited hearings for the less pecunious spouse to receive the funds to level the playing field and hearings involving a reasonable perception of child endangerment from a parent's substance abuse disorder, other mental conditions, and/or financial neglect. The author posits that an understanding in the "more pecunious spouse" that these hearings will occur quickly, and the law will be applied appropriately is likely to lead to more direct resolutions of at least the temporary fee, cost, and support issues directly between counsel prior to hearing, as it is the knowledge that the mediation can be used as either leverage or delay for this litigant that drives his or her strategy rather than the law. Lack of funding for the family court system is, of course, what led to the overuse of alternative dispute resolution to attempt to resolve issues where there is an obvious and innate imbalance of power.

[16] History of court processes, programs, and initiatives, Florida Office of State Courts Administrator (2024), https://www.flcourts.gov/Publications-Statistics/Publications/Short-History/Delivering-Justice (last visited Oct 6, 2024).

[17] *Id.*

[18] In the same way that the mediation mandate disproportionately harms the less pecunious spouse, so to do high filing fees, as these litigants appear too wealthy on paper to qualify as indigent notwithstanding that they may have no access to the liquidity necessary to pay costs to the courts or experts necessary to prosecute their cases.

[19] *Id.*

[20] Divorce Rates by State: 2019-2022, Center for Disease Control, https://www.cdc.gov/nchs/pressroom/sosmap/divorce_states/divorce_rates.htm (last visited Feb. 18, 2025).

Trauma-Informed Courts and Pro Se Litigants: Judicial Reflections

By Dina Foster, General Magistrate

DINA FOSTER

In 2023-2024, the Office of State Courts Administrator and the Family Law Section of the Florida Bar conducted statewide Trauma Family Law workshops throughout the state. This was an extraordinary effort by OSCA and the statewide planning team—Sarah E. Kay, Honorable Jack Hellinger (6th Circuit), and Magistrate Phillip Wartenberg—as well as contributions from the Florida Chapter of the AAML. The program was developed to create a trauma-informed and trauma-responsive domestic relations court process among the local courts, local practitioners, therapeutic and local resources, and a trauma informed judiciary.

This trauma-informed programming inspired me to write this article, which evolved from the following thoughts: The judiciary can play a pivotal role in informing family court litigants on the impact of trauma on their children. What is the role of the judiciary when it comes to informing litigants on the impact of trauma on their children and what are the most effective methods for doing so?

"Trauma" can be defined or contextualized as: "An emotional Response to a terrible event" and as "exposure to an emotionally disturbing or life-threatening event with lasting adverse effects on capacity to function." It's not the event itself but the continuing fear and sense of not being safe. Trauma often presents with physical symptoms like migraines or sleeping or eating disorders as well as with mental issues like anxiety or depression. Trauma can affect babies and young children by witnessing yelling or physical violence. If unhealed, trauma can be passed from generation to generation.[1]

Separation and divorce are stressful for parents and children. It is considered as one of the ten "Adverse Childhood Experiences" (ACEs) that can negatively impact children for a lifetime.[2] Stress impacts brain development especially during the pivotal time from birth to age five years, when ninety percent of the brain is hard-wired. These early years shape the teenager and adult they become.

Families in conflict may mistakenly think that children won't be affected by the yelling or hitting and that young children won't remember. But brain science shows that even before it has words to express its fears, the body remembers. Stress activates the fear response in the brain (amygdala), which hijacks the thinking part of the brain (prefrontal cortex).

As a general magistrate, the complexity of addressing trauma-related issues with pro se litigants is especially challenging. Of course, awareness by attorneys practicing in domestic court should enhance the process and the outcomes in cases. But when there are no attorneys on a case, how does a court address these issues. Should the court educate the litigants beyond what is instructed in the Parent Education and Family Stabilization course required by section 61.21, Florida Statutes ("Parent

Stabilization Course")? It has been my experience that the Parent Stabilization Course is insufficient to address the impact of trauma on litigants and children.

As I complete my third year as a general magistrate, I continue to consider my own personal style and what role I play or should play by informing the litigants about ACES and the impact of trauma on children. Awareness of ACES and the impact it has on parties and children is important.

A recent case before me accentuates how trauma impacts all aspects of the case. A mother was physically abused growing up, and she did not receive any mental health treatment for the abuse. Later in life, after giving birth to three children, her childhood trauma emerged into rage and she seriously battered her 10-year-old child. She was convicted of felony battery, incarcerated for four years, and received mental health treatment during her incarceration. Ideally, the child would have trauma therapy and then parent/child therapy to repair the relationship. Understanding the multigenerational trauma can help victims empathize and give the parent another chance. But, what assurances are necessary to ensure the now fourteen year-old child that he will be safe? What if the fourteen-year-old does not want any contact with his mother even after completing therapy?

In addition, how does this trauma impact the other aspects of the case? Financially, if the father is awarded sole parental responsibility and the majority or all of time-sharing, then child support must be calculated accounting for these considerations. Again, financial considerations often will dictate the parties' behavior and motivations. The child has a right to child support. Being aware of denying the mother time-sharing, or granting only limited time-sharing, and ordering mother to pay child support may impact the mother's own trauma through a sense of piling on. Is the court allowed to "deviate" because of mother's prior trauma under section61.30(11)(a)11., Florida Statutes, which permits the court to make "any other adjustment that is needed to achieve an equitable result."

Is awareness enough? How does the Court educate parents about the impact of trauma and the cycle passed down by generation? Each judicial official has their own individual style or practice that needs to be authentic to that judge or general magistrate. My colleague, Administrative General Magistrate Ace Pedrosa, adopted his own ACES information sheet to give to litigants. Former General Magistrate, Amanda Wall, also developed a video for litigants to watch prior to a hearing.

I personally discuss the impact of trauma on the children with the litigants especially if the parents need to hear it or will be receptive to it, which is not always the case. I also highly recommend trauma therapy for the entire family, even for young children to help repair the family relationships. I continue to contemplate the best manner to impart this knowledge and awareness to the parties. There is a role the court and judicial officials can play with informing parents about their behavior and the impact of trauma on all involved, and it is always a work in progress! It's not so much about perfection but taking action in a positive direction.

If you'd like to learn more, consider books or YouTube videos by Dr. Bessel van der Kolk, such as:

https://www.youtube.com/watch?v=BJfmfkDQb14

https://www.youtube.com/watch?v=iTefkqYQz8g

See also https://www.nctsn.org/trauma-informed-care/families-and-trauma/introduction

I extend a special thank you to Dr. Mimi Graham, Director, FSU Center for Prevention & Early Intervention Policy, Tallahassee, Florida, 2024,

for her insight on the relationship between trauma and neurophysiology.

Dina Foster *is a General Magistrate in the Second Judicial Circuit. She currently hears all family law related matters in Wakulla, Leon, Jefferson and Franklin Counties. Prior to her appointment, Dina was a partner at the law firm of Pennington, P.A. in Tallahassee, Florida, practicing primarily in the areas of family law. Dina was a Certified Parenting Coordinator, Supreme Court Certified Family Mediator, and Guardian Ad Litem. She is also trained in Collaborative Law and was active in the Tallahassee Legal Aid and North Florida Legal Services prior to her appointment as a General Magistrate. She is currently a member of the Stafford Inns of Court.*

Prior to being licensed in Florida, Dina was licensed to practice law in North Carolina in 1991 and served as a District Court Judge in North Carolina for the 27B Judicial District for fourteen and a half years. She was a certified juvenile court judge for the State of North Carolina and presided over all domestic relations, domestic violence and dependency cases.

Endnotes

[1] American Psychological Association: https://www.apa.org/topics/trauma/; The National Child Traumatic Stress Network:

[2] Source: The National Child Traumatic Stress Network:https://www.nctsn.org/trauma-informed-care/families-and-trauma/introduction Rev.

Thank You to Our Annual Sponsors

SIGNATURE SPONSORS

NSM

FLORIDA APPEALS

Smolin
ADVISORY • TAX • ACCOUNTING

PLATINUM SPONSORS

OurFamilyWizard®

ARI S. HARPER, CPA, ABV, CFE

GOLD SPONSOR

DPA FAMILYLEGAL

FMG LAW Freeman Mathis & Gary LLP
When It Counts

SILVER SPONSOR

Green Cardigan Marketing.com
The Marketing Solution For Your Law Firm

PSYCHOLOGICAL AFFILIATES

BRONZE SPONSORS

MILESTONE REPORTING
YOUR PATH THROUGH LITIGATION

The Florida Bar
651 East Jefferson Street
Tallahassee, FL 32399-2300

PRSRT-STD
U.S. POSTAGE
PAID
TALLAHASSEE, FL
Permit No. 43