



# The Florida Bar

# FAMILY LAW SECTION

# COMMENTATOR



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MS Word format is preferred for documents, and jpeg images for photos.

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**ON THE COVER:** Photograph courtesy Susan Schultz Waller

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# Message from the Chair

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Amy C. Hamlin  
2019-2020 Section Chair

Hello Everyone! The 2019-2020 Year is off to a fantastic start! For those of you who missed it, there are pictures in this edition of our Instillation Lunch held during the Florida Bar Annual Convention in June. One of my favorites is the picture of the former Chairs of the Section who were in attendance. Abigail Beebe, Immediate Past Chair, recognized a number of very deserving award recipients. Congratulations to everyone! In July, we started off with a sold out Trial Advocacy Workshop in Tampa. Please check out the pictures on our website, [www.familylawfla.org](http://www.familylawfla.org), in addition to information about upcoming events and seminars.

Laura Davis Smith and Sonja Jean chaired the Publications Committee last year and did

an outstanding job. They set the bar pretty high, and, fortunately, Sarah Sullivan and Robin Scher, the current chairs, are up to the task. They hit the ground running, and with the help of Anya Cintron Stern, have a line up of informative articles for the year.

The Publications Committee is dedicated to educating the members of the Section about the law and best practices via the Commentator and the monthly e-newsletter, FamSeg. In addition, it informs people about all of the goings-on of the Section. Please don't hesitate to contact Sarah or Robin if you have an interest in writing or want to read about a particular subject. We welcome your feedback and hope you enjoy this edition.





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# Message from the Co-Chairs of the Publications Committee

Greetings Family Law Section Members! As most of us are recovering from the summer and getting back into the swing of Section involvement, Robin and I would like to introduce ourselves to our readership. I have served as co-chair of Publications in the distant past, and absolutely love being a part of the publications team. I am a true geek (proud) and enjoy reading, editing and writing articles for the Section and beyond. I have been involved in the Section on and off for over 20 years. My co-chair, Robin Scher, is new to the Publications Committee leadership team, but a veteran of the Section. Her keen critical thinking skills



SARAH SULLIVAN.



ROBIN SCHER

and fervent advocacy for those we serve are the foundation for so much of the work the Section has done over the years and the Publications Committee is lucky to have her. Together, along with Amy Hamlin, Chair of the Family Law Section, we plan to have four solid Commentators, multiple submissions to the Florida Bar Journal, and monthly electronic FamSeg's keeping you in the know about all things Family Law Section. We encourage all members to contribute both in idea and in written material, so if you have any ideas, articles or constructive comments, send them our way.

## Visit FAMSEG and see what's new!

The Family Law Section's FAMSEG is a monthly e-newsletter that keeps section members apprised of section activity. It includes upcoming meetings, events and announcements, and occasionally features substantive topics of interest.



[www.familylawfla.org](http://www.familylawfla.org)



# Message from the Co-Chairs of the Commentator

Time is precious and we are thankful for our contributing authors for dedicating theirs. The valuable insight each article provides is important for the progress of the Section and the advancement of legislation. The

Commentator provides family law professionals (including mediators, arbitrators, financial professionals, mental health professionals, divorce coaches the judiciary and attorneys) with the platform to exchange knowledge and ideas that other professionals incorporate



Anya Cintrone Stern, Esq.



Anastasia Garcia, Esq.

(or hope to incorporate) within their practice. If a professional goal is to become engaged in a scholarly publication process, connect with readers who share similar interests, and sharpen writing and research skills,

the Commentator welcomes your article submissions. We look forward to expanding the village that it takes to produce the Commentator. Submissions may be emailed directly to [anya@anyacintronstern.legal](mailto:anya@anyacintronstern.legal).



## SECTION CALENDAR

Look for information on the Family Law Section's website: [www.familylawfla.org/event/](http://www.familylawfla.org/event/)

November 14

**CLE: 10th Annual Family Law Case Law Update**

12:00 PM - 2:00 PM

Live Audio Webcast

Course #: 3448

December 12

**CLE: Mechanics of Board Certification**

12:00 PM - 2:00 PM

Live Audio Webcast

Course #: 3449

GUEST

## EDITOR'S CORNER



By Jordan Abramowitz, Esq.  
Coral Gables



Guest editing this edition of the *Family Law Commentator* was both an honor and a learning experience. I learned that it truly takes cooperation, collaboration, and tenacity to produce a publication as valuable as the *Family*

*Law Commentator*. I had the privilege of editing an article published in this edition of the *Commentator* that focuses on an important aspect of domestic relations actions: "status quo" administrative orders, sometimes referred to as "standing orders." While maintaining stability is vitally important to assisting lawyers and litigants during the pendency of a case, the article notes the lack of uniformity amongst the 18 out of 20 judicial circuits currently issuing such administrative orders. Orders may include

provisions more restrictive than current Florida law, impose obligations upon individuals that are not required by Florida law, and present potential conflicts with Florida constitutional provisions. While practitioners litigate the conflicts between the varied orders and Florida statutes, rules, and constitutional provisions, it is crucial for family law practitioners to familiarize themselves with the order that applies in their particular circuit. In addition to the article on "status quo" administrative orders, we also have great contributions from Eddie Stephens, Jerry Reiss and Marc Brawer, Ronald Kauffman, Thomas Gillmore, and Timothy Voit. The Section is fortunate to have such wonderful contributors to the *Commentator*.

I want to thank the Chairs of the *Commentator*, authors Amanda Tackenberg and Lindsay Gunia, and the Family Law Section for their hard work on this edition.



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- Receive the Family Law Section's Commentator, a quarterly publication containing all of the latest news involving the Family Law Section and Florida family lawyers.
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**Membership is only \$65.00.**

# Where Do We Stand?

## An Examination of Florida's Standing Family Law Orders

By Lindsay Gunia and Amanda Tackenberg



Lindsay Gunia, Esq.



Amanda Tackenberg, Esq.

The Florida Rules of Judicial Administration define an administrative order as *a directive necessary to administer properly the court's affairs but not inconsistent with the constitution or with court rules and administrative orders entered by the supreme court*. Fla. R. Jud. Admin. 2.120(c). The chief judge of each judicial circuit has administrative supervision over all courts within the circuit and may enter and sign

administrative orders necessary to carry out this responsibility. See Fla. R. Jud. Admin. 2.215. Each order is recorded by the clerk of the court and the clerk is to maintain a complete set of administrative orders which are considered public record. *Id.*

Due to the unique nature of family law cases, given the sensitive subject matter and high number of pro se litigants, many circuits began enacting standing temporary administrative orders (sometimes referred to as "status quo" orders or "standing orders") at the commencement of such actions. These standing orders were created in an effort to (1) promote the stability of families engaged in the domestic relations actions, (2) provide guidance in an effort to help parties pattern their behavior and conduct

in ways that reduce the negative impact that such proceedings have on the children and parties involved, and (3) reduce the number of emergencies/hearings during the beginning stages of dissolution of marriage and paternity actions. See Commentary to Fla. Fam. L. R. P. 12.000. The standing orders govern the conduct of the parties during the pendency of the case and remain in effect until modified by the court or a final judgment is entered. Failure to abide by them can result in sanctions.

Currently, counties in 18 of the 20 judicial circuits in Florida issue standing temporary administrative orders or "status quo" orders in family law matters.<sup>1</sup> Depending on the county, the order may apply solely to dissolution of marriage cases (many counties have separate orders for dissolutions with and without children), or in a variety of other cases, include paternity cases or cases where "child custody is raised in the pleadings."

These orders often include provisions on:

- disposition of assets
- incurrence of additional debt
- destruction of records
- maintenance of insurance policies
- relocation
- payment of child support
- parental responsibility
- timesharing
- mediation

<sup>1</sup> The exceptions being the 2<sup>nd</sup> and 15<sup>th</sup> judicial circuits and Lake County in the 5<sup>th</sup> judicial circuit.

Noteworthy is the lack of uniformity between the standing orders. They vary significantly in form, content and length depending on the circuit, the county within the circuit, and the individual judge assigned to the case. The standing orders may also include provisions that are more restrictive than Florida law, or may impose additional obligations that are not required by Florida statutes.

The standing orders also raise interesting constitutional questions. For instance, does a provision enjoining a party from selling, transferring, or disposing of assets subject the parties to a civil injunction without due process? Fla. Fam. L. R. P. 12.605 states that a temporary injunction without written or oral notice may only be granted if it appears from the specific facts shown by affidavit or verified pleading that immediate and irreparable injury, loss or damage will result before the adverse party can be heard in opposition and the movant's attorney certifies in writing any efforts that have been made to give notice and the reasons why notice was not given. Notably, many standing orders contain provisions governing the sale, transfer, or encumbrance of marital assets without written agreement by the parties or further court order. In some circuits, a party may not even sell, encumber, or transfer a non-marital asset.

Similarly, standing orders which restrict a parties' relocation may conflict with Fla. Stat. §61.13001. While Fla. Stat. §61.13001 defines relocation as "*a change in the location of the principal residence of a parent or other person from his or her principal place of residence at the time of the last order establishing or modifying time-sharing, or at the time of filing the pending action to establish or modify time-sharing. The change of location must be at least 50 miles from that residence, and for at least 60 consecutive days not including a temporary absence....*", many standing orders prohibit relocation outside the county, circuit or state.

And when the standing orders apply in paternity cases, provisions regarding timesharing and child support may also run in conflict with Florida law. Under Florida law, until paternity is adjudicated a Mother has sole parental responsibility and timesharing. In cases where a standing order applies in a paternity case and where such standing order contains provisions on parental responsibility and timesharing, this may be a source of confusion to litigants. Some counties, but not many, have separate orders for dissolution of marriage and paternity cases. In those counties, the standing orders for paternity matters provide a more advisory role on Florida law regarding parental responsibility and timesharing and do not order shared parental responsibility or a timesharing schedule.

Few cases have even addressed these standing orders and/or the conflicts they may create. In *Herrera-Frias v. Frias*, 130 So. 3d 733 (Fla. 2d DCA 2014), the Appellate Court affirmed the trial court's ruling due to a party's failure to comply with a pretrial order. In *Herrera-Frias*, prior to entry of a final judgment, the Wife fled to Mexico with the parties' three children in contravention of the trial court's pretrial order prohibiting the removal of the children from the jurisdiction. The Court found that when a parent is in willful violation of a pretrial order addressing the removal of children from the jurisdiction of the court, it was well within the discretion of the trial court to award sole parental responsibility to the parent who is properly before the court and compliant with the orders of that court. It is worth noting that the Wife in this case was also in violation of Florida law on relocation, however, the Court's reasoning for awarding sole parental responsibility to the Husband was the Wife's willful violation of the pretrial order.

In *Lopez v. Lopez*, 135 So. 3d 326 (Fla. 5th DCA 2013) the Husband appealed the trial court's order in which it allocated the full value of a depleted 401(k) including all tax consequences of the liquidation to the Husband. The final judgment stated that

*continued, next page*

## Where Do We Stand?

CONTINUED, FROM PAGE 11

contrary to the terms of the Standing Temporary Order the Husband wasted and dissipated the 401(k) account by liquidating the entire account without court approval or the Wife's assent. The Appellate Court did not address the trial court's position on the Husband's actions as contrary to the Standing Order, but reversed and remanded solely to reconsider the distribution of the entire amount of the depleted 401(k) funds (including those used by the Husband to pay attorney's fees) and entire tax burden associated with the same as the distribution failed to account for the portion of the funds used to pay attorney's fees.

In *Boksmati v. State*, 2015 WL 12660354 (Fla. Cir. Ct.)(Trial Order), the Court denied a Petition for Writ of Prohibition filed by a Petitioner (Husband) seeking review of a denial of a motion to dismiss a misdemeanor battery case. The Petitioner and his Wife were in divorce proceedings and in the

process of opening a business. The Petitioner claimed the Wife was removing joint property from the business in violation of the Standing Temporary Domestic Relations Order entered in the divorce case. The Petitioner claimed that in preventing the Wife from removing property he pushed her aside. The Petitioner was arrested, charged with battery and filed a motion to dismiss. The trial court denied the motion to dismiss and found that the Petitioner was essentially attempting to enforce the domestic relations standing order, which did not provide him immunity under Florida Statute on preventing trespass and denied the Petition for Writ of Prohibition. The merits of the standing order itself were not addressed.

In *Rokosz v. Haccoun*, 2019 WL 2361475 (Fla. 3<sup>rd</sup> DCA), the Court found that the Former Husband violated the status quo order by entering into a 1031 Exchange Agreement with his father wherein he exchanged a New York Condominium (which had been awarded to the Husband pursuant to a Partial Marital Settlement Agreement) with a



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condominium in Duval County and some land Duval County which were owned by his father. The Court found that the Husband's transfer of properties violated the status quo order and granted the Wife's Motion for Leave to File Lis Pendens on those exchanged properties.

Procedurally, too, there is no uniformity among the circuits regarding how and when these orders are implemented. In many cases the standing orders will be generated by the clerk at the same time as the issuance of the summons and must be served on the respondent at the time of initial service of process, but in other counties, the parties simply need to be aware that these orders exist and are binding. Despite the lack of uniformity and questions that the content of certain standing orders raise, it appears our courts (thus far) have determined the standing orders are more beneficial to the administration of justice than they are harmful, and that the ends justify the means.

One thing that IS uniform among the standing orders is that they are very difficult to find and obtain if they are not being generated in an active case. While we were fortunate to speak to several helpful clerks and judicial assistants during our search, many standing orders are buried in the clerks' websites (often outdated versions), and many are not even available online. Accordingly, we compiled the following chart to serve as a guide to the basics of each county's/circuit's standing orders. However, family lawyers should be aware that these orders may be modified by each individual judge or county, are subject to judicial enforcement, and your client may be sanctioned for any non-compliance. Therefore, it is crucial for you (and your clients) to be familiar

with the specific and applicable standing order in your domestic relations cases.

**Lindsay A. Gunia** is a partner at Foster-Morales Sockel-Stone, LLC in Miami, Florida and practices exclusively marital and family law. During her career she has authored numerous articles and continuing legal education materials for marital and family lawyers, as well as for the Florida Bar's Mental Health & Wellness of Florida Lawyers Committee. Ms. Gunia is a member of the Florida Bar Family Law Section where she serves on the Continuing Legal Education and Publications Committees, and is actively involved in the Dade County Bar Association. Ms. Gunia is a graduate of the University of Michigan and the University of Miami School of Law. She is also a graduate of Leadership Miami and provides pro bono legal services to domestic violence victims.

**Amanda P. Tackenberg** is an associate at Foster-Morales Sockel-Stone where she joined the firm in 2013 after graduating cum laude from the University of Florida Levin College of Law. While in law school, Attorney Tackenberg received the Family Law Certificate as well as Book Awards in the Juvenile Civil Clinic and Genetics and the Law. Ms. Tackenberg was a recipient of the Terrye C. Proctor Memorial Scholarship. Ms. Tackenberg is a Building Bridges Ambassador for the Children's Home Society and enjoys donating her time volunteering at CHS as well as providing pro-bono legal services through Put Something Back by Dade Legal Aid. Ms. Tackenberg is a member of the Family Law Section of the Florida Bar, The Family Law Inns of Court, the Florida Association of Women Lawyers, the Dade County Bar Association and the Cuban American Bar Association.

*See Chart on following pages*



## Guide to the basics of each county's/circuit's standing orders

JUDICIAL CIRCUIT	COUNTY	ADMIN ORDER #	CASES IN WHICH IT APPLIES	SALE OF ASSETS PROVISION	INCURRENCE OF DEBT PROVISION	DESTRUCTION OF RECORDS PROVISION	INSURANCE PROVISION	RELOCATION RESTRICTION PROVISION	PARENTAL RESPONSIBILITY OR TIMESHARING PROVISIONS	CHILD SUPPORT PROVISION	UNIQUE REQUIREMENTS
1st	Okaloosa	OCAD 2013-02	DOM	YES	YES	YES	YES	Yes - no removal from county for residential purposes	YES (general guidelines)	Yes - voluntary payments	School Attendance Provision; Go into effect only when individual family law judges direct the clerk to issue these orders in their cases
1st	Escambia	ECAD2018-02	DOM	YES	YES	NO	YES	Yes - no permanent removal from Florida	YES (and attaches holiday schedule)	NO	One Order for DOM without children; one order for DOM with children; contains provision on filing income tax returns; Implements a holiday timesharing schedule and attaches Standing Pretrial Order Holiday Schedule; provisions for childcare and school designation
1 <sup>st</sup>	Walton	WCAD 2007-01	DOM	YES	YES	NO	YES	Yes - no permanent removal from Florida	YES	NO	School Attendance Provision; Contains Order of Referral to Mediation
1st	Santa Rosa	order provided by clerk	DOM	YES	YES	NO	YES	Yes - no permanent removal from Florida	YES (and attaches holiday schedule)	NO	Implements a holiday timesharing schedule and attaches Standing Pretrial Order Holiday Schedule
2 <sup>nd</sup>	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
3rd	Columbia, Dixie, Hamilton, Lafayette, Madison, Suwannee, Taylor	2005-003	DOM; Separate Maintenance; Annulments	YES	YES	NO	YES	Yes - no permanent removal from Florida	NO	NO	Contact for children provision
4 <sup>th</sup>	Clay	order provided by clerk	DOM; Separate Maintenance; Annulments	YES	YES	NO	YES	Yes - must comply with Fla Stat. 61.13001	NO - but, citation to Fla. Stat. 61.13(2)(c)(1)	NO	Contact for children provision
4 <sup>th</sup>	Duval	2015-05	DOM; Paternity; Separate Maintenance; Annulments	YES	YES	NO	YES	Yes - no permanent removal more than 50 miles	YES (general guidelines)	NO	Includes Parenting Course and Financial Disclosure provisions
4 <sup>th</sup>	Nassau	order provided by clerk	DOM; Separate Maintenance; Annulments	YES	YES	NO	YES	Yes - no permanent removal from Florida	NO - but, citation to Fla. Stat. 61.13(2)(c)(1)	NO	Contact for children provision;
5 <sup>th</sup>	Citrus	C2007-22-B	DOM (with or without children - two orders) ; Supplemental Petitions for Modifications; "Other Proceedings in which Parenting Issues are Raised"	YES	YES	YES	YES	YES - no change in residence beyond boundaries of 5th Circuit	YES (general guidelines)	NO	Procedures for hearings, CMC's, mediation, courtroom behavior, and a pretrial catalogue
5 <sup>th</sup>	Hernando	H-2018-66	all Domestic Relations cases except adoption, TPR, civil injunctions under Chapters 741 and 784, child support under Chapters 88 and 409, Dependency, Chapter 39, juvenile delinquency, Chapter 751 temporary custody by extended family members and by-pass cases under Chapter 390	YES	YES	YES	YES	YES - no change in residence beyond boundaries of 5th Circuit	YES	NO	Procedures for hearings, CMC's, mediation, courtroom behavior, and a pretrial catalogue
5 <sup>th</sup>	Sumter	S2008-03	All family law cases (one order for cases with children's issues and one without children's issues)	YES	YES	YES	YES	YES - no change in residence beyond boundaries of 5th Circuit	YES	NO	Procedures for hearings, CMC's, mediation, courtroom behavior, and a pretrial catalogue
5 <sup>th</sup>	Lake	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
5 <sup>th</sup>	Marion	M-2010-23-E	all Domestic Relations cases except adoption, TPR, civil injunctions under Chapters 741 and 784, child support under Chapters 88 and 409, Dependency, Chapter 39, juvenile delinquency, Chapter 751 temporary custody by extended family members and by-pass cases under Chapter 390	YES	YES	YES	YES	YES - no change in residence beyond boundaries of 5th Circuit	YES	NO	Procedures for hearings, CMC's, mediation, courtroom behavior, and a pretrial catalogue

6 <sup>th</sup>	Pasco and Pinellas	No Order- But See Standing Notice for Cases without Children and Standing Notice for Cases with Children	DOM	YES	YES	YES	YES	Yes - no removal from county for residential purposes	YES	NO	Provision on alternative cooperation track, courtroom conduct and behavior, and prohibition on bringing children to court
7 <sup>th</sup>	Flagler, Putnam, St. Johns and Volusia	FM-2013-040-SC	DOM; actions for alimony and/or child support	YES	YES	NO	YES	Yes - no permanent removal from Florida	NO	NO	Contact for children provision
8 <sup>th</sup>	Alachua, Baker, Bradford, Gilchrist, Levy, Union	5.09	DOM; Separate Maintenance; Annulments	YES	YES	NO	YES	Yes - no removal from Florida	NO	NO	Contact for children provision
9 <sup>th</sup>	Orange and Osceola	2004-05-04 (DOM)	DOM; Paternity (different orders)	YES	YES	YES	YES	Yes - no change in residence from school zone of child	YES	Yes - voluntary payments	Provisions on parenting class, mediation, and communication
		2010-27 (Paternity)						Yes - no change in residence from school zone of child	YES (notes that if child support order does not contain parenting plan, parent receiving has sole parental responsibility/TS; if paternity judgment does not est. child support, mother has sole PR/TS)	Yes - voluntary payments	
10 <sup>th</sup>	Hardee, Highlands, Polk	5-51.0	DOM	YES	YES	NO	NO	Yes - no change in residence from school zone of child	YES	Yes - voluntary payments	Contains provision on support and requires the parties to be reasonable in providing for needs of dependents; Requires parties to comply with Admin. Order 5-20.7 regarding administrative provisions for family law division
11 <sup>th</sup>	Miami-Dade	14-13	DOM; Paternity	YES	YES	YES	YES	Yes-no removal from current county of residence; intent not to prohibit temporary travel within the State	YES	Yes - voluntary payments	Provisions on parenting class, mediation, and communication
12 <sup>th</sup>	Manatee, Sarasota, Desoto	2013-16-12	DOM; Paternity; Separate Maintenance; Annulments	YES	YES	YES	YES	Yes - no removal from county for residential purposes	YES	NO	Contact for children provision, treatment of children provisions, provisions on mental health professionals social studies, parenting class, informs re: mandatory disclosure and mediation
13 <sup>th</sup>	Hillsborough	S-2018-052	"all family law cases" except for DV and adoption; additional provisions for cases involving minor children	YES	YES	YES	YES	Yes - no removal from county for residential purposes	YES	NO	Contact for children provision, treatment of children provisions, forbids bringing children to court, parenting class, informs re: mandatory disclosure, provisions on courtroom conduct and behavior
14 <sup>th</sup>	Bay, Calhoun, Gulf, Holmes, Jackson and Washington	2016-00-01	DOM; alimony, paternity, parental responsibility and timesharing, supplemental proceedings	YES	YES	YES	YES	Yes - must comply with Fla Stat. 61.13001	YES	NO	Neither party may change the child's school or daycare arrangement without written agreement or Court Order; provisions on mediation, case management conferences and temporary hearings
15 <sup>th</sup>	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
16 <sup>th</sup>	Monroe	Entered by clerk	DOM	YES	YES	YES	YES	YES-no permanent removal from Monroe County	YES	NO	Contact for children consistent with the habits of the family; comply with rules and regulations of 16th Judicial Circuit; treatment of children/no alienation; conduct of parties during case; parenting class required
17 <sup>th</sup>	Broward	2019-15-UFC	DOM; Paternity	YES	YES	YES	YES	Yes - must comply with Fla Stat. 61.13001; not intended to prohibit temporary travel within Florida	YES	Yes - voluntary payments	Use of the order is "discretionary with each judge" and may be modified; Sanctions if failure to comply with the rules pertaining to production of financial records or other documents without good cause

18 <sup>th</sup>	Brevard	13-38-B	DOM and actions in which "child custody is raised in the pleadings"	YES	NO	NO	YES	Yes - no removal from Florida	NO	Yes - voluntary payments	Provision containing mutual restraining order and non-harassment; beneficiaries may not be changed on survivor benefit plans; provision requiring parties to read certain administrative orders of the 18th judicial circuit and shall file a statement with the clerk of court
18 <sup>th</sup>	Seminole	05-15-S Amended	DOM	YES	YES	YES	YES	YES- no change of residence of children beyond 10 mile radius from current residence; may not change child's customary school district or daycare arrangement	NO-(provides shared parenting guidelines but not specifically ordered by the court)	Yes - voluntary payments	Provision containing mutual restraining order and non-harassment
19 <sup>th</sup>	Indian River, Martin, Okeechobee, St. Lucie	2015-12	DOM	YES	YES	YES	YES	YES-no permanent removal from the 19th Judicial Circuit	YES-parties should encourage timesharing	Yes - voluntary payments	Provisions on treatment of children and no alienation; mutual restraining order
20 <sup>th</sup>	Charlotte	order provided by clerk	DOM (with or without children - two orders)	YES	YES	YES	YES	YES-no removal from current county of residence; does not restrict travel within the 20th Judicial Circuit and not intended to prohibit temporary travel within the State	NO -but states that Shared Parental Responsibility is presumptive in Florida	YES-voluntary payments	Sanction of \$250 if failure to comply with the rules pertaining to production of financial records or other documents or failure to answer interrogatories or attend a deposition
20 <sup>th</sup>	Collier	order provided by clerk	DOM; orders for with and without minor children; Paternity	YES	YES	YES	YES	YES-no removal from current county of residence for residential purposes; no travel outside of the FL	YES-parties shall agree on timesharing schedule within 60 days of filing	Yes - voluntary payments	If participant in Florida Retirement Systems Benefits-may not change beneficiary designations; Sanction of \$250 if failure to comply with the rules pertaining to production of financial records or other documents or failure to answer interrogatories or attend a deposition
20 <sup>th</sup>	Glades	order provided by clerk	Separate Orders for DOM with children and without children; Paternity	YES	YES	YES	YES	YES- no removal from 20th Judicial Circuit	YES-parties must confer and agree on all parenting decisions; work out own timesharing schedules; parent who wants to be "primary residential parent" has affirmative obligation to encourage relationship between party and children	YES-voluntary payments	Sanction of \$250 if failure to comply with the rules pertaining to production of financial records or other documents or failure to answer interrogatories or attend a deposition
20 <sup>th</sup>	Hendry	order provided by clerk	DOM; Paternity	YES	YES	YES	YES	YES-no removal of children from current county of residence; does not restrict travel within the 20th Judicial Circuit	NO -but states that Shared Parental Responsibility is presumptive in Florida	YES-voluntary payments	Sanction of \$250 if failure to comply with the rules pertaining to production of financial records or other documents or failure to answer interrogatories or attend a deposition
20 <sup>th</sup>	Lee	order provided by clerk	DOM	YES	YES	YES	YES	Yes - no removal from current residence or an order as allowed by Fla. Stat. 61.13001	<b>broward</b>	NO	Parties required to attend initial case management with the case manager



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# "Invincible"

by Eddie Stephens, Esquire



While most disputes are, and should be, resolved without resorting to litigation, there are always those cases that involve high conflict, extreme wealth or poor decision-making that end up before a

Judge.

I cannot think of a worse way to make decisions about a family or children than pushing them through the adversarial process of the circuit court, and leaving such important decisions to the "*Stranger in the Black Robe*," who likely hears only a very small portion of the story.

It takes two people to promise everlasting love. It takes two people to create new life together. When those same two people are unable to make important decisions with the assistance of trained professionals when their relationship fails, that case will be processed by the legal system and the impact of that decision not only affects the two parties and their children, but this ritual also has a tendency to poison all those involved.

As a family law attorney, I know I am being exposed to toxicity on a daily basis. Throughout my twenty-two year career as a divorce attorney, I have become mentally and physically ill during those moments of high stress on the job. Divorce law is certainly not for everyone.

So why would one choose to willingly expose himself to such contention?

From my perch, I have witnessed miracles. I have also seen people commit atrocious acts.

Here are a few beatitudes that have helped me stay sane in a vocation that is often irrational:

**Be caring.** Among the family law attorneys whom I admire, the trait each of them possesses is that they truly care about what they do. They care about their clients. They care about their outcomes. If you don't care about what you're doing, don't do it. Someone will get hurt.

**Be competent.** Whatever you do, be a master of it. I chose to specifically focus on family law. By knowing every aspect of my vocation, I am confident and do not get anxious about issues that arise with my cases and my clients. It took several years to learn my trade well enough to the point I could teach it to someone else. By putting that effort in early, I have eliminated many uncertainties that would have caused additional anxiety. Whatever it is that you do, do it well.

**Be resilient.** Over the years, I have "won" more times than I have "lost." But over 22 years...I have lost many times. Each loss produces a scar. Even some "wins" can scar you. Even though I have more "wins" than "losses," there is an element in litigation that makes some results unpredictable. I have many scars that demonstrate that fact. If you are unable to accept the fact that at times you will lose when you should have won, change professions.

**Be good to your body.** Your body is a machine. It requires proper fuel and rest. It also requires regular exercise. If you neglect your physical and emotional health, your body and mind will not adjust well to the unexpected curve-balls that life has in store for each of us.

**Be patient.** We are all human. We all have our personal struggles. We do not know all of the



struggles of those whose paths we cross. Allow yourself to be patient with others.

**Be forgiving.** Most of us have baggage. Why would you let your life be defined by a negative event? There are things that are within your control, and there are things that are not in your control. Logic dictates you can change those things within your control, but you cannot change those things outside of your control. If that is the case, then why would you allow those things outside of your control to cause you to suffer? If you let go of a hot rock, the burning will stop and you can heal. It requires a conscious decision to let go.

**Be humble.** There is no need to brag in this profession. Let your actions and achieved results speak for you. We also have a "code" articulated in our *Oath of Attorney, Rules of Professional Conduct* and *Bounds of Advocacy*. Follow the rules, follow the code.

**Be helpful.** I think everyone will agree that if we want a more productive, functional society, we have to leave this world in better condition than we found it. We have to make a commitment to make a difference. As we do, we are leading by example. If this is done in an enthusiastic, appropriate manner, you will find it to be contagious and others around you will become infected; and thus, the positive cycle continues. If everyone in the world put effort into a selfless act, this would certainly be a better place. It is unrealistic to think that everyone will take this extra step. However, if you consciously chose to do that right now, we would have one more person creating positive change in this profession, and in this world. If you do so enthusiastically, you might even influence others to do the same. Having a cause or hobby that you are passionate about will add necessary balance to your life, especially when things get hectic at work.

**Conclusion.** For thousands of years, American Indians have protected their communities and lands. "Warrior" is an English word that has come to describe them. Their traditional roles involved more than fighting enemies. They cared for their fellow people and helped in many ways, regardless of the difficulty, and were regarded with the utmost respect in their communities.

I think this is an accurate description of what we do. We are hired to bring these matters to a judge, if necessary. However, it is our responsibility to avoid litigation, if feasible.

A true "Warrior" knows their path is a lifelong journey, and mastery is often simply staying on that path.

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# Mishandled QDROs: The Armageddon of Family Law

By Jerry Reiss and Marc Brawer

Dividing benefits without valuations will destroy most family law practices, and this article will demonstrate exactly why. As QDROs are really an enforcement mechanism to the final judgment, if the QDRO divides the benefit incorrectly, it can be corrected at any time to properly reflect the final judgment.<sup>1</sup> And if the monies have been completely distributed, it can be corrected outside the QDRO because there are many other ways to enforce final judgments. Therefore, most errors that add to professional exposure are already part of the final judgment and unfixable. Sometimes the errors are fixable; but they are not addressed by the current people drafting QDROs. Accordingly, increased professional exposure is currently off the charts over the last 15 years.<sup>2</sup> This is because so many charlatans have emerged claiming expertise in QDROs that contribute to mishandling the divisions in the final judgment. They do not help family law attorneys avoid these errors before the settlement agreement or final judgment is entered, or do they help them fix the errors when they are correctable. The cause may be the ease related to learning how to draft a QDRO document, but actual division requires an understanding of the benefits divided which they themselves lack.

Since we emerged from the Great Recession, Mr. Reiss spends roughly one third of his time fixing fixable mistakes involving litigation with trials costing more than \$10,000. The vast-majority that aren't fixable increases the



JERRY REISS



MARC BRAWER

mounting professional exposure for the family attorneys involved. From my current interactions with malpractice lawyers, most family lawyer have little to worry about because malpractice lawyers don't like cases

involving technical issues outside their area of expertise. This would require malpractice lawyers to retain lawyers with specialty training and experts to assist them. But that won't always be so. As more and more divorce lawyers and experts compete for fewer clients, it won't take long before family lawyers begin transitioning to the fertile ground of malpractice law, because there is literally a fortune to be made suing family law attorneys with that mounting professional exposure.

Family law is replete with complex rules involving complex topics, such as gifting and other transmutation issues, active effort, apportionment between marital and nonmarital efforts, along with a hierarchy of burdens associated with them, among others, applied to complex benefit structures, and taxation laws<sup>3</sup>. Is there little wonder why attorneys have so much exposure? But attorneys are not going to understand just how much exposure they have until we identify the simple mistakes made in everyday practice. These are serious errors created by family law attorneys that refuse to deal with complex issues. Complex matters require real expertise and real expertise requires real experts that involve real cost.

*continued, next page*

### I. Everyday Errors Caused by Unqualified Experts

#### *QDRO Lawyers That Assume Too Much Responsibility*

Lawyers drafting QDROs seldom understand complex benefit concepts, actuarial issues, or administrative procedures, but upon drafting QDROs, they quickly learn their professional exposure accepting the work (and how to pass that liability back to the family law attorneys involved with the final judgment). Oftentimes, disputes arise because valuations weren't performed and these issues fall outside the expertise of lawyers. Older lawyers that drafted QDROs were very expensive, often charging between three and five thousand to draft a single QDRO, but they brought these issues to your attention. These days, some millennial lawyers that draft QDROs deal with these complications by having many attorneys (or their clients) sign contracts giving them exclusivity to decide valuation or divisional disputes, and to resolve disagreements, ambiguities or clarity problems as they see fit. If they are wrong, as they almost always are, they can't be sued because they were given those exclusive rights in the contracts that you and your client signed. Worse yet, some courts are enforcing these contracts, which unless successfully appealed, translates into malpractice for the attorney that permitted this under their watch.

Attorneys are better suited to draft QDROs than many of the non-attorneys they compete with only after a competent valuation addressing divisional issues is completed, with the final result memorialized with specific language that addresses the valuation results. The specific language should be provided by the benefits professional competent to do

valuations. Competence requires knowledge and experience acquired outside family law, so that person is versed in federal and state law on what can and cannot be divided and how the value of the divided benefit relates to the division. Such experts were carefully defined in *Cross-Examining The Pension Expert*.<sup>4</sup> This suggested specific language creates a road map for the QDRO attorney to follow, thereby eliminating the need to understand benefits. It was understood that if the drafter was incompetent to do QDROs he/she was not suited to assist with the benefit division in the final judgment. Benefit actuaries have served in this capacity for years drafting retirement trusts because the attorneys that previously drafted them created so many problems with the trusts that required that they be fixed by the actuaries who understood the issues. They were not trying to replace the retirement plan attorneys but only remedy that they were paid to redraft the plan document. But it caused the attorneys who felt threatened by their involvement to file a lawsuit against them challenging that ability to draft them under Florida's Unauthorized Practice of Law Statute. The Florida Supreme Court refused to regulate actuaries under this statute noting that they bring to the table expertise needed to draft them properly and that the federal license they hold specifically grants them this authority under federal law. As federal law trumps state law under the Supremacy Clause of the US Constitution, state law cannot be enforced against federally licensed actuaries.<sup>5</sup>

#### *Inartful Words Used to Describe Divisions*

Unqualified experts have peripheral knowledge that often becomes problematic. Family Law attorneys were better off when they used basic language when left to their own devices. Phrases such as contributions, together with passive earnings, may have been clumsily written but they were functional. We are seeing use of terms like "accrued benefit"



used to describe portions of benefit earned for 401(k) and other defined contribution plans, when the experts and QDRO lawyers using this precise benefit terminology never worked in the employee benefits industry and could not define the terms they use.<sup>6</sup> If they could they would understand that family law makes measurements using effort, whereas "accrued benefit" doesn't distinguish effort between its components, but rather includes all earnings.<sup>7</sup> Therefore, it includes passive earnings on prior earned benefits. If the benefits industry didn't precisely define it this way, what was earned would not be *definitely determinable*,<sup>8</sup> and employee rights to benefits earned could be manipulated by the employer as to what was earned and could not be enforced in a court of law (as frequently occurred with all private benefit plans prior to enactment of ERISA of 1974.)

Defined benefit plans are altogether different because Florida jurists made determinative rulings based on a misunderstanding of pension benefits accruals (discussed below). If they understood them, they would recognize that the same principles are in play, and earning the higher salary involves tangential effort which creates passive increases. Their misunderstanding is shaped by bad case law in lieu of understanding sound principles.

*Boyett v. Boyett*, 703 So.2d 451 (Fla. 1997), split hairs deciding that a Coverture Fraction applied after the cutoff date violates the concept that earnings end on that date, but applied on the cutoff date accurately measures the marital portion. This is a mathematical oxymoron with the Florida Statutes defining marital property.

F.S. §61.075(6)(a)1.d includes retirement benefit accruals. These benefit accruals include salary earned after the cutoff date. The Supreme Court confused termination benefits on the cutoff date from that portion of the retirement benefits earned on the cutoff date, which properly uses salary at retirement. As the

second part of the ruling excludes a penalty for early retirement, that penalty would apply if the employee terminated employment on the cutoff date, which is the only trigger that creates the entitlement to termination benefits. Otherwise, the employee is entitled to receive the higher prorata portion of the higher benefit at retirement (which doesn't include the early retirement discount.) Therefore, our Supreme Court employed circular reasoning in concluding earning the higher salary after the cutoff date improved what was earned on the cutoff date, otherwise it was incorrect in its second finding that the early retirement discount doesn't apply.

The reasoning it applied also undermines the definition of marital and nonmarital property at §61.075(6)a1 and §61.075(6)b, using F.S. 61.075(7) ("the cutoff date") thereby showing its interpretation that salary earned afterwards creates non-marital property is wrong. That is because use of a Coverture Fraction creates equal earnings for every incremental period that precedes the date to which it is applied. This is fully supportable when it is applied at retirement, making all the increments equal. Its use at retirement is justified when one embraces the concept that pension benefits are built on a foundation of efforts, where each service year is equally responsible for the benefit at retirement. The Florida Supreme Court rejected this theory when benefits are based on average salary because its use at retirement incorporates salary earned after the cutoff date and therefore violates §61.075(6)(b)(7) (2018). Because its use results in a violation of the cutoff date, it necessarily means earning that higher salary after that date involves §61.075(6)(a)1.b "active effort." Otherwise it would be marital property under application of §61.075(6)(b)3, as passive appreciation of marital property to the date paid.<sup>9</sup> Consequently, its use on the cutoff date involves active improvement of the premarital

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## Mishandled ODROs

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portion, thereby showing those improvements are marital property (even though they are based on non-marital service). This proves the benefit was *not* earned in equal intervals over the abridged period ending on the cutoff date with the theory employed by *Boyett*. Therefore, use of a Coverture Fraction on the cutoff date violates the exact same principal using it after the cutoff date does.

Therefore, the pension benefits cannot be earned equally during the marriage unless they are earned equally over the marital and non-marital portions, which requires using a Coverture Fraction at the date of retirement. That is why using the cutoff date the way the *Boyett* Supreme Court did, involves splitting hairs, embraces circular reasoning, and why no sister state followed Florida. Once this is understood, there is no breach of the cutoff date in *Boyett v. Boyett*, 703 So.2d 451 (Fla. 1997) explained by the New York Court of Appeals in *Majauskas v. Majauskas*, 463 N.E. 2d 15, 21 (N.Y. 1984), which has an identical definition with Florida of the cutoff date:

*Moreover, pension rights acquired incrementally during marriage cannot be characterized as the increase of separate property originating before marriage in light of the exclusion of "appreciation due in part to the contributions or efforts of the other spouse" (Domestic Relations Law, §236, part B, subd 1, par d, cl [3]) from the definition of separate property increase and thus its inclusion in the concept of marital property. Nor does the fact that the highest consecutive 36 months' earnings upon which the employee spouse's monthly stipend depends may occur after divorce affect the conclusion, for as the Delaware Supreme Court held in Jerry L. C. v Lucille H. C. (448 A2d, at p 226), "[s]ince each employment year is counted for pension purposes each contributes to the high salary years."*

and

*As concerns the method of computation, the Trial Judge had directed the use, as the numerator of the fraction, of the number of months the parties were married. By limiting the numerator to the number of months prior to commencement of the action during which the parties were married, the Appellate Division simply conformed the judgment to the statutory definition of marital property as property acquired before commencement of the matrimonial action (Domestic Relations Law, §236, part B, subd 1, par c). Majauskas @ p. 22.*

Accruals include active contributions, passive and active appreciation on the "whole benefit", which includes its marital and non-marital portions. It includes forfeitures, as it should, because it's an active addition requiring active service credits, contributions that were declared for a prior period, and employer matches that were committed contractually. Accruals also include catch up contributions that, in part, trace back to earlier periods. While these adjustments often can and must be made with correct language, when the marital portion uses "accrued" to describe the marital portion, the non-marital portion has been deprived of its proper share of earnings and it's unfixable as a described division because *accrued* has a very specific meaning when used for defined contribution plans.<sup>10</sup> We've seen other specific words used having specific meaning for military plans and OPM plans, resulting in unintended consequences. If the meaning is very specific, it can only be corrected if other language used contradicts intent elsewhere in the division, making the overall meaning ambiguous. This likely requires a hearing, testimony and the introduction of parole evidence.

*No One Is Reading Administrative Procedures*

This is an expected consequence of cheap QDRO's. When only \$700 or \$800 is paid to draft QDRO's, no one is going to spend an hour carefully reading the final judgment, more time

reading the settlement agreement(s), resolve unclear divisions, address valuation issues not addressed in the final judgment, apply the case law, and then read several more pages of administrative procedures, then draft the QDRO with care. And the procedures are unique from employer to employer and plan to plan.

#### *What Are Administrative Procedures?*

Every plan must have written administrative procedures under the Department of Labor regulations.<sup>11</sup> They describe in detail how they will administer the QDRO. This includes how they will interpret it and resolve conflicts. They delineate the procedure for determining qualified status and the effects of a qualified determination and adverse determination.<sup>12</sup>

#### *Examples of Administrative Procedures:*

The Office of Personnel Management "OPM" explains in its procedures that earnings for their Thrift Plan will be determined based on the exact investments made on the valuation date and that they will track earnings as if those investments never changed.

Example 1: Suppose the divisional date was in 2009 and the order dividing benefits was made in 2015. Shortly after 2009 the employee changed his investment to interest only but before that he was fully invested in securities. In 2012, he changed back to mostly securities. As the market doubled within the 3-year time frame before he switched back, OPM would credit earnings (for purposes of interpreting the order) doubling the account balance with earnings that weren't realized, so that when distribution is made the spouse gets twice the amount and therefore the entire marital portion. Had administrative procedures been read in advance of the order it would have been clear that an independent valuation need be done before an Order is drafted thereby avoiding this outcome.

Example 2: Another example defined the marital portion for a 401(k) plan in the administrative

procedures as the difference of account balances between the date of marriage and the date of division. If the valuation date was on 12/31/2001 or 12/31/2008, that could have produced a zero benefit even when half the contributions were marital, or conversely making most of it marital when almost nothing was marital when the market quadrupled between 12/31/2009 and 5/1/2018. This is because the market tanked on the earlier date but quadrupled by 2018. Ironically this result would be correct if "accrued benefit" were used to describe the division but then it would only be correct as to what was ordered or agreed, not what was intended. We've seen widespread use of this interpretation, including with OPM procedures.

Many lawyers drafting these Orders fault OPM for not knowing what they are doing. Lawyers that do failed to read the administrative procedures before drafting the QDRO because it was fully explained in those procedures.

## **II. Simpler Valuation Errors**

### *401(k) and Other Defined Contribution Plans*

Retirement plan trusts are exempt from the doctrine of commingling. This is because the trust owns the assets and the employee only has rights to benefits from the trust. The benefits are unrelated to the assets for a host of reasons, including forfeiture for non-vesting. That means tracing investments serves no purpose because funds cannot be gifted or converted to marital property. Accordingly, when funds are distributed how the funds were used has nothing to do with how the payment affects marital property. As marital portions are always defined as marital contributions, plus earnings thereon, distributions will not affect what is marital. Only additional contributions will affect the percentage. Non-marital additions will lower the percentage that is marital and marital contributions will increase it.

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## Mishandled ODRos

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If the Doctrine of Commingling doesn't apply, and it shouldn't, the mere fact that the two portions (marital and non-marital) sit inside an indistinguishable fungible account has no bearing on determining a marital portion. That is because intent has nothing to do with retirement funds. That is a necessary consequence of the definition of marital property because the percentage that is marital does not change except when contributions are added. It is not one bit different than the defined benefit plan whose marital percentage only changes as additional accruals are earned. Therefore, the non-marital portion is the current account balance less the account balance entering the marriage, improved with the *same* internal rate of earnings the marital contributions enjoyed during all the marital years.

We should know the earnings on the total fund for each measurement period. We also know that earnings compound, and to properly determine the percentage that each share of the compounding we need two things: the

date of all the transactions, and the amount of each transaction. To exactly replicate the compounding curve the actual to-the-minute balances should be used, which is not a problem with high speed computers. But using monthly instead of daily or actual to-the-minute values works well for family law applications, where the interest addition is 99.5% accurate in lieu of daily compounding. What has just been described is known as the "dollar weighted method" and it is universally accepted as a method used to measure the rate of return in banking, funds, and market measurement, as well as for actuarial applications. An example showing how it works was furnished in a 2007 Bar Journal article with the late Matt Miller.<sup>13</sup> This then is the only correct way to determine the internal rate of return shared by two or more funds when they are indistinguishable because the liquid funds they represent are fungible.

### *Coverture Fractions*

The motivation behind its use is the ease with which determinations are made. As explained earlier, the theory to support it is that pension benefits are built upon a foundation of efforts, where each service year is equally responsible for the benefit at retirement. The

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Florida Supreme Court rejected this theory when benefits are based on average salary because its use at retirement incorporates salary earned after the cutoff date and therefore violates 61.075(6)(b)(7) (2018). We showed earlier that a Coverture Fraction need not be used when benefits are based on average salary because the higher salary earned during the marriage can be used to demonstrate active improvement of the pre-marital service portion, which makes the earnings during the marriage much higher.

Because not all pension benefits are based on average salary or salary earned after the cutoff date, *Boyet* allows its use in connection with determining earned benefits, making it the burden of the party claiming otherwise to prove active improvement is in play. Not using a Coverture Fraction when there is a pre-marital portion can produce a much higher marital benefit, which is only fair because all the sister states have either ruled COLA increases in salary are passive improvements after the cutoff date (as in *DeLoach*)<sup>14</sup> or all increases in salary are used based on the Marital Foundation Theory (as in *Kirkland*)<sup>15</sup>. There is one exception where the Nevada Supreme Court ruled in *Gemma v. Gemma*, 778 P.2d 429 (Nev 1989) that it is the burden of the claimant who desires excluding foundational increases (*Kirkland*) to demonstrate the promotions were entirely the product of post-marital effort, where then salary increases are limited to cost of living increases (as in *DeLoach*). Florida rejected both theories used throughout the US and instead embraced the Brightline Theory<sup>16</sup>, but only for salary increases after the cutoff date. It embraced the Marital Foundation Theory in all other applications ruling the early retirement discount should not apply when the employee has not retired and suffered the cutback.<sup>17</sup> This means certain types of early retirement subsidies are marital property under *Boyet*. We see its use throughout Florida's family law. *Boyet* reversed both *DeLoach* and *Kirkland*.

Many salaried plans are step-rated, meaning that different rates of earnings apply for different periods. One sees this with the Civil Service Retirement System ("CSRS"), and especially with the Reservists Military Retirement Plan, which rewards extra service credits for active engagement during battle. Many non-salary-based union plans award credits based on hours worked. These plans can award partial and multiple years of credited service based on hours worked in an individual year. All these plans are based on individual effort where use of a Coverture Fraction distorts what was earned, sometimes tremendously.

Its use with defined contribution plans (Thrift, ESOPs, 401(k), Profit Sharing, 403(b) annuity) is never justified for the reasons discussed herein: With the exception of 403(b) plans, these plans involve voluntary contributions that vary widely from year to year. Its use will produce portions that vary substantially from the definition of marital property ("the sum of marital contributions, plus earnings thereon.") Behavior often changes with marriage because there is more pressure for income. Marriages where both people work and earn substantial incomes will often lead to greater savings. Other marriages with a primary breadwinner will often see the contributions decrease during the marriage. Thus, whether the fraction understates or overstates the marital portion is determined by behavior. Applicable to all plans, periods of high inflation and higher earnings will exaggerate the effect of compounding, depending on which period applies to the premarital portion. The Coverture Fraction creates a very poor estimate of earnings. Its use therefore directly violates 61.075(6)(b)(3) of the Florida Statutes for all defined contribution plan<sup>18</sup>

#### *Tracing as a Valuation Methodology*

As explained earlier, the retirement plan trust owns the assets, not the employee. The plan

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## Mishandled ODRos

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sponsor owns the trust and retains the ability to change it or terminate it. The worker only has rights to the benefit amount, otherwise vesting would be meaningless, and benefit forfeitures would be void and completely unworkable. Tracing has application outside retirement trusts and ostensibly is used in family law to overcome a presumption of an interspousal gift by demonstrating intent. Because the trust owns the assets the requirements for tracing can never be met. Only when the employee has total control can intent be established. This is the very reason why these funds are exempt from the doctrine of commingling explaining why it is not a legitimate way to measure earnings.

### III. More Complicated Valuation Errors

#### *Retirement Plan loans*

Plan loans are universally mishandled, and a correct valuation has made the difference between a court finding that two-thirds of the account balance is marital property as opposed to one-third. This is true where the account balance was small or \$500,000 or more. The error traces back to using intent, where intent has no place in the valuation of a retirement plan (except to support an unequal distribution where an otherwise windfall could be shown.<sup>19</sup>) The loan produces a distribution of cash, involving fungible marital and non-marital contributions at the time the distribution is made. Repaying that loan is with payroll deductions, which are marital property, even the portion that represents the interest repayment. In one case the attorney that cross-examined the valuation expert argued that since the loan was marital the distribution had to come from marital funds. This was clearly nonsense because the distribution of funds is unrelated to the loan. More importantly,

to further show this if a \$50,000 loan was secured one week after the parties married that argument creates a negative \$50,000 marital portion at the beginning of the marriage because there were no marital contributions made when the loan was secured shortly after the marriage began. Naturally the court didn't buy the nonsense that classification of the loan demonstrated intent from which portion the money should be deducted.

The misapplication of this family law principle is what was wrong with *Kaaa*<sup>20</sup> and examining the principle reveals how the Florida Supreme Court should have handled it, thereby avoiding the need to change the statute (because neither approach makes sense). The non-marital residence was refinanced several times in *Kaaa* during the marriage. The ruling could have used an amended version of *Straley v. Frank*, 612 So.2d 610 (Fla. 2nd DCA 1992) to include passive appreciation on the mortgage paydown, by using the debt financing method to determine the marital portion, as was referenced in footnote 15 of the 2007 Florida Bar Journal article<sup>21</sup>, and then adjust that result with all the transmutation that occurred as a result of the multiple refinances. This would have avoided the need to change the statute this year and would have produced a far better method of treatment.<sup>22</sup> But the 2018 statute does permit use of another method shifting the burden to the person that wants to use it to demonstrate a more equitable result.

#### *Survivor Benefits*

When the form of benefit involves survivor rights, failure to value them separately leads to huge mistakes.<sup>23</sup> This is because survivor benefits that are marital property are not shared but paid only to the survivor (as survivor benefits are structurally designed to do that). When a non-marital portion is involved, that doubles the error for an equivalent amount of marital survivor benefit because even though none of it is marital property but the exclusive



property of the employee, nevertheless it is completely paid to the non-employee spouse.

The value of the survivor benefit should be offset against the marital portion of the life-only benefit. It is not uncommon that a survivor benefit completely offsets the life-only portion with either a large non-marital percentage of earned benefit or a 100% survivor benefit, especially with a much younger spouse, or a lesser combination involving both. Failure to value it compounds the error when DROP is involved because the DROP amount is a function of the life-only benefit<sup>24</sup>. If the offset eliminates the life-only benefit, it eliminates sharing in DROP at the same time.

#### *Alimony then No DROP*

Paying alimony during DROP is another huge mistake. The Florida Supreme Court found that alimony should not include a savings component because to do so violates *Boyett v. Boyett*, 703 So.2d 451 (Fla. 1997). See *Mallard v. Mallard*, 771 So.2d 1138 (Fla. 2000). That is precisely what DROP is, a savings component. As a matter settled by agreement this is dealt with either by not sharing DROP or as a reduction in alimony, dollar for dollar with the DROP Payment. This is handled a bit differently as a tried matter, noting *Acker v. Acker*, 904 So.2d 384 (Fla. 2005) also requires the pension payment made to the alimony recipient offsets need when the payment is made. Therefore, because the DROP payment is marital property, the spouse's share of DROP must be paid from the employee's wages (and not saved) reducing need, in order to both comply with *Acker* and *Mallard* at the same time. Then alimony consists of a term amount ending when DROP is paid, and a permanent amount equal to the amount that creates a level payment when added to the pension payment (after DROP) and the term payment (before DROP). Either alimony payment ends on remarriage. Naturally it can be made much simpler if alimony is only durational alimony.

## Conclusion

When Mr. Reiss coauthored *Drafting QDROs: A Malpractice Waiting to Happen!* and submitted it for publication in the 1995 Florida Journal, he didn't understand which errors are fixable and what was not, because the case law deciding these issues took years to develop. But soon after that he identified both and began writing about it. What was written fell on deaf ears because family law attorneys instead decided to pass liability to someone else to draft the QDRO and absolve themselves of all involvement. But given these errors occur before the final judgment is entered it is their liability, not the drafter of the QDRO, because the latter can be fixed to conform to the final judgment and the errors that cannot are part of the final judgment.

The family law attorney's refusal to accept responsibility enabled charlatans to enter the field which exacerbates their exposure. Most baby boomers escaped their day of reckoning because malpractice law was in its infancy. But given the changes in tort law many P.I. lawyers sought refuge in malpractice law, or they added it to their menu of services. With so much competition for fewer clients, malpractice cases are exploding. Surely that will create opportunity for the family law attorney to transition to malpractice law in an overcrowded family law profession. The bad habits learned from baby boomers when combined with the shortcuts of bundled services millennial attorneys created, and less appetite to spend money as fees became competitive, add up to and spells Armageddon for the millennial lawyer who has few prospects to earn the money the baby boomers once earned. Only those that change the behavior now will survive.

**Marc H. Brawer** was a Fellow of The American Academy of Matrimonial Lawyers for 37 years and board certified in marital and family law

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## Mishandled ODROs

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for 25 years. He is recognized in *Best Lawyers in America*. A past member of the Florida Bar for over 40 years, and of the New York Bar for over 49 years, he currently concentrates on strategic consulting and alternative dispute resolution in family law matters.

**Jerry Reiss** is a federally-licensed pension actuary who has had published over 40 articles, covering multiple disciplines, more than a dozen of which were published in the *Florida Bar Journal*. He was admitted to *Best Experts in America* for both Family Law and Employment Law, and was recommended by a past president of the Illinois Bar Association for the AAML Best Experts List in 1995.

### Endnotes

<sup>1</sup> *Self v. Self*, 907 So.2d 546 (Fla. 2nd DCA 2005). Also see *Storey v. Storey*, 192 So.2d 670 (Fla. 4th DCA 2016).

<sup>2</sup> Carbone III & Viggiani, *The Rise of Legal Malpractice Lawsuits*, Defense Digest, (March 1, 2014); also see Flaherty, *Legal Malpractice and Defense Costs Increase: Study, The American Lawyer* (June 26, 2018).

<sup>3</sup> Currently Family Law has the third highest rate of legal malpractice. Scott, *Special Focus: Understanding Specialty Area Malpractice Risk*, Minnesota Lawyers Mutual "The View", Vol. 29, No. 1, (January 2013).

<sup>4</sup> Reiss and Walsh, *Cross-Examining The Pension Expert*, 72 Fla.B.J. 98 (June 1998) republished (with permission) as a lead article at 12 Minn. Fam.Law.J. 1 (Nov/Dec 1998).

<sup>5</sup> See *The Florida Bar Re: Advisory Opinion- Nonlawyer Preparation of Retirement Plans*, 571 So. 2d 430 (Fla. 1990).

Also see *Sperry v. The Florida Ex Rel Florida Bar*, 373 US 379 (1963).

<sup>6</sup> See 29 USC §1054 (c)(2)(A).

<sup>7</sup> *Id.*

<sup>8</sup> Treas. Reg. 1.401(a)-1(b)(1).

<sup>9</sup> *Parker v. Parker*, 610 So. 2d 719 (Fla. 1st DCA 1992).

<sup>10</sup> See f.n. 4.

<sup>11</sup> Appears in the Final Regs. Regarding QDROs effective August 9, 2010. Also see ERISA §206(d)(3)(G)(ii).

<sup>12</sup> *Id.*

<sup>13</sup> Miller and Reiss, *Determining the Marital Portion of Retirement Benefits and Other Property* 81 Fla.B.J. 34 (Feb. 2007).

<sup>14</sup> *DeLoach v. DeLoach*, 590 So.2d 956 (Fla. 1st DCA 1991).

<sup>15</sup> *Kirkland v. Kirkland*, 618 So.2d 295 (Fla. 1st DCA 1993).

<sup>16</sup> This theory stands for the simple proposition that earnings can be gleaned at any point in time by shining a bright line on that moment and whatever could be received by terminating employment on that date is what was earned.

<sup>17</sup> *Boyett* @ p. 453 citing *Trant v. Trant*, 545 So.2d 428 (Fla. 2nd DCA 1989).

<sup>18</sup> An exception is measuring pure effort with respect to vesting because neither monetary contributions nor passive earnings are directly involved, as with the award of stock and options, and typically its use is restricted to either a short vesting period or partial incremental vesting.

<sup>19</sup> Example: Suppose in a three-year marriage the salary used to determine benefits tripled. This could create a huge benefit accrual based on demonstrating it actively improved a sizeable premarital portion. This creates a windfall based mostly on non-marital property. A similar argument could be based on active improvement of non-marital funds of a SEP, Thrift, or 401(k) Plan in a short-term marriage.

<sup>20</sup> *Kaaa v. Kaaa*, 58 So3d 867 (Fla. 2010).

<sup>21</sup> Miller and Reiss, *Determining the Nonmarital Portion of Retirement Benefits and Other Marital Property*, *supra*.

<sup>22</sup> Fl. Stat 61.075(6)(a)1(c).

<sup>23</sup> *Haydu v. Haydu*, 591 So.2d 655 (Fla. 1st DCA 1991);

*Johnson v. Johnson*, 602 So.2d 1348 (Fla. 2nd DCA 1992).

<sup>24</sup> *Ganzel v. Ganzel*, 770 So.2d 304 (Fla. 4th DCA 2000).

## YOUR PHOTO COULD BE ON THE COVER!



If you would like to submit a large format photo for consideration, please email it to Anastasia Garcia (agarcia@anastasialegal.com) or Anya Cintron Stern (anya@anyacintronstern.legal), Co-Chairs of the Commentator.

# Rebuttal of Expert Valuator

By Thomas Gillmore, CPA, ABV, CFF, CFE Winter Park, FL



Many family law attorneys constantly ask how to best counter an expert financial professional and/or business valuator. Although a retained financial professional could tailor questions

to your specific case, I herein propose a set of questions to help the family law attorney rebut an expert valuator. The subject business in this sample set of questions is a restaurant, Yummy Foods. The subject year of the business is 2017. The names of the parties are fictional names. When reviewing these questions, there may be terms included herein that are unfamiliar to you, but look on the bright side, consider it a guide as to what you may look forward to learning about.

## Advocacy

- Mr./Ms. Expert on page 6 of your report, you state that you performed this valuation in conformity with the AICPA Statement of Standards for Valuation Services No." (SSVS)
- Are you aware of the importance of objectivity and integrity required by those standards?
- And your CVA credential requires a similar commitment to objectivity and integrity?
- Would it be fair to say that the AICPA and NACVA both frown on a valuator becoming an advocate for their client?

## Limited Discussion

- Mr./Ms. Expert on page 5 of your transmittal letter, you state that your report

is "limited in its discussion regarding information utilized in the valuation process."

- However, you included an eight-page discussion of marketability discounts, is that right?
- And you also included several pages of in-depth discussion regarding the operating assets of this company?
- You agree that those operating assets are necessary to generate the cash flows of this company is that right?
- You agree that a valuation of the cash flows of this company would by definition include those operating assets is that right?
- You agree that a hypothetical buyer of this business would expect the assets to stay intact when he or she took over the operations?
- You agree that a hypothetical buyer would not pay for the cash flows of the company and then pay an additional amount for the equipment and other operating assets?

## 59-60 (Hypothetical Seller)

- Mr./Ms. Expert, I would like you to read from page four of your report where you quote Revenue Ruling 59-60 as it pertains to the Hypothetical Seller:
  - "The price, expressed in terms of cash equivalents, at which property would change hands between a **hypothetical** willing and able buyer and a **hypothetical** willing and able seller, acting at arm's length in an open and unrestricted market, when

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## Rebuttal of Expert Valuator

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neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts.

- You would agree that you are instructed by Revenue Ruling 59-60 to value Yummy Foods on the basis of a hypothetical seller and a hypothetical buyer?
- You would agree that you are to value the company as if someone other than Mr. Japin is selling it?
- You would agree that you are to value the company without a specific buyer in mind?

### Highest and Best Use

---

- Mr./ Ms. Expert, you would agree that the premise of value is an important factor in the evaluation of the eventual selling price of a company?
- Mr./ Ms. Expert, on page 1 of your exhibits, you twice list Shannon Pratt, Ph.D., one of the most respected and prolific authors in the business valuation profession?
- Mr./ Ms. Expert, I am going to show you an excerpt of Dr. Pratt's definition of premise of value from his 5th edition of *Valuing a Business* ( 2008), McGraw Hill. pages 47 and 48.
- On pages 47 and 48, Dr. Pratt he lists four premises of value starting with Value as Going Concern, and then he lists three more premises of value for an enterprise that will undergo a form of liquidation such as (1) Value as an assemblage of assets; (2) Value as an Orderly disposition; and, (3) Value a Forced Liquidation is that correct?
- And in the last sentence of the third paragraph at the middle of page 48, Dr. Pratt states, "in either case the buyer and seller are still 'willing.' And in both cases, they have concluded a set of transactional

circumstances that will **maximize the value** of the collected assets of the subject business enterprise," is that correct?

- And again, in the second sentence of the following paragraph, Dr. Pratt states, "[t]ypically, in a controlling interest valuation, the selection of the appropriate premise of value is a function of the **highest and best use** of the collective assets of the subject business enterprise." (Emphasis added).
- Mr./ Ms. Expert, I am going to show you page 19 of the NACVA professional standards issued June 1, 2017. The document lists the International Glossary of Business Valuation Terms.
- You would agree that in Canada, the term "price" should be replaced with the term "highest price," is that correct?
- Mr./ Ms. Expert, you included a **liquidation value** referred to as the Net Asset Value in Scenario 1 of your report, is that true?
- You would agree that the liquidation value does not agree with the premise of highest and best use, is that true?

### 2017 Versus Prior Years

---

- Mr./Ms. Expert, I am referring you to the weight applied to the earnings shown on the top of page 13 where you applied three times the weight to 2017 compared to any other of the four years listed.
- You would agree that placing a weight on a particular earnings stream is a subjective matter, requiring professional skill and objectivity?
- And you placed the highest weight on the lowest earnings stream which happened to be in 2017, is that right?
- The date of filing in this case was October, 2017, is that right?
- You would agree that a business owner facing divorce would realize they may be

required to pay support for their spouse and children, correct?

- You would agree that a spouse facing divorce **may** have an incentive to report less take-home income to avoid paying the support obligation is that right?
- In fact you are aware of the slang/ term "Sudden Income Deficit Syndrome" in the context of family law proceedings?
- Mr./Ms. Expert have you examined any audited financial statements of Yummy Foods?
- You are relying on the business owner's representation of the financial records, is that correct?
- You would agree that many business owners, large or small, seek to reduce their tax liabilities toward year-end?
- It is common for business owners to increase their expenses at year-end to show less profit?
- For example, a business owner may prepay property taxes and other expenses?
- You would agree that a restaurant would likely not be able to reduce their year-end revenues, is that correct?
- It would be difficult for a restaurant owner to refuse service to patrons in order to reduce the tax exposure on the revenue side, is that right?
- You would agree that aside from not reporting cash sales, the revenue stream is less likely to have been manipulated by a tax payer, is that correct?
- You would agree that the revenue stream is a reliable data point?
- I am now referring you to page 14 of your report which indicates that 2017 recorded the highest revenue of all previous years, is that right?

- On page 13, your report shows 2017 to be the lowest earnings year over the four year period 2014 to 2017 is that correct?
- And you ultimately gave the 2017 earnings stream the highest weight among the years you considered?
- You deemed the 2017 low-level of earnings to be more reliable than the higher level of earnings reported in previous years?

### **Weight - Revenues**

---

- Mr./Ms. Expert, you would agree that the books and records of many small business owners include personal/ non-business expenses such as a fringe benefits or a perks to themselves for owning the company?
  - Such as fuel purchases?
  - Such as travel?
  - Such as automobile leases?
- How much time did you spend searching for personal expenses?
- What percentage of your time was spent searching for personal expenses?
- It would be fair to say that expensing personal use of business funds would have an impact on your valuation if they were to go unnoticed, is that right?
- Is it your opinion that the **revenues** of Yummy Foods are fairly stated on their tax returns and financial statements?
- You would agree that aside from unreported cash receipts, there would be no personal expenses coming out of those reported revenues?
- No shenanigans played on the revenues?
- You have no reason to believe the revenues are misleading, correct?
- And yet you gave the revenue multiple a zero weight in your report?

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## Rebuttal of Expert Valuator

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### Weight - Earnings

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- You would agree that the payment of personal expenses (if they occurred) would be recorded on the profit/loss statement along with the business expenses?
- And the result after paying all of these expenses from collected revenue is what you call net operating cash flow, is that right?
- Mr./Ms. Expert on page 12 of your Yummy Foods report, you list total personal expenses for the year 2014?
  - Can you read that for the court?
    - \$441 miscellaneous.
    - \$250 parking and tolls.
    - \$1,000 association.
- You found no personal expenses for 2015?
- And for the year 2016, you list personal as well. Can you read those for the court?
  - \$904 Miscellaneous.
  - \$52,085 in taxes.
- And for the year 2017 you list personal as well. Can you read those for the court?
  - \$150 fee
  - \$12 services
- You would agree that there may be other miscellaneous expenses that were not uncovered?
- And you gave the earnings multiple 100% of the weight in your report?

### Net Asset Value

---

- You include the Net Asset method in Scenario #1 of your report, is that correct?
- You intend for the court to consider this method as an option between Scenario #1 and Scenario #2, is that right?
- Mr./Ms. Expert, I would like you to read from NACVA instructions for using the

Asset Based Approach to valuations. The part where they reference Revenue Ruling 59-60:

- "The value of the stock of a closely held investment or real estate holding company, whether or not family owned, is closely related to the value of the assets underlying the stock. **For companies of this type** the appraiser should determine the fair market values of the assets of the company..."
- You intend for the court to consider this method as an option between Scenario #1 and Scenario #2, is that right?
- Is Yummy Foods an investment holding company?
- Is Yummy Foods a real estate holding company?
- Did you follow the guidelines of Revenue Ruling 59-60 as it pertains to valuing investment or real estate holding companies?
- Is Yummy Foods going out of business to your knowledge?
- Is Yummy Foods under threat of liquidation?
- Yummy Foods generated over \$1m in revenue in 2017, is that right?
- Mr. Japin is in good health as far as you know?
- Mr. Japin is a competent business man?
- Mr. Japin knows how to make a profit?
- Does the net asset value represent the highest value that a hypothetical seller could possibly hope for?
- Does the net asset value represent the lowest value that Mr. Japin could possibly hope for in this dissolution of marriage proceeding?
- You would agree this net asset value would be a good result for Mr. Japin if the judge were to accept your calculations under scenario #1, is that right?

- And you included it here in your report because it might result in a favorable outcome for your client?

### **Double Dip**

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- Mr./Ms. Expert, I would like you to read from page four of your report where you quote Revenue Ruling 59-60 as it pertains to the Hypothetical Seller:
  - "The price, expressed in terms of cash equivalents, at which property would change hands between a **hypothetical** willing and able buyer and a **hypothetical** willing and able seller, acting at arm's length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts.
- When presenting the double-dip theory in Scenario #1, you are referring to a hypothetical seller as required by Revenue Ruling 59-60, is that right?
- Or are you referring to Mr. Japin specifically in the Scenario #1 double-dip?
- Would a hypothetical will seller need to consider a double-dip argument under Revenue Ruling 59-60?
  - The answer is no.
- Mr./Ms. Expert, Revenue Ruling 59-60 articulates the definition of Fair Market Value definition, is that right?
  - Are you aware of the concept of perpetuity?
  - You would agree that the revenues and earnings of Yummy Foods are considered to be ongoing in perpetuity for the purposes of your valuation?
  - Are you aware of any enterprise that somehow decreased in value because the owner used the profits to pay alimony or child support?

- Does it make a difference to the future value of the firm (in perpetuity) whether or not the profits were historically used to pay alimony?
- You would agree that regardless of whether alimony was paid from the profits, the owner may sell the enterprise at some date in the future right for its full fair market value?
- Or the owner may decide to gift the enterprise to family members to whom the cash would flow in perpetuity?

### **No Compete**

---

- Mr./Ms. Expert, you pay a subscription fee to obtain the Direct Market Data shown on page 15, 16, and 17 of your report is that right?
- This database(s) is/are relied on by members of NACVA is that right?
- Members of the valuation community normally rely on this same database(s) for their valuation work?
- You agree that it is common for valuers to rely on this type of database to obtain an idea of what the pricing multiples are for the subject industry?
- Your colleagues regularly use this database information as a type of sanity check is that right?
- And you downloaded 108 market transactions from this subscription database(s)?
- Mr./Ms. Expert, on page 3 of your transmittal letter, you stated that the market approach was considered but ultimately not weighted because "it cannot be determined if any of these transactions included a non-compete."

*continued, next page*

## Rebuttal of Expert Valuator

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- So, you ignored the 108 completed transactions because a non-compete was not evident in any of them?
- You would agree that the database information you paid for is not suitable for use in the Yummy Foods valuation assignment?
- Is it common in your profession to include three or four pages of information that is ultimately discarded as valueless?
- You would agree that a database generating information that is valueless to you would also be valueless to any of your colleagues who paid for the subscription, is that right?
- You would agree that a non-compete for Yummy Foods **could be negligible** in value, is that right?
- You would agree that a non-compete for Yummy Foods **could be valued** as low as \$10,000 for example, is that right?
- Mr./Ms. Expert on page 19 of the Yummy Foods report you show a revenue-based value of \$236,296, is that right?
- And you excluded the \$236,296 value because it might contain a non-compete?
- But you chose to include the Net Asset Value of \$88,748 on your report as "Scenario #1"?
- And you included another low value of \$140,540 in Scenario #2 based on the earnings approach?
- Would it make a difference in the valuation of a non-compete if the hypothetical seller chose to compete in the first year following a sale of Yummy Foods?
- Would it make a difference in the valuation of a non-compete if the hypothetical seller chose to compete in the second or any other year following a sale of Yummy Foods?
- And it would be unlikely for a person of good moral character to compete in any event regardless of whether it was the first, second, or third year following the sale, is that right?





- Have you calculated the probability of a hypothetical seller competing during the first year following a sale?
- Have you calculated the probability of a hypothetical seller competing during the second year or any other year following a sale?
- You agree it would make a difference if the probability of competing was very low.... for example if the person selling was retiring or moving to another state, right?
- You agree that it is the hypothetical-seller we are talking about here, is that right?
- It is not Mr. Japin specifically?
- You would agree it is important to know the statutory time-limitations for no-competes in the State of Florida?
- Did you calculate the value of a non-compete on behalf of Yummy Foods?

### **Market Comps**

---

- On pages 15 through 17 of the Yummy Foods report, you list approximately 108 completed transactions, is that right?
- 108 market comps?
- And those completed transaction records are conceptually similar to a person selling their home and looking for market comps, right?
- And you weighted each of those transactions with regard to each one's applicability to Yummy Foods, is that right?
  - Column 4 of each page 15, 16, and 17.
- And at the bottom of page 17, you calculated the weighted average multiplier for revenues based on those market comps?
  - The revenue multiplier is 33.4%?
- And you calculated the weighted average multiplier for earnings based on those market comps?
  - The earnings multiplier is 1.23%?

- Did you rely on either of these two completed transaction multipliers?
- You found them both to be irrelevant for your purposes?
- You found your own multiplier to be more appropriate and more reliable than these 108 transactions?
- What is the purpose of providing these three pages of completed transactions to the court if you deemed them to be unusable?

### **Revenue versus Earnings**

---

- Mr./Ms. Expert, I will be referring to the 33.4% revenue multiplier that we just spoke of (page 17).
- You applied that 33.4% multiplier to the weighted average revenues of \$1,011,570 as shown on page 14?
- And the result was \$337,566 as shown on page 18?
- You split this two-step piece of information across five separate pages of your report, 14 and 18 before revealing the result, is that true?
- This \$337,566 value is quite a bit higher than the \$141,000 value you reported on page 19 of your report, is that right?

### **Value – Revenue Method**

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- Referring to the \$337,566 value showing on page 18 of your report:
- And if I take the \$337,566 value and divide that by the 1.23 earnings multiplier you listed on the bottom of page 17, I would get weighted average earnings for Yummy Foods based on the 108 comparable transactions from the marketplace, is that right?
  - And that earnings/ revenue stream before taxes, depreciation, and

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## Rebuttal of Expert Valuator

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interest would be \$274,444 based on this simple math exercise, is that right?

- And yet your calculation of earnings is a mere \$52,524, is that right?
- This earnings discrepancy created a reduction in market value of \$272,962, is that right?

Revenues	Multiple	Market Value	Implied earnings base using Revenue-based Market Value divided by opposing expert's market multiple of 1.23
\$1,011,570	0.334	\$337,566	
Earnings B4 Taxes	Multiple	Market Value	Unlikely earnings base calculated by opposing expert without market verification.
\$274,444	1.23	\$337,566	
Earnings B4 Taxes	Multiple	Market Value	Effects of valuation discrepancies created by opposing expert.
\$52,524	1.23	\$64,605	
DISCREPANCIES			
Earnings		Market Value	
-\$221,920		-\$272,962	

### Capitalization Rate

- Mr./Ms. Expert, I am taking you to page 11 of your Yummy Foods report:
- You calculated a 29.4% capitalization rate, is that right?
- And 20% of this number comes from company specific risks?
  - (2) on this report
- And those company specific risks include local market factors as stated in note #2 on this page?
- And the company specific risks include key-man discounts; also stated in note #2 on this page?
- How much of the 20% comes from local market factors?
- Did you discuss any specific local market factors in your report?
- How much of the 20% comes from the key-man discount?

- Did you discuss a description of the key-man attributes in your report?
- What other company specific risks are included in this 20% number?
  - How much of the 20% comes from \_\_\_\_\_you just mentioned?
  - How much of the 20% comes from \_\_\_\_\_you just mentioned?
  - How much of the 20% comes from \_\_\_\_\_you just mentioned?
  - How much of the 20% comes from \_\_\_\_\_you just mentioned?
  - How much of the 20% comes from \_\_\_\_\_you just mentioned?
- Mr./Ms. Expert, I am taking you to page 11 of your Yummy Foods report:
- Regarding the Key-Man discount:
  - You would agree the current owner/ key-man is personable?
    - This attribute does not rise to a level of significance above any other person would be buying this company, is that right?
  - You would agree the current owner/ key-man is likeable?
    - This attribute does not rise to a level of significance above any other person would be buying this company, is that right?
  - You would agree the current owner/ key-man is knowledgeable in this industry?
    - This attribute does not rise to a level of significance above any other person would be buying this company, is that right?
  - How many patrons come to see the owner/ key-man personally at the Yummy Foods location?
  - You would agree that most patrons come for the food and the community atmosphere, is that right?
  - You would agree that a buyer of this company would very likely be an

established member of the Cuban community, is that right?

- You would agree patrons would not stop coming to Yummy Foods simply because the current owner/ key-man was no longer in the picture?

### **Error – WACC**

---

- Mr./Ms. Expert, you would agree that the capital structure of a business comes from owner funding and a lender may provide additional funding?
- The difference between those two funding sources is referred to as equity, is that true?
- Similar to the equity I have in my home?
- The owner's equity is **only a portion** of the overall value of the enterprise, is that true?
- So we have equity capital and debt capital which when combined equals totals enterprise value of capital, is that correct?
- Mr./Ms. Expert, on page 12 of your report you added-back interest to the earnings stream which was then capitalized to determine the company value, is that correct?
- And in so-doing, you calculated debt-free cash flows to the company, is that correct?
- And you capitalized that earnings stream at 29.4% as shown on page 11 of your report?
- You would agree that the risk-rate of debt is the interest rate charged on that debt, is that correct?
- The bank estimates their risk and then demands a higher or lower rate of interest based on the risk involved?
- Did you ask the owner what the interest rate is on the debt that you removed from cash flow stream?
- You would agree that the cost of debt/ the interest being paid by Yummy is probably less than the 29.4% risk rate on page 11 of your report, is that correct?

- You would agree that NACVA provides guidance on how to account for the equity risk rate versus the debt risk rate, is that true?
- Mr./Ms. Expert I am handing you a printout from NACVA chapter five titled "Weighted Average Cost of Capital."
- You are familiar with the Weighted Average Cost of Capital concept?
- Please read out-loud the second sentence of paragraph #2.
  - "WACC is used when the valuation analyst want to determine the value of the **entire capital structure** of a company, such as in an acquisition scenario."
- The guidance outlines an industry-approved method for valuers to evaluate the risk of debt separately from the risk of equity, is that correct?
- This W.A.C.C. method is customarily used by valuation professionals in your industry when the subject company has debt on the books?
- In fact, NACVA provides five pages of instructions on this topic to assist valuers in getting their facts straight on this topic, is that correct?
- Mr./Ms. Expert, I am handing you another printout from NACVA chapter five where it talks about the build-up method you calculated page 11 of your report:
- Please read out-loud the first sentence of the first paragraph beginning with "Ibbotson Associates"
  - .... "uses both historical and current inputs to estimate the cost of **equity capital** for a company. "
- You agree that term equity capital is not the same term as entire capital structure, is that true?

*continued, next page*

## Rebuttal of Expert Valuator

CONTINUED, FROM PAGE 41

- And, again, the difference in the two terms is a reference to the debt capital that is added to the equity capital to determine the overall capital structure, is that true?
- On page 13 of your report, you report an **equity value** of \$140,540 is that correct?
- Did you determine the amount of debt owed by Yummy Foods?
- Did you add the value of any debt to the equity value of \$140,540 to determine the total value of the company?
- The 2017 tax return shows \$34,039 interest payment so there must be a significant amount of debt to go along with it?
- Assuming a bank charged 10% interest the amount of debt on the books, would be \$340,390 is that correct?
- And the value of the equity plus debt would be the total company value?
- Did you report the total company value in your report?
- Mr./Ms. Expert when considering the capitalization rate on debt-free basis NACVA instructs the valuator to determine the ratio of debt to equity, is that true?
- And that ratio is used to determine an applicable capitalization rate for the entire capital structure?
- And the entire capital structure risk-rate is then used to determine the entire company value, not just the equity value is that true?
- And the ratio of the debt to equity on Yummy is something other than zero correct?
- We know there is debt being paid, is that true?
- Assuming the debt is \$100,000 as shown on the 2017 tax return the ratio would

be the equity value of \$140,540 and the \$100,000 is that right?

- Equity is 58% of the total and debt is 42% of the total?
- And the price of equity is 29.4% while the interest being paid is roughly 10% (minus the tax rate) or 7.9% is that right?
- And 58% of the equity rate is 17.2%, is that right?
- And 42% of the tax-affected interest rate is 3.3%, is that right?
- So the overall all capitalization rate for debt-free cash flows would be 20.46%, is that right?
- And applying this 20.46% enterprise capitalization rate to the \$41,384 debt-free cash flows appearing on page 13 of your report, the total company value would be \$202,267, is that right?
- Not the \$140,540 you calculated?

WACC - Yummy Foods		Value (\$M)	Weight
Equity Risk Rate	29.40%	140,540	58.4%
Yield on Debt	10.00%		
Tax Rate	21.0%		
Debt	7.90%	100,000	41.6%
Total	20.46%	240,540	100.0%

### Error – Earnings Multiple

- Mr./Ms. Expert, on page 11 of your report you calculated a capitalization rate of 29.4% which equates to an earnings multiple of 3.4, is that correct?
  - 1/divided by the risk rate.
- And you agree that if I take the number one (1) and divide that by your cap rate of

29.4% I would get a market multiplier of 3.4?

- And vice-versa if I take one (1) and divide that by the market multiplier I would get the 29.4%, cap rate also known as the risk rate?
- Referring to the 1.23 market multiplier shown on page 17 of your report:
  - You would agree that if I divide one (1) by 1.23 multiplier, the result is an 81.3% risk rate, is that correct?
- So you ignored the 81.3% market-comp risk rate in favor of your build-up rate of 29.4%, is that correct?

#### Earnings Multiple to Risk Rate

Numerator	1	
Divided by	81.3%	Risk Rate
Market Multiple	1.23	Result

#### Opposing Expert's Rate to Earnings Multiple

Numerator	1	
Divided by	29.4%	Risk Rate
Market Multiple	3.40	Result

#### Error - Cash to Earnings

- Mr./Ms. Expert, please read your description of the 3% increment where the Net Earnings Discount Rate exceeds the Net Cash Flow Discount Rate.
- You would agree that there is a transition from net cash flows to net earnings by way of starting with net cash flows and then adding-back depreciation, interest, taxes, and non-business expenses?
- And in fact, you added back the items of depreciation, interest, and taxes on page 12 of your report, is that right?
- When calculating the earnings stream on page 13 of your report, you relied on

historical data from 2014, 2015, 2016, and 2017, is that right?

- It is fair to say that those historical earnings streams from 2014, 2015, 2016, and 2017 are what the hypothetical seller is selling?
  - This historical earnings stream is what the hypothetical buyer expects to receive going forward in to the future?
  - Did you make any further adjustments to the future earnings stream that that the hypothetical buyer should be aware of?
  - Mr./Ms. Expert, I am going to hand you a printout of NACVA's Calculation of Cash to Earnings Factor as described in Chapter Five titled Capitalization/Discount Rates; Fundamentals, Techniques & Theory.
  - Mr./Ms. Expert, please read your description of the 3% increment where the Net Earnings Discount Rate exceeds the Net Cash Flow Discount Rate.
  - Have him read the first line:
    - "When future earnings approximate future cash flows, no adjustment is necessary to convert the capitalization rate."
  - Have him read the second to last line:
    - "However, when the analyst expects that future cash flows will NOT be consistent with future earnings, adjustment of the capitalization rate is necessary."
  - It would be fair to say the NACVA cash to earnings adjustment is isolated to instances where future cash flows are expected to be significantly different from current-day, is that right?
  - But you included this adjustment in your calculation of the capitalization rate anyway?
  - And on page 12, you have another Cash-to-Earnings calculation where you add back
- continued, next page*



## Rebuttal of Expert Valuator

CONTINUED, FROM PAGE 43

depreciation, interest, and a few personal expenses, is that true?

- Is there any difference between the Cash-to-Earnings factor on page 11 versus the Cash-to-Earnings adjustments you made on page 12?
- You would agree that you have double-counted the Cash-to-Earnings factor, is that right?
- It would be fair to say that this mistake was beneficial to your client?

### Value – Risk Method

- Referring to page 13 of the Yummy Foods report where you have an earnings stream of \$41,384:
  - Dividing that earning stream by your capitalization rate of 29.4% comes out to be \$140,540 as shown on page 13 of your report?
  - Dividing that earnings stream by a smaller cap rate means the value of the firm increases, is that right?
  - For example, dividing that same **2017** earnings stream by a risk rate of 20% would give you a value of \$206,920 is that right?
  - And if you had relied on the **2016** earnings stream of \$54,416 a 20% capitalization rate would give you a value of \$272,000 is that right?
  - And if you capitalized the **2015** earnings stream, the value would be \$474,845, is that right?
- But you chose to put 3x more weight on the 2017 earnings than any of the other years?
- You would agree that a discussion of your decision to apply a 3x weight on 2017 would help us to understand your reasoning, is that right?

- But in fact you provided no discussion on this topic in your report.
- And you provided no narrative in your report to explain how the highest revenue-producing year (page 14 of your report) resulted in the lowest earnings (page 13 of your report), is that true?

### DL0M & Holding Period

- Mr./Ms. Expert, you agree that the inability to quickly sell an asset is an important consideration of fair market value of a business?
- The shorter period of time to sell equates to a reduced marketability discount all else being equal?
- And in fact you included a marketability discount in your valuation of Yummy Foods in the risk build-up process?
- You included an eight-page discussion on this topic for us to follow- along with your reasoning, is that correct?
- Mr./Ms. Expert, in the process of valuing a company you would agree that ultimately the numbers should make economic sense?
- You would agree that historical treatises and historical scholarly studies should be scrutinized for applicability to today's marketplace?
- Those historical references and studies should not be applied haphazardly?
- **Inapplicable** historical studies should not be averaged in haphazardly along with **relevant** data, is that right?
- The discount for marketability/ liquidity should be a reasonable estimate of the **actual costs** that will be incurred in getting cash from the sale of an asset?
- And when you calculated the marketability/ liquidity discount for Yummy Foods, you estimated the reasonableness of those numbers, is that correct?

- The reasonableness of the \$101,270 discount shown on page 18 of your report?
- Your eight-page discussion on marketability lists twenty restricted stock and IPO studies, is that right?
  - See page 2 of the marketability report.
- You would agree that the IPO studies reflect the stock prices of publicly traded companies before and after the issuance of each company's Initial Public Offering on NASDAQ or a similar stock exchange?
- You would agree the restricted stock studies show the price of a company stock for certain individuals who cannot immediately trade the stock due to timing the restrictions set forth in SEC Rule 144; also traded on NSDAQ or a similar stock exchange?
- And you calculated a marketability discount for Yummy Foods based on these studies as shown on page 18 of your report?
- It is fair to say that Yummy Foods has not issued any restricted stock, is that true?
- And it is fair to say Yummy Foods has not applied to the SEC for an initial public offering of its stock, is that true?
- When referring to the holding period of a restricted stock study, you are incorporating a reference to SEC Rule 144, is that right?
- And you know that rule 144 was originally issued in **1933** under the Securities act which is memorialized in 17 CFR § 230.144?
- More specifically, you are referencing 230.144 (d) the general rule on Holding Period requirements?
- And you realize that those holding period requirements have changed over the years from 1933?
- In fact they changed substantially from the

time of the first study in 1966 to the most recent study in 2012?

- In fact the holding period prior to April 29, 1997 was two years, is that right?
- And after April, 1997 the holding period was down to one year, is that correct?
- And as of February 15, 2008, the holding period was reduced even further to where it is at currently, which is six-months, is that right?
- Would it be fair to say that only four out of the twenty studies reflect a holding period that is similar to today's marketplace?
  - Harris/TVA study 2007-2008 18.1%
  - FMV Opinions Study 1980-2010 20.7%
  - Pluris DLOM Study 2001-2012 22.4%
  - SRR Restricted Stock Study 2005-2010 9.3%
- And the average of these four studies is **17.6%**?
- And what discount rate did you incorporate i to your report on page 18?
  - **30%**
- And you did incorporate a marketability discount rate in to the capitalization rate that you say is "assumed to be implicit in the calculated build-up rate?"

### **DLOM – Actual Costs**

- Mr./Ms. Expert, you recently established that Yummy Foods is not going to be listed on the NASDAQ or any other stock exchange. The company has no restricted stock nor will it be applying for an initial public offering.
- The company will not incur a cost or marketability discount in that sense, is that true?
- You would agree however, a hypothetical seller of Yummy Foods might incur a brokerage fee to sell the company, is that right?
- And there may be attorney fees?
- And there may be some accounting fees to pay?

*continued, next page*

## Rebuttal of Expert Valuator

CONTINUED, FROM PAGE 45

- And there would be a discount for the time-to-sell requirement?
- In your opinion as a valuator, how much would the brokerage fee be?
  - Roughly 10% of the first million or \$25,000 assuming the company is worth \$250,000?
- The broker would spend his or her time marketing the company and introducing potential buyers to the hypothetical seller?
- Or the hypothetical seller could reduce or eliminate the brokerage fee by marketing the firm himself or herself?
- The cost for an attorney to draft the sale documents would be roughly \$5,000?
- The cost to get the books cleaned up/ or audited would be another \$5,000?
- Discounting the expected sale price of

\$250,000 on a twelve-month CD earning 2% the time- value of money/ present value discount would be \$5,000, is that correct?

- So, you would agree that the actual marketability costs would include the broker fee, the attorney, and the accountant, and a present value discount from the expected sale date?
- Adding all of these costs would come to \$40,000, is that right?
- But you came up with a discount of \$101,270 without considering any of these specific costs, is that right?

### **About Tom Gillmore, CPA, ABV, CFF, CVA**

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## **FAMILY LAW SECTION OUT OF STATE RETREAT**

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# Best Practices in Addressing Retirement Benefits in Settlement Agreements

Timothy C. Voit, Bonita Springs Florida



The number of disputes over the interpretation of settlement agreement language, in the context of retirement plans, could never be understated. Many times it lacks an understanding

of the retirement plans in question, and in particular in the context of being divided by a QDRO or like order. There is more that can be written on this topic than possible in the context of an article, in effect, one could write a thesis on how to draft settlement agreement language as it relates to retirement plans. Here, we provide five (5) more common points to consider when preparing a settlement agreement involving retirement plans.

1) If you, as the attorney, realize that you might not be familiar with the type of retirement plan, perform a search of the plan over the internet and, in the very least, convey the intent of whether a retirement account is being divided or a monthly pension benefit payable over a lifetime. All too often, these two types of plans are confused with one another: (1) a defined contribution plan vs. (2) a defined benefit plan. A most recent example involved the division of a Florida Retirement System (FRS) Investment Plan. Although the language of the MSA clearly addressed issues having to do with a FRS Pension Plan, the FRS Pension Plan is MSA was designed to pay out a monthly pension for life. The FRS Investment Plan,

similar to a 401(k), has an account balance containing mutual funds. Here, the division of the FRS Investment Plan included COLAs, post-retirement enhancements, subsidized benefits, none of which pertain to the FRS Investment Plan. Perhaps the intent was to include gains/losses (market fluctuations) in the value, but the but the MSA did not include language related to gains and/or losses.

2) *"The Wife is awarded 50% of the present value of the Husband's pension as of the date of divorce"*. There are a few issues with the wording of this. First, the term "pension" is associated with a defined benefit pension plan paying a monthly pension for life. If the particular retirement plan is not designed to pay out a lump-sum, but rather a monthly pension amount, the italicized language would actually limit the Wife's award. Second, the value of a monthly pension benefit increases over time even though the dollar amount (per month) accrued does not change. For example, if the monthly pension, assuming it is all marital, as of the date of filing is \$1,000 per month with each party's share being \$500 per month. If the parties were approximately 42 years of age, the value of \$500 per month can be \$25,000, but at age 62 the same \$500 per month would have a value of \$75,000. If in fact you're dealing with a pension plan, it would be helpful to simply state "the spouse is awarded 50% of the monthly pension accrued as of the date of filing". Caution is advised as there may be cost-of-living-

*continued, next page*



## Retirement Benefits in Settlement Agreements

CONTINUED, FROM PAGE 47

adjustments (COLA) or other benefits, e.g. subsidized benefits based on years of service that are not related a period of time, i.e. post-marital, but rather based on years of service.

3) You will want to familiarize yourself with the Florida case, *Blaine v. Blaine*.<sup>1</sup> *Blaine*, in essence, states that if a benefit or provision is not addressed in the settlement agreement, it cannot be included in a QDRO or like order. Another important Florida case to review is *Storey v. Storey*.<sup>2</sup>

In the *Storey* case, the Court was presented with the issue of defining the marital portion of the Husband's pension. The defined marital portion could differ whether the Court applied federal law, Florida law, or the language included within the parties' agreement. In *Storey*, the plan at issue was governed under federal law and had a default mechanism to determine the marital portion of the pension. At the time of the parties' agreement, the applicable case was *Deloach v. Deloach*.<sup>3</sup> The language within the parties' agreement defined what was marital—even though years later, they disagreed. The plan, on the other hand, interpreted the language within the parties' agreement to provide the wife with approximately double of what the agreement defined. The appellate court ruled in favor of the husband in deciding that the language within the parties' agreement controlled.

4) "*The Husband is awarded 50% of the Wife's 401(k).*" Again, this is subject to multiple interpretations: Is the award a dollar amount in the account at the time or are there gains and/or losses that are applied to the award? Second, as of what date? The date of the agreement? The date the parties filed for divorce? Or the date the QDRO is entered? Would you want the gains (or losses) from the

cut-off date for equitable distribution to the date of distribution? You cannot have gains without losses and stating a party is entitled to "interest" doesn't fly either. A 401(k) does not pay interest, not directly anyway, unless there are individual bonds in the account or a money market account. 401(k)s fluctuate in value based on the underlying investments. Most plan administrators will NOT compute interest on an alternate payee's awarded share, but rather adjust it for gains and/or losses. One Florida case of interest is the *Hoffman v. Hoffman*<sup>4</sup> case. The court in *Hoffman v. Hoffman* came to the conclusion that a 401(k) is an asset of fluctuating value and therefore, the parties share in the ups and downs of the account. At the end of the day, if you award a percentage of a retirement account, gains and losses are implied. If the intent is not to award gains and/or losses, then simply specify a dollar amount from the account.

5) Albeit a minor issue, but annoying nonetheless for the QDRO preparer, is stating that a spouse is awarded 50% of the marital portion, when in fact the benefit or account is all marital as of that particular date. It instantly raises the question, is there a premarital component? If the plan is a 401(k) and there is a pre-marital portion, extensive calculations would have to be performed to determine what is marital. Typically, a plan administrator will NOT compute the marital portion of a 401(k) as it would consume the time of the plan's staff. One exception is Publix. Publix is a privately held firm who have been the record-keepers of their own plan since the plan's inception. It is not unusual for other plans to change plan administrators from time-to-time. The burden should be placed on the spouse with the plan to have the calculations performed as the goal, actually, is to deduct an updated premarital value.

### Endnotes

<sup>1</sup> *Blaine v. Blaine*, 872 So.2d 383, 384 (Fla. 4th DCA 2004)



- <sup>2</sup> *Storey v. Storey*, 192 So. 3d 670 (Fla. 4th DCA 2016)  
<sup>3</sup> *Deloach v. Deloach*, 590 So.2d 956, 963 (Fla. 1st DCA 1992)  
<sup>4</sup> *Hoffman v. Hoffman*, 841 So.2d 695, 696 (Fla. 4th DCA 2003)

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*specializes in the preparation of QDROs and valuation issues involving pensions. Mr. Voit is retained to consult on appellate briefs involving retirement plans in divorces and testifies to the applicability of appellate decisions to certain retirement plans. Tim Voit is a regular speaker for CLE credits related to QDROs and has testified as an expert in state and federal courts.*

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# "No, This IS a Court of Equity!" And That's OK.

By Brian Kruger, Gainesville



In the Winter 2019 edition of this publication appears an article entitled "But This is a Court of Equity!"<sup>1</sup> The article rightly points out that many Florida practitioners have conceptual problems

with the idea of "chancery" courts, the merger of law and equity, and exactly how that should be dealt with in dissolution of marriage and other Chapter 61 proceedings (which would also include post-dissolution modification proceedings, and, because Chapter 742 arguably "borrows" many Chapter 61 statutory provisions some issues in paternity suits under the "determination of parentage" statutes).

The article begins with an all too familiar hypothetical: blindsided by a case on point, cited by opposing counsel, the desperate fictional attorney "utter[s] a phrase that has been the "Hail Mary pass" for family law attorneys forever, "But Judge... this is a Court of Equity!" I wholeheartedly agree with the article's admonition: please don't, in that situation, do that.

That said, let me offer a differing viewpoint on why that approach may not work, and suggest an alternative. But before we get down to those proverbial brass tacks, we need the historical framework, which, to be fair, is also presented in the prior article.

Section 61.011 of the Florida Statutes states,

<sup>1</sup> Reuben Doupe, "But This is a Court of Equity!," in *The Florida Bar Family Law Section Commentator* (Spring 2019) (hereinafter "Commentator article").

without further elaboration, "[p]roceedings under this chapter are in chancery."<sup>2</sup> "But Florida hasn't had a king since Ferdinand VII, and hasn't had an *English* king since George III; and, that means no royal Chancellor, and thus no Chancery, the royal secretariat in which was ensconced the Royal Seal, named for "the latticed screen or chancel behind which the clerks worked." J.H. Baker, *An Introduction to English Legal History* 84 (2d ed.1979) (hereinafter "*Baker*").<sup>1</sup>

The prior *Commentator* article then proceeds to this conclusion: "[t]he name of the court is a Court of Chancery, and the types of actions heard are Equitable Actions. Thus the phrase a "Court of Equity," is a misnomer." (Capitalization in original). Professor Black provides a much more generalized definition, stating that "chancery" is simply "Equity; equitable jurisdiction; **a court of equity**; the system of jurisprudence administered in courts of equity." Black's Law Dictionary, 210 (5<sup>th</sup> ed. 1979) (emphasis supplied).<sup>2</sup>

Thus, there is no "misnomer" in referring to a Florida court hearing a Chapter 61 proceeding as a "court of equity." Professor Black says so. Just don't capitalize it as "Court of Equity." It's not a proper name, but a term descriptive of the court's powers. *See also* Fla. Stat. §26.012(2)(c) (2018) (providing that circuit courts "shall have exclusive original jurisdiction... [i]n all cases in equity"). There is no royal seal in Florida, and no chancel. "Chancery" is no more correct than "equity," and at any rate "Court of Chancery" is **not** the "name" of any court sitting in Florida.

<sup>2</sup> Fla. Stat. §61.011 (2018).

*continued, next page*

## "No, This IS a Court of Equity!"

CONTINUED, FROM PAGE 51

(You can find the **name** of the court at the top of any pleading or motion—it's the "Circuit Court In and For...")

The prior *Commentator* article goes beyond its recommendation of a somewhat talismanic prohibition to that of the author's ultimate proposition:

[D]o not actually say the words "Court of Equity;" remove that phrase from your vocabulary as it is nothing more than a white flag signal to the judiciary that you know you have lost.<sup>5</sup> Instead, point out that the issue raised is one in which the court has judicial discretion.

-----  
5. If it was not a white flag before, it will be now that the Statewide Family Law judiciary have read this article.

6. If however, the issue raised does not allow any judicial discretion, then you should find a manner in which you can maintain your dignity by conceding the point of law, and you should be better prepared next time.<sup>3</sup>

The two conclusions provided within the prior *Commentator* article are the author's opinions; they do not cite to actual authority. While there is nothing objectionable with presenting an opinion, I believe that there are good reasons for disagreement for both contentions.

First, as previously noted, there is absolutely nothing wrong with "the words "Court of Equity"," besides the capitalizing. I'm sure that our "Statewide Family Law judiciary" (to which the same capitalization critique could be applied) already knows that.

The key, to why, in this author's opinion, this generalized "white flag" conclusion is wrong, is found in the second footnote, and indeed the structure of the prior article—the reference is

not to using the "wrong" phraseology (which, in fact, is not wrong) in **any** situation, but to misusing an appeal to equity itself, **specifically** in response to a situation where one should instead simply have been "conceding the point of law," as the author's footnote reflects. The author is correct that an appeal to equity should **not** be used in that latter fashion. Such a use connotes ignorance of the substance of equitable principles, since one equitable maxim is that "equity follows the law." See *Saulnier v. Bank of Am., N.A.*, 187 So.3d 854, 856 (Fla. 4th DCA 2015) (asserting that "equity follows the law and cannot be used to eliminate its established rules," (citing *Davis v. Starling*, 799 So.2d 373, 378 (Fla. 4th DCA 2001)).

Since the prior article opens with and is based upon a hypothetical, allow me to posit one myself. Say a frustrated carpenter needs a hammer but does not have one. Instead, he fishes out a crescent wrench from his toolbox and attempts to drive a nail with it. After bending several nails in succession, he determines that crescent wrenches are useless tools and that he will avoid ever using them again. But, if he ever again becomes so "desperate" that he feels forced to use a wrench to drive a nail, he resolves that in such situation, and from now on, he will refer to all wrenches as "hammers," in hopes that this will somehow improve the performance of the wrench.

The problem is not with the tool. Nor is the problem with what we **call** the tool. The problem is with misusing the tool. User error. The prior article is correct that we should not use the tool of an appeal to equity in order to attempt to circumvent clear legal precedent, but that article is **not** correct that using an appeal to equity should therefore be generally avoided as, or necessarily considered, a "white flag;" nor should it be supplanted by the "judicial discretion" standard in making argument to a court.



I would be remiss if I were not to propose an alternative.

The first bit of that proposal would be to learn the **substance** of equity, namely its principles and maxims. "[E]quity follows the law." It is this author's opinion that it is a gamble to risk the lack of the Judge's familiarity and/or knowledge of such maxim. Neither of those gambits, in my opinion, is acceptable.

While it admittedly doesn't help my argument that one traditional equitable maxim is that "equity is as long as the chancellor's foot." See *Circle Finance Co. v. Peacock*, 399 So. 2d 81, 85 (Fla. 1st DCA 1981) ("[I]t is an ancient maxim of the law that equity is as long as the chancellor's foot."); *Marsh v. Marsh*, 399 So. 2d 433, 436 (Fla. 5th DCA 1981) (Coward J., dissenting)(expressing that "[t]he result is that cases involving the same simple question and the same essential facts are decided differently from case to case after extensive litigation with the result depending on the particular trial and appellate court's understanding of *Ball*, perceptions as to the credibility of the parties and the weight of the evidence, and various ancillary factors including... the length of the chancellor's foot." (footnote omitted), conversely, admittedly that is **not** to say that when the court is sitting in chancery a litigant may simply shamanistically intone the phrase "court of equity" in order to receive a "get out of jail free" card—an act committed by the "Hail Mary" protagonist of the prior *Commentator* article.

I think the better view is that equity remains a valuable tool to "fill in the blanks," in the innumerable situations when there is **not** a case directly on point threatening to sink your argument. Equity is **not** some amorphous phrase without any substantive meaning:

Because the courts of Chancery were thought to be too subjective, by contrast to the common law courts, they eventually developed their own rules, albeit ones stated in much more generalized terms. *Baker* at 90-2.

These equitable rules are known in jurisprudence as "maxims," and guide Chapter 61 proceedings and other cases in chancery. Florida Jurisprudence, Second identifies a good dozen of these maxims, at least some of which should be familiar to family law practitioners: Equity suffers no wrong without a remedy; Equity acts in personam, not in rem; Equity follows the law; Equality is equity; Equity regards as done that which ought to be done; Equity regards substance rather than form; Equity will leave parties to illegal transactions where they find themselves; Equity Aids the Vigilant; One Who Seeks Equity Must Do Equity; and the ever-popular Clean Hands doctrine. See *id.* at Equity §§ 58-76.

*Insignares, supra.* As noted in "But This Is A Court of Equity!," injunctive relief is one traditional equitable remedy often resorted to in family law cases, and I would add that the equitable concepts of laches and estoppel can come in very handy as well. Whenever you seek such relief or rely on such defensive arguments, you are invoking the equitable powers of the court, whether you explicitly so state or otherwise.

Such equitable arguments are valid or not, given the circumstances of each case. Referring to the court as one "of equity" is no "white flag." Rather, it is an accurate description of the court and the powers that one requests be exercised and does not reflect on the validity of the argument one whitt. For example, laches is a well-established defense in family law cases, particularly for support claims, in family law cases. See also *Gaines v. Gaines*, 870 So.2d 187, 188-9 (Fla. 4th DCA 2004)(specifically stating that the determination of validity of laches defense "is primarily a question of equity and depends on the unique circumstances of each individual case"); *McIlmoil v. McIlmoil*, 784 So.2d 557 (Fla. 1st DCA 2001); *Garcia v. Guerra*, 738 So.2d 459, 461 (Fla. 3d DCA 1999) (referring to consideration of defense as "the doing of

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## "No, This IS a Court of Equity!"

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equity"); *Hall v. Wilson*, 530 So.2d 410 (Fla. 3d DCA 1988); *Wing v. Wing*, 464 So.2d 1342 (Fla. 1st DCA 1985); *Brown v. Brown*, 108 So.2d 492, 494 (Fla. 2d DCA 1959)(stating that "it has not been demonstrated that [the chancellor]... was in error in deciding that the equities were in favor of appellee").

Finally, there is obviously nothing wrong with reminding your judge, sitting in chancery, that s/he may be making a decision that is subject to a "judicial discretion" standard, as also recommended in "But This Is A Court of Equity!" My quibble with that suggestion in the prior *Commentator* article is that the recommendation is to do so "[i]nstead" of making an appeal to equity (*i.e.*, using the supposedly verboten phrase "court of equity"). I believe such recommendation, at that point, is based on a false dichotomy.

The judicial discretion, or "abuse of discretion," standard, is essentially a procedural one as it is a standard of review applied **on appeal**, to very many issues in family law. See also *Canakaris v. Canakaris*, 382 So. 2d 1197 (Fla. 1980). As such, this rule accords trial courts great leeway, since when this standard applies:

If reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion. The discretionary ruling of the trial judge should be disturbed only when his decision fails to satisfy this test of reasonableness.

*Id.* at 1203. That said, framing an issue purely as one involving judicial discretion, without invoking the court's equitable powers (whether or not the dreaded term "court of equity" is used) devolves to simply being an argument to be reasonable, because "if reasonable men could differ" then the ruling is not unreasonable and will be upheld. That's great, but hardly

provides any **guidance** to a court to rule in your favor. Surely our family law judiciary would strive to be reasonable anyway.

The judicial discretion approach should not be used "instead" of an appeal to equity. It should be used in **tandem** with an appeal to equity. But when you remind the court that it is a court of equity, you need to make a **specific** appeal to the court sitting in chancery, referencing a particular maxim or equitable remedy, and note why the elements of same are present in your case.

If you're in court in a Chapter 61 proceeding, please do not feel that you have to avoid the phrase "court of equity." Doing so throws out the proverbial baby with the bathwater. Conversely, reminding the court that it sits in chancery and thus **is** a court of equity can be an effective tool in obtaining the best result for your family law client.

At least, that's my opinion.

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1. Luis E. Insignares, *7 Magic Words: Chapter 61's Secret Weapon Statute*, in *Res Gestae* at 12 (Lee County Bar Association, Feb. 2014) (hereinafter "*Insignares*"). This short piece resulted from a discussion between the author and myself regarding our shared and respective experiences with appeals to equity. The copy of *Baker* cited therein is my law school copy (from a course entitled "English Legal History," if memory serves), as is the cited copy of *Black's Legal Dictionary*.
  2. *Id.*

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# Daubert House

By Ronald H. Kauffman, Esq. Miami, FL<sup>1</sup>

*"Like the little-known codicil in the Faber College constitution . . ."*<sup>2</sup>



For much of Florida's history, we have relied on the *Frye* "general acceptance" standard for the admission of expert testimony.<sup>3</sup> Six years ago, the Florida Legislature enacted the *Daubert* standard to govern the

admissibility of expert testimony, replacing the old *Frye* standard.<sup>4</sup>

Since then, the *Daubert* standard was criticized for the way it was enacted, and caused many lawyers to shout about the threat to our constitutional rights.<sup>5</sup> Last year a majority of the Florida Bar Board of Governors plotted to get rid of the *Daubert* standard, and the Florida Supreme Court ultimately expelled it. This year *Daubert* crashed back into law like a rogue parade float, proving once again 'it wasn't over when the Germans bombed Pearl Harbor.'<sup>6</sup>

This article briefly looks at Florida's old *Frye* test, discusses the rapid-fire changes to Florida's expert witness rules, and reviews the *Daubert* evidentiary standard for the admission of expert testimony.

## Florida is a *Frye* State

For almost 70 years, both the Florida and Federal court systems used the same expert witness standard established in *Frye v. United States*.<sup>7</sup> In *Frye*, a defendant on trial for murder wanted to offer an expert witness to testify about a lie detector test. The trial judge denied the request. The appellate court affirmed: ". . . while courts will go a long way in admitting

expert testimony . . . the thing from which the deduction is made must . . . have gained *general acceptance* in the particular field in which it belongs."<sup>8</sup>

The Federal Evidence Code was established in 1975. The Florida Evidence Code was established in 1979, and adopted the same numbering system and significant portions of the Federal Code. At the time, there was a dispute as to whether the adoption of the respective Evidence Codes replaced the *Frye* general acceptance standard.

The U.S. Supreme Court held in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) that *Frye*'s "general acceptance" test was superseded by the adoption of the Federal Rules of Evidence.<sup>9</sup> However, the Florida Supreme Court never addressed whether Florida's Evidence Code superseded *Frye*.<sup>10</sup>

Since the U.S. Supreme Court's decision, Florida was one of the dwindling minority of states still applying the *Frye* test to expert testimony. The Florida Supreme Court announced in *Brim v. State* that "despite the federal adoption of a more lenient standard in *Daubert* . . . we have maintained the higher standard of reliability as dictated by *Frye*."<sup>11</sup>

However, the *Frye* rule was always applied very loosely in Florida. For instance, the Florida Supreme Court held in *Marsh v. Valyou* that if an expert relies only on his or her personal experience and training, then the testimony is admissible without the need for a *Frye* hearing.<sup>12</sup> In other words, if an expert is testifying as to "pure opinion," it is presumptively admissible.



*Marsh* also created an exclusion from *Frye* by limiting it to opinions involving "new or novel scientific techniques." As the *Marsh* court noted, most expert testimony does not involve new or novel scientific techniques, so the "vast majority" of expert testimony in Florida was never even subject to *Frye*.<sup>13</sup>

In his concurrence in *Marsh*, Justice Anstead questioned why Florida still used the *Frye* test after adoption of the Florida Evidence Code commenting, "unlike the United States Supreme Court, we have never explained how *Frye* has survived the adoption of the rules of evidence."<sup>14</sup>

### Florida is a *Daubert* State

The Florida House bill amending Rule 702 became effective July 1, 2013, and fundamentally changed Florida law on expert testimony. However, there was a lot of constitutional uncertainty because of the way the bill passed.

Generally, legislation which encroaches on the Supreme Court's power to regulate courtroom practice and procedure is unconstitutional, but the Legislature can enact substantive law.<sup>15</sup> When one branch of government encroaches on another branch, Florida traditionally applies a "strict separation of powers doctrine."<sup>16</sup>

Given that the Evidence Code contains both substantive and procedural provisions, deciding whether a law is substantive or procedural is as difficult to distinguish as the difference between courts of law and equity.<sup>17</sup>

Accordingly, there was a looming question whether the Legislature violated the separation of powers doctrine.<sup>18</sup> Determining if amended Rule 702 was substantive or procedural would not be known until *DeLisle v. Crane Co.*, 258 So. 3d 1219 (Fla. 2018) reached the Florida Supreme Court.

Florida's expert witness rules, as amended from the former rules, state:

Section 90.702, Testimony by experts. – If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise, if:

(1) The testimony is based upon sufficient facts or data;

(2) The testimony is the product of reliable principles and methods; and

(3) The witness has applied the principles and methods reliably to the facts of the case; however, the opinion is admissible only if it can be applied to evidence at trial.

Section 90.704, Basis of opinion testimony by experts. –The facts or data upon which an expert bases an opinion or inference may be those perceived by, or made known to, the expert at or before the trial. If the facts or data are of a type reasonably relied upon by experts in the subject to support the opinion expressed, the facts or data need not be admissible in evidence. Facts or data that are otherwise inadmissible may not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

The preamble to House Bill 7015 states the legislative intent was to pattern Rule 702 after the Federal Rules of Evidence, adopt the *Daubert* standard for expert testimony, abandon the *Frye* rule, and prohibit "pure opinion testimony" in Florida courts.<sup>19</sup>

Over the next few years, and despite a growing controversy, Florida courts were faithfully applying *Daubert* and following the Legislative amendment. After all, *Daubert* seemed to have the tacit approval of the Florida Supreme Court.<sup>20</sup> Unknown to everyone, the *Daubert* Standard would flounder under secret probation.

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### No, Florida is a *Frye* State

*Has the entire federal court system for the last 23 years as well as 36 states denied parties' rights to a jury trial and access to courts?*<sup>21</sup>

The controversy over the *Daubert* amendment graduated into a full-blown food fight among members of the Florida Bar. As part of the Evidentiary Rules making process, the Florida Bar Code and Rules of Evidence Committee, by a vote of 16–14, recommended that the Florida Supreme Court not adopt the Legislature's amendments to sections 90.702 to replace the *Frye* standard for admitting expert opinion evidence with the *Daubert* standard.

Next, the Florida Supreme Court declined to adopt the *Daubert* Amendment to the extent that it is procedural, due to the constitutional concerns raised. The Florida Supreme Court instead left it for a proper case or controversy.<sup>22</sup>

The case arose in *DeLisle v. Crane Co.*, 258 So. 3d 1219 (Fla. 2018). DeLisle developed mesothelioma, a disease caused by exposure to asbestos. He filed a personal injury action against sixteen defendants, but proceeded to trial only against Crane, Lorillard Tobacco Co., and Hollingsworth & Vose Co., claiming he was exposed to asbestos fibers from sheet gaskets and smoking Original Kent cigarettes from 1952 to 1956.

The parties hotly disputed causation, and even DeLisle's own experts did not agree on which products produced sufficient exposure to asbestos to constitute a substantial contributing factor to DeLisle's disease. The trial court awarded DeLisle \$8 million in damages, apportioned among the defendants based on the jury's distribution of fault.

The Fourth District reviewed the admission of the testimony of the experts under the *Daubert*

standard, and as a boon to the defendants, reversed for a new trial for R. J. Reynolds, and reversed and remanded for entry of a directed verdict for Crane.

After review of the Fourth District's opinion, the Florida Supreme Court invalidated the 2013 legislative changes to the Florida Evidence Code that adopted the *Daubert* standard.

The Florida Supreme Court found that the Legislative amendments to Section 90.702 were not substantive because they did not "create, define, or regulate a right", but was procedural rulemaking instead.

Additionally, the Court held that the *Daubert* amendment conflicted with the exiting *Frye* rule because *Frye* and *Daubert* were competing methods to determine the reliability of expert testimony. The Court held that, once again, *Frye* was the appropriate test in Florida courts. Unknown to everyone, *Frye* was on "Double Secret Probation."<sup>23</sup>

### Florida is a *Daubert* State!

*But we can't ignore the process altogether and do whatever we want, whenever we want to do it . . .*<sup>24</sup>

D-Day marking the return of *Daubert* was November 20, 2018. On that day, following a machine recount, Floridians learned Republican nominee, Ron DeSantis, defeated Democratic nominee Andrew Gillum. At age 40, DeSantis became the youngest incumbent governor in the United States.

As an otter takes to water, the new Governor's Supreme Court appointments started on his second day in office. For purposes of the Evidence Code, his appointments became the most consequential moves of his governorship. That is because at the time Governor DeSantis took office, three justices forming the plurality decision in *DeLisle*, Barbara Pariente, R. Fred Lewis and Peggy Quince, reached mandatory retirement, giving the Governor a rare

opportunity to change Florida's expert witness rules.<sup>25</sup>

The Florida Supreme Court, as part of its Constitutional rulemaking authority, has the power to adopt Legislative changes to the Evidence Code. As we learned in 2017, the Court previously refused to adopt the *Daubert* amendments, to the extent that they were considered procedural, solely "due to the constitutional concerns raised" by the Committee members and commenters who opposed the amendments.<sup>26</sup>

This year however, without re-addressing the correctness of its own ruling in *DeLisle*, and after noting that *DeLisle* did not address the amendment to section 90.704 made by section 2 of chapter 2013-107, the Florida Supreme Court chose to recede from its prior decision not to adopt the Legislature's *Daubert* amendments.<sup>27</sup>

Rejecting the recent complaints about the *Daubert* standard, the Florida Supreme Court remarked that *Daubert* has been routinely applied in federal courts since 1993, a majority of states adhere to the *Daubert* standard, and caselaw after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule.

Effective immediately, the Florida Supreme Court has adopted the Legislatures' 2013 amendments to section 90.702 as procedural rules of evidence, and adopted the amendment to section 90.704 to the extent it is procedural.<sup>28</sup>

### The *Daubert* Trilogy

*Our responsibility, then, unless we badly misread the Supreme Court's opinion, is to resolve disputes among respected, well-credentialed scientists about matters squarely within their expertise, in areas where there is no scientific consensus as to what is and what is not "good science," and occasionally to reject such expert testimony*

*because it was not "derived by the scientific method."*<sup>29</sup>

The Florida Supreme Court, having decided that Florida is a *Daubert* state again, it is useful to review what that actually means for family cases. The *Daubert* standard developed in three product liabilities cases in which the main issue was causation.

The plaintiffs in each case tried to introduce expert testimony to prove products caused their damages. The courts ultimately rejected each of the plaintiffs' experts. The result was a fraternity of three opinions, which raised the minimum passing grade for the admission of expert testimony.

The dean of the trilogy was *Daubert v. Merrell Dow Pharmaceuticals, Inc.* itself.<sup>30</sup> *Daubert* was a toxic tort case against the maker of the morning sickness drug Bendectin. The plaintiffs alleged Bendectin caused limb reduction birth defects.<sup>31</sup> The U.S. Supreme Court first had to decide whether the *Frye* test had been replaced by the Federal Rules of Evidence, and ultimately held that it was.

The majority then established a new standard for admitting expert testimony which diverged from the *Frye* test. Recall that *Frye* admitted all expert testimony as long as it was based on a science generally accepted in the scientific community. Under *Daubert*, a judge has to ensure that expert testimony is both *reliable* and *relevant*. This requires establishing the expert's theory or technique is scientifically valid, and can be applied to the facts in issue.<sup>32</sup>

The *Daubert* court listed four non-exclusive factors to consider when applying the test: (1) whether the theory or technique can be tested; (2) whether the theory or technique has been peer reviewed; (3) what the "potential rate of error" is; and (4) whether it has widespread acceptance.

The next case to matriculate was *General Electric Co. v. Joiner*.<sup>33</sup> The plaintiff was an

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electrician who claimed his exposure to polychlorinated biphenyls (PCBs) caused his lung cancer. The Plaintiff's expert testified that it was "more likely than not that lung cancer was causally linked to PCB exposure" by extrapolating from animal studies in which mice were injected with PCBs. The trial judge excluded the expert's testimony because the studies did not sufficiently support the expert's conclusion that PCBs caused cancer.

The appellate court reversed after applying a "stringent standard of review" to the order excluding the expert testimony. The U.S. Supreme Court reversed, requiring that the abuse of discretion standard be applied to rulings on the admissibility of expert testimony. This is another split from the Florida *Frye* test. The abuse of discretion standard is far more deferential than the *de novo* standard we have been using in Florida.<sup>34</sup>

*Joiner* also resolved the challenge to the underlying expert testimony by requiring the trial judge to sit as "gatekeeper" to screen testimony. In excluding the testimony, Chief Justice Rehnquist wrote: "nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert."<sup>35</sup> Instead, courts are free to exclude testimony when "there is simply too great an analytical gap between the data and the opinion proffered."<sup>36</sup>

Expert *ipse dixit* is an area in which the new *Daubert* standard differs from previous Florida law. After *Marsh*, an expert's 'pure opinion' testimony was presumptively admitted in Florida. By contrast, *Daubert* frees judges to reject 'pure opinion' testimony because it is only "connected to existing data only by the *ipse dixit* of the expert."

The omega case in the trilogy was *Kumho Tire Co. v. Carmichael*.<sup>37</sup> The plaintiffs sued after a tire blew out on their minivan, causing a fatal accident. The plaintiffs' expert, a tire-failure analyst, testified that the tire was defective after visually inspecting it. The trial judge, grading the expert's opinion 0.0, excluded the expert's testimony. The appellate court reversed, limiting *Daubert* to cases where an expert is applying scientific principles, rather than personal observation. The U.S. Supreme Court reversed, and extended *Daubert* test to all expert testimony.<sup>38</sup>

*Kumho* marks another difference with Florida case law. Remember, *Marsh* limited the *Frye* test to "new or novel scientific techniques", rendering it "inapplicable in the vast majority of cases." By contrast, *Kumho* extended the new *Daubert* standard to all expert testimony, forcing experts to apply the same "intellectual rigor in their field" to the courtroom.<sup>39</sup>

### Admitting Expert Testimony Under *Daubert*

To qualify a witness as an expert under the new *Daubert* standard, and have the opinion testimony admitted, the witness must be qualified to give an opinion. In other words, the witness must be an actual expert. Additionally, the expert's testimony must be both relevant and reliable.

#### A. Qualifying the Expert Witness

There is no hard and fast rule as to the degree of knowledge required to qualify a witness as an expert under *Daubert*. Rule 702 merely defines an expert as someone who is qualified in a subject matter by knowledge, skill, experience, training, or education.<sup>40</sup> However, the proponent of the expert evidence carries the burden of laying the proper foundation for the admission of expert testimony by a preponderance of the evidence.<sup>41</sup>

Establishing an expert's competency and knowledge in a particular profession is done



through *voir dire*, an examination of the expert's credentials.<sup>42</sup> Once the proper foundation is met, the witness is deemed an expert after being qualified as an expert by the court.

Family law cases frequently rely on experts, and accountants and psychologists are two of the more commonly admitted experts. In Florida, accountants and mental health professionals are required to be licensed in order to practice.

Additionally, professionals licensed in other states have to be certified in Florida as an expert witness to testify here.<sup>43</sup> However, unless specifically required by statute, a witness need not have a state license to qualify as an expert.<sup>44</sup> The lack of a license then only goes to the weight of the testimony given.

### **B. Relevancy and Reliability**

Since the Legislature passed the *Daubert* standard in Florida, a few appellate courts have had an opportunity to consider the new evidentiary rule.<sup>45</sup> For example, in *Perez v. Bell South Telecommunications Inc.*, the plaintiff became pregnant while employed as a call center operator by Bell South. Plaintiff's board-certified obstetrician and gynecologist, classified plaintiff's pregnancy as "high risk", and recommended a week of bed rest.<sup>46</sup>

The plaintiff had also had a prior medical history which contributed to her high-risk pregnancy: she was obese, and had gastric surgery due to her obesity, she had suffered two herniated discs, had back surgery, and had her gall bladder removed prior to her pregnancy.

The plaintiff was fired for non-performance. Two days later, she suffered a placental abruption and delivered her child twenty weeks early. Plaintiff's expert opined in that workplace stress, exacerbated by Bell South's alleged refusal to accommodate Ms. Perez's medical condition, was the causal agent of the abruption. The expert's testimony was the only

testimony linking the premature birth to Bell South.

However, the plaintiff's expert also testified there was no way of ever knowing for sure what caused the placental abruption, and that his conclusions were purely his own personal opinion, not supported by any credible scientific research.

Interestingly, the trial court dismissed the expert's testimony under the old *Frye* standard.<sup>47</sup> In affirming the lack of admissibility of the plaintiff doctor's testimony, the *Perez* panel held that under *Daubert*:

"the subject of an expert's testimony must be 'scientific knowledge.' "[I]n order to qualify as 'scientific knowledge,' an inference or assertion must be derived by the scientific method." The touchstone of the scientific method is empirical testing—developing hypotheses and testing them through blind experiments to see if they can be verified. "[S]cientific method [is] an analytical technique by which a hypothesis is formulated and then systematically tested through observation and experimentation." As the United States Supreme Court explained in *Daubert*, "This methodology is what distinguishes science from other fields of human inquiry." Thus, "a key question to be answered" in any *Daubert* inquiry is whether the proposed testimony qualifies as "scientific knowledge" as it is understood and applied in the field of science to aid the trier of fact with information that actually can be or has been tested within the scientific method. "General acceptance" [from the *Frye* test] can also have a bearing on the inquiry, as can error rates and whether the theory or technique has been subjected to peer review and publication. Thus, there remains some play in the joints. However, "general acceptance in the scientific community" alone is no longer a sufficient basis for the admissibility of expert testimony. It "is simply one factor among several." Subjective belief and unsupported speculation are henceforth inadmissible.<sup>48</sup>

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*Perez* established three things: (1) the Legislature intended to tighten the rules concerning the admissibility of expert testimony, (2) the *Daubert* standard applies retroactively to all cases, and (3) an expert's subjective, unsupported belief – the so-called “pure opinion” testimony – is inadmissible.

### Conclusion

*National Lampoon's Animal House* follows Faber College freshmen Lawrence Kroger and Kent Dorfman as they get rejected from the prestigious Omega Theta Pi fraternity. They reluctantly pledge the disreputable Delta Tau Chi. Unknown to everyone Faber's Dean puts Delta House on double-secret probation after invoking “the little-known codicil in Faber's Constitution.” Despite being expelled, the Deltas are not over, and ultimately become respectable.

*Animal House* may explain how we got here, but it is more important to understand where “here” is. After Florida expelled *Frye* and passed *Daubert*, it brought our courts back into line with the U.S. Supreme Court, all federal courts, and a growing majority of state courts. While not everyone will be throwing toga parties in celebration, *Daubert* is the prevailing law in Florida again. If you are still confused, there is always John “Bluto” Blutarsky's guidance.<sup>49</sup>

### Endnotes

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<sup>2</sup> See *In re Amendments to Florida Evidence Code*, SC19-107, (Fla. May 23, 2019) (Luck, J. dissenting).

<sup>3</sup> *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

<sup>4</sup> See §90.702, Fla. Stat. (2019).

<sup>5</sup> See Ronald H. Kauffman, *The Daubert Crucible*, The Commentator (Fall 2015) (“Given that the Evidence Code contains both substantive and procedural provisions, there is still lingering suspicion that the Legislature violated the

separation of powers doctrine.”).

<sup>6</sup> See *National Lampoon's Animal House*, Universal Pictures (1978) (What? Over? Did you say “over”? Nothing is over until we decide it is! Was it over when the Germans bombed Pearl Harbor? Hell no!).

<sup>7</sup> 293 F. 1013 (D.C. Cir. 1923).

<sup>8</sup> *Id.* (emphasis added).

<sup>9</sup> See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 590 U.S. 579 (2013).

<sup>10</sup> See *Sikes v. Seaboard Coast Line R.R.*, 429 So.2d 1216, 1221 (Fla. 1st DCA 1983) (citing Charles W. Ehrhardt, *A Look at Florida's Proposed Code of Evidence*, 2 Fla. St. U.L.Rev. 681, 682–83 (1974)).

<sup>11</sup> *Brim v. State*, 695 So.2d 268, 271 (Fla. 1997). Ironically, scholars have concluded that *Daubert* is the stricter standard. See Stephen E. Mahle, *The “Pure Opinion” Exception to the Florida Frye Standard*, 86 Fla. B.J., Feb. 2012, 41; Edward Cheng & Charles Yoon, *Does Frye or Daubert Matter?: A Study of Scientific Admissibility Standards*, 91 Va. L. Rev. 471, 472 (2005).

<sup>12</sup> 977 So.2d 543 (Fla. 2007).

<sup>13</sup> *Id.* at 547.

<sup>14</sup> *Id.* at 551.

<sup>15</sup> See Fla. Const. Art. V, §2 (“The supreme court shall adopt rules for the practice and procedure in all courts . . .”). See also *Massey v. David*, 979 So.2d 9314, 936 (Fla. 2008).

<sup>16</sup> *Bush v. Schiavo*, 885 So.2d 321, 329 (Fla. 2004).

<sup>17</sup> See Reuben Doupe, *But This is a Court of Equity!*, The Commentator (Winter 2019).

<sup>18</sup> See *supra* note 5.

<sup>19</sup> See Fla. HB 7015 (2013) at 1-3.

<sup>20</sup> See *Perez v. Bell S. Telecommunications, Inc.*, 153 So. 3d 908 (Fla. 2014) (The Florida Supreme Court declined to accept jurisdiction.) See also *Perez v. Bell S. Telecommunications, Inc.*, 138 So. 3d 492, 498, n. 12 (Fla. 3d DCA 2014). (“We take comfort here in the fact that the Florida Supreme Court periodically adopts all legislative changes to the Florida Evidence Code to the extent they are procedural . . . and has already stricken all references to the Frye test from the Florida Rules of Juvenile Procedure . . .”).

<sup>21</sup> See *In re Amendments To Florida Evidence Code*, 210 So. 3d 1231, 1242 (Fla. 2017) (Polston, J. dissenting).

<sup>22</sup> See *Id.*, 210 So. 3d at 1236.

<sup>23</sup> See *supra* note 6 (“There is a little-known codicil in the Faber College constitution which gives the dean unlimited power to preserve order in time of campus emergency.”).

<sup>24</sup> See *supra* note 2 (Luck, J. dissenting).

<sup>25</sup> Jim Saunders, *How is new Florida Supreme Court doing? Ruling on expert testimony signals shift*, Sun Sentinel (May 24, 2019) Available at <https://www.sun-sentinel.com/news/politics/fl-ne-nsf-florida-supreme-court-20190524-so76lr6imjfp7bzgnfh6jdesn4-story.html>

<sup>26</sup> In *In re Amendments to Florida Evidence Code*, 210 So.3d 1231, 1239 (Fla. 2017).

<sup>27</sup> See *supra* note 2 (Luck, J. dissenting).

<sup>28</sup> In 2010, after the Arizona legislature enacted a *Daubert* bill, the Arizona statute was declared unconstitutional under a separation of powers argument. However, the Arizona Supreme Court was pressured to amend Rule 702

itself, which it later did. *See* Ronald H. Kauffman, *Out of the Frye Pan? Expert Witness Testimony Under New Rule 702*, *The Commentator* (Fall 2013).

<sup>29</sup> *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, (9th Cir. 1995).

<sup>30</sup> 509 U.S. 579 (1993).

<sup>31</sup> Interestingly, Bendectin is returning to the marketplace under a new name with a new maker. The FDA never required Bendectin's removal, it is just that no one wanted to risk litigation. *See* Amy Orciari Herman, *Morning-Sickness Pill Bendectin Back on the Market with a New Name*, <http://www.jwatch.org/fw201304100000001/2013/04/10/morning-sickness-pill-bendectin-back-market-with> (April 10, 2013).

<sup>32</sup> *See Daubert*, 509 U.S. at 590–591.

<sup>33</sup> 522 U.S. 136 (1997).

<sup>34</sup> *See Castillo v. E.I. Du Pont De Nemours & Co., Inc.*, 854 So.2d 1264, 1268 (Fla. 2003).

<sup>35</sup> *Joiner*, 522 U.S. at 146. Ipse dixit is Latin for "he himself said it".

<sup>36</sup> *Id.*

<sup>37</sup> 526 U.S. 137 (1999).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 152.

<sup>40</sup> *See* §90.702, Fla.Stat. (2018).

<sup>41</sup> *See Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1306 (11th Cir. 1999).

<sup>42</sup> From the French meaning "to speak the truth." *See* Cornell Law School, Legal Information Institute, available at [https://www.law.cornell.edu/wex/voir\\_dire](https://www.law.cornell.edu/wex/voir_dire) (last visited July 23, 2015).

<sup>43</sup> *See e.g.* §466.005, Fla.Stat. (2014).

<sup>44</sup> *See Rose v. State*, 506 So. 2d 467, 470 (Fla. 1st DCA 1987).

<sup>45</sup> *See Conley v. State*, 129 So. 3d 1120, 1121 (Fla. 1st DCA 2013), (remanding for a determination of the admissibility of the evidence under the Daubert standard codified by section 90.702).

<sup>46</sup> *See Perez v. Bell S. Telecommunications, Inc.*, 138 So. 3d 492 (Fla. 3d DCA 2014).

<sup>47</sup> Section 90.702 of the Florida Evidence Code was held to be applied retrospectively. *See Id.* at 498.

<sup>48</sup> *Id.* at 498–99 (internal quotations omitted).

<sup>49</sup> *See supra* note 6 ("My advice to you...is to start drinking heavily.").

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