



THE FLORIDA BAR FAMILY LAW SECTION

COMMENTATOR

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ON THE COVER: Photograph courtesy of Trisha Armstrong, West Palm Beach, Florida

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Message from the Chair

Heather L. Apicella, 2020-2021 Section Chair

I truly cannot believe how fast this year has flown by! This is my last message as Chair of the Family Law Section, and it is such a bittersweet feeling! As I continue to reflect on this past year, the mountains this Section climbed, the tasks we conquered and the wonderful accomplishments we made, it was all truly possible because of the endless hours dedicated by our Section Members and team of incredible professionals.

My theme of *positivity and kindness* radiated throughout this year in ways that I could never begin to imagine. The many obstacles this Section overcame did not occur smoothly, there were many days and many nights which were encapsulated with significant stress on all fronts ranging from a multitude of issues. However, absolute optimism, compassion and perseverance was prominent at all times and truly exemplified by so many wonderful members of this Section. It was those amazing people who carried those very hard days/nights, never giving up and always ensuring that each and every task was performed with care, grace and true professionalism.

It is so true that "time has a wonderful way of showing us what really matters" – Margarete Peters. Taking the time to stop and enjoy the moments that life has to offer is so critical in our field. On a near daily basis, we find ourselves consumed with our goals of facilitating resolution of various issues in other people's lives, and at times we may overlook things that are happening in our own. For each event that the Section put on over the course of this year, it was very important to me for those individuals who contributed their



H. APICELLA

precious time planning and ultimately hosting the event to be able to step back, watch and enjoy what they created. This is a lesson that I will carry with me in my own life and hope will remain as this Section continues to grow and flourish.

Speaking of making wonderful memories, there are many great events on the horizon for the Section! Right at the start of Summer, on June 22, 2022, the Honorable Philip S. Wartenberg will be sworn-in as your new Chair! His Leadership Retreat and Section Fall Meetings will be held on August 24-27th, at

the Biltmore Hotel in Miami. His fantastic In-State Retreat will be held at the Ritz-Carlton, Sarasota on October 20-23rd! Please be sure you are on the lookout for the registration link (generally released around Labor Day weekend) for the highly sought after 2023 Marital & Family Law Review Course, which will be held on January 27-28, 2023 at the Gaylord Palms Resort and Conference Center! Finally, save the date for the Out of State Retreat in Austin, Texas which will take place on March 22-26, 2023! Of course, always check the Family Law Section website (<https://familylawfla.org/>) for any and all updates regarding all of the events hosted by the Section!

It has been a true honor and privilege to Chair this incredible Section. I can say wholeheartedly that the lessons that I have learned will be with me for a lifetime, the memories that were made I will cherish forever, and the friendships that I have made will never disappear. I look forward to stepping into my new role (as Immediate Past Chair) and enjoying all of the moments of the journey that lies ahead.

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Commentator Chair Message

By Amanda P. Tackenberg



A. TACKENBERG

We have reached the final edition of the Commentator for the 2021-2022 Bar Cycle. There have been outstanding contributions by so many members of our Section this year and I am grateful to all of the authors for sharing their knowledge, expertise, personal lives, and opinions with the members of our Section. I believe our profession is better when we collaborate, share our knowledge, and learn from each other's experiences and the unique ability of the Commentator to deliver well-written and relevant articles to the members of our Section is what makes the Commentator so valuable. It has been a great experience being the Chair of the Commentator for the past two bar cycles and I hope you will consider becoming involved in the Publications Committee. The knowledge I have gained and the people I have met have made me not only a better attorney, but also a better and more well-rounded person.

It is hard to believe the year is coming to a close, but I look forward to what the Section and the next bar cycle have in store for us. Many thanks to the wonderful executive committee of the Section for their great leadership and to Sarah Sullivan and Anya Cintron-Stern for being such respectful leaders of the Publications Committee. I hope you will join us at our next meeting.

We gladly welcome submissions relating to the practice of family law. If you find yourself with a unique set of facts, a complex problem, or an issue you think needs to be addressed by our judiciary or legislature, please write and submit your article to the Commentator. For more information, please email us at publications@familylawfla.org.



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Message from the Co-Chairs of the Publications Committee

Fading into the daily background of our personal and professional lives, one could assume that our past year would be smooth sailing. However, challenges and lots of time-consuming and difficult work is the more accurate characterization of the Family Law Section's leadership and many committees this year. Heather Apicella's leadership was embodied in her theme of Positivity and Kindness. Heather was at the helm of the Section's legislative battle against proposed bills which would create an automatic 50/50 time sharing presumption, and she welcomed us back to the in-person Marital and Family Law Review Course in Orlando. Heather put in a lot of time, hard work and effort into leading the Section and did so consistent with



SARAH SULLIVAN



ANYA CINTRON-STERN

her theme of Positivity and Kindness. At the same time, we will soon be welcoming our in-coming Chair-Elect, General Magistrate Philip Wartenberg! Having worked with Phil on the Commentator when he served as a Guest Editor, we are sure that this next Bar year will be a success. He has already communicated some of his priorities of member engagement and diversity with an emphasis on recruiting,

welcoming and supporting future leaders of the Section. If you are reading this message, we know your interest in Section involvement is certainly piqued so join us on June 22nd at the Hilton Orlando Bonnet Creek for the Florida Bar's Annual Convention and the Family Law Section's annual meeting.

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Certified Family Mediator*

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GUEST

EDITOR'S CORNER



By Lindsay Gunia



L. GUNIA

It has been a privilege to serve as guest editor of this edition of the Family Law Commentator. I remain amazed at the dedication of our colleagues who take time from their busy practices and families to educate others about their own personal and professional experiences. Thank you to the Commentator Chair along with the Section's Publications Co-Chairs, and to the authors of the articles in this edition for their hard work. The Family Law Section continues to strive for and achieve excellence in its service to its members and to Florida's families.

Expanding our networks and building professional relationships is an instrumental part of growth. I had the honor of editing an article by Maria Gonzalez, Esq. that focuses on the importance of mentorship for both young and experienced lawyers. The article also outlines numerous resources available to those interested in becoming mentors or being mentees. The gift of mentorship is simply invaluable to younger lawyers.

We also have powerful contributions from the Honorable John I. Guy, who wrote a heartfelt article about mental health, wellness, and loss, as well as from Philip Schipani, Esq. on his personal and professional challenges about parenting plans for special needs children. Eddie Stephens, Esq. discussed adverse childhood experiences (ACEs) and how being trauma-informed helps family lawyers help those we represent. These articles are intimate, thoughtful, and serve as

compelling reminders of the need to maintain perspective amidst our busy lives.

This edition also contains Part II of a three-part series regarding the navigation of appeals in family law matters, written by Shannon McLin, Esq. and Erin Pogue Newell, Esq. on behalf of the Appellate Committee of the Family Law Section, and an informative article from David Hirschberg, Esq. and Jennifer Patti, Esq. on how "standing positions" are established and reviewed.

The Section truly benefits from the expertise and contributions of our peers, and I am incredibly grateful for the opportunity to serve as guest editor of the Commentator. Enjoy this wonderful edition and enjoy your summer.

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Loss: The Death of a Sibling Affected by a Substance Use or a Mental Health Disorder

By The Honorable John I. Guy, Fourth Judicial Circuit-Family Division, Jacksonville, Florida



J. GUY

For those of you who have buried a sibling, you know too well the sentiments to come. But if you have never lost a sibling affected by a substance use or mental health disorder, indulge me.

The loss of a brother or sister is different. It breaks a circle that before could only expand.

The bond between siblings is unique. Down to their blood they share. The same parents, the same childhood, the same joys, the same problems. Siblings are shaped sleeping under the same roof and eating at the same table. They grow up looking in the same mirrors and smiling in the same photographs.

Brothers and sisters know each another like no one else. Countless family meals, memorable vacations, forgettable holidays. Siblings mold each other. They are a part of each other. They know each other's past.

There exists between brothers and sisters an unspoken loyalty, an empathy that anyone outside the circle cannot fully understand. That's why the loss is so painful.

But from the same soil individuals grow. Like branches from a common tree, siblings spread in different directions. They can become unrecognizable to their youth. Their way becomes their own. Champions are developed, weaknesses are exposed. History forges change.

And so it is with substance use and mental health disorders. Setting aside cause, innocence is lost.

The connection between siblings changes. The once bright light from a child's eyes can wane. The joy present in youth can vanish.

From old photographs one realizes it's not the moments captured that matter, but the countless moments in between. Those are the times that make us who we are.

For the brothers and sisters of those impacted by mental health or substance use disorders questions arrive in powerful, mournful waves. How did we get here? What did I miss? How did I fail? What happened to the child I knew? Where did that smile go?

But the most difficult questions are those about the affected sibling. What is going through *their* mind? What do they understand? What do they remember? How do they feel? How much of our bond remains? How much of the loyalty do they feel? How much our conversations matter?

The answers don't come easy, if at all. Time together isn't the same. Only glimpses of the past remain; a dense fog clouds the rest. What was so easy then, is now a struggle. The world we once shared is now two.

And for the surviving siblings, emotions overflow. Guilt, regret, sorrow, and emptiness. But above the rest are loss and understanding. The loss of the circle. And the realization that, like time itself, time spent moves in only one direction.

When my plane landed, intended for me to have one more visit, the message on my phone asking me to call was all I needed to know; I hadn't made it in time. As my plane was descending through the clouds my sister and I were crossing paths.

Judge Guy is currently assigned to the Family Law Division of the Circuit Court of Florida's Fourth Judicial Circuit. He was appointed to the Circuit Court bench by Governor Rick Scott in December 2015. Judge Guy is a past President, and current member, of the Florida Family Law American Inn of Court. He is also a member of The Chester Bedell Inn of Court. Judge Guy is a co-chair of the Jacksonville Bar Association Judicial Relations Committee and a member of the Fourth Judicial Circuit Pro Bono Committee and the Duval County Courthouse Security Committee. Judge Guy is a faculty member of the Florida Judicial College, the Florida College of Advanced Judicial Studies, and the Florida Conference of Circuit Court Judges. He is also the Mentor Coordinator for the Fourth Judicial Circuit. In October 2019 Judge Guy was

designated as the Hague Convention Judge for the Fourth Judicial Circuit. Prior to his appointment, Judge Guy was an Assistant State Attorney for the Fourth Judicial Circuit for more than 22 years. Judge Guy had been a prosecutor since graduating from the University of Florida College of Law in 1992. Judge Guy served as a faculty member for the National District Attorneys Association from 2002 to 2010. He has also lectured for the American Prosecutors Research Institute (APRI), the Florida Prosecuting Attorneys Association (FPAA), the Association of Prosecuting Attorneys (APA), and the North Carolina Conference of District Attorneys (NCCDA). Judge Guy taught a Trial Practice course as an adjunct professor at the Florida Coastal School of Law from 2002 to 2019.

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The Trauma Informed Family Lawyer

By Eddie Stephens, BCS and Vice-Chair of Center for Child Counseling, Inc. Board of Directors



E. STEPHENS

When a client's ability to make decisions in connection with the representation is impaired, or whether because of minority, mental disability, or for some other reason, rule 4-1.14 of the Rules Regulating the Florida Bar requires a lawyer to maintain a normal client-lawyer relationship with a client. This rule also allows ("may") the attorney to seek the appointment of a guardian or take other protective actions with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

The Preamble to Chapter 4 anticipates that within the framework of these rules, many difficult issues of professional discretion will arise.

In family law, emotions run high. Often times, attorneys represent clients that have some sort of mental affliction or struggle, whether it is formally diagnosed or not. These issues often prevent the client from acting in their own best interest, and other times, they do not. When these issues arise, it serves as breeding grounds for complex ethical dilemmas.

From my perspective, the most common occurrence of an attorney employing the protections of Rule 4-1.14 is preventing a client from agreeing to something and entering into a binding agreement while in mental distress. The conundrum of having to stop mediation when you think your client is so upset that they are not thinking reasonably, versus knowing the offer being made might disappear forever if not accepted at that moment is all too common.

While the client may not be under a permanent mental disability, the situational stress and impact of that stress on the client may still require the attorney to terminate the mediation. It is even more common that clients face the "mediation blues" after settling the case by second-guessing their decision to settle or questioning the terms of their agreement. Knowing the voluntariness of the client's agreement during mediation, and the motivation to question the terms of the agreement after could exemplify the normal emotional arc of a person closer to ending an intimate personal relationship, or could also exemplify someone under emotional fragility or duress.

Early in my career I represented a very successful businessman. Imagine my surprise when he confided in me that he was addicted to crack cocaine. I was so young and naïve, and I thought how can this be? This is a successful businessperson, who I viewed as highly functioning. I have certainly learned a lot since that moment. The more people I have represented over the course of my career, the more often these issues would present themselves. It is inevitable.

Due to the high level of mental lability that occurs in family cases, I would argue an attorney who practices in this field should be "Trauma Informed" to meet the requirements of Rule 4-1.14.

Attorneys, for the most part, are not licensed mental health professionals. It is not up to us to provide mental health care or treatment to our clients. But as attorneys, we should understand the impact of mental health concerns on our clients and make referrals for appropriate services.

Trauma is common. 1 in 4 children experiences some sort of maltreatment (physical, sexual, or emotional abuse).¹ 1 in 4 women experience

domestic violence, and 1 in 5 have been raped at some point in their lives.²

Trauma Informed Care is an approach that assumes an individual is more likely than not to have a history of trauma. Trauma Informed Care recognizes the presence of trauma symptoms in a person and acknowledges the role trauma may play in an individual's life.

Adverse Childhood Experiences (ACEs) are potentially traumatic events that occur before a child reaches the age of 18. In the absence of healthy relationships, these experiences can interfere with a person's health, opportunities and stability throughout his or her lifetime—and can even affect future generations (inter-generational trauma) until the cycle is disrupted. Adverse Community Environments, such as housing instability and community violence, add an additional burden of trauma for many families.

The impact of ACEs was first realized in the mid-1990's when a study conducted on 17,000 participants sought to determine how traumatic childhood events may negatively affect adult health.³

The participants were asked about their experiences with childhood mistreatment, family dysfunction, current health status, and behaviors. The ACEs study found a direct link between childhood trauma and adult onset of chronic disease, employment challenges and incarceration. The higher number of ACEs, the greater the incident of negative outcomes in a person.

ACEs are just one form of trauma. Someone's life and mental wellness can be impacted by witnessing a single traumatic event.

Dealing with trauma is traumatic. We deal with a high level of toxicity in our field. Vicarious Trauma or Compassion Fatigue is caused by being indirectly exposed to someone else's trauma.⁴ Just listening to others recount a traumatic event could trigger an emotional reaction from deep within. It is important to recognize this and counterbalance these effects with appropriate self-care.

Sadly, our society has created a stigma about seeking out and receiving mental health care. Great progress has been made towards normalizing the term "self care" and "mental health" but the personal vulnerability it takes to admit the need for help, and then seeking and receiving the help is still stigmatized. To become a more functional community, we must eliminate this stigma. The fastest way to eliminate this stigma and to truly comply with Rule 4-1.14 is to create a trauma informed community. To reach that aspiration, it is important for us to:

- Understand the prevalence of trauma and adversity, and the impact of these on health and behavior;
- Recognize the effects of trauma and adversity on health and behavior;
- Receive Training on ACEs, Trauma, and Trauma Informed Care;
- Integrate knowledge about trauma and adversity into our laws, policies, procedures, and practices; and
- Avoiding re-traumatization by approaching clients who have experienced adversities with non-judgmental support.

You can better respond to trauma survivors in a trauma-informed manner when you recognize and acknowledge the impact of childhood trauma and subsequent adult trauma. Being Trauma Informed requires us to make a paradigm shift from asking, "What is wrong with this person?" to "What has happened to this person?"

A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice. Another lawyer title is "counselor of law" yet many lawyers don't fully realize how this role of "counselor of law" is not only embodied in professional rules, but necessary for identifying then adequately addressing how a client's past trauma may affect their legal matter.

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Trauma Informed Family Lawyer

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A trauma informed legal practice not only reduces re-traumatization, it also makes better lawyers. To properly comply with Rule 4-1.14, a lawyer must be able to recognize the role trauma plays in the lawyer-client relationship, including how one's own trauma history impacts interactions and behaviors.

For more resources on becoming trauma informed, please visit the Center for Child Counseling's Inc.'s website at:

<https://www.centerforchildcounseling.org/>

ACEs Toolkit:

<https://www.centerforchildcounseling.org/fightingaces/acetoolkit/>

TIC Training:

<https://www.centerforchildcounseling.org/traumainformedcare/>

Eddie Stephens is a Board Certified Marital and Family Attorney at Stephens & Stevens, PLLC. With 25 years of litigation experience, Eddie specializes in high-conflict matrimonial law. He has earned the AV Preeminent™ Peer Review Rating by Martindale-Hubbell, a professional rating indicating the highest ethical standards and professional ability, and has been selected for inclusion in *Best Lawyers in America*, a peer-review publication recognizing the top 4% of attorneys in the country.

In addition to practicing family law, Eddie serves as Vice-Chair and Director of Legal Education for the Center for Child Counseling, inc., a charitable organization whose vision is to create healthy, resilient children and families through ACEs-aware and trauma-informed communities.

Eddie is an author, lecturer, and community leader who supports a number of local civic and charitable organizations including Leadership Palm Beach County, Inns of Court, Kelsey Cares, Delta Sigma Pi, and the Boy Scouts of America.

Eddie has developed a successful family law

practice focused on highly disputed divorces. He is a popular and engaging motivational speaker. His personal motto is "Do Something that Matters," and in that spirit, he brings a passion for inspiring others along with his own personal childhood experiences overcoming adversity. His hobbies include cooking, yoga, Jiu Jitsu and spending time with his family. Eddie is happily married to Jacquie and has two children, Christopher and Matthew, and they all call Palm Beach, Florida home.

Endnotes

¹ World Health Organization, Child Maltreatment, <https://www.who.int/news-room/fact-sheets/detail/child-maltreatment> (last visited June 10, 2022).

² Centers for Disease Control and Prevention, Injury Prevention and Control, Preventing Sexual Violence, <https://www.cdc.gov/injury/features/sexual-violence/index.html> (last visited June 10, 2022).

³ Vincent J. Felitti, MD, *The Relation Between Adverse Childhood Experiences and Adult Health: Turning Gold into Lead*, PERM J. 2002 Winter; 6(1) 44-47. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6220625/>.

⁴ *What is vicarious Trauma?*, Psych Central, <https://psychcentral.com/health/vicarious-trauma#definition> (last medically reviewed March 9, 2022) (last visited June 10, 2022).



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In Good Standing: How Standing Positions are Established and Reviewed

By David L. Hirschberg and Jennifer Patti

In order for The Florida Bar, a committee, a special committee, a section, or a division of the Bar to take action on a legislative or political issue, that position (commonly known as a "standing position") must be submitted to, and approved by, the Florida Bar Board of Governors.

The board will permit a voluntary bar group to take a position on a legislative or political issue only when the issue:

- (1) is within the group's subject matter jurisdiction as described in the group's bylaws;
- (2) either is beyond the scope of the bar's permissible legislative or political activity, or is within the bar's permissible scope of legislative or political activity and the proposed position is consistent with an official bar position on that issue; and
- (3) does not have the potential for deep philosophical or emotional division among a substantial segment of the bar's membership.

The master list of legislative (standing) positions for all Bar, committee, special committee, section and division positions (including but not limited to the Family Law Section) can be found at <https://www.floridabar.org/member/legact/legact003/#1595441562985-375a6bb4-1f94>.

With respect to the Family Law Section, a recommended standing position is voted on by its Legislative Committee, and if approved, is then submitted to the Executive Council of



D. HIRSCHBERG



J. PATTI

the Family Law Section for approval. Once approved by the Executive Council, the standing position is submitted to the Board of Governors for approval.

Pursuant to [Standing Board Policy](#) 9.20(e), all legislative positions of The Florida Bar automatically sunset every two years,

unless recommended for continued advocacy and approved by the Board of Governors. By way of example, the 2020-22 biennium – including those of committees, sections and divisions – will sunset at the July, 2022 meeting of the Board of Governors. The 2022-24 biennium begins with the legislature's first 2022 organizational session.

As part of the Family Law Section's ongoing relationship with The Florida Bar, its Legislative Committee is required to review the Family Law Section's standing positions on family law-related matters. These positions can be as general as the Section "opposes legislation that would seek to remove from the courts in any way the establishment, modification, or enforcement of family support", to more specific positions on what factors the courts should consider when interpreting Florida Statutes.

The standing positions are reviewed bi-annually by a group of Family Law Section members who evaluate whether the Family Law Section should keep, table, or sunset each issue. Each position is also reviewed by the Ad Hoc Standing Issues Committee to determine whether such position

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In Good Standing

CONTINUED, FROM PAGE 15

is still relevant and/or whether the language of the position should be modified to provide for the needs of the modern family.

There are currently 105 standing positions, which cover various family law issues related to domestic violence, modification, child support, spousal support, injunctions, and legislative interpretation. The objective of the Standing Positions Committee is to maintain the values and goals of the Family Law Section which benefit Florida's families, while staying informed to ensure that these values and goals provide insight to the Section, the Bar, and to the next Ad Hoc Standing Positions Committee in 2024, on what we believe will continue to best serve Florida's families.

David L. Hirschberg is the founding member of the Law Offices of David L. Hirschberg, P.A. He is a graduate of the University of Florida Levin College of Law, cum laude (J.D., 2003) and received his

undergraduate degree from the University of Florida, with honors (B.A., 2000). Mr. Hirschberg is Florida Bar Board Certified in Marital and Family Law, a Florida Supreme Court Certified Family Mediator, and is AV Preeminent Rated by Martindale-Hubbell. He is licensed to practice law in both Florida and Illinois, and is an active member of the Family Law Section of the Florida Bar, where he serves on the Executive Council. In 2020, Mr. Hirschberg received the Chair's Award for Extraordinary Service, an annual award bestowed upon a professional in recognition of their service, unwavering dedication, and continued commitment to the Family Law Section of the Florida Bar.

Jennifer A. Patti is an associate with Brodie & Friedman, P.A. in Boca Raton. She worked her way from receptionist to paralegal to associate while attending evening school to earn her Bachelor of Science in Paralegal Studies, with honors, and then JD, cum laude, from Nova Southeastern University in 2017. She is a Family Law Section Rising Star Award recipient for 2020-2021.

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Feeling Your Way Through a Family Law Appeal

Part II. Composing a Persuasive Appellate Brief and Presenting Oral Argument

By Shannon McLin and Erin Pogue Newell

Welcome back to Part II of this three-part series on feeling your way through a family law appeal, in which we identify and discuss the issues we've encountered handling family law appeals and offer guidance and best practices to family law practitioners on appellate practice. As we noted in Part I of this series on the appealability of the trial court's decision and applicable standards of appellate review, the nuances of appealing or seeking review are multifaceted and cannot be fully covered in these articles. That said, Part II includes our best practices for composing a persuasive appellate brief and presenting oral argument.

I. Composing a Persuasive Appellate Brief

Unlike litigation in the family law courts where the judge is routinely persuaded by an oral presentation at hearing or trial, the appellate court often relies exclusively on the written word to decide the outcome of an appeal. So, the composition of your appellate brief is important. Florida Rules of Appellate Procedure 9.210 details the specific section requirements, such as the table of contents, table of authorities, summary of argument, and others. Rule 9.045(b), effective January 1, 2021, sets the font and word count rules.



S. McLIN



E. NEWELL

These technical requirements can be found directly in the appellate rules and are not discussed extensively in this article. Instead, we highlight six principles that serve as a foundation in composing persuasive appellate briefs.

A. Tell the truth.

Never, as in never-ever, misstate the facts, the record, or the law. Your reputation is more important than a client who attempts to persuade you to exaggerate. Double-check the record to ensure that what is stated in the brief is 100 percent accurate. By the same token, never conceal unfavorable law or facts.

The appellate court judges and their law clerks will find the law or facts that you have omitted, and your credibility will be ruined. Instead, acknowledge any unfavorable law or facts and explain why they do not affect the remedy you are seeking. By doing so, you will establish credibility with the appellate court. This will not only help your client in the current case but will also assist your future clients and your professional reputation. You will also be better able and prepared to address those unfavorable issues that opposing counsel will likely raise in the opposing brief.

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B. Face bad facts and bad law head-on.

Effective appellate briefs include a discussion of the opposing party's strongest points. This goes along with telling the truth. By addressing your weakest issues head-on, you will gain credibility by showing candor to the appellate tribunal, and your pre-emptive strike could take the wind out of your opponent's sails and weaken their position. However, remember that while it is appropriate to couch your opponent's argument in your client's favor, you cannot misrepresent the facts or the law in doing so, and if you are an appellant challenging the trial court's findings of fact, you must present the facts in the light most favorable to the prevailing party below.

C. Be clear and concise.

Leave the legalese at the door. Appellate judges are generalists. Perhaps the panel members on your appeal (and their law clerks) have never practiced family law and are not familiar with Chapter 61. That's why it is important to write your brief so the recent law school graduate with no experience in the specific subject matter will understand your points. You don't need complicated sentences to convey complicated ideas.

D. Use technology to your advantage.

Appellate brief writing is not an exercise in scholarly dissertation. Brief writing has changed throughout modern jurisprudence, and more importantly, brief reading has too.

Most appellate judges read briefs on a tablet or PC rather than by paper hard copy. This may lead the reader to "satisfice." When we satisfice, we skip ahead if we believe reading each word or sentence is a waste of time. One study on the impact of digital reading found:

[S]creen based reading behavior is characterized by more time on browsing

and scanning, keyword spotting, one-time reading, non-linear reading, and more reading selectively; while less time is spent on in-depth reading and concentrated reading, and sustained attention is decreasing.

This concept shows how important it is to make each sentence count. Sometimes, an argument can be more persuasive by communicating points through:

- bullets,
- tables, and
- graphs.

See what we mean? Don't constrain yourself from using the writing tools you have at your disposal to craft the most persuasive presentation in your appellate brief.

E. Tell the court what you want it to do.

During oral argument, panel members often ask appellate counsel, "What do you want us to do?"

Make sure you have a specific and practical answer (more on this in the next section). The answer should already be clearly stated in your appellate brief. Indeed, your remedy can be in your Introduction, and it certainly should be specifically spelled out in your Conclusion.

Judges are human, and they want to reach a sensible and reasonable result. An appellate brief should make the court want to rule for the party on whose behalf it is submitted. An appellate attorney's job is to provide the court persuasive, logical arguments, and to state in clear language how the court can grant the relief their client is seeking.

F. Edit, edit, and edit again.

We all know the saying often attributed to Winston Churchill, Mark Twain, and others — "If I had more time, I would have written a shorter letter." Likewise, where appellate writing is concerned, less is more.

As Yale professor and author William Zinsser advised, "Examine every word you put on paper.

You'll find a surprising number that don't serve any purpose." This is paramount when crafting a persuasive appellate brief. It is wise to have an editing checklist nearby, and to use online tools like Microsoft Editor and Grammarly. Each sentence should have no extraneous words. Each paragraph should have no extraneous sentences.

Also edit for structure. Does your brief have a logical flow? Consider the order of the issues on appeal. Generally, the strongest issue should be presented first, but sometimes employing that structure will seem forced and a different order will make more sense or be more persuasive.

Finally, pass your draft around to colleagues in your office to red line. Remember, the three panel members on the appellate court know nothing about your case and possibly even the subject matter of the appeal. It's a great idea to have someone read and edit your brief who is unfamiliar with the subject matter. When you've edited, and your colleagues have edited, edit and edit again.

II. Requesting Oral Argument

Appellate courts traditionally granted oral argument in final civil appeals routinely. But over the past decade, oral arguments have become rarer, and it is not uncommon for an appellate court to *sua sponte* dispense with an oral argument and decide the appeal only on the briefs. When requesting oral argument under Florida Rule of Appellate Procedure 9.320, it is important to refrain from a generic request without elaboration. Such an approach does not help the appellate panel who will be ruling on the request. If you genuinely believe that oral argument will benefit the judicial decision-making process, state the reasons why oral argument will help the merits panel. Is the issue of great public importance? Will a decision affect many people throughout the district or potentially across Florida? A specific assertion about why oral argument will be beneficial will influence the panel deciding whether to hold an oral argument.

III. Presenting Oral Argument

Many appellate attorneys covet the opportunity to discuss their briefs with the assigned panel of judges. This section is meant to assist those granted the opportunity to present oral argument in preparing for that opportunity, using general time markers.

A. When Oral Argument is Granted

Start by creating a timeline and putting it on your deadline calendar. From the time the last brief was filed to the date oral argument is scheduled could be anywhere from two to six months or more. Once the appellate court grants oral argument and sets the oral argument date, it is important to block off sufficient time on your calendar to prepare. It's easy to be tempted to "reschedule" and think of the blocked time as a "soft deadline" and push it out to be done later. This will not serve you or your client's best interests. Treat the preparation time as important as showing up for a hearing or deposition.

B. About 3 Weeks Out

Then re-read the briefs, the record, and the law. About three weeks out is a good time to re-read the briefs and take notes of the key facts, as well as to refamiliarize yourself with the relevant cases and statutes. An appellate attorney will also review the record and note specific record pages of the important facts. Anticipate questions and be sure to write down the record cites of important testimony. While it's not necessary to know the facts of every case cited in the briefs (especially if there are several parenthetical citations), you should know the key cases.

It is also important to perform supplemental research to determine whether any cases cited in the briefs have been cited, distinguished, or overruled, as well as if there is new authority that was not issued at the time of the briefing. Now is the time to file a Notice of Supplemental Authority if necessary.

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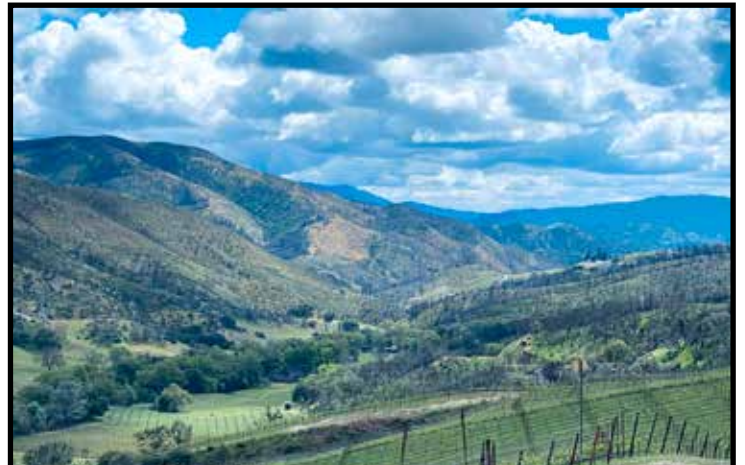
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C. About 2 Weeks Out

The next step, perhaps two weeks out, is to prepare an outline and an introduction. Do not write out your argument. Appellate arguments are conversational, and if you prepare a word-for-word presentation, you will be tempted to read from it. The outline should fit on one page and is there only to trigger your memory should you get lost once the court is asking you questions.

Now, prepare to ditch it. When the judges start asking you questions, you need to stop—even mid-sentence—and answer the direct question asked. Do not be married to the outline. The purpose of the argument is to educate the judges about why your position should prevail. If they have questions and concerns, those need to be addressed no matter where the issue falls on the outline.

Besides the outline, it can be handy to write out a 30-second introduction. It should begin:

"May it please the Court. My name is
----- and I represent the Appellant
(or Appellee), John Doe. . . ."

At that point, you need to capture the panel's attention. Tell the court in a compelling way why your client should win. Depending on the circumstances of your case, it might be wise to explain the nature of the order on appeal, what you are asking the Court to do, and why.

Another option is to provide the Court with a roadmap of where you intend your argument to go. For instance, tracking your brief you could tell the court you plan to discuss three main points, and then in a sentence each, tell the Court what those points are. This is not a hard-and-fast rule and really depends on your specific appeal. It might be more persuasive to jump right into the reasons why the Court should affirm or reverse the order on appeal.

D. About 1 Week Out

About one week before the oral argument is a good time to get down to the nitty-gritty and practice your argument. You can start by running through your points out loud to yourself and, once you feel more comfortable, it is time to present your argument to others through mock oral arguments or "moots." Treat the moots like dress rehearsals and take them seriously.

Find two or three colleagues who will help you and provide them with the briefs and other relevant materials several weeks before the scheduled moots. Videotaping the arguments and watching yourself might not sound like fun but it is an effective way to catch annoying habits that you are unaware of and correct potential problems. Simulate the "real" oral argument as much as possible by using a timer and truly pretending like you are performing the actual oral argument that will be presented to the appellate judges.

During your first moot, make sure you have your judges ask questions about your weak points, so you're prepared to address them and articulate an intelligent response. It is imperative that you are asked tough questions at this stage, so you are better prepared to answer them when it really matters. Present your argument for about an hour and then have a debriefing with your panel. This is an opportunity for them to provide feedback and suggest solutions to issues that arose during the moot. A second moot can be done a few days before the argument. During this moot, pay closer attention to the timer and practice articulating better responses to questions you struggled with during the first moot. Following the argument, revise your outline and introduction if necessary.

E. The Big Day

When the date for oral argument has arrived, reduce your nervousness by recalling how prepared you are and know that you will do an excellent job for your client. Once at the podium (or in the zoom room), don't just repeat language

from your brief, but use the opportunity to talk with the judges as if they were colleagues.

Also, be on the lookout for softball questions. It's possible that a panel member will agree with your position and will throw out a question to invoke a response to persuade a fellow panel-member to rule in your favor. Maintain eye contact and have a respectful but conversational dialog with the Court.

When a panel member asks you a question, answer it. One of the biggest pet-peeves appellate judges voice at CLE seminars on oral argument is that lawyers presenting oral argument do not always answer the questions asked of them. The art of oral argument is to address the panel's questions head-on and convince the panel that an answer does not hinder your client's ability to prevail on the appeal.

For example, a "yes" or "no" question could be answered:

- "Yes, Your Honor, however ..."; or
- "No, Your Honor, that case is different because ..."

Avoiding a direct answer will only hurt your client's position in the end.

Finally, as in the briefs, make sure you remember to tell the panel the specific relief you are requesting for your client. Many times, particularly if your client is the appellant, there can be different options as to the best form of relief, and it is important to spell out to the panel exactly what relief you are seeking.

CONCLUSION

It's fair to say that every family law attorney will, at some point, encounter a trial court decision that requires them to consider appellate review. Understanding the composition of a persuasive appellate brief and oral argument preparation are essential to feeling your way through a family law appeal. We invite you to join us in the next issue of *The Commentator* for Part III of our series about

the ins and outs of requesting and obtaining an award of appellate attorneys' fees and costs in family law appeals.

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

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

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

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

Erin Pogue Newell is an appellate lawyer with Florida Appeals, a statewide law firm with six appellate lawyers and two appellate paralegals who handle appellate litigation and trial support

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Family Law Appeal

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throughout Florida. Erin manages the firm's Ft. Lauderdale office.

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

Erin graduated Magna Cum Laude from Manhattan College (Riverdale, NY) in 2006 with a Bachelor of Arts in English and Secondary Education. After teaching high school English for several years, she attended St. Thomas University

School of Law (Miami, FL) where she earned CALI Book Awards in Legal Research and Writing, Torts and Constitutional Law, and graduated Cum Laude in the top 10% of her class in 2012.

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

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

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Endnotes

¹ Effective January 1, 2021, among other things, the Supreme Court of Florida altered the typefaces permitted to either Arial or Bookman Old Style and replaced page limitations with word counts. See *In re: Amendments to the Florida Rules of Appellate Procedure* 9.120 and 9.210. SC20-597.

² See *Hall v. Hall*, 190 So. 3d 683, 684 (Fla. 3d DCA 2016) ("The appellants are obligated to provide the statement of facts and to interpret the evidence in the light most favorable to sustaining the conclusions of the finder of fact.").

³ Ziming Liu, *Reading Behavior in the Digital Environment: Changes in Reading Behavior over the Past Ten Years*, 61 J. Documentation 700, 705 (2005).

⁴ "If I Had More Time, I Would Have Written a Shorter Letter" has been traced to French mathematician and philosopher Blaise Pascal's work "Lettres Provinciales" in 1657. Written in French the quote says, "Je n'ai fait celle-ci plus longue que parce que je n'ai pas eu le loisir de la faire plus courte."

⁵ William Zinsser, *ON WRITING WELL: THE CLASSIC GUIDE TO WRITING NONFICTION*, 12 (7th ed., Harper Perennial 2006).

⁶ If you are the Appellant, you need to remember to ask the presiding judge (the judge in the middle) if you may reserve a certain number of minutes for rebuttal (usually between 2 and 5).

Mentoring Makes A Difference

"BAM!" Be A Mentor¹

By Maria C. Gonzalez



M. GONZALEZ

The formal definition of "mentor" is "a trusted counselor or guide...tutor, coach."² For young lawyer mentees, a lawyer mentor represents so much more. The lawyer mentor is a teacher, advisor, role model, tutor, confidante, guide, good listener, and caring person. The key to an effective mentor/mentee relationship is establishing a trusting relationship over a period of time. The mentor shares their skill, knowledge, and expertise to help the mentee grow and develop in their practice. They give their time, offer constructive feedback, and invite the mentee into their networking circles. The mentee's development of leadership skills is often a positive and direct result of the mentoring experience. Many seasoned and highly accomplished lawyers today readily admit that they may not have applied for a leadership position, but for the advice and encouragement of their mentor.

A recent survey of Florida Bar members revealed that 82% of members polled would support the creation of a Florida Bar mentoring program with experienced lawyers who "would provide professional guidance and share practical knowledge with new lawyers."³ Members can access the Florida Bar's "Mentoring Program Handbook", which contains valuable information for both mentors and mentees, including goals, guidelines, checklists and requirements.⁴ There are numerous opportunities for mentors and mentees.

The Board of Legal Specialization and Education (BLSE) offers a program where lawyers can connect

with over 190 volunteer board certified attorneys in a specific area of law. The program is cleverly known as "Certified Lawyers on Call" (CLOC).⁵ This mentoring program provides a legal aid organization staff attorney or private attorney who works with a legal aid organization on a referral basis, with telephone consultation access to a board-certified lawyer. Since 2018 when the program began, one of the highest areas of law requesting mentors has been marital and family law. To participate in CLOC you may contact CLOC@flabarblse.com.

The Family Law Section has always been a strong supporter of, and takes the lead to promote mentoring. The Section has a dedicated link on its website with the contact information of 50 participating and experienced Section members from all over the state, ready to serve as mentors to Section member law students and other less-experienced family law attorneys.⁶ The Section also offers a useful link to access several Florida Bar mentoring resources. Those interested in becoming a mentor, or mentees in search of a mentor, may contact the Membership Committee at membership@familylawfla.org. The Section routinely sponsors mentoring events throughout the state to promote connection between mentees and mentors.

The Young Lawyers Division has an excellent "Mentoring with the Masters Video Series" aimed to bridge the gap between law school and the practice of law in the real world.⁷ It also offers "Legal Accelerator" which is a virtual mentoring resource with access to interviews with experienced attorneys and judges on topics such as professional development, ethics and professionalism, health and wellness, and substantive legal issues.⁸

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Be A Mentor

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Chapters of the American Inns of Court creates another environment for the exchange and open discussion for young lawyers to learn professional values from senior members of the community (both bench and bar).⁹ The goal is to foster excellence in professionalism, ethics, civility, and legal skills to less experienced members of the legal profession. Regardless of the level of expertise, Chapters offer an opportunity and means to mentor through regularly scheduled meetings, dinners and skit presentations. The Inns 'experience,' provides young lawyers the opportunity to speak one-on-one with judges, general magistrates, and seasoned lawyers. Chapters encourages the interaction of Inns members both inside and outside the formal setting of its meetings. Several Florida Chapters of the American Inns of Court focus on marital and family law. If you are interested in joining a Chapter, contact any of the following American Inns of Court:

1. The First Family Law American Inn of Court in Miami-Dade County
2. The *Canakaris* American Inn of Court in Clearwater
3. The Florida Family Law American Inn of Court in Jacksonville
4. The Stann Givens Family Law American Inn of Court of Tampa
5. The Susan Greenberg Family Law American Inn of Court of the Palm Beaches

The Henry Latimer Center for Professionalism and the Standing Committee on Professionalism have made great strides on promoting awareness of the value of mentoring.¹⁰ Likewise, The Florida Bar Foundation promotes a unique and effective way for law students and lawyers to connect through its *Florida Pro Bono Law School Challenge*.¹¹ The *Challenge* is an annual spring semester event, which commenced in 2019 and has resulted in matching over 1,000 law students to work side by side with a lawyer mentor on a pro bono case

from a legal aid organization. Not only is the law student experiencing a mentor while working with real clients, but is also introduced to public service early in their profession.

One of the most successful long-standing mentoring programs has been the John W. Kozyak Minority Mentoring Foundation (KMMF), which pairs minority law students with community lawyers and members of the judiciary to serve as mentors.¹² The Broward County Bar Association partners with several voluntary bar associations to participate in the South Florida Legal Mentoring Picnic to connect mentors and mentees. Countless other voluntary bar associations and the career development offices of most Florida law schools also provide mentoring opportunities. Here are a few resources to consider:

1. The Asian Pacific American Law Student Association (APALSA)
2. The Black Law Students Association (BLSA)
3. The Cuban American Bar Association Mentor Program (CABA)
4. The Dominican American Bar Association (DABA)
5. The Gwen S. Cherry Black Women Lawyers Association (GCBWLA)
6. The Haitian Lawyers Association (HLA)

Frequent and helpful communication between a mentor and mentee is key to a successful mentoring experience as is the development of a trusting relationship. The ability to observe a mentor in court, mediations or negotiations is useful. Likewise, the ability of a mentor to invite a mentee to join a variety of networking opportunities will expose the mentee to a wide range of professional social settings with the opportunity to influence their interactions. Every interaction affords an opportunity to incorporate how to practice with professionalism and civility especially in marital and family law, when client emotions are often raw. The mentoring experience has been described by some as follows:

"It was amazing to have someone I respect teach and guide me. My mentor provided valuable advice and skills sets I needed. I became more prepared to face real clients."

"My mentor provided me with a better understanding of background information, big and small, knowledge and skills for which I am very grateful."

"Being a mentor has been empowering and I highly recommend it."

"Being a mentee is the smartest thing a young lawyer can do...and I highly recommend it. There is so much involved in family law that a young lawyer cannot possibly know how to navigate the world of family law without some assistance. Mentoring is one way of obtaining that assistance to be able to compete with other professionals in our field."

Mentoring promotes ethical and professional conduct. It also develops character, competence and leadership skills. Similar to pro bono work, being a mentor is an invaluable contribution to your profession and extremely gratifying. I speak from experience when I ask you to consider paying it forward and giving back to your profession by becoming a mentor. It is a wonderful thing when a mentee transforms into a mentor and is able and willing to pass along special skills they learned from their mentor plus their own experiences. When I was approached to write this article, my immediate reaction was a smile from ear to ear. I have been truly blessed with the most extraordinary mentors during my journey and professional career. Without these amazing role models in my life, I would not have accomplished a fraction of the goals and accomplishments in my career, for which I will be eternally grateful. As a result, I also continue to experience the gratification of mentoring others to help surpass their goals and potential.

Maria C. Gonzalez, Esq. is managing partner at the law firm of Maria C. Gonzalez, P.A. in South Florida and practices exclusively in marital and family law. She is Board Certified in Marital and Family Law (1997) and is past-Chair of The Family Law Section of the Florida Bar. She is a Fellow of the American Academy of Matrimonial Lawyers (AAML) and past-Chair of

The Florida Bar Marital and Family Law Certification Committee. Ms. Gonzalez is Immediate Past-President of the Florida Chapter of The Association of Family and Conciliation Courts (FLAFCC) and achieved Board Certification in Family Law by the National Board of Trial Advocacy (NBTA). She is on the Board of Directors of The Florida Bar Foundation. In 2018, Ms. Gonzalez was appointed to the Ad Hoc Committee tasked with updating the Bounds of Advocacy which establishes aspirational ethical goals for family law attorneys. She was appointed and served on the Florida Supreme Court's Commission on Professionalism and Civility. Ms. Gonzalez is a Florida Supreme Court Certified Family Law Mediator and a Certified Marital Law Arbitrator by the AAML. She frequently lectures and publishes on a variety of family law topics and is a strong advocate to promote Board Certification.

Endnotes

¹ Celebrity chef, Emeril Lagasse coined the phrase "BAM!" It is his trademark catchphrase used to introduce spices to liven up a dish.

² Merriam-Webster Dictionary. <https://www.merriam-webster.com/dictionary/mentor>.

³ The Florida Bar News. Feb. 1, 2022. Survey Suggests Florida Lawyers Support the Concept of a Bar Mentoring Program. <https://www.floridabar.org/the-florida-bar-news/survey-suggests-florida-lawyers-support-the-concept-of-a-bar-mentoring-program/>.

⁴ The Florida Bar. <https://www-media.floridabar.org/uploads/2017/04/3-mentoring-handbook-ada.pdf>.

⁵ The Florida Bar. <https://www.floridabar.org/about/cert/resources/cloc/>.

⁶ The Family Law Section. <https://familylawfla.org/get-involved/mentoring/>.

⁷ The Florida Bar Young Lawyers Division website. <https://flayld.org/get-involved/mentoring/>.

⁸ The Florida Bar Young Lawyers Division website. <https://flayld.org/get-involved/mentoring/>.

⁹ American Inns of Court. https://home.innsofcourt.org/AIC/AIC_For_Leaders/AIC_Achieving_Excellence/AE_Mentoring/Inns_of_Court_Model_Mentoring_Program.aspx.

¹⁰ The Florida Bar News. Apr. 11, 2022. Mentoring Makes a Difference Program Underscores the Value of Mentoring. <https://www.floridabar.org/the-florida-bar-news/mentoring-makes-a-difference-program-underscores-the-value-of-mentoring/>.

¹¹ The Florida Bar Foundation. <https://thefloridabarfoundation.org/florida-pro-bono-law-school-challenge/>.

¹² The Kozyak Minority Mentoring Foundation. <https://kmmf.kmmfoundation.org/>.

The Practice of Family Law, Adjudication of Family Law Matters and the Gap Between the Knowledge of the Practitioner and the Trier of Fact

By Philip J. Schipani



P. SCHIPANI

Background

I have been a member of the Florida Bar for approximately twenty (20) years, practicing almost exclusively in family law. I am happily married and the father of two children, a sixteen-year-old daughter, who is academically gifted, and a ten-year-old son who has autism and verbal apraxia. My son is approximately 90% non-verbal. Although this article may focus on autism, because that is what I am most knowledgeable about, the concepts apply to children with any type of special needs. There are many different types of special needs that children may have that require different considerations by the practitioner and the court. As a parent of a child with special needs, I choose to be open about my experiences with my son and my family. Partly, this is due to my personality. Partly, this affords me an opportunity to educate my colleagues and the judiciary on these issues, which in turn will help children with special needs whose parents are going through a divorce or custody matter. I am proud of my son and every little accomplishment he makes because they are all victories. Everything in my son's life seems more difficult than in a "neuro-typical" child's. The lives of special needs children are more difficult for their parents and siblings too. Studies suggest that the stress that a special

needs parent is under on a daily basis is akin to that of a soldier in active combat.¹

As one could imagine, this level of stress will have a significant impact on a person's relationships, including marriages and as co-parents. Anecdotal evidence suggests that the divorce rate for parents of special needs children is higher than parents of neuro-typical children. For some reason yet to be scientifically identified, the rate of autism has grown exponentially since the year 2000. In that year, the rate of people who identify as autistic was 1 in 150. In 2022, that number is 1 in 44.² With the rate of divorce of special needs parents being substantially higher, and the increase in the population of people who have autism, family law practitioners are also dealing with special needs issues in their cases on an increasing basis. Further, one could deduce that the courts are dealing with these issues on a sharply increasing basis.

As my experiences, struggles, and triumphs grew as a special needs parent, and my experience practicing family law widened, I noticed a large gap between the law regarding divorce, the knowledge of family law practitioners and the judiciary, and the actual needs and best interests of special needs children. The current statutes, rules, case law, and parenting plans do not provide any real consideration for special needs children. Furthermore, history shows that changes in statutes and rules often take a long time.

In 2008, the State of Florida passed sweeping changes to Florida Statute Chapter 61, including

the dismissal of primary and secondary residential parents in favor of shared parental responsibility (already in the pre-2008 statute), the removal of the term "custody," and the introduction of the term "timesharing." The changes in 2008 emphasized the ability of parents to co-parent their children. In short, what I started to see in my practice was a steady and sharp pace towards over ninety percent (90%) of my cases ending, whether by agreement or adjudication, with shared parental responsibility and equal timesharing. The 2008 changes to Chapter 61 were long overdue. Prior to those changes, the circuit in which I practice provided "standard visitation" which gave the "non-residential" parent increasing visitation by age. Essentially, the "non-residential" parent, typically the father, was awarded every other weekend and one night for dinner during the week.

Changes to the law are often lagging indicators of what are changing societal norms. For instance, marriage between people of the same sex has been legal in the State of Florida since January 6, 2015, as a result of *Brenner v. Scott*.³ However, over seven (7) years later, the Florida Legislature still has not revised Fla. Stat. §741.212 which defines the term marriage as only a legal union between one man and one woman as husband and wife.

At this time, the only provision that could apply to special needs children is Florida Statute §61.13(3)(s) "[t]he developmental stages and needs of the child and the demonstrated capacity and disposition of each parent to meet the child's developmental needs", which is a factor the court is to take into consideration when adjudicating timesharing and parental responsibility.

The Florida Supreme Court Parenting Plan⁴ has provisions for extra-curricular activities, transportation, information sharing, school calendars and timesharing. There are no provisions regarding special needs children. This article is intended to highlight some issues common among special needs children in divorces.

Special Needs Issues and Practice Tips

Most special needs children have what is called an Individualized Education Program (IEP) or 504 plan through their school. A 504 plan is similar to an IEP in that it provides accommodations for student who has a disability that interferes with the child's ability to learn in a general education classroom. In essence, the difference between an IEP and a 504 is that an IEP deals with special education and a 504 deals with certain disabilities and provides accommodations, but the child remains in a general education setting. At school, the IEP is needed and intended to provide services for the child, including speech therapy, occupational therapy, behavioral therapy, one on one aids and other accommodations. Periodically the child's school will hold an IEP meeting and as mandated by Federal Law, the school has to give notice to the parents of same. A parent being a part of an IEP meeting is extremely important as the parents are considered part of the IEP "team", and are there to give input, make suggestions and sometimes advocate on behalf of their child. If you are a divorced parent and have a parenting plan, the school district only sends notice of an IEP meeting to the enrolling parent. Often in cases involving special needs children there are numerous co-parenting issues regarding the services, therapies, and treatments for the child. In a situation like this, one parent may show up to the IEP meeting and discontinue services and/or suggest things that the other parent disagrees with, despite having shared parental responsibility within their parenting plan. There is a simple solution to this often-missed issue; adding to the parenting plan that both parties are to be noticed of IEP meetings and any other meetings at the child's school.

Special needs children also have several options when they have an IEP/or 504 when it comes to their choice of schools. If a child has been enrolled in public school for two FTE periods,⁵ meaning a certain amount of being full time and attending

continued, next page

school, the child has the option of using the McKay Scholarship Program. Depending on the severity of the child's disability, the IEP will assign that child a matrix number. The higher the matrix number, the more money a child will receive in McKay Scholarship funding. Then that child is allowed to enroll in the McKay Scholarship, and use those funds to attend private school. The McKay Scholarship is unique to Florida. The McKay Scholarship will be transitioning into the Family Empowerment Scholarship Program signed into law by Governor DeSantis and will be effective July 1, 2022. The change in programs is not expected to change eligibility and funds that were received under the McKay Scholarship.⁶ Understanding and knowing that this scholarship exists is important for any practitioner handling a case with special needs children, especially if one parent needs to have ultimate decision-making authority over educational issues.

Early intervention is of the utmost importance and can help a child with autism and special needs reach their full potential.⁷ However, in cases with special needs children there can be a lot of conflict between the parents on how best to treat the child. In a large number of cases I have dealt with regarding special needs children, ultimate decision-making is a must. If the parties do not agree on treatment for the special needs child, it could take months to resolve the issue through the Court. Every day that goes by is a day wasted for an opportunity to help the child reach their full potential. To that end, it may be appropriate, in the beginning stages of a case involving a special needs child to inform the Court that this case deserves priority treatment. One way to do this is through the Florida Rules of Judicial Administration. Rule 2.545(C)(1) allows *any* party to file a notice of priority status explaining to the Court why the case is a priority and should be given priority status on the Court's docket. This

immediately lets your Judge know that there is a special needs child involved in the dissolution of marriage and that a case management hearing needs to be held to discuss why priority status is appropriate, and to insure the children are protected from the damage of the divorce to the extent possible.

Other Issues and Resources

A family law practitioner handling cases with special needs children should be familiar with a multitude of issues and available resources. These issues may require the consultation of outside counsel who specialize in Educational Law, Estate Planning and Guardianship, as well as Disability. As difficult as it may be for a client to think about such issues during a divorce, the client should be counseled on estate planning for special needs trusts, in the event their child not be able to provide for itself after they are deceased.

The client should also be familiar with other resources that the State of Florida provides, including the Medicaid Waiver and Crisis Medicaid Waiver programs through the Agency for Persons with Disabilities. There is a long waiting list for the Medicaid Waiver and it is important to apply as soon as possible. The Medicaid Waiver provides services for persons with a developmental disability, which occurs prior to age 18, and constitutes a substantial handicap that can reasonably be expected to continue indefinitely. The Medicaid Waiver program will provide for residential care, therapies (including occupational therapy, speech therapy and behavioral therapy), family care, respite care, and others depending on the need of the applicant.⁸

Crisis Medicaid Waiver is for applicants who are in crisis, meaning they are currently homeless, exhibit life-threatening behaviors that place them or others in extreme danger, or have a caregiver who is in extreme duress. If the applicant qualifies, there is no waiting list and the services are not "needs" based. This program, for a child, can provide for diapers, wipes, therapies, respite

care, Medicaid secondary insurance and other services. These programs can be essential and life altering for families, however, the system is not easy to navigate.⁹ A client should become educated on obtaining these services, and may need to hire additional professionals, such as psychologists, to evaluate their child and guide them through the process.

There is simply not enough room in this article to discuss all of the issues and resources available for special needs children. The Family Law Bar and Judiciary who handle cases with special needs children should be aware that the current law, and most parenting plans, do not adequately provide for and/or address the issues associated with special needs children. Awareness of these unique issues and the resources available will put the practitioner and the Court in a better position to ask the right questions, create an appropriate parenting plan that is in the best interests of special needs children, and request help from the right professionals and experts.

Philip J. Schipani, is the principal of Schipani, Norman & McLain, P.A. located in Sarasota, Florida, is Board Certified by the Florida Bar in Marital and Family Law, a fellow of the American Academy of Matrimonial Lawyers and the International Academy of Family Lawyers. Mr. Schipani has been practicing since 2002 starting out as a case manager in the family law division of Miami-Dade Circuit Court. Mr. Schipani currently handles all aspects of family law cases, including, high-net worth divorces, complex custody cases, cases under the Hague on the Civil Aspects of International Child Abduction. Mr. Schipani is very active in the Family Law Section of the Florida Bar, including Co-Chairing the first full day CLE on Special Needs Children and Divorce, being on the faculty of Trial Advocacy Seminar, a current member of the executive council and legislation committee, has testified in Tallahassee on behalf of the section and is currently the chair of the Domestic Violence Committee. Mr. Schipani is AV Rated by Martindale Hubbell and has received

recognition from Super Lawyers every year since 2014.

Endnotes

- ¹ Smith, L.E., Hong, J., Seltzer, M.M. et al. Daily Experiences Among Mothers of Adolescents and Adults with Autism Spectrum Disorder. J Autism Dev Disord 40, 167-178 (2010).
- ² www.cdc.gov/mmwr/volumes/70/ss/ss7011a1.htm
- ³ Brenner v. Scott, 999 F. Supp. 2d 1278 (N.D. Fla. 2014), order clarified, No. 4:14CV107-RH/CAS, 2015 WL 44260 (N.D. Fla. 2015)
- ⁴ Fla. Fam. L.R.P. form 12.995(a)
- ⁵ <https://www.fl DOE.org/schools/school-choice/k-12-scholarship-programs/mckay/mckay-faqs.html>
- ⁶ <https://www.fl DOE.org/schools/school-choice/k-12-scholarship-programs/fes/index.html>
- ⁷ <https://www.nichd.nih.gov/health/topics/autism/conditioninfo/treatments/early-intervention>
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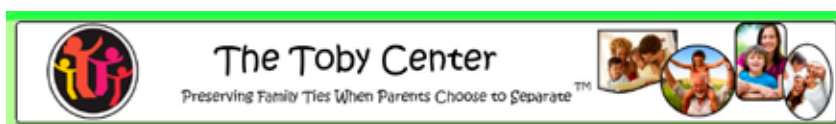
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