To view Part 1 (pages 1 to 57) of this Family Lawyer Magazine, please click here.
I recently read an article about how a series of changes, most of them slow and over the course of 15 years, has brought some of the newspaper industry’s players to their knees. But the article was also about how the industry and these players could have avoided its current predicament, or at least minimized it, by adapting and being more proactive.

Some family law firms are experiencing similar challenges, and losing clients because:
1. The internet has dramatically increased the public’s access to information on legal issues, resulting in more do-it-yourself divorces.
2. There is increased competition for business and the Internet has had a significant impact on how and why a family lawyer is found and hired (or not found and not hired).
3. Less people are divorcing. In fact, about 25% less over the past 30 years.
4. More lawyers who did little family law are taking on family law such cases to offset business lost in other practice areas due to the economic downturn.

I have been helping family lawyers market their services for over 17 years and have noticed that for the most part they have been reactive rather than proactive to these changes. This is particularly true of more established law firms that have traditionally relied heavily on referrals for their business. In fact, it is these firms who stand to lose business, one client at a time, to new lawyers and law firms who are aware of the need to market their practice, and who take advantage of what effective marketing and technology have to offer.
Are Family Law Firms Adjusting to Change?

In the past few months I visited over 60 well-established family lawyers in various states including New Mexico, Missouri, Massachusetts, Oklahoma, Indianapolis, Ohio, Connecticut, New York, New Jersey, Pennsylvania and South Carolina. I also attended the American Bar Association Family Law Section October meeting in Philadelphia, where I spoke with over 30 family lawyers from across the country. Almost without exception, all of these lawyers expressed how their family law practice has changed. They conveyed how:

- Business is not as robust as it has been, compared to just a few years ago.
- It has become more of a challenge to secure good, quality clients.
- Increasingly, the opposing counsels are lawyers they have never dealt with before, and they wonder how these lawyers managed to get the case.
- Tried and true referral sources are no longer as dependable.

The very fortunate few who found themselves still as busy also acknowledged they were not turning away the quantity of clients they once did.

Do any of these comments ring true for your practice?

When asked what they were doing to adapt to these changes, most shrugged their shoulders and said they had done little to nothing, and expected things would “get back to normal” when the economy picked up. A very small percentage said they were revamping their websites, connecting more frequently with their referral sources, getting more active on LinkedIn.com, and creating or expanding their Facebook presence. Essentially, embracing technology to make them more effective and help them stay connected with their clients.

Law Practices Growing Through the Economic Downturn

Surely the slower economy over the past few years would explain why business has not been as good, right? Well, not necessarily. Among the clients of our marketing agency, we have seen examples of growth that would make a lot of family law firms envious. One client has grown from one lawyer to 15 in less than four years. Another has grown from three to six lawyers, and another from 12 to 16 lawyers. There are also countless examples of family lawyers striking out on their own after working for other law firms and these lawyers are a real threat to established firms because they have often have the necessary experience and they’re hungry for business.

Through the years, we have built many websites for family law firms, promoted them through search engines, social media and pay per click campaigns, advised and redirected their advertising budget from the printed Yellow Pages to advertising on targeted websites. We have also shown them how to generate leads and stay in touch with their referral sources in a systematic manner. It has not been an easy task, but they (removed “almost”) always pay off for our clients.

Just this week, a client said this to our V.P. of Marketing: I once did tell Dan (many years ago) “Why would anyone want to advertise on the Internet?” And I have eaten those words as many meals.”

Those family lawyers who are embracing change and asking questions like, “What do I need to do to prepare my law firm for the future?” will likely thrive and take business away from the family law firms who are not adapting. Those lawyers who said to me they will “Wait it out” or “Get around to doing a more effective job of marketing their firm when they have the time and money to do so” will continue to blame the economy for the slowing down of their business. And it will likely get worse if they don’t take some action now.

An Example of Embracing Technology and Marketing

Yesterday a family lawyer contacted our firm for help with marketing her new practice. She is leaving a prominent family law firm to “go out on her own”. She mentioned that her current firm had “no interest in marketing” and how crazy that approach was in this day and age. She did not need to be convinced of the value of marketing, or why, and instead was asking how to best market herself. She contacted our agency after reading an article we wrote on marketing in Family Lawyer Magazine. Within one day of contacting us, she retained our agency to:

- Build her new practice a website — better than her current employer’s ignored five-year-old website.

CONTINUED ON PAGE 61
Reaching “Generation Ex”

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This is what one young, single practitioner is doing to take advantage of technology and to market a family law practice she has yet to name.

What about you? When you meet her, or somebody like her, as your opposing counsel you shouldn’t need to wonder how she got the case. You’d know they did it by embracing technology and marketing to build their practice, one client at a time.

Dan Couvrette is the CEO of Divorce Marketing Group and Publisher of Family Lawyer Magazine and Divorce Magazine. Divorce Marketing Group is a marketing agency dedicated to promoting family lawyers and divorce professionals. His firm’s website is www.DivorceMarketingGroup.com.

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Social networking platforms like Facebook, LinkedIn, and Twitter have fundamentally changed the way people communicate and share information. Facebook has over 1 billion users worldwide, and Twitter has gone from processing 5,000 “tweets” a day in 2007 to over 400 million a day just six years later. Lawyers too have embraced social networking. According to the 2012 ABA Legal Technology Survey Report, 88% of the responding law firms are on LinkedIn, while 55% are on Facebook. While most lawyers report using social media tools for career development and networking (72%), they are also utilizing them for case investigation (44%) and client development (42%). The question, however, is whether lawyers are using social media in an ethical, responsible way, or are they risking a malpractice suit or trip to the disciplinary board?

 Plenty of lawyers have already found themselves in hot water for their online statements or conduct. In July 2012, former Norfolk, Virginia prosecutor Clifton Hicks was charged with making a felony threat after he allegedly posted messages on Facebook threatening bodily injury to his former employer. In May 2010, former Illinois assistant public defender Kristine Ann Peshek was disciplined for disclosing client confidences on a blog she maintained, where she frequently referred to clients by their first names, nicknames, or jail identification numbers. She described — in sometimes graphic detail — the clients’ cases, courtroom testimony, and other embarrassing and potentially damaging information. Peshek wasn’t shy about the judges she appeared in front of either, referring to one as “Judge Clueless.” Clearly, the ease of use and the sheer pervasiveness of social media can lead to lawyers letting down their guard and forgetting the same rules of traditional communication conduct apply in cyberspace.

Areas of Concern for Family Lawyers

The first runs counter to one possible reaction to cautionary tales like these above — avoidance. One simply can’t stick one’s head in the sand to avoid social media and its potential problems. The ABA Ethics 20/20 Commission recently approved changes to the Model Rules of Professional Conduct in order to address the impact of technology and globalization on the legal profession. One of these changes updates Rule 1.1 — the duty to provide competent representation — and Comment 6 to that Rule. Providing competent representation to clients now not only requires that one stay abreast of changes to the law in your practice area, but also obligates lawyers to remain current on “the benefits and risks associated with technology.” In an age in which locating and using content from social networking sites is playing an increasingly important role in a broad range of practice areas (a 2010 study by the American Academy of Matrimonial Lawyers revealed that 81% of respondents had used social media evidence in their cases), a lawyer who is not conversant in the use of social media truly providing competent representation?

Social networking: A NECESSARY WEAPON OR AN ETHICAL MINEFIELD?

By John G. Browning, Trial Lawyer

By John G. Browning, Trial Lawyer
We Make Your Website Mobile Friendly
In Just One (1) Day, For One (1) Fixed Price

- Over 180 million Americans use smartphones regularly
- In 2013 more people will use their mobile phones than PCs to get online

A well-designed mobile website makes it:
- Easier to read
- Easier to navigate
- Easier for them to call, email, & find you

A regular website
as seen on a smart phone

The same website
we have made mobile friendly

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involves the gathering of information about a party or witness. While there is generally no ethical issue in viewing the publicly available portion of an individual’s Facebook page, what about those pages with privacy restrictions, allowing only “friends” to see such non-public content? May an attorney, or someone working for that attorney, try to become someone’s “friend” in order to gain such access? If the person is a represented party, the answer is clearly “no”. Under Rule 4.2 of the Model Rules of Professional Conduct, a lawyer should not communicate or cause another person to communicate with a person represented by consent without the prior counsel of that party’s attorney. In May 2011, the San Diego County Bar Association’s Legal Ethics Committee considered this Rule’s application in the digital age. It ruled that a lawyer seeking access to a represented party on social media sites could not do so through “friend” requests, but rather should seek such information through formal discovery channels or by contacting the party’s attorney first, seeking consent to such a communication.

The issue of potential deception or misrepresentation on social media — “false friendin” — is at the heart of several other ethics opinions and at least one lawsuit. In separate opinions, the Philadelphia Bar Association Ethics Committee and the New York City Bar Association Committee on Professional Ethics both held that a lawyer — or someone working under that lawyer’s supervision, like a paralegal — could not “friend” a witness under false pretenses. They pointed out doing so would violate Rule 4.1’s prohibition against knowingly making a false statement of fact to a third person, as well as Rule 5.4’s ban on conduct involving dishonesty, fraud, deception, or misrepresentation. The New York City Bar opinion also noted the increasing use of social media sites by lawyers and the fact that deception is even easier virtually than in person make this an issue of heightened concern in the digital age. Such fears have already led to legal action against one law firm, its investigator, and its insurance company client. A May 2012 lawsuit filed in Cleveland, Ohio alleges that in a dog bite case involving a minor plaintiff, the investigator posed as one of the girl’s Facebook friends, enabling him to view her private information, messages, and photos. The lawsuit alleges invasion of privacy claims as well as violation of wiretapping statutes.

A final area fraught with ethical risks for lawyers concerns the presentation of evidence. Nobody wants to discover embarrassing or damaging photos or comments on a client’s Facebook page, but lawyers can’t instruct the client to remove content or to delete their Facebook account. Model Rule 3.4 prohibits a lawyer from unlawfully altering or destroying evidence and from assisting others in doing so. A lawyer’s ethical duty to preserve electronically stored information encompasses social networking profiles. In another cautionary tale, a plaintiff’s counsel in a 2011 Virginia wrongful death case (Lester v. Allied Concrete) directed his paralegal to instruct the client to delete his Facebook page, and further misrepresented to the defense attorneys during discovery that his client didn’t have a Facebook account. After a $10.6 million verdict for the plaintiff, the defense counsel sought a new trial based on spoliation of evidence. The court slashed the verdict in half and levied sanctions totaling $722,000 against attorney Matthew Murray and his client for their “extensive pattern of deceptive and obstructionist conduct.” On appeal, the original verdict was restored, but the sanctions remained. Murray, a former president of the Virginia Trial Lawyers Association, has since resigned from the practice of law.

The use of social networking in the practice of law is both a necessary weapon in a lawyer’s arsenal and a potential ethical minefield. Family lawyers run the risk of breaching their duty to provide competent representation if they ignore social media platforms and the utility they offer. Yet at the same time, the misuse of social media in investigation, fact-gathering and in preserving evidence presents serious professional responsibility issues. Attorneys need to heed some of the same advice they give to clients: treat social media as simply another form of communication subject to the same ethical constraints (and rules of common sense) as the more traditional modes, and don’t post or tweet anything that you wouldn’t want the public to see.
The U.S. District Court for the Northern District of Alabama conducted a bench trial on a Hague proceeding on October 11 and 12, 2011. Immediately after closing arguments, the court ruled orally in favor of Mrs. Chafin, granting her petition to return the child to Scotland.

Within twenty minutes of the oral ruling, Sergeant Chafin filed a written motion, asking the district court to stay its order pending appeal. Within sixteen minutes, the trial court denied that motion and issued a one-paragraph order permitting Mrs. Chafin to take E.C. to Scotland that same day. Two hours later, before the district court even issued a written opinion, Mrs. Chafin and the child boarded the first flight out of the country, to Canada, and from there on to Scotland. Sergeant Chafin appealed to the 11th Circuit.

The 11th Circuit applied its precedent, Bekier v. Bekier which holds that when children are removed from the borders of the United States, the courts are powerless to do anything about it because the issue has become moot. The circuits which have considered this issue have reached contrary opinions. Sgt. Chafin petitioned the United States Supreme Court for Certiorary to resolve the child to continue to resolve the divorce and custody case while the left behind parent pursues return of the children in the foreign country. Finally, the Chafin case restores appellate review to a trial court determined to allow a foreign parent to abscond with a child.

In a 9-0 decision, the Supreme Court of the United States reversed the 11th Circuit. Reiterating that a case “becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party.” Knox v. Service, the Court concluded that the Chafin case was not moot because U.S. courts are not powerless when children are removed from United States’ borders. Even assuming a worst case scenario, that a Hague signatory would become a rogue nation and refuse to return a child, some relief could be granted in the form of sanctions against the party refusing to comply with the court’s order and granting or denying attorney fees.

The Court held that Ms. Chafin’s assertion that the case was moot confused mootness with the merits of the case because no law of physics prevents the child’s return from Scotland, even though Ms. Chafin unequivocally asserted that Scotland would ignore any order from the Supreme Court. As the Court found, “Courts often adjudicate disputes where the practical impact of any decision is not assured. For example, courts issue default judgments against defendants who failed to appear or participate in the proceedings and therefore seem less likely to comply... Courts also decide cases against foreign nations, whose choices to respect final rulings are not guaranteed.”

The Chafin case has implications much broader than a traditional Hague action. Many times in family law, a parent will remove a child during the pendency of a divorce. The Chafin ruling allows the

Contributing Editor: Laura Morgan

**NATIONAL**

*Chafin v. Chafin*
By Michael Manely of the Manely Firm

The U.S. District Court for the Northern District of Alabama conducted a bench trial on a Hague proceeding on October 11 and 12, 2011. Immediately after closing arguments, the court ruled orally in favor of Mrs. Chafin, granting her petition to return the child to Scotland.

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**ALABAMA**

*Ruberti v. Ruberti*
No. 2110938: Jan 18, 2013
Alabama Court of Civil Appeals
Issue: Child Support - Disabled Child

*Boyle v. Boyle*
Arizona Court of Appeals
Issue: Spousal Maintenance

*Rinegar v. Rinegar*
Arizona Court of Appeals
Issue: Omitted Property - Decree

*Walsh v. Walsh*
Arizona Court of Appeals
Issue: Valuing Goodwill

*Merrill v. Merrill*
Arizona Court of Appeals
Issue: Military Benefits
At the Trial, the parties testified that when H and W met, W had a part-time retail job. H was a Harvard Law graduate and a partner at his law firm. When the parties decided to marry, H presented W with a premarital agreement that he drafted. W testified that she had an attorney review the Agreement on her behalf. H and W signed the Agreement the day before their wedding.

The Agreement stated that none of the property acquired during the marriage would be community property and limited the property W was to receive in the event of divorce to $100,000; another $100,000 if the marriage lasted longer than 15 years and H had been partner at his firm for seven years; half of any sum earned from the sale of the marital residence, minus the down payment paid by H; the home’s furnishings; and an automobile. This section further stated that the enumerated list would “constitute [W’s] sole right to property acquired during the marriage, and to support and replace or supersede any entitlement to such property that [W] might otherwise have under the law.”

The Trial Court concluded that the spousal support waiver was unconscionable. Trial court further concluded the Agreement was inseverable, and therefore unenforceable in its entirety. H appealed and the Court of Appeal reversed and remanded “with orders to enter a new judgment not inconsistent with this opinion.” The Court of Appeal undertook an analysis of the Family Code, case law and equitable principles and concluded that the Trial Court correctly found the spousal support waiver to be unconscionable and therefore invalid, but erred in refusing to sever the invalid provisions from the rest of the Agreement. The Court of Appeal agreed with H that the Trial Court erred in holding the spousal support waiver was illegal as a matter of law. Citing the Uniform Premarital Agreement Act (UPAA), enacted in 1985, the Appellate Court affirmed spousal support waivers in premarital agreements are not invalid per se. [Id. at p. 980.]

However, the Court of Appeal found the spousal support waiver in the instant case to nevertheless be unconscionable both at the time the parties entered the Agreement and at the time of enforcement. The Trial court’s reliance on Family Code section 1612(c) was misplaced, because case law has established this subsection is not retroactive to premarital agreements entered into before 2002. Instead, the Court of Appeal relied on case law, citing In re Marriage of Pendleton and Fireman (2000) 24 Cal.4th 39, 53-54: “it is enough to conclude here that no public policy is violated by permitting enforcement of a waiver of spousal support.
support executed by intelligent, well-educated people, each of whom appears to be self-sufficient in property and earning ability, and both of whom have the advice of counsel regarding their rights and obligations as marital partners at the time they execute the waiver. Such a waiver does not violate public policy and is not per se unenforceable.” The Appellate Court agreed with the Trial Court in finding the Agreement unconscionable at execution because at the time there was a “great disparity in the parties’ respective incomes and assets” and education, as well as a “significant inequality of bargaining power.” [Id. at p. 983.]

In light of the parties’ long term marriage, during which W did not work or pursue her education and H continued to earn substantial income and amassed a separate property fortune of upwards of $10 million, the Appellate Court also found the Agreement to be unconscionable at the time of enforcement.

Finally, the Appellate Court found the spousal support waiver to be severable from the rest of the Agreement and concluded the rest of the Agreement should be enforced. First, Family Code section 1615(a)(2) provides that unconscionability only renders a premarital agreement unenforceable if there was also an absence of fair and reasonable disclosure of premarital assets. Here, H fully disclosed his assets. Furthermore, the Agreement contained a severability clause, which California courts generally construe liberally. The Appellate Court also concluded trial court erred in relying on sections of the Civil Code pertaining to commercial contracts, noting that the UPAA assumes such statutes are inconsistent with the purposes served by PMAs. Finally, Appellate Court deemed it inequitable to deny severance in light of the parties’ testimony regarding their respective intents upon entering the PMA.

This case suggests that courts will scrutinize spousal support waivers. In light

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The following are some of the case reviews by Garrett C. Dailey of Attorney’s Briefcase, Inc. They are available @ www.FamilyLawyerMagazine.com.

Holland V. Jones

FACTS: P sued his ex-wife (D) for libel as a limited jurisdiction matter, alleging she maliciously made false statements about him in a declaration she filed in their divorce.
212 Cal. App. 4th 967: 2013

P appealed to the app.div. super. court, which construed the appeal from the order sustaining a demurrer without leave to amend as an appeal from an order of dismissal. App.div. reversed the dismissal, concluding the exception to the litigation privilege in Civil Code section 47(b)(1), for an allegation in an affidavit filed in a marital dissolution proceeding, potentially applied because P alleged D made the statements about him with malice.

Court of Appeal granted D’s petition to transfer the cause to the appellate court per California Rules of Court, rule 8.1002 and California Rules of Court, rule 8.1008, then reversed.

HELD: Civil Code section 47(b)(1) exception to litigation privilege applies only to statements made in disso. proceeding by or against 3d party, not where statements are made against a party.

D’s statements, “whether true or false or made with malice or without, in her declaration filed in the marital dissolution proceedings, on which [plaintiff] bases his defamation cause of action against her, fall squarely within the litigation privilege. They are communications made in a judicial proceeding by a litigant to achieve the objects of the litigation with some connection to the action.”
The exception on which the appellate division relied “simply does not apply” to D’s statements. That exception may under certain circumstances apply to statements in an affidavit filed in a marital dissolution proceeding when they are “made of or concerning a person by or against whom no affirmative relief is prayed in the action . . . .” (CC §47(b)(1).) D made the statements about P, who is not a person against whom no affirmative relief is prayed in the action.

As P presented no basis on which he could amend his complaint to avoid the litigation privilege, trial ct. properly sustained a demurrer to his complaint without leave to amend.


Marriage of Hibbard
212 Cal.App.4th 1007 Jan 15, 2013 California Court of Appeal
Issue: Spousal Support Modification

Estate of Wilson
211 Cal.App.4th 1284 : Dec 13, 2012 California Court of Appeal
Issue: Domestic Partnership Agreements

Marriage of Melissa
212 Cal.App.4th 598: Dec 3, 2012 California Court of Appeal
Issue: Spousal Support Waiver

Sargon Enterprises, Inc. v. USC
55 Cal.4th 747: Nov 26, 2012 California Court of Appeal
Issue: Expert Testimony Admissibility

Marriage of Barth
Issue: Retroactive Child Support

Chodos v. Cole
Issue: Attorney Malpractice - Anti-SLAPP

Burnham v. CalPERS
208 Cal.App.4th 1576: Aug 31, 2012 California Court of Appeal
Issue: Survivor Benefits - Domestic Partnership

In re Marcelo B.
209 Cal.App.4th 635: Sep 24, 2012 California Court of Appeal
Issue: Parental Rights Termination

Kern County Dept. of Child Support Serve v. Camacho
209 Cal.App.4th 1028: Sep 11, 2012 California Court of Appeal
Issue: Child Support

Graves v. Graves
No. 11-FM-0729: Sep 26, 2012 D.C. Court of Appeals
Issue: Property Division

DISTRICT OF COLUMBIA

Freid and Goldsman devotes its practice solely to the field of family law. The firm handles the full range of domestic relations law, which includes dissolution of marriage, separation, nullity, paternity, support, custody, visitation, division and valuation of marital and nonmarital property, prenuptial and postnuptial agreements, Marvin actions and the prosecution and defense of appeals.

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Sandra Rosenbloom, Collaborative Attorney and Mediator, RosenbloomLaw.com

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**Canty v. Otto**
By Sarah S. Oldham of Rutkin, Oldham & Griffin

The Connecticut Supreme Court ruled on a case full of sex, lies, and murder in Canty v. Otto. The plaintiff in Canty was the administratrix of the estate of Shamaia Smith. Ms. Smith was an exotic dancer and prostitute. Mr. Otto had been sexually involved with her, she disappeared, and her remains were found on property co-owned by Mr. Otto with his son. Shortly after that revelation, Mr. and Mrs. Otto undertook together to transfer various motor vehicles and residential property into Mrs. Otto’s name. The wife then contacted a divorce lawyer, who promptly commenced a dissolution of marriage action, including lis pendens against property in Mr. Otto’s name.

Meanwhile, the executrix of Ms. Smith’s estate obtained a prejudgment remedy in a wrongful death action and moved to intervene in the divorce case, but was denied. Her appeal from that denial was dismissed. The divorce judgment then entered, and the court ruled, giving Mrs. Otto all of the real property while what Mr. Otto received was negligible. The executrix again appealed from the decision denying her the right to intervene in the divorce case, and again the Appellate Court dismissed the appeal. Meanwhile, Mr. Otto was convicted of the murder of Ms. Smith. In the wrongful death action, a hearing was held wherein the judge established that the entire divorce between the Ottos was a sham concocted to avoid having to pay anything to Ms. Smith’s estate in the wrongful death action. This action by the executrix against the defendant under the Uniform Fraudulent Transfer Act followed, along with another successful application for prejudgment remedy from which this appeal was taken.

The Supreme Court found that the plaintiff had standing under the Uniform Fraudulent Transfer Act. The Court was persuaded that many states had determined that a dissolution judgment may constitute a transfer of assets under the Act. The Court dated the claim for fraudulent transfer back to the day Ms. Smith was murdered, which preceded any transfer. The Connecticut Supreme Court found particularly compelling the California Supreme Court’s public policy reasoning in Mejia v. Reed, 31 Cal 4th 657, 669 (2003), which states in consideration of the Act: “[i]n view of this overall policy of protecting creditors, it is unlikely that the [l]egislature intended to grant married couples a one-time-only opportunity to defraud creditors by including the fraudulent transfer in [a marital separation agreement].” Id. at 668.

The Court held that this was not a collateral attack by the plaintiff, who had never had a chance to be heard in the original litigation. It was significant that the plaintiff was not trying to set aside the divorce decree. She was instead merely seeking to attach certain assets related to that divorce decree.

**Berzins v. Berzins**

The Connecticut Supreme Court recently limited and more carefully circumscribed the basis for legal fee awards in family cases based on litigation misconduct in Berzins v. Berzins. Divorce judgment was entered on a default basis against Mr. Berzins for his failure to appear. Mr. Berzins then passed away and the administrator of his estate was substituted for him as a party during appellate and post judgment proceedings. The administrator proceeded to file multiple baseless motions. Ultimately, the trial judge awarded $12,584 in legal fees to Mrs. Berzins. The Appellate Court affirmed that award under Ramin v. Ramin, 281 Conn. 324 (2007), which provides for an award of attorney’s fees to a party when those fees are largely due to the other party’s egregious litigation misconduct. On further appeal to the Connecticut Supreme Court, the Court stated that Ramin was only a limited expansion of Maguire v. Maguire, 222 Conn. 32 (1992), which held that “an award of attorney’s fees in a marital dissolution case is warranted only when at least one of two circumstances is present: (1) one party does not have ample liquid assets to pay for attorney’s fees; or (2) the failure to award attorney’s fees will undermine the court’s other financial orders.” Ramin, 281 Conn. at 352. The Supreme Court in Berzins pointed out that Ramin was intended to “provide a trial court with the discretion to award attorney’s fees to an innocent party who has incurred substantial attorney’s fees due to the egregious litigation misconduct of the other party when the trial court’s other financial orders have not adequately addressed that misconduct.”

However, the Supreme Court stated that Ramin’s holding had been grounded in the principles of full and frank disclosure set forth in Billington v. Billington, 220 Conn. 212 (1991). Emphasizing the limited nature of the expansion that had occurred under Ramin, the Berzins Court made it clear that Ramin only applies to the discovery process, and not to post judgment matters such as were at issue in Berzins. The award of attorney’s fees under Ramin was therefore reversed.

Nonetheless, the Supreme Court found another basis to remand. Relying on Maris v. McGrath, 269 Conn. 834 (2004), the court said one must ask: (1) Was the claim entirely without color? and (2) Was the claim in bad faith? The Berzins Court described this test as a “high hurdle” and explained it by quoting further from Maris: “Whether a claim is colorable, for purposes of the bad-faith exception, is a matter of whether a reasonable attorney could have concluded that facts supporting the claim might be established, not whether such facts had been established.... To determine whether the bad-faith exception applies, the court must assess whether...”

CONTINUED ON PAGE 72
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CONNECTICUT from page 70

there has been substantive bad faith as exhibited by, for example, a party’s use of oppressive tactics or its wilful violations of court orders; [t]he appropriate focus for the court ... is the conduct of the party in instigating or maintaining the litigation.”

Maris, 269 Conn. at 845-846. The trial court in Berzins found that the administrator’s actions were entirely without color, and supplied a great deal of specificity for those findings. However, the trial court did not determine whether the administrator had acted in bad faith. On this basis, the Supreme Court remanded the case for the trial court to complete the proper two-part analysis and determine whether the award of attorney’s fees was supported by Maris instead of Ramin.

Taylor v. Taylor
By Richard West and Susan Savard of West Green & Associates

The parties were divorced following a 22 year marriage. The Husband did not file an answer to the Petition, nor did he appear at final hearing. The 2008 Final Judgment provided that the Wife would receive the Husband’s one-half interest in the former marital residence as lump sum alimony. The home was the only significant marital asset, valued at $380,000. Four months following entry of the Final Judgment, the Wife remarried. The Former Husband appealed.

Lump sum alimony is not a type of alimony, but a means to accomplish the ends of rehabilitative or permanent alimony. Lump sum alimony establishes a fixed monetary obligation that vests immediately, is nonmodifiable and does not terminate when the payee remarries or when the payor dies. Proof of special circumstances must be found by the trial court, and findings must be made that no other forms of alimony are available or appropriate. An award of lump-sum alimony is a two pronged analysis. First, there must be a special necessity. Second, there must be an unusual circumstance, above and beyond the justifications for an award of permanent periodic alimony, to require a non-modifiable award of support. Although the trial court found unusual circumstances to justify the award of lump-sum alimony in the Former Husband’s threats and history of non-payment, there was no “special necessity,” in light of her remarriage four months following the 2008 Judgment. The Wife’s remarriage terminated her entitlement to permanent alimony. The award to the Former Wife of the Former Husband’s entire interest in the marital residence constituted an abuse of discretion. The award of lump-sum alimony was reversed and remanded to the trial court for distribution of the marital home in accordance with F.S. 61.075. 2013 LEXIS 6554: 2013

T.N.H. v. D.M.T.
By Thomas Duggar of Duggar and Duggar

The parties were in a long-term, committed same-sex relationship, holding property jointly as tenants, holding joint-property bank accounts, and generally holding themselves out as a couple. The parties decided to have a baby whom they would raise together as equal parental partners. After seeking reproductive medical assistance, they learned that the appellee was infertile. So, using funds from their joint account, they paid a reproductive doctor to withdraw ova from the appellant which were then fertilized and implanted into the appellee. This led to the birth of a baby in 2004 whose birth certificate listed only the appellee as the mother and did not indicate a father. However, a maternity test confirmed there was a 99.9 percent certainty that the appellant was the biological mother.

The parties separated in 2006 and the child lived with the appellee, with the appellant making regular child support payments and the appellee accepting same. However, all child support ceased when the parties agreed they would share time equally with the child. In 2007, the appellee unilaterally severed the appellant’s contact with the child and moved to an undisclosed location, which the appellant later determined to be Queensland, Australia. After a hearing on a motion for summary judgment, an order was entered in favor of the appellee in which the trial judge stated he felt constrained by the law and expressed hope the district court would reverse its ruling. The district court did, in fact, reverse, finding that it was error for the trial court to deprive the parental rights of a lesbian woman who provided her ova to her partner so both women could have a child to raise together as equal partners and who did co-parent the child for several years after his/her birth. In so finding, the following question was certified to the Florida Supreme Court: Does the application of Section 742.14 deprive parental rights to a lesbian woman who provided her ova to her lesbian partner so both women could have a child to raise together as equal partners and who did co-parent the child for several years after his/her birth rendered the statute unconstitutional under the Equal Protection and Privacy Clauses of the federal and state constitutions? To date, the Florida Supreme Court has yet to determine this issue.

79 So.3d 787: 2012
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Case Reviews

If the trial court had no authority to enter a temporary protective order in the first place, then said court could not enforce and/or modify consent agreements entered into by the parties in relationship to that temporary protective order. A trial court did not have the authority to enforce a temporary protective order beyond the date of its expiration.

In a child support modification action, the trial court had two options when faced with a previous order requiring the father to pay various miscellaneous expenses of the children: 1) order a new child support amount, and remove the obligation to pay these other expenses; or 2) order a new child support amount, and include a Schedule E deviation and requisite written findings supporting the continued payment of these extra expenses.

A trial court was authorized to give primary physical custody to a party who only requested joint physical custody in his pleadings; the trial court has broad discretion to create a custodial arrangement that best promotes a child’s welfare and happiness.

A discretionary downward deviation in child support due to medical expenses must be supported by the requisite findings in Schedule E of the child support worksheet. Where a trial court declines to enter a discretionary deviation in child support, no findings supporting that decision are required.

Husband’s sea pay constituted “special pay or incentive pay” as defined under O.C.G.A. Sec. 19-6-15(f)(1)(E) that shall not be included in gross income when determining child support.

Where converting weekly amounts into monthly amounts in domestic cases, Uniform Superior Court Rule 24.2A requires a conversion factor of 4.35, even though 52 weeks divided by 12 months equals 4.33.

A trial court may order that out-of-pocket medical expenses are equally divided (versus divided pursuant to the parties’ pro rata income percentages); such a determination is not a child support “deviation,” but rather within the trial court’s discretion as set forth in O.C.G.A. Sec. 19-6-15(b)(10).

More Georgia Case Reviews are available on www.familylawyermagazine.com/article-category/case-reviews.

Black v. Black
WL 1248170 Ga.: 2013
Georgia Supreme Court
Issue: Child Support

Lacy v. Lacy
WL 1189289 Ga. App.: 2013
Georgia Court of Appeals
Issue: Court Conduct

Singh v. Hammond
WL 1092644 Ga.: 2013
Georgia Supreme Court
Issue: Child Support

Riggins v. Stirgus
WL 600160 Ga. App.: 2013
Georgia Court of Appeals
Issue: Naming Of Child

Bankston v. Warbingon
WL 617076 Ga. App.: 2013
Georgia Court of Appeals
Issue: Attorney Fees

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Marriage of Mayfield
By Gunnar J. Gitlin and Stephanie A. Kasten of the Gitlin Law Firm

Marriage of Mayfield, Illinois Supreme Court (May 23, 2013), held that a lump sum worker’s compensation award was income for child support purposes — but only as based on the facts of that case. The case does not say that worker’s compensation awards necessarily constitute income on which support should be based. Instead, the Illinois Supreme Court went out of its way to essentially urge that if the case had been properly presented, it may have been appropriate that there would be a deviation from the minimum support guidelines.

The case concluded: “More importantly, Mayfield presented insufficient evidence to warrant a deviation under section 505(a)(2). . . Mayfield did not testify that [the daughter]’s financial resources; her standard of living if the marriage had not been dissolved; her physical, mental, emotional, and educational needs; or even his own financial resources and needs were such that a downward deviation from the guidelines was appropriate. He provided no details about his injury or his prognosis for future employment, other than the settlement agreement, which stated only that he is “seeking employment [within] his restriction,” but provided telling details about how he spent the settlement. Accordingly, the trial court was correct to set child support at 20% of the lump-sum settlement in the absence of any evidence to support a different amount.”

Parentage of J.W.

The second recent case is Parentage of J.W., Illinois Supreme Court, May 23, 2013, in which the Illinois Supreme Court addressed visitation rights versus privileged in parentage cases. The question was whether under the Illinois Parentage Act of 1984 (Illinois Parentage Act), the initial burden is on the noncustodial parent to show that visitation will be in the best interests of the child pursuant to §602 of the Illinois Marriage and Dissolution of Marriage Act (Illinois Marriage Act).

In Illinois parentage cases, the custody and visitation standards within the Illinois Marriage Act are incorporated by reference within the law regarding paternity. The Illinois Parentage Act states, Sec. 14. Judgment. (a) (1) The judgment shall contain or explicitly reserve provisions concerning any duty and amount of child support and may contain provisions concerning the custody and guardianship of the child, visitation privileges with the child, . . . which the court shall determine in accordance with the relevant factors set forth in the Illinois Marriage and Dissolution of Marriage Act and any other applicable law of Illinois, to guide the court in a finding in the best interests of the child. In determining custody, joint custody, removal, or visitation, the court shall apply the relevant standards of the Illinois Marriage and Dissolution of Marriage Act . . .

So, the question in the case was a narrow one: what is the proper standard to be applied in determining visitation after a finding of parentage, in terms of whether the Illinois Parentage Act had incorporated the visitation provisions of §607(a) providing a presumption in favor of the biological parent for visitation and not requiring that parent to prove visitation was in the child’s best interests.

§607(a) of the Illinois Marriage Act provides: [a] parent not granted custody of the child is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would endanger seriously the child’s physical, mental, moral or emotional health.” 750 ILCS 5/607(a) (West 2008). But §602(a) of the Illinois Marriage Act provides, “The court shall determine custody in accordance with the best interest of the child.” 750 ILCS 5/602(a) (West 2008).

The Court stated: “As a result, the presumptive right to visitation in section 607(a) of the Marriage Act, drafted over 30 years ago, is in keeping with the traditional model of a family paradigm, where each parent has presumably exercised custody over the child and one parent will now be granted custody and the other reasonable visitation. Such a presumption reflects a legislative recognition of the need to protect the preexisting parent-child bond that presumably developed prior to the divorce or separation of two parents. Thus, to overcome the presumption that visitation is in the best interests of the child in custody proceedings filed by a parent under the Marriage Act, the General Assembly sought a higher, more stringent burden on the custodial parent than merely the traditional best-interests factors.

In contrast, in actions under the Parentage Act, paternity is at issue and must first be proved. At the time visitation

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is sought, a relationship with the child may not have ever been forged, especially where paternity is established long after birth. See 750 ILCS 45/8(a)(1) (West 2010) (recognizing that the statute of limitations for raising paternity is two years after the minor reaches the age of majority). Additionally, the paradigm of preserving or continuing the parent-child relationship of a traditional intact family unit does not accurately reflect many family situations. Thus, in parentage actions, issues of visitation may arise under situations where the court may be asked to balance several competing interests related to the child.”

The Court focused on the traditional model of “family” that was in place at the time the two Acts were enacted, even though the IPA will potentially be rewritten in the near future. While I would disagree somewhat from an equal protection point of view, the Supreme Court has spoken.

IRPO J.W., 2013 IL 114817

MICHIGAN

By Scott Bassett of Divorce Appeals:

Kaftan v. Kaftan
No. COA 301075: Apr 25, 2013
Michigan Court of Appeals
Issue: Modification of Divorce Agreement

MISSISSIPPI

By Mark Chinn of Chinn and Associates:

Jones v. Jones
Court of Appeals
Issue: Attorneys fees

MISSOURI

By Lindsay Matthews of James H. Young and Associates

In re Matter of T.Q.L. v. L.L
386 S.W.3d 135 (Mo. 2012).
Supreme Court of Missouri
Issue: Third-party Custody and Visitation
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In this recent decision the Court of Special Appeals of Maryland (the State’s intermediate appellate court) addressed issues relating to the computation of child support and the proof necessary to determine a parent’s income, while also expanding the trial court’s authority to allocate the tax dependency exemption between parents.

Jeffrey Reichert and Sarah Hornbeck were only married for approximately 18 months, but they did have a young son when they divorced. They were awarded joint physical and legal custody of their child. Sarah was denied alimony. Jeffrey was ordered to pay child support of $1,651 per month. Jeffrey appealed the trial court’s decision regarding calculation of his child support obligation, as well as the court’s order that the parents alternate the tax dependency for their son.

Jeffrey asserted that the court erred by including “unrealized income” as part of his monthly salary which resulted in an artificially higher income and monthly child support obligation. At the heart of the issue was the trial court’s conclusion that Jeffrey failed to present expert testimony concerning his participation in an incentive investment plan through his employment, even though Jeffrey testified regarding his income and produced tax returns, current pay stubs, and a copy of the incentive investment plan at issue. The appellate court, relying upon the statutory language of Maryland’s Child Support Guidelines, noted that in determining a parent’s “actual income” for child support purposes, the trial court must “verify” the income with documentation of current and past actual income. The Court of Special Appeals reviewed its 2006 decision in Walker v. Grow, 170 Md. App. 255, 907 A.2d 255 (2006), a case involving unrealized income of a minority shareholder in an S Corporation. Although the Walker case involved expert testimony from the corporation’s accountant regarding the shareholder’s unrealized income, no such evidence was offered on behalf of Jeffrey Reichert in the instant case. However, the appellate court explained that a parent who seeks to exclude pass-through or unrealized income from “actual income” in the calculation of child support award is not required to present expert testimony to support the documentation used to verify his or her income, particularly when that parent offers a variety of suitable documentation of actual income into evidence. Thus, the trial court’s decision was reversed and the case was remanded with instructions to recalculate child support.

No. 213: March 20, 2013

Maryland Reichert v. Hornbeck

By Thomas C. Ries of Kaufman, Ries & Elgin

To read the full case review, please visit: familylawyermagazine.com/articles/reichert-v-hornbeck

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**NEVADA**

**Grisham v. Grisham**
No. 289 P.3d 230: Dec 6, 2012
Nevada Supreme Court
Issue: Marital Agreements/Property Settlement

**Devries v. Gallio**
No. 57199: Dec 13, 2012
Nevada Supreme Court
Issue: Property Division

**NEW HAMPSHIRE**

**In re Muller**
No. 2011-736: Jan 11, 2013
New Hampshire Supreme Court
Issue: Child Support - Imputed Income

**NEW JERSEY**

**Emma v. Evans**
By David Wildstein of Wilentz, Goldman & Spitzer

**Issue 1:** When divorced parents have joint legal custody and a child is born in wedlock, does the Parent of Primary Residence (PPR) have a presumption in his/her favor in a change of name dispute?

**Holding 1:** No. The court reasoned: (a) the presumption creates a bias in favor of the maternal surname since the PPR is normally a woman, (b) if you have a presumption, the parties will litigate the “PPR” label, (c) the parties agreed to joint legal custody which encompasses a change in a child’s surname, and (d) the court distinguished cases that preserved the presumption in children born out of wedlock. The court reaffirmed the best interest standard for a change of name proceeding. Roman v. Adely, 182 N.J. 103 (2004), set forth the relevant factors:

1. The length of time the child uses the surname.
2. The identification of a child as part of a family unit.
3. The anxiety or discomfort a child may experience if he/she uses a different surname from the custodial parent.
4. The child’s preference.

**Issue 2:** Was it reversible error to file the change of name proceeding in the family court rather than a separate action under N.J.S.A. 2A:52-1?

**Holding 2:** No. All that matters is notice and the opportunity to be heard. Viola v. Fundrela, 241 N.J. Super. 304 (Ch. Div. 1990), is overruled.

**Issue:** What is the standard and burden of proof for an application to change a child’s surname?

**Holding:** Good cause is not the standard. The standard was articulated in Gubernat v. Deremer, 140 N.J. 120 (1995) and Roman v. Adely, 182 N.J. 103 (2004). The standard should be “best interest” with a strong presumption that the name selected by the primary parent is in the child’s best interest. In determining best interest the court should consider: (a) the length of time the child used the surname, (b) the identification of the child as a member of the family unit, (c) the anxiety or embarrassment child may experience if child uses surname different that custodial parent, (d) the preference of the child. The court also envisioned rebuttal of the presumption if the child used the surname of the non-custodial parent for a period of time, the child’s comfort of the surname and frequent contact of the child and non-custodial parent.


**Clinical v. Clark**
New Jersey Superior Court
Issue: Alimony – Limited Duration

**J.E.V. v. K.V.**
New Jersey Superior Court
Issue: Alimony – Criminal Conduct

**Jacob v. Jacoby**
New Jersey Superior Court
Issue: Child Support

**Musico v. Musico**
426 N.J. Super. 276 (Ch. Div. 2012)
New Jersey Superior Court
Issue: Child Support

**NEW YORK**

**Melody M. v. Robert M.**
By Leigh B. Kahn of Mayerson Abramowitz & Kahn

The parties entered into a separation agreement in 2006 which provided that the parties would share joint custody of their three children, then two, three, and six years old. This joint custody arrangement was confirmed in a stipulation executed by the parties in February 2009, which also provided, inter alia, that the father would have primary physical custody, with the mother to spend time with the children pursuant to a fixed access schedule. Just over a year later, in response to the mother’s application to modify her access schedule, the father filed a number of petitions, including a petition to modify the custody arrangement so that he would have sole legal custody of the children.

The Third Department upheld the Family Court’s determination that there was a sufficient change of circumstances to

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Case Reviews

NEW YORK

 support a conclusion that joint custody was no longer a viable option. In doing so, the Third Department noted that there was a significant deterioration of the parties’ relationship to warrant a change of custody, and that the mother did not dispute such change in circumstances.

In upholding the determination of the Family Court that the children’s best interests would consequently be served by a change of legal custody to the father, the appellate court cited the finding of the Family Court that the mother—who was acknowledged to have mental health issues and was in counseling—had engaged in a “pattern of inappropriate behavior” which had a detrimental effect on the parties’ oldest child. Among the behaviors cited by the appellate court were that the mother (1) testified that she frequently called the father to take the oldest child away during her parenting time because she could not deal with his behavior; (2) conceded swearing and yelling at the oldest child, “often resorting to physical means to deal with him”; and (3) did not participate in the child’s counseling because she didn’t like the therapist or agree with the recommendation that the child needed structure and should follow the same routine in the mother’s household as in the father’s household.

Most interesting, however, was the final behavior noted in the appellate court’s decision. Citing findings by the Family Court, the Third Department noted that the mother “utilized Facebook to insult and demean the child, who was then 10 years old, by, among other things, calling him an ‘asshole,’’ further noting that the mother testified that she believed that “it was important for her Facebook friends to know this.” Based in part upon this behavior — as well as upon the mother’s use of physical force against the oldest child — the appellate court also upheld the Family Court’s issuance of an order of protection against the mother, prohibiting her from, inter alia, posting any communications to or about the children (not just the oldest child) on any social network site. In upholding the order of protection, the appellate court found that “there was sufficient evidence regarding the mother’s inappropriate use of the Internet to demean and disparage the oldest child, as well as her lack of remorse or insight into the inappropriateness of such behavior, so as to justify the court’s issuance of the order of protection.”

It is to be hoped that the fact pattern set forth in Melody M. is far out of the norm, and that there are not many cases in existence in which a parent’s “inappropriate” postings on a social network site could form a basis not only for a change of custody, but also for the issuance of an order of protection. Nonetheless, the facts (and outcome) of this case should serve as yet another warning about the potential pitfalls lurking in posting to social network sites, particularly where children are concerned.

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It is not particularly surprising that postings which expressly “insult and demean” a child and engage in derogatory name-calling could lead to a negative outcome in a parent’s custody matter. However, the extent of the attention paid to the Facebook postings in Melody M. begs the question of how courts would view even less inflammatory material. For example, what if a parent posts a child’s report card, with comments about the child’s performance which might be seen as overly critical and perhaps somewhat derogatory? Or posts pictures of and/or comments about a new romantic relationship with a partner who might be viewed as a potential negative or harmful influence on the children? In a close case, in which a court must award sole custody to one parent or the other, might such a lapse in judgment be sufficient to tip the scales toward the non-posting parent? The decision in Melody M. cautions us that it is imperative to remind clients to think twice before sharing—with, effectively, the world—thoughts or images which could directly or indirectly impact a child.

**Mukuralinda v. Kingomb**
New York Supreme Court
Issue: Parentage

**NORTH CAROLINA**

By Carole S. Gailor of Gailor, Hunt, Jenkins, Davis & Taylor

**In re T.R.T.**

Main Issue: Communication with child via Skype is not visitation as contemplated by N. C. Gen. Stat § 7B-905(c).

In February 2012 the Department of Social services for New Hanover County filed a juvenile petition alleging five year old T.R.T. was neglected and improperly supervised. T.R.T. had previously been adjudicated neglected and been in DSS custody for more than a year before he was returned to his mother. The mother had known mental health problems. In March 2012 the trial court entered an order concluding T.R.T. was a neglected juvenile within the meaning of N. C Gen. Stat. § 7B-101(15)(2011). The child remained in DSS custody. DSS was ordered to set up visitation with the mother via Skype to occur during a supervised visitation class.

The mother appealed the order. The Court of Appeals affirmed the trial court’s order finding the juvenile was neglected based on T.R.T.’s prior adjudication of neglect, the DSS workers’ knowledge of the mother’s mental health history and evidence that the mother refused to cooperate with DSS workers. Further, the mother argued that the trial court erred in setting up the visitation plan because communication with the child via Skype is not visitation as contemplated by N. C. Gen. Stat. § 7B-905(c) and the order therefore denies her visitation.

The Court of Appeals concluded that communication with the child via Skype is not visitation as contemplated by N. C. Gen. Stat. § 7B-905(c). The order therefore denies her visitation.

**Wieder v. Wieder**
New York Supreme Court
Issue: ADR - Arbitration

**Rubin v. Della Salla**
New York Supreme Court
Issue: Shared Custody/Child Support

**Jasen v. Karassik**
New York Supreme Court
Issue: Child Support – UIFSA

**Shah v. Shah**
New York Supreme Court
Issue: Property Division

**Maldonado v. Maldonado**
New York Supreme Court
Issue: Child Support
Skype is not a substitute for in-person visitation and is not visitation as contemplated by N. C. Gen. Stat. § 7B-905(c). The statute provides that electronic communication may supplement visitation but not as a replacement. Because the order failed to make any findings that the mother forfeited her right to visitation or that visitation would be inappropriate under the circumstances the trial court’s order was reversed and remanded for additional findings of fact and conclusions of law relating to this issue. 2013 N. C. App Lexis 171

**North Carolina**

**Finney v. Finney**

**Main Issue:** Valuation of marital residence based on owner’s opinion is sufficient; misallocation of the burden of proof regarding the classification of separate property requires reversal and remand for further proceedings.

Plaintiff-wife appealed the trial court’s unequal distribution ruling on Equitable Distribution. The trial court granted an unequal distribution of the marital estate to defendant-husband awarding him 60% of the marital estate. Wife appealed the trial court’s ruling: (1) based on a lack of evidence supporting the valuation of the marital home; (2) that the trial court’s classification of the State Employee’s Credit Union accounts as the separate property of defendant was incorrect, and (3) that the trial court should not have awarded an unequal distribution of property in favor of the husband.

The wife contended that the husband’s opinion regarding the value of the marital residence of $189,000 was not competent evidence. The Court of Appeals held that two credit union accounts acquired during the marriage were the separate property of the husband. The Court reiterated the rule regarding the shifting burden of proof articulated in Fountain v. Fountain, 148 N.C. App. 329, 332, 559 S. E. 2d 25, 29 (2002).

The Court of Appeals held that the trial court’s finding the wife did not meet her burden of proof of showing the credit union accounts were marital property was erroneous and that since the wife met her burden of proof the burden of proof had shifted to the husband to prove by a preponderance of the evidence that the accounts were his separate property. The Court of Appeals reversed and remanded regarding classification of these accounts. The court held that once the trial court correctly applies the burden of proof and makes appropriate findings of fact and conclusions of law it then can determine what is an appropriate distribution of marital property. 2013 N. C. App. Lexis 59, 736 S. E. 2d 639

**NORTH DAKOTA**

**Sateren v. Sateren**

No. 20120192: Jan 23, 2013
North Dakota Supreme Court
Issue: Appeal-Procedure

**Ohio**

**Barrientos v. Barrientos**

No. 5–12–13: Feb 11, 2013
Ohio Court of Appeals
Issue: Property Division

**Adams v. Adams**

No. 14-12-03: Nov 5, 2012
Ohio Court of Appeals
Issue: Child Support

**Oklahoma**

**Smith v. Villareal**

Case No. 108829: Dec 18, 2012
Oklahoma Supreme Court
Issue: Property Division

**Pennsylvania**

**Reeder v. Carter**

N. C. App. Lexis 335: Apr 2, 2013
North Carolina Court of Appeals
Issue: Separation Agreement

**Hausle v. Hausle**

North Carolina Court of Appeals
Issue: Child Custody/Attorney Fees

**South Carolina**

**Barber v. Barber**

No. 5096: Mar 6, 2013
South Carolina Court of Appeals
Issue: Property Division/Survivor Benefits

**Wilburn v. Wilburn**

No. 27222: Feb 20, 2013
South Carolina Supreme Court
Issue: Property Division

**Texas**

**Nuveen v. Nuveen**

No. 20120246: Dec 18, 2012
North Dakota Supreme Court
Issue: Child Support

**See page 86**

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Echols & Associates is primarily engaged in contested and complex family law cases, valuation and division of marital estates, determination of marital and separate property, business valuations, requests for and defense of requests for support alimony, contested child custody, visitation and support, jurisdictional disputes, including international law issues, paternity, guardianship, probate, and domestic violence. Established in 1979, the firm has been recognized for many years by the Bar Register of Preeminent Lawyers rated by Martindale-Hubbell for both legal ability and adherence to the highest professional standards. The firm’s eight attorneys have a combined experience of over 100 years in the practice of family law. The attorneys have dedicated themselves to helping their domestic clients find their future, while honoring their past, through compassionate, knowledgeable and experienced representation in the Family Courts of Oklahoma.

M. Eileen Echols, the Managing Attorney and Senior Litigator, innovated a team approach to provide exemplary service. Each case is assigned a minimum of two attorneys, who work together with the firm’s other attorneys, to provide quality legal services. Eileen is a former Family Law Judge, twice named Outstanding Family Law Judge for the State of Oklahoma, by the Family Law Section of the Oklahoma Bar Association.

David W. Echols is a Fellow in the American Academy of Matrimonial Lawyers, and he has been an AV rated attorney by Martindale Hubbell for over twenty (20) years. Both David and Eileen have been selected as SuperLawyers, by review of their peers; both are former Chairs of the Oklahoma Bar Association’s Family Law Section, former Adjunct Law Professors, and both are frequent teachers and lecturers on the topic of Family Law to Oklahoma lawyers.

Completing the team are distinguished attorneys Jonathan D. Echols, selected as a Rising Star, since 2011, by SuperLawyers, graduated first in his law school class at OCU and was named the Outstanding Law School Graduate of 2005; Amy L. Howe, selected as a Rising Star, by SuperLawyers; Lindsey W. Andrews, recipient of the 2013 Journal Record Leadership in Law Award from the Oklahoma County Bar Association; Benjamin P. Sisney, who prior to joining the firm, clerked for U.S. District Judge Gregory K. Frizzell, Tulsa, Oklahoma; Richard E. Smalley, IV, who has received an AV rating from Martindale-Hubbell, by his peers for legal ability and adherence to the highest professional standards and Allyson E. Dow, who was awarded the Outstanding Family Law Student Award for 2012, by Professor Robert Spector of the University of Oklahoma.
The case of M.J.M. addresses the issue head-on. The Superior Court in M.J.M. states: “This language is clear, and we cannot expand it to provide that a trial court must also give weighted consideration to a party’s role as primary caretaker. We simply cannot graft the judicially-created primary caretaker doctrine on to the inquiry that the Legislature has established, and so we conclude that the primary caretaker doctrine, insofar as it requires positive emphasis on the primary caretaker’s status, is no longer viable.” The Superior Court further indicates that its conclusion does not mean the trial court cannot consider “a parent’s role as the primary caretaker when engaging in the statutorily-guided inquiry” and that when necessary the trial court may “explicitly consider” one’s role as the primary caretaker. However, a party’s role as the primary caretaker will no longer be given weighted consideration over the other factors enumerated under Section 5328. This holding is extremely important for future custody cases. Because of this holding, other doctrines and policies such as the separation of siblings policy will likely not be given additional weight as well. Factor six under Section 5328 provides: “The child’s sibling relationships.” Under the separation of siblings policy, unless compelling reasons dictating a contrary result are presented, siblings should not be separated. Based on the decision in M.J.M., it appears as though the child’s sibling relationships will be evenly analyzed with all other factors.
At Obermayer Rebmann Maxwell & Hippel LLP, our family law attorneys believe the practice of law is about helping people — our clients. We understand that dealing with family issues such as divorce, child custody and child and spousal support are complex and challenging.

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- Separation agreements
- Name change
- Property settlement agreement
- Mediation assistance
- Arbitration services

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Obermayer is a full-service law firm with more than 100 attorneys working in a broad range of practice areas. The attorneys from our family law group draw on the exceptional resources within the firm to handle complex family law matters. When appropriate, we work closely with our tax, trust and estate, corporate and real estate attorneys to achieve the best result for your divorce.

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Case Reviews

L.F. v. Breit
Nos. 120158, 120159: Jan 10, 2013
Virginia Supreme Court
Issue: Parentage

In re Mele
United States Bankruptcy Court, W.D.
Issue: Bankruptcy

Johnson v. Masters
By Greg Herman of Loeb and Herman

Patricia Johnson and Michael Masters were divorced on July 20, 1989. Pursuant to the judgment of divorce, Johnson was awarded half of the value of Masters’ Wisconsin Retirement System (WRS) from the date of marriage to the date of divorce via a Qualified Domestic Relations Order (QDRO). On September 13, 2010, Johnson filed a motion seeking to compel Masters to provide pension information so that the necessary QDRO could be prepared and his WRS pension could be divided in accordance with the judgment of divorce. The circuit court denied Johnson’s motion for the entry of a QDRO on the grounds that the motion was barred by Wis. Stat. _ 893.40, a statute of repose, which states that “action upon a judgment or decree... shall be commenced within 20 years after the judgment or decree is entered or be barred.” Johnson appealed.

The Supreme Court of Wisconsin held that Johnson’s motion was not barred by the operation of Wis. Stat. _ 893.40 because the judgment contained a provision that required the filing of a QDRO with the WRS, and it was not until 1998 that legislation authorized WRS to accept such orders for marriages, such as this one, that were terminated in 1989. The court found that it would be absurd and unreasonable to construe the statute of repose in such a way that it would begin to run at the time of a judgment with regard to a provision that assigned Masters’ interest contrary to existing law, which was, and continued for the next nine years, to be that WRS pension interests were not assignable. Therefore, construing the statute as starting to run as to the pension provision at the point when the provision was no longer contrary to law is a way to retain the statute’s limiting function in a manner that serves its purpose.

Under the circumstances present in this case where a statute precludes a provision in a judgment, the statute of repose cannot begin to run as to that provision until the legislature changes the law such that the provision can be carried out. In this case, that change went into effect on May 2, 1998, and the statute of repose will bar actions on such a provision only after May 1, 2018. The Supreme Court therefore reversed the order of the circuit court and remand for further proceedings consistent with this opinion.

Hanson v. Belveal
Wyoming Supreme Court
Issue: Child Custody

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88 | Read More Case Reviews at: www.familylawyermagazine.com/article-category/case-reviews
**TEXAS**

By Brad Lamorgese and Eileen Costello of McCurley, Orsinger, McCurley, Nelson & Downing

**In the Interests of J.M. and Z.M.**

In this parental rights-termination case, the Supreme Court of Texas considered the issue of whether a motion for new trial and notice of appeal combined in one document can invoke appellate jurisdiction. The Supreme Court held that the combined filing conferred jurisdiction on the appellate court. Before the trial court signed the termination order, the Mother’s trial counsel filed a “Motion for New Trial or, in the Alternative, Notice of Appeal.”

The Court of Appeals dismissed the suit for want of jurisdiction. On review, the Supreme Court applied Rule of Appellate Procedure 25.1 which provides that an appeal is perfected and the appellate court’s jurisdiction is invoked when a written notice of appeal is filed with the trial court clerk. A party complies with this rule by making a bonafide attempt to invoke appellate jurisdiction. The Supreme Court reasoned that because the combined filing expressed an intent to appeal and was partially titled a notice of appeal, it constituted a bonafide attempt to invoke appellate jurisdiction. Therefore, the combined filing invoked appellate jurisdiction.

12-0836 (Tex. Mar. 15, 2013)

**In re Office of the Attorney General**

The Supreme Court of Texas was called upon to interpret whether Texas Family Code § 157.162(d) provides a mechanism for an obligor to avoid contempt for missed payments alleged in a motion to enforce that, though untimely under the support order, had been satisfied prior to the enforcement hearing. The Supreme Court held that an obligor may invoke Texas Family Code § 157.162(d) by demonstrating that he or she is current on all support payments as of the date of the enforcement hearing, including those that become due after a motion to enforce has been filed.

In June 2008, a motion to enforce child support was brought against the Father. Prior to the enforcement hearing, the Father paid the entire pled arrearage and also accrued a new arrearage by making partial payments for the remaining intervening months between the filing and the hearing. Despite Father being current on the payments pled in the motion, the trial court still found him in contempt for those amounts. On appeal, the Father argued that Texas Family Code § 157.162(d) prohibited a finding of contempt because he had paid all the pledged amounts by the time of the hearing. In a divided decision, the court of appeals adopted this interpretation and ordered the trial court to vacate its contempt order. The Mother and the Office of the Attorney General petitioned the Supreme Court for mandamus relief. The Supreme Court held that when a statute’s language is clear and unambiguous, it is inappropriate to resort to rules of construction or extrinsic aids to construe the language. The plain language of 157.162(d) allows a respondent to avoid a finding of contempt when the respondent shows he or she “is current in the payment of child support as ordered by the court.”

Therefore, the Supreme Court found that the plain language of the statute required the Father to show that no outstanding arrearage existed as of the date of the enforcement hearing. Because Father had accumulated a new arrearage prior to the enforcement hearing, he was not current on all child support obligations. Thus, Texas Family Code § 157.162(d) could not be invoked by Father to avoid being found in contempt for failure to pay child support.

Managing Your **STRESS** Effectively

By John P. Matias and Elodie Mertz

The practice of family law can be a stressful occupation, and how effective you are at your job affects more than just yourself. Although stress can result from your work, it can also impact your concentration and energy while doing that very work. We’ve put together a list of helpful methods to alleviate your stress while in the workplace.

- **Take a Breath**
  Taking a few deep breaths at your desk can do wonders to help clear your mind. Stop at least twice a day to breathe deeply.

- **Good Posture**
  Slouching and hunching forward can constrict blood flow to the nervous system, digestive system, and brain. Keep your head up; as if your body were hanging by a thread, and your legs perpendicular to the floor with feet flat on the ground.

- **Time for a Walk**
  This can be done before and after work, or during your lunch break. 20 to 30 minutes of brisk walking has the same effect as a mild tranquilizer, and the endorphins and alpha waves produced promote a sense of relaxation and well being.

- **Stay Hydrated**
  Keeping yourself hydrated is good for more than just optimal bodily health. Being just half a liter dehydrated can raise your stress levels and increase your heart rate. A hydrated body is an essential tool in maintaining a body that is stress free.

- **Stretch and Yawn**
  It may not look professional, but stretching and yawning just like when you get out of bed will help to ease your mind, and release tension from your muscles. Yawning helps the body to achieve homeostasis and regulate brain temperature. Concentrating on the good feelings that result from stretching can help boost your positivity.

- **Light and Plants**
  Add green plants to your workspace to clean the air and bring in oxygen and humidity into your indoor environment. Also, don’t underestimate the ability of light to reduce stress, fatigue and increase productivity. Ideally, opt for natural light, or if this is not possible use full-spectrum tubes. Natural light helps to reduce cortisol, which is the stress hormone, and is easier on your eyes.

- **Get the Sleep You Need**
  Lack of sleep not only diminishes mental performance the next day, it also has the same effect on your ability to cope with stress. Research shows that sleep deprivation is equivalent to being legally intoxicated.

SUPERFOODS
The First Step to a Healthier You

By John P. Matias and Elodie Mertz

There is no one sure-fire way to attain optimal health, but the truth is most people are simply not getting the nutrients they require on a daily basis. We reviewed some recent research and have compiled a list of nutrient-rich foods that can boost your immune system, improve your digestion and increase your energy.

- **Kale**
  A good source of chlorophyll, it’s also where you should turn for iron and vitamins A, C, and K. Kale also has powerful antioxidants that can help ward off cancer, and fight against inflammatory conditions. This leafy green cleanses your system, as it is filled with both fiber and sulfur. Kale also helps detoxify the body, and keep your liver in better condition.

- **Lemon**
  Lemon is rich in vitamin B6 and C as well as in bioflavonoids, which support the antioxidant effects fighting against free radicals. It is a natural antibiotic and a powerful antibacterial, perfect to ward off cancer, and fight against inflammatory conditions. This leafy green cleanses your system, as it is filled with both fiber and sulfur. Kale also helps detoxify the body, and keep your liver in better condition.

- **Lemon**
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- **Kefir**
  Like yogurt, kefir is full of probiotics, or healthy bacteria. Foods created by lacto-fermenting are easier to digest, and increase the healthy balance of your intestinal tract. The probiotics in kefir not only improve digestion, but also help your genes fight disease and prevent allergies.

- **Coconut Oil**
  Use coconut oil as a cooking substitute. The fat content of coconut oil — half of which is lauric acid — is...
converted by our bodies into monolaurin, which is also found in human breast milk and has both antiviral and germ-killing properties. Other benefits of coconut oil include lowering cholesterol, keeping diabetes in check, reducing heart disease, supporting the immune-system, helping with weight loss, boosting energy and current research suggests that it fights Alzheimer’s disease.

- **Sweet Potatoes**
  In addition to energy, they’re also packed with a lot of minerals derived from the soil, like potassium, phosphorus, magnesium and iron. Sweet potatoes also contain beta carotene and vitamin A. One cup of sweet potatoes every week can reduce the risk of lung, skin and prostate cancers. They can help prevent heart disease, and are effective in calming stress-related symptoms, including muscle cramps.

- **Sprouts**
  Sprouts contain large amount of vitamins, minerals and are a high source of protein, calcium, vitamins B1, B2, B3 and potassium. With more nutritional value than we could even list, sprouts are a superfood that need to make it onto your menu.

- **Turmeric**
  Turmeric, used alone or in curry, is an anti-inflammatory agent and a wound healer. It can relieve arthritis and help inhibit the growth of pancreatic cancer cells. On top of that, by stimulating the gallbladder, turmeric improves digestion. Mixed with black pepper or dissolved in oil, it is better assimilated by the body.

- **Ground flax and Chia seeds**
  Flax seeds contain lots of omega-3 fatty acids, and a large amount of fiber, which in addition to aiding digestion, is effective in lowering cholesterol and stabilizing blood sugar. Chia seeds are rich in antioxidants, calcium and vitamin C.

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Tulúm, México: Why We Travel in the First Place!

Tulúm and its unique community of backpackers, yoga enthusiasts, spiritual travelers, ‘green’ tourists, boho hippies, A-List celebrities and fashion industry execs, would all agree that Tulúm is the hot place to be.

By Jessica Seba

Tulúm is holding true to its origins as a cross roads: between the intensive development to the north and pristine nature to the south. Tulúm, a once “off the beaten path” destination on Mexico’s dazzling Caribbean Coast, is known for its picturesque Mayan archaeological site perched on a cliff overlooking the turquoise blue Mexican-Caribbean sea. Today, as the region has grown into a world-class tourism destination, it is one of the most visited Mayan sites. As increased visitation and development pushes down the coast from Cancun, Tulúm has retained its bohemian, wild feel and is home to some of the most spectacular beaches in the world. It has evolved from a cross-roads trading post of the Mayan Civilization to a truck stop village into the type of “travelers place” that reminds us why we travel in the first place!

Travelers who come to Tulúm are generally looking for an off the beaten path, secluded, intimate experience with nature and a strong sense of place and community; the contrast from Cancun couldn’t be more stark! The new wave of boutique hotels, restaurants and shops that have cropped up along the beach in and around Tulúm embody the ethos of the destination with a small scale, authentic, down to earth look and feel that is more and more difficult to find. Price points range from $20 (for a place to pitch your tent) to $1,000 dollars a night, offering options for every traveler’s budget. Tulúm and its unique community of backpackers, yoga enthusiasts, spiritual travelers, ‘green’ tourists, boho hippies, A-List celebrities and fashion industry execs, would all agree that Tulúm is the hot place to be. In fact, Ralph Lauren Magazine says “Tulúm has emerged as a destination for the fashionable to decompress and spiritually recharge.”

Read full article here: www.familylawyermagazine.com/articles/tulum.

Jessica Seba is the Community Manager at Journey Mexico, a luxury travel company that provides authentic travel experiences throughout Mexico.

www.journeymexico.com
COSTA RICA is a Synonym for Pure Life!  By Michael Kaye

Why do so many travelers choose to vacation in Costa Rica over all the other countries in the world that they might visit? In 2011, my friend of over 40 years, explorer and adventure travel pioneer, Richard Bangs, went to find out. Here’s what he found:

“For trekkers, Nepal is heaven, and the trekking staff in Nepal handles tourists perhaps better than any other country. The country rises from a hundred feet above sea level on the Indian border to Mount Everest at 29,028 feet in less than a hundred miles and contains eight of the ten tallest mountains in the world. But you do not have to be a trekker to enjoy the country, nor do you have to be a mountaineer. In fact, Nepal is a wonderful family destination. With the expanded road system in the country, there are many new places to visit for the non-trekker. People can visit Nepal year round. Truly, any season is festival season and there is always something wonderful to see and do in Nepal.

Today, more tourists than ever are flocking to this marvellous Himalayan country and travel is the largest industry and source of revenue in the country. Moreover, a visit to Nepal soon becomes chronic, leading to many more. As many visitors comment, “I went to Nepal for the mountains, but came back for the people!”

If you have dreamed of visiting this Himalayan country, now is the time to go. If you don’t start walking, you will never get there!

Read full article here: www.familylawyer magazine.com/articles/costa-rica.

Michael Kaye is a co-founder of Costa Rica Expeditions and Real Travel Feedback, a website for meaningful conversations about vacations.

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“Here, endless natural wonders rouse the faculties and excite the soul. But what I find most remarkable is the sensitivity the people have to their surroundings. Costa Ricans have set aside one quarter of their land as national parks and protected areas. What has brought me back to Costa Rica so many times over the years is a sense of well-being I’ve felt in few countries on earth.

Himalayan High: A Visit to Nepal

While you go to Nepal for the mountains, you will come back for the people.
By Antonia Neubauer

For trekkers, Nepal is heaven, and the trekking staff in Nepal handles tourists perhaps better than any other country. The country rises from a hundred feet above sea level on the Indian border to Mount Everest at 29,028 feet in less than a hundred miles and contains eight of the ten tallest mountains in the world. But you do not have to be a trekker to enjoy the country, nor do you have to be a mountaineer. In fact, Nepal is a wonderful family destination. With the expanded road system in the country, there are many new places to visit for the non-trekker. People can visit Nepal year round. Truly, any season is festival season and there is always something wonderful to see and do in Nepal.

Today, more tourists than ever are flocking to this marvellous Himalayan country and travel is the largest industry and source of revenue in the country. Moreover, a visit to Nepal soon becomes chronic, leading to many more. As many visitors comment, “I went to Nepal for the mountains, but came back for the people!”

If you have dreamed of visiting this Himalayan country, now is the time to go. If you don’t start walking, you will never get there!

Read full article here: www.familylawyer magazine.com/articles/himalayan-high.

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support, and property division. For the client, an exchange of quantifiable positions about the issues under these legal rubrics leaves unnamed, unvented, and unresolved the underlying emotional forces that drive the conflict. Our clients frequently leave such settlement processes with little or no sense of the closure or “ownership” that are the hallmarks of deep conflict resolution.

Our brains organize memory in neural pathways that include sensory data saturated with intense emotions; these patterns shape incoming sensory data to fit the pre-existing template. Every time our client recalls the bad experiences surrounding separation and divorce, a pattern in her implicit memory system is reactivated, strengthened, and altered, so that today’s painful experience merges contextually with every other similarly painful relationship experience extending back into childhood, gathering force and in a sense rewriting the story of the marriage — not only now but as it was lived previously — through the lens of pain, disappointment and betrayal. Each reactivation of this increasingly emotion-saturated narrative trope triggers involuntary physiological events throughout the body as it prepares to defend against attack. Blood pressure rises, heartbeat speeds up, cortisol floods the bloodstream. As a direct biochemical result the newer cognitive centers of the brain — located in the neo-cortex, which engages in cause and effect thinking and in imagining new solutions to old problems — go offline for as long as several hours after a triggering memory while the “fight, flight, or play dead” response plays out in body and mind.

Some studies have suggested a substantial temporary drop in I.Q. of 30 points or more when a spouse experiences rejection by the former partner. Our divorcing clients are required (perhaps for the first time in their lives) to make complex and far reaching decisions about finances and parenting at a time of unprecedented and sustained stress, and for many of them, deep and wounding rejection is the context in which this decision-making must take place.

We are, in other words, representing clients who may for much of the time we work with them be experiencing transient states of diminished capacity. We cannot erase their pain, and we cannot rewrite their history; but I believe we do have a professional responsibility to understand how unrealistic, unhelpful, and biologically incorrect a primarily rationalist decision-making model really is for distressed clients.

What might change for the better if we brought practical neuro-literacy into the picture? For instance, if we appreciated the reality that for the emotional brain there is little or no difference between experiencing something, imagining it, remembering it, and recounting it — and if we also appreciated the inescapable neurobiological reality that in the presence of strong emotion, the rational thinking brain will be switched “offline” for perhaps hours at a time — we would understand the importance of ensuring that no client is encouraged to make “rational” decisions soon after re-experiencing the intense emotional states invoked by recounting or recalling intense divorce-related narratives. The artistry of when and how we attend to our clients’ pain-saturated stories, when we ask them to recount them, and how we encourage clients to envision the goals of their divorce separate and apart from the pain of the marital breakup, can be greatly enriched by a grounding in practical neuroscience.

We can also be clear about the difference between empathy and destructive alignment or identification as we fulfill our responsibilities as effective advocates. We can reconsider how we respond when a client retells the painful history of a divorce, or the most recent spat with an “ex”. As neuro-literate advocates, we can learn new skills for reframing the backward-looking, pain-saturated narrative into one more congruent with realizing the client’s best hopes for the future.

When we consider what neuroscience discoveries have to say about how encouraging clients to remain immersed in pain-saturated stories can diminish our clients’ capacity to plan effectively for their own future and the future of their children, and can even make them physically ill, it is difficult to escape the conclusion that neuro-literacy is no longer optional. We do not need to be psychotherapists to learn better and more effective empathic skills that allow us to form alliances that help, rather than harm, angry or distraught clients; we do not need to be neuroscientists to learn how to work constructively with pain-saturated narratives to help clients...
return more quickly to higher-functioning cognitive states. Skills like these should constitute vital parts of the core professional education of divorce lawyers — especially those of us who choose to work in consensual out-of-court models that depend on full client engagement, and that promise a deeper and fuller kind of resolution than is available from a court.

Enhancing Interactions with Clients and Colleagues during Negotiations

Human beings across all languages, cultures, and levels of sophistication express and understand emotions through mirroring and reading facial expressions that are universal. Thought to be a key evolutionary advantage, mirror neurons enable all of us to “know” without engaging any of the higher cognitive brain centers whether a person is friend or foe, happy or sad, flirtatious or disgusted, truth-teller or liar. We know what others feel because our brains are constantly running a simulation program, mirroring in our own bodies the sensory data we pick up from others. We feel one another’s pain and joy in the most literal way, as an evolved biological mechanism for rearing infants and for forming and sustaining relationships and communities built on trust and cooperation — the evolutionary advantage that has allowed us to develop complex human cultures. Moreover, we don’t merely read the emotional language of others; the emotional states of each of us are contagious to everyone in proximity to us, without us usually being conscious of the phenomenon.

It follows that every communication between and among the lawyers and the parties in a case necessarily carries a biologically-wired emotional substratum. Lawyers who are unsophisticated in the workings of mirror neurons may make the well-intentioned error of allowing distressed clients to unload on one another at settlement meetings, believing there is something constructive in what they call “catharsis.” Not so, neuroscience tells us. Each client, and everyone else in the room, will simulate via their own mirror neurons the intense emotions being expressed, and will experience in their own bodies and brains the “fight or flight or play dead” evolutionary defense program that strong emotions trigger. The possibility of creative problem solving disappears, neurally speaking, for quite some time following such outbursts.

So if allowing clients free rein for outbursts in settlement meetings is counterproductive, should we instead instruct clients to “suck it up,” or adopt that strategy ourselves when frustrated or angry at someone else in the negotiating room? It turns out that won’t work well, either. Our facial muscles, body language and the timbre of our voices speak louder than words, communicating our actual feelings, and contaminating the environment at the table. If the feelings are there, they will be read by every brain in the room and can silently undermine trust and cooperation.

How might practical neuro-literacy help us address more effectively the eruption of negative emotion during case-related communications? We can:

• Learn “self scanning,” a technique for becoming conscious of how various emotions express themselves uniquely in our own bodies.
• Invoke self soothing techniques that operate at the neural level to abort emotional “hijacking” of higher brain functions.
• Teach clients simple techniques to soothe and avert emotional melt-downs, many of them involving sensory inputs associated with implicit memory patterns of relaxation, trust, and other desired states.

Collaborative lawyers have instinctively employed techniques like these for nearly two decades. Now, hard science confirms that far from being touchy-feely, these techniques work because of how our brain works. Strong emotions should neither be allowed to contaminate the safe space of the negotiating room, nor be excluded from the negotiation process. Learning how to manage them constructively is part of becoming neuro-literate.

Conclusion

Becoming neuro-literate in conflict resolution work means embarking on a long and very personal process of recognizing when we are in the throes of unhelpful naïve realism, and gradually developing nuanced new skills to replace positional argumentation based on deductive logic. This is a tall order. Such retooling cannot be done alone.

In this regard, collaborative law, which is inherently collegial and which is built on protocols and roadmaps for sophisticated professional teamwork, represents one of the cutting edge methods for reshaping our understanding of what it means to be effective, neuro-literate advocates in the 21st century.

This article has been abridged and reprinted with permission from New York Dispute Resolution Newsletter, Vol. 21, No.3. Published by New York State Bar Association. To read the full, original article with endnotes, visit www.familylawyermagazine.com/articles/what-is-neuro-literacy.

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The LVA 6.50 is currently being used by over 75 law enforcement agencies including the United States Department of Defense, and the United States Secret Service. It is also utilized by several insurance companies with help from special investigation units. Family lawyers could use this analysis when interviewing key witnesses during trial preparation.

JOE GILL
What are the most common requests you receive from family lawyers?

We receive many requests from family lawyers. Background checks are often used in custody matters, particularly when a new person is involved in the child’s life, such as a boyfriend or girlfriend, nanny or childcare provider. Asset checks are also requested frequently in a divorce if an ex is claiming no assets and a judgment has been rendered against the party. Family lawyers also request our service if they need to find a missing parent or to locate a biological parent when looking to adopt a child.

Can you tell us about the use of surveillance in family law cases?

Surveillance can be used in many types of situations. It’s not only used to catch a cheating spouse, but often in child custody matters. It can help determine if a parent is adhering to the agreed upon or court-ordered terms of custody and visitations. It can also be used to show that a parent is working a job and not documenting the income, or to prove co-habitation in alimony and custody matters.

Can you speak a little more about asset investigations in family law?

An asset investigation looks for property and vehicle ownership, county and federal level civil lawsuit settlements, as well as business ownership or interests and employment. The employment aspect of the investigation usually reveals the most useful information. In many cases, an individual involved in a spousal support matter claims to be unemployed or underemployed and through record searches and discreet surveillance, we can identify where and when the individual is actually working. We have often discovered large amounts of unreported income through construction and contracting jobs in which the individual deals only in cash. Other types of work that are frequently conducted out of the home and not reported are hair cutting/styling, computer repairs, childcare, landscaping and graphic design.

In one particular case, our client believed his ex-wife had a hidden source of income. Through the use of an undercover investigator, we discovered that the woman was involved in adult toy parties and sales. She even disclosed to our investigator that she chose this business specifically because she could hide the substantial income from her ex-husband.

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How do you help your clients, and yourself, deal with the emotional stress caused by divorce?

Well, you have to strike a path of proper balance. Of course, you have to maintain professional distance to a certain degree, but at the same time if you pull back too far you then lose empathy for your client. You must maintain a balance at all times. I’ve done a number of things to try to improve my own abilities, such as ongoing CLEs and coaching, as well as studying psychology and psychiatry to better help me understand how the brain works.

How did you decide that you wanted to start a family law firm, and do you have any suggestions for others who want to do the same thing?

My goal was to set about building and maintaining the most proficient and efficient firm that I could. As far as others starting their firm, I would encourage them to concentrate on where they want to be. Also, they should never hire people who they’re unwilling to be partners with.

Tell us your thoughts about achieving a work-life balance?

I am by nature a self-driven individual, and so is Mary Johanna, my partner and wife. Left to my own devices I work way, way too much. And so we take time off and we use travel to take us away from work. We have a home that we go to. It’s a good sort of short term resting place. We also sit down each quarter and plan what we want to do in our business and personal life. We do the same thing at our firm. Aside from our regular monthly meetings we have a year-end meeting where we discuss goals for the future.

As far as goals for the future, what do you think lies ahead?

I have become selective in everything that I do, and am not yet in the process of my retirement. I can’t think of retirement, because it’s a step toward death. My grandfather lived until he was 105. And while I am not ready to start facing that possibility, I think in my mind the wiser thing is that I continue this state of transition rather than retirement. My life is on track now as far as I’m concerned, and how I would want to move past this depends on where my law practice goes. The prospect of change in the area of family law and where we might be headed next really excites me. All I want to do is to stay on the cutting edge all of the time.

For more information on Mike McCurley and his firm visit: www.momnd.com.

Read or listen to the full version of this interview: Mike McCurley on Creating and Managing Long-Term Goals — www.familylawyermagazine.com/articles/creating-and-managing-long-term-goals.
EMBRYOS / CONTINUED FROM PAGE 55

mediations, this is a visual method of dividing the marital estate. Enter various assets and liabilities — which become icons on the main screen — and move them back and forth between the parties’ sides of the screen. With each move, the totals automatically adjust. You can then email your finished scenario with an accompanying spreadsheet and proprietary iSplit Divorce file.

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A different analysis was produced by the Massachusetts court in A.Z. v. B.Z., 725 N.E.2d 1051 (Mass. 2000). The state Supreme Judicial Court ruled that an alleged contract on a form provided by a fertility clinic between the parties would not control, and that if one of the parties wished to avoid procreation after the divorce, that person’s choice would control.

The New Jersey court in J.B. v. M.B. and C.C., 783 A.2d 707 (N.J. 2001) took a different position. It ruled that agreements to dispose of embryos are not contrary to public policy, but that each party has a right to change his or her mind up to the point of use or destruction of the embryos. Under this analysis, generally the party choosing not to become a parent will prevail. However, the New Jersey court expressly declined to state the result if an infertile party wishes to use the embryos against the will of his or her partner. This, of course, raises the question if a case in which a party who has no other way to have a genetically connected child should be treated differently.

On the question of whether a contract to donate embryos in the event of a divorce, a New York court gave a positive answer. It enforced the terms of consent forms signed by the husband and wife. The document provided that in the event of a divorce, the embryos would be disposed of by the in vitro fertilization clinic where they were cryopreserved and could be used for research. The court took the position that when the progenitors of the embryos chose to be bound by such agreements, there is no reason for the court to refuse enforcement. See Kass v. Kass, 696 N.E.2d 174 (N.Y. 1998).

Although there may be as many as a million or more cryopreserved embryos in the United States, and many married couples who created them in order to deal with fertility problems get divorced, many states have not yet evolved criteria to resolve disputes over the disposition of the embryos when these couples do divorce. It may be years before any general consensus evolves on such criteria, if ever. Counsel confronted with such disputes will want to research the judicial reasoning in those courts which have considered the issue and develop arguments which accord with their client’s position.

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