

I N S I D E T H E M I N D S

Strategies for Family Law in Florida

*Leading Lawyers on Working with Clients, Creating
an Effective Strategy, and Handling Complex Cases*

2012 EDITION



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The Changing Landscape of
Florida Family Law and
Alternative Dispute
Resolution's Role in Florida's
Family Law System

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Introduction

The economy, combined with recent and frequent law changes, and the significant inconsistencies in established decisions has added complexity to the practice of family law in Florida. Prior to the recession and the real estate crash, family law practitioners routinely divided assets, whereas, now, they frequently divide debt. The dramatic shift in the financial landscape has raised new issues, and those issues have not yet been adequately addressed under the current law. Further, aside from the economy, Florida is also feeling the effects of multiple changes in its statutory law. In the past three years the legislature has made significant revisions to many of the core statutory sections impacting family practice. The law changes have impacted how courts address typical issues in a divorce case, including children's issues, property issues, and alimony. At the same time, practitioners are confronted with conflicting and inconsistent case law, especially relating to some of the more complicated areas of practice such as equitable distribution.

As a result, these situations make resolution of family cases more difficult and less predictable. And this is at a time where most families' finances are insufficient to allow them to litigate to certainty. It may be that these factors in combination will make alternative dispute resolution mechanisms even more important in family law in the coming years.

The Economy

Very few individuals have been unaffected by the economy, and it has even made divorce unaffordable or at least ill-advised in certain cases. Routinely, there is often less to go around these days, and as a result, it is significantly harder to fashion a remedy that is satisfactory to everyone. For most families, there is simply not enough to meet the needs of the family as an intact family unit, much less to meet the needs of the family living in two separate households. The reality for many is that they have shifted from having substantial wealth to being near disaster, and in those cases, resolution is even more difficult because of the emotional transition clients must go through to cope not only with divorce but with the sometimes catastrophic financial issues.

Much of Florida's case law does not reflect the transitions many clients have experienced financially. As a single example, in one of the few

equitable distribution cases recently decided by the Florida Supreme Court, *Kaaa v. Kaaa*, 58 So. 3d 867 (Fla. 2010), the court addressed division of the passive *appreciation* in the parties' marital home. Although admittedly it would have been dicta, no mention was made of any reasoning that would allow lower courts to extrapolate from the opinion how depreciation, as opposed to appreciation, would be treated, and while the house at issue had appreciated substantially during the marriage as of the final hearing held in 2007, it is almost certain the facts were more likely to be far bleaker on remand after the date of the opinion at the end of 2010. Similarly, and as another isolated example, practitioners are confronted daily with how to value mortgages on real property that at the time of the divorce are under water. Is the full value of the excess debt from the mortgage to be used in determining an equitable distribution, or is it only part of the amount since the deficiency may be waived? As a result of the economy and the dearth of cases addressing the resulting aftermath, family law attorneys and courts currently do not have clear direction in how to resolve or even to successfully predict the outcomes of these matters.

Recent Changes and Lingering Inconsistencies in Florida's Family Law

Virtually every aspect of Florida's substantive family law has been tweaked, modified or completely rewritten in the past three years. Substantive changes have been made to sections impacting child support, child custody, equitable distribution, and alimony. To identify only a few of the changes, special equity has been abolished, partial equitable distribution is permitted, presumptions regarding titling by the entireties have been added, concepts of child custody and primary and secondary responsibility have been replaced with parenting plans and time sharing, child support is adjusted for the parent with more than 20 percent of the overnights, day care expenses are fully included in the new child support calculation, as well as a presumptive amount of income for imputation purposes, and alimony is now by and large a creature of statute. The impact of these changes and their application to specific facts remains to be seen, since too little time has passed to allow development of the case law relating to these changes. However, some of the most significant changes may prove to be those changes relating to Section 61.08, or the alimony provisions, of the Florida Statutes. While the change in the statute appears primarily to codify case law and provide clarity across the districts where there were conflicts, the

changes created a new form of alimony, called durational alimony, which historically was only available to practitioners in settlement, but not by court order. While the addition of durational alimony provides a welcome option for an “intermediate” form of support, the impact and application of this provision is not yet known. The parameters of durational alimony and those relating to permanent alimony set forth in the statute make clear that we are unlikely to see permanent awards of alimony in a marriage of short or moderate duration, but we are likely to see awards of durational alimony in those settings and even in long-term marriage situations. As we see continued challenges to permanent alimony through proposed legislation and case law that limits consideration of the parties’ lifestyle, and other similar factors, it is equally possible that durational alimony may be the new standard in alimony awards in Florida. As a result, Florida seems likely to be less supportive of permanent alimony, and attorneys in Florida will likely see fewer permanent alimony cases in the future.

In addition to the law lagging behind the changing economic landscape and the sweeping legislative changes, practitioners are also faced with significant inconsistencies in existing Florida case law. As a single example, in *Pfrenge v. Pfrenge*, 976 So. 2d 1134 (Fla. 2d DCA 2008), the Second District Court of Appeal held that non-marital monies deposited in an account titled in the owning party’s name is inextricably commingled and essentially untraceable if that money, which is fungible, is deposited into an account with marital monies. *See also, e.g., Link v. Link*, 897 So. 2d 533 (Fla. 5th DCA 2005). So, under *Pfrenge*, non-marital monies contributed to a marital checking account cannot be traced or “pulled back out” for division purposes, but we can, for example, trace and retrieve monies contributed to a mortgage, to a retirement plan, or to the accumulation of stock options. *E.g., Kaaa v. Kaaa*, 9 So.3d 756 (Fla.2d DCA 2009), *rev’d*, 58 So. 3d 867 (Fla. 2010) (principal pay down from mortgage); *Trant v. Trant*, 545 So. 2d 428 (Fla. 2d DCA 1989) (retirement account); *Parry v. Parry*, 933 So. 2d 9 (Fla. 2d DCA 2006) (stock options). The commingling cases are but one example where the issues are handled inconsistently even within a single district.

Family Law Strategy

Litigation is inherently risky in any family law situation, not only for the client but for the attorney. American courts are not designed to adequately

address families. In reality, the process is best suited for dealing with situations where money is abundant and the parties have no ongoing relationship. This adversarial system is difficult for families to navigate emotionally, and it also expensive. Additionally, it rarely results in the “victory” that the party craves. Divorcing clients are often filled with anger and a desire to win or secure a victory against their spouse. Their knowledge of the law often comes from popular television or movies where good trumps evil no matter what, and the emotional or financial costs of the case are never addressed. The often unrealistic expectations of the clients combined with the uncertainty of the law and the discretionary nature of the decisions, which make it hard to obtain a reversal, make the route risky for the attorney who seeks happy clients and limited exposure at the end of a case. One of the best ways attorneys and clients can obtain certainty and reduce expense is to explore alternative dispute resolution methods, if those are an option.

The Client's Role in Family Law Strategy

A family law client should be the core of any case. As a family law attorney, there is an opportunity not only to work as an attorney in the client's legal interests, but also to be an advisor involved in directing them to other appropriate professionals—mental health, financial, or otherwise—in any given case. It is incredibly important for attorneys to use the initial consultation not only to allow the client to interview them, but to interview the client. The initial conference gives the attorney the opportunity to understand the client's objectives in the case, to clearly establish both the attorney's and the client's roles and responsibilities, and perhaps most importantly to address the client's expectations. From the outset, the attorney should set realistic expectations for the client regarding what should and could happen in a given case. Honesty is essential. One of the biggest problems I see in initial consultations are clients who have not been dealt with honestly in various stages of the process, and are usually promised more than what is realistically possible. Those are the clients that often seek alternate counsel. It may be tempting for an attorney to “over-promise” in an effort to win a client's business, but attorneys who do this do themselves and the clients a disservice. In the end, it is more important for the client who did not hire you to know you gave them sound and objective advice and to retain satisfied clients who were given appropriate

expectations. In setting expectations, an attorney should be up front about the uncertainty and cost of litigation, and they should be willing to explore how to get the case resolved in a manner that best implements the client's interests, whether through litigation or settlement.

Common Mistakes in Family Law Practice

A common mistake that clients make is living too much in the moment without planning for the future. Family law attorneys generally deal with people who are upset, angry, and not thinking rationally. One of the biggest mistakes a client can make is to make decisions that are grounded in current emotions. This translates to clients making more out of issues than they normally should, and spending money arguing a case based on principle. This is sometimes compounded when an attorney takes on the client's cause and their corresponding emotions. Satisfy yourself that you may not be able to resolve the factual disputes and work from there. Family law attorneys must be able to convince their clients that the anger will recede, so the client does not end up wondering in hindsight why they spent money to argue about unimportant things. Clients must also understand the importance of preserving relationships with ex-spouses when children are involved. While clients may not be able to see the value of these things at the time of the divorce, they will likely appreciate the candid advice, and know that you worked in their best interests in the end.

Alternative Dispute Resolution

In an ideal world every family law case would be resolved by the parties, but not every case is suited for alternative dispute resolution. Cases with an inherent difference in bargaining power may not be appropriate for alternative dispute resolution. Similarly, in cases involving a client with a personality disorder, this can impede the process and keep the case from settling on terms similar to those that a party could obtain at trial. A case will not settle (unless there are circumstances that should not be in play) based on one party's best- or worst-case scenario. Further, in collaborative law, specifically, where clients must provide the discovery information voluntarily, dishonest parties can be an impediment to the process. In general, however, alternative dispute resolution is often effective and is a good option for many family law clients.

Mediation

Contrary to other states, Florida has a mandatory mediation requirement where cases must be mediated before they can be tried in court. Mediation is incredibly helpful in settling family law cases, as it helps eliminate some of the highly-charged emotional factors that may be impediments to settling. Mediation places people in a setting where they are focused on resolving the case. It also solves some of the impediments to settlement that attorneys face regarding where there is hostility from the other party toward them or their client; in mediation, clients do not necessarily need to deal directly with the opposing attorney or client. A talented mediator can eliminate the emotional negativity and communication barriers that often impede settlement to resolve the case.

Arbitration and Private Judging

While mediation is effective, especially in allowing parties to craft their result, with the idea that if they are the architects of the plan they are more likely to follow it, other forms of alternative dispute resolution are available and are useful options. Arbitration, binding and non-binding, and private judging are available in family law cases, except in disputes involving child custody, visitation, child support, and certain other cases. While arbitration and private judging are not available for those matters, they are great methods for resolving cases with complex financial issues because the attorney is able to choose who will hear each case, and often the arbitrator or judge can be someone with far more experience in dealing with those issues than many family law judges. Of course, one of the problems with arbitration is the lack of appellate rights, and clients must understand there is a significant difference in their ability to correct an arbitrator's mistakes.

Collaborative Law

Another alternative dispute resolution process is collaborative law, which is an approach where the parties and counsel commit to settling a case based on the family's best interest as a whole. If settlement proves impossible, the attorneys are required to withdraw before the parties proceed to litigation. For years, questions remained about an attorney's ethical ability to participate

in the collaborative process in light of the limited scope of representation and the possible conflicts that were inherent in this method of resolution. However, the American Bar Association (“ABA”) has determined in a formal ethics opinion that attorneys may represent a client in the collaborative process, so long as the client is properly advised. American Bar Association, Formal Op. 07-447 (2007) (ethical considerations in collaborative law practice). Also the Uniform Law Commission has crafted the Uniform Collaborative Law Act, currently enacted in three states, to standardize the most important features of collaborative practice.

Like mediation, collaborative law gives the parties control of the outcome of their case, while at the same time it completely removes families from the litigation process. While the process is often successful in helping the parties preserve their relationships, the disadvantage to collaborative law relates to the fact that there is room for manipulation of that process. Discovery disclosure, as everything in collaborative law, is voluntary. Clients need to appreciate the difference between collaborative law and traditional litigation because the attorneys’ obligations are different and require the attorneys to make disclosures of material facts even if not specifically requested by the other side. While the process can prove valuable in many cases, for those high conflict cases where income is limited, it generally is not the best option since months or even years of work can be lost if the process fails and the parties may be left with limited resources to then litigate the case. On the other hand, well-trained attorneys who are committed to settling cases can help clients benefit from the lower costs and lower stress resolutions involved in collaborative law.

Best Practices for Family Law Litigation

Whether cases are litigated or settled, an informed client is a happy client. There is nothing worse than a client who expects result A but gets result B. It lessens a client’s trust in his or her attorney and in the system. While settled cases can give clients and lawyers certainty and results at a lower cost, both financially and emotionally, litigated or settled cases should be handled in much the same manner. The fundamental issue in any case is knowledge of the facts, since those facts drive the resolution. It is important to let clients know what the law is in terms of how it applies to the facts and when the outcome is uncertain, either because of the potential inconsistencies or

uncertainties in the law, or because of the factual disputes in the case. Full and frank counsel on those issues help ensure clients get the results they expect, even in an uncertain legal environment. A case is successful when we get an outcome that is based in law, that is based on the facts, that helps preserve a relationship between parents, and is close to the objective the client identified during the initial interview or to what the attorney and client have been able to resolve as the client's raw emotions have lessened.

Conclusion

Family law in Florida is going through some significant transitions, and it will be interesting to see how the law continues to develop. Cases will continue to develop around the economic crisis many people are experiencing, and attorneys will most likely begin to get some guidance as a result. Hopefully, the courts will begin to settle the issues raised by the new legislation and many of the inconsistencies in how different assets are currently being treated in Florida. Attorneys will also get more direction on alimony and the appropriateness of using durational alimony versus permanent alimony; currently Florida statute has provided for those remedies but it does not yet have a body of law dictating the parameters. Finally, in light of the uncertainty in the law and the limitation of many parties' finances, alternative dispute resolution methods may gain importance in how cases are handled.

Resources Regarding the Latest Developments in the Law

Advance sheets are a great resource for staying current on the latest developments. Family law attorneys should also consider being involved in the Family Section of the Florida Bar. The individual substantive committees meet regularly to discuss problem areas or potential concerns with how the law has developed or is developing. The section also has lobbyists dealing with legislative efforts on its behalf. This is certainly a resource that many practitioners under-use, and attorneys certainly should be aware of and, if possible, involved with the Family Law Section and its activities. The Family Law Section is successful because of the commitment of family practitioners and the depth and breadth of the collective knowledge of the participating members of the section.

Advice for New Family Law Practitioners

The most beneficial thing a new lawyer can do is to associate with an experienced family law practitioner. Despite the common perception that family law is an easy, fact-based type of practice, the variety of issues a family law attorney often confronts broadens its complexities. There are many ethical issues that new attorneys might not appreciate, and many problems they can avoid or mitigate by being involved with someone with experience who can give them advice and counsel. Even if a new attorney does not work in a larger firm with a more experienced attorney, they can still take advantage of the mentoring programs available through the bar.

Key Takeaways

- Use your initial conference to understand the client's objectives in the case and to clearly establish both your and the client's roles and responsibilities.
- Know the law and facts and discuss them completely with your client.
- Resist the temptation to "over-promise" your client. Set realistic expectations for the client regarding what should and could happen.
- Remember that not all cases are appropriate for alternative dispute resolution. Cases involving an inherent difference in bargaining power, a client with a personality disorder, or a dishonest party should be handled by other means.
- Join the Family Section of your state bar organization. It can serve as a resource to you on current issues and law changes.
- If you are new to family law, associate yourself with an experienced family law practitioner or participate in a mentoring program. Many problems can be avoided or mitigated by being involved with someone with experience who can provide advice and counsel.

Related Resource

- American Bar Association, Formal Op. 07-447 (2007) (ethical considerations in collaborative law practice)

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Ms. Goetz received her JD, with honors, from University of Florida, Fredric G. Levin College of Law in 1997. Ms. Goetz began her career representing indigent clients in family law matters as a staff attorney at Brevard County Legal Aid. She then served as a staff attorney for the Twentieth Judicial Circuit, and in 2003, she joined the marital and family law firm formerly known as Asbell & Ho, P.A. Joining the firm as an associate, she became a shareholder and then served as managing shareholder of the firm from 2007 until 2010, when she left the firm to start her own practice. Ms. Goetz is actively involved in the Family Law Section of the Florida Bar and its efforts to improve the practice of family law. In addition to her participation with numerous projects and with various committees and ad hoc committees of the Section, she has served as special advisor, co-vice chair, and co-chair of the Family Law Section's Equitable Distribution Committee. She is currently serving as vice chair of the Continuing Legal Education Committee, and she is a member of the Family Law Section's Executive Council. As a result of her work on behalf of the Section, Ms. Goetz has received multiple awards including a Rising Star Award in 2008, an Award of Merit in 2009, the Chair's Special Award of Merit in 2010, and the Keeper of the Flame Award in 2011. Ms. Goetz is a frequent lecturer on family law topics, and she co-authored the December 2008 Florida Bar Journal article titled, "A Brave New Frontier: The Equitable Distribution 2008 Legislative Changes." Finally, Ms. Goetz was selected as one of Florida's Legal Elite for 2007, 2008, 2009, and 2010 by Florida Trend Magazine, and she was named a Super Lawyer Rising Star for 2010 and 2011 by Super Lawyer's magazine.

Dedication: *To my many mentors with whom I have worked, including the judges of the Twentieth Judicial Circuit, and John Asbell and Victoria Ho, both exceptional attorneys who have had a profound influence on not only my practice, but my life.*



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