

# American Journal of **Family Law**

VOLUME 34 NUMBER 3 FALL 2020

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# The Illegal Trade in Bank Account Records

BY PHILIP SEGAL

One of the most commonly-asked questions when clients first ask my company to perform an asset search is: “Can you get bank account information?”

Our response is invariably, “Without a court order, it’s probably illegal.”

More times than not, a person has then said, “But my lawyer got that for me last year.”

Sad to say, many lawyers are ignorant of the basic statutes in the United States that govern the confidentiality of financial records. Worse, many lawyers appear to be outsourcing such inquiries to private investigators who assure the lawyers that such retrievals are perfectly legal even without a court order or subpoena.

Anyone with any knowledge of professional ethics will know that this gets things backward: The agent doesn’t tell the principal what should be happening, it’s the other way around. Not only that but the principal also has a duty to monitor the non-lawyer agent’s activities. Misconduct of the agent is imputed to the principal.<sup>1</sup>

Most of us would not like the idea that a disgruntled client, competitor, or nosey neighbor could, for \$40, pay someone to find out how much money we have in the bank and in brokerage accounts. Yet, there is a large industry that promises just such a service, sometimes boldly claiming that they are fully compliant with the law. This is usually not the case.

### STATUTORY PROTECTION

The main federal statute that protects banking records is the Gramm Leach Bliley Act.<sup>2</sup> Its

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*Philip Segal is Managing Member, Charles Griffin Intelligence, New York.*

provisions governing confidentiality are comprised of two major portions: One which governs who can get this information and one which specifically prohibits fraudulent access to financial information.

I always tell my clients that if companies claim to be able to get the information legally (*i.e.*, without using fraud), they should be able to tell you under which provision of the law they are operating. Most will not do so because they are probably using fraud.

### Anti-Fraud Provisions

Take the second portion of the law first, because it is so straightforward: It is illegal to obtain banking information “by making a false, fictitious, or fraudulent statement or representation to an officer, employee or agent of a financial institution.”<sup>3</sup>

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*Misconduct of the agent is imputed to the principal.*

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The law goes on to prohibit using forged documents (faked signatures authorizing account disclosure). There are exceptions for insurance companies investigating fraud or the collection of delinquent child-support payments subject to judgment.<sup>4</sup> And the statute broadly defines financial institutions governed by the law. It includes broker-dealers, investment advisors, credit card issuers, and consumer reporting agencies such as Equifax, Transunion, and Experian.<sup>5</sup>

### Claimed Loopholes—“No Fraud, So It’s Legal”

No investigator would admit to using fraud, so how can he claim to be getting bank records before

any lawsuit has been filed and not to be breaking the law? That takes us to the other major portion of the statute and the variety of half-baked reasons providers give to support claims that they are acting legally.

One database provider (whose service we declined to use) claimed that while bank account transactional information was not permitted to be disclosed, banks could legally disclose the fact that a consumer banked there. The statute, however, bans disclosure of "nonpublic personal information," which includes personally identifiable financial information "resulting from any transaction with the consumer or any service performed for the consumer."<sup>6</sup> That should include the identity of clients.

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*The statute bans disclosure of "nonpublic personal information."*

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One case noted by the Atlanta Journal Constitution saw the State Bar of Georgia uphold the practice of lawyers hiring investigators to get banking information on the grounds that the investigators were licensed.<sup>7</sup> The paper also heard from one dubious player who claimed to be a member of the SWIFT network that sends messages between banks, and said that this was the way he could get the information legally. In fact, SWIFT has no access to account information and does not count private investigators among its members.<sup>8</sup>

Another company told us that they got nonpublic information pursuant to the general exceptions for disclosure to self-regulatory organizations.<sup>9</sup> These are defined as "any national securities exchange, registered securities association, or registered clearing agency."<sup>10</sup> But the standard investigator, collection agent, or process server does not qualify. Neither would they qualify in nearly any civil context for the exception relating to a matter of public safety.<sup>11</sup>

My favorite of the many awful excuses I have been given is that "The PI's have special databases." Very simply, why would private investigators, a group with much looser set of ethical standards than lawyers, be entitled to databases that lawyers are not? It defies common sense, never mind that the phrase "licensed private investigator" appears nowhere in the statute governing banking confidentiality.

Of all the loopholes, the most hopeful one for some agents relates to information that can be released to a Consumer Reporting Agency<sup>12</sup> as defined under the Fair Credit Reporting Act.<sup>13</sup> Some outfits that do consumer credit checks (which is supposed to be with consumers' consent) double as bank account finders for investigators and lawyers. The problem is, they are allowed to get bank account information if there is "a legitimate business need for the information in connection with a business transaction initiated by the consumer."<sup>14</sup>

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*Lawyers have a duty to supervise their non-lawyer agents (e.g., private investigators).*

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I would be careful before relying on such an exception. Consider that in the Fair Credit Reporting Act, you cannot conduct an investigative consumer report<sup>15</sup> (interviewing people about the consumer) unless the consumer is informed.<sup>16</sup> It makes no sense that it would be easy to get bank records in secret, but you have to inform the consumer if you want to talk to his neighbor.

Even assuming your investigator can get the banking information because it relates to a transaction under investigation, your investigator would still need to be a consumer reporting agency under the statute. Looking for the assets of a husband during a divorce would not fit the bill.

Ultimately, how these people get banks that claim not to share information with third parties to share it with them should not be such a deep secret. If it is legal, they should be able to cite the provisions of the law make what they are doing legal without giving up "trade secrets."

Another such provider told us that the Gramm Leach Bliley act granted him access to bank accounts under its "permissible uses." Instead of citing the portion of the statute, he invited us to Google "GLB permissible uses."

We did so and found that these uses govern the use of databases such as LexisNexis and Westlaw that use "credit header" information. This is the portion of a credit report that typically contains an individual's name, aliases, birth date, Social Security number, current and prior addresses, and telephone number, *but not bank account information.*

As the Federal Trade Commission explained in its December 1997 report, *Individual Reference Services—A Report to Congress*, "Information in a

credit report other than the 'credit header' may reflect an individual's financial status, employment background, credit history, or medical records. The dissemination of this type of information is strictly regulated by the Fair Credit Reporting Act."<sup>17</sup>

## DOING IT THE RIGHT WAY

Adhering to the Gramm Leach Bliley Act is not enough to stay on the right side of the law during an asset search. Other statutes loom large and the law is changing quickly.

Laptops and phones contain a lot of good information, but you need to be sure you have the right to examine these devices without a court order. Even if you have the right to do so, some software that captures email conversations and sends them to your account has been found to constitute wiretapping.<sup>18</sup>

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*Ask anyone you interview if they are represented.*

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Even without breaking the law, attorneys can run afoul of rules of professional conduct, especially if they hire reckless investigators who either do not know or do not care about conduct that may be legal, but is off-limits to lawyers.

- Lawyers have a duty to supervise their non-lawyer agents.<sup>19</sup> It is not a defense to say you warned your agent not to break the law. There is case law on attorneys who used stolen information they should have known was improperly obtained. In one case, the entire action was dismissed because of the attorney's willful blindness.<sup>20</sup> Other courts may impose sanctions, exclude evidence, or both.
- Social Network searching can be productive, but it is held to be unethical in a number of jurisdictions to "friend" or otherwise correspond with parties on social media using fake personae. Browsing what is publicly available to any user is permitted.
- Interviews can be extremely useful in teasing out the names of secret companies where assets are often hidden. But does your

investigator have the right to speak to the person they are interviewing? Remember, you or your agent may not talk to someone you *know* is represented, but you have a duty to inquire.<sup>21</sup> Furthermore, a comment to the rule says that knowledge person is represented "means that the lawyer has actual knowledge of the fact of the representation, but such actual knowledge may be inferred from the circumstances."<sup>22</sup> To be safe, ask anyone you interview whether or not they are represented.

## NOTES

1. American Bar Association, Model Rules of Professional Conduct 5.4©. Note that ratification of the conduct can include doing nothing when the work product was probably not gathered in a legal way. *See* 155 Cal. App.4<sup>th</sup> 736 (2007).
2. 15 USC 6801 et.seq.
3. 15 USC 6821(a)(1).
4. 15 USC 6821(g).
5. 15 USC 6827 (4)(B).
6. 15 USC 6809(4).
7. AJC, Jan. 18, 2019. <https://www.ajc.com/news/crime--law/documents-show-how-law-firm-got-one-woman-bank-account-information/ZC9prKAXnRHZZXea9ceoxYN/>.
8. [https://www2.swift.com/knowledgecentre/publications/s\\_corp\\_r](https://www2.swift.com/knowledgecentre/publications/s_corp_r).
9. 15USC 6802(e)(5).
10. 15USC 79c(a)(6).
11. 15USC 6802(e)(5)
12. 15USC 6802 (e)(6)(A). Agencies defined in 15USC 1681a(f).
13. 15 USC 1681.
14. 15USC 1681b(a)(3)(F)(i).
15. 15USC 1681(a)(e).



16. 1681d(a)(1).

17. <https://www.ftc.gov/reports/individual-reference-services-report-congress>.

18. *Luis v. Zang*, 833 F. 3d 619 (6<sup>th</sup> Cir. 2016). *See also* *Zaratzian v. Abadir*, 15-1243-cv (2d Cir. May. 26, 2017) (sufficiency of notice that a wife's email was being forwarded was a matter for the jury to decide whether automatic email forwarding constitute wiretapping.)

19. American Bar Association Model Rule of Professional Conduct, Rule 5.3(c)(1).

20. Note 1, *supra*.

21. American Bar Association Model Rule of Professional Conduct, Rule 4.2.

22. *Ibid.*, Comment 8.

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# Navigating the AICPA Statement on Standards for Forensic Services No. 1

BY JAMES A. DIGABRIELE, PH.D./D.P.S., CPA/ABV/CFF

Matrimonial attorneys engaging Certified Public Accountants (CPAs) to perform forensic services in a litigation or investigative setting such as valuing a business, preparing a lifestyle analysis, determining cash flow for child support and alimony, settlement of tax issues and asset tracing, need to be aware of a new forensic standard effective January 1, 2020. The Statement on Standards for Forensic Services No. 1 (SSFS 1) has an effective date for engagements accepted on or after January 1, 2020, and applies to any member of the American Institute of Certified Public Accountants (AICPA), or employee of a member firm, who provides services to a client as part of a litigation or investigation engagement. CPAs engaged to perform forensic accounting services that involve the application of specialized knowledge and investigative skills to collect, analyze, and evaluate specific evidential matter and to interpret and communicate findings must abide by the new standard. SSFS 1 provides stakeholders; forensic accountants, clients and attorneys, guidance for adherence to a specific standard. This article will review SSFS 1 and its impact on matrimonial forensic accounting services.

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**James A. DiGabriele, Ph.D./D.P.S., CPA/ABV/CFF** is an accounting professor at Montclair State University. His primary research interests are forensic accounting and the valuation of private companies. His articles have appeared in numerous academic and professional journals including *Accounting Horizons*, *Critical Perspectives on Accounting*, *Journal of Legal Economics*, *Journal of Forensic Accounting*, *The CPA Journal*, and *Journal of Accountancy*. He has qualified as an expert in forensic accounting in federal and state courts.

## PURPOSE AND SCOPE OF SSFS NO. 1<sup>1</sup>

The first standard on forensic services issued by the AICPA is effective January 1, 2020. The standard classifies forensic services within two categories, litigation or investigation. Prior guidance was fragmented, and the need for a forensic standard was long overdue. SSFS1 will reinforce all of the general standard attributes such as professional competence, due professional care, planning/supervision, sufficient relevant data, objectivity, and integrity. Though, from a forensic services perspective. The standard will impact accounting-related fraud investigations and forensic litigation practice. The effect will spill over to other forensic experts not governed by a standard.

SSFS1 outlines forensic services within the scope of the standard while taking into consideration when other services such as business valuation are part of a litigation engagement. The concise but straight forward standard allows attorneys to manage forensic expert expectations.

The statement establishes standards for a member providing services to a client as part of the following engagements:

- *Litigation*: An actual or potential legal or regulatory proceeding before a trier of fact or a regulatory body as an expert witness, consultant, neutral, mediator, or arbitrator in connection with the resolution of disputes between parties. The term litigation is not limited to formal litigation but is inclusive of disputes and all forms of alternative dispute resolution.
- *Investigation*: A matter conducted in response to specific concerns of wrongdoing in which the member is engaged to perform procedures to collect, analyze, evaluate, or interpret

certain evidential matter to assist the stakeholders (for example, client, board of directors, independent auditor, or regulator) in reaching a conclusion on the merits of the concerns

The statement also prohibits CPAs from accepting contingency fees in a litigation engagement and opining on the legal outcome of the occurrence of fraud. The statement does not prevent expert opinions relating to whether evidence is consistent with the elements of fraud based on objective evaluation. Current guidance does not overtly proscribe a member or member firm from producing an opinion on the occurrence of fraud. The eventual decision on fraud is for a trier of fact.

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*CPAs are prohibited from contingency fees in a litigation engagement.*

---

SSFS 1 will not allow an expert witness/member to provide an agreed-upon procedures engagement. A discussion of each issue will follow and how it impacts forensic accounting engagements in matrimonial cases.

## CONTINGENT FEES

AICPA Code of Conduct *prohibits* the performance of any professional services for a contingent fee under the following circumstances:

- In the performance of an audit or a review of the financial statements for a client;
- In the performance of a compilation of a financial statement for which there are an accountant's compilation report and the compilation report does not disclose a lack of independence;
- In the performance of an examination of prospective financial information; or
- In the preparation of an original tax return, the amendment of a tax return, or the preparation of a claim for a tax refund.

AICPA Code of Conduct *permits* contingent fees as follows:

- Representing a client in connection with a revenue agent's examination of the client's federal or state income tax return
- Filing an amended federal or state income tax return claiming a tax refund based on a tax issue that is the subject of a test case involving a different taxpayer or with respect to which the taxing authority is developing a position
- Filing an amended federal or state income tax return (or refund claim) claiming a tax refund in an amount greater than the threshold for review by the Joint Committee on Taxation or state taxing authority
- Requesting a refund of either overpayments of interest or penalties charged to a client's account or tax deposits that a federal or state taxing authority improperly accounted for in circumstances in which the taxing authority has established procedures for the substantive review of such refund requests
- Requesting, by means of a protest or similar document, the state or local taxing authority's consideration of a reduction in a property's assessed value under an established taxing authority's review process for hearing all taxpayer arguments relating to the assessed value
- Representing a client in connection with obtaining a private letter ruling or influencing the drafting of a regulation or statute

SSFS 1 will not allow a member engaged as an expert witness in a litigation engagement to provide opinions under a contingent fee arrangement unless explicitly allowed otherwise under the AICPA code of conduct. SSFS 1 eliminates any doubts about the compensation received by CPA and member firms for performing forensic accounting engagements

The rules are unambiguous. Matrimonial attorneys, however, need to be aware of a specific circumstance that surfaces in high income/equitable distribution cases. There are situations when a forensic expert will refer a financial planner to one or both divorce litigants. Financial planners are typically commission-based compensated. If the forensic expert holds licenses such as Series Six/Seven

and Life/Health Insurance, legally, they can participate in the commission without disclosing. Yet, ethically it presents a violation of SSFS 1.

### LEGAL CONCLUSION OF THE OCCURRENCE OF FRAUD

SSFS 1 states, “The ultimate decision regarding the occurrence of fraud is determined by a trier of fact; therefore, a member performing forensic services is prohibited from opining regarding the ultimate conclusion of fraud. This does not apply when the member is the trier of fact. A member may provide expert opinions relating to whether evidence is consistent with certain elements of fraud or other laws based on objective evaluation.”

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*SSFS1 is closely aligned with ACFE Professional Standards.*

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SSFS 1 is now closely aligned with the Association of Certified Fraud Examiners (ACFE) Professional Standards. Article Five of the ACFE Code of Professional Ethics specifically prohibits CFEs from expressing opinions “regarding the guilt or innocence of any person or party.”<sup>2</sup> Many expert witnesses offering forensic services can hold several professional certifications. The Certified Fraud Examiner (CFE) is a widely held credential.

On the surface, it seems axiomatic a forensic accountant should not opine on a legal matter. A forensic accountant is not an attorney. Yet, it is no surprise how many times forensic accountants are asked by attorneys to provide an opinion of whether fraud has occurred or not.

A salient issue in matrimonial cases is when a spouse has a substantial amount of unreported income. The result is tax fraud. According to the Internal Revenue Service manual (IRM) 25.1.1.2, fraud and tax fraud are defined as follows:

- Fraud is deception by misrepresentation of material facts, or silence when good faith requires expression, which results in material damage to one who relies on it and has the right to rely on it. Simply stated, it is obtaining something of value from someone else through deceit.

- Tax fraud is often defined as intentional wrongdoing, on the part of a taxpayer, with the specific purpose of evading a tax known or believed to be owing. Tax fraud requires both: a tax due and owing; and fraudulent intent.

Next, we have IRM 25.1.1.3 Indicators of Fraud vs. Affirmative Acts of Fraud<sup>3</sup>:

- 1) Indicators of Fraud:
  - a) Taxpayers who knowingly understate their tax liability often leave the evidence in the form of identifying earmarks (or indicators).
  - b) Serve as a sign or symptom or signify that actions may have been done for the purpose of deceit, concealment, or to make things seem other than what they are. Indications, in and of themselves, do not establish that a particular action was done.
  - c) Examples include substantial unexplained increases in net worth, substantial excess of personal expenditures over available resources, bank deposits from unexplained sources substantially exceeding reported income, and documents that appear to be altered or false.
- 2) Affirmative Acts (Firm Indications) of Fraud:
  - a) Those actions that establish that a particular act was deliberately done for the purpose of deceit, subterfuge, camouflage, concealment, some attempt to color or obscure events, or make things seem other than what they are.
  - b) Fraud cannot be established without affirmative acts of fraud.
  - c) Examples include omissions of specific items. This can include concealment of bank accounts or other assets, failure to deposit receipts to business accounts, and covering up sources of receipts.

It is essential to outline the criteria because of the member/forensic accountants’ objective opinion

is constructed on “whether evidence is consistent with certain elements of fraud or other laws.”

---

*The CFE is a widely held credential.*

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Based on SSFS 1, the focus for a member CPA would be on the factual results of the forensic examination that determine the unreported income. The listed categories of the indicators of tax fraud according to IRM 25.1.2.3. are:

- 1) Income Category:
  - Failing to report entire sources or substantial amounts of income
  - Failure to explain substantial increases in net worth and bank deposits that exceed reported income
  - Failure to explain personal expenses exceeding reported income
- 2) Expense Category:
  - Claiming fake and overstated deductions
  - Reducing business income substantially by personal expenses

See IRM 25.1.2.3 for additional indicators of fraud.

The forensic accountants would conclude that the evidence is consistent with the elements of tax fraud. SSFS 1 would prohibit a CPA/member to issue fraud opinion on tax fraud.

## AGREED-UPON PROCEDURES

AT-C Section 215 states<sup>4</sup>: “An agreed-upon procedures engagement is one in which a practitioner is engaged to issue, or does issue, a report of findings based on specific agreed-upon procedures applied to subject matter for use by specified parties. Because the specified parties require that findings be independently derived, the services of a practitioner are obtained to perform procedures and report the practitioner’s findings. The specified parties determine the procedures they believe

to be appropriate to be applied by the practitioner. Because the needs of specified parties may vary widely, the nature, timing, and extent of the agreed-upon procedures may vary, as well; consequently, the specified parties assume responsibility for the sufficiency of the procedures because they best understand their own needs. In an engagement performed under this section, the practitioner does not perform an examination or a review and does not provide an opinion or conclusion. Instead, the report on agreed-upon procedures is in the form of procedures and findings.”

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*A calculation engagement does not include all the procedures in a valuation engagement.*

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SSFS 1 maintains: “When a member is engaged as an expert witness by one party in a litigation engagement to provide expert opinions, the member may not perform the work under AT-C section 215. However, results may be reported under the agreed-upon procedure standard in an engagement in which a member is engaged by the trier of fact or both sides of the dispute jointly, or both. In each scenario, this statement and the agreed-upon procedure standard applies.”

Considering the agreed-upon procedures paragraph of SSFS 1, a question arises, how does SSFS 1 affect a calculation of value report for a business valuation?

Statement on Standards for Valuation Services No. 1 (SSVS1, VS 100) states “the valuation analyst and the client agree on the specific valuation approaches and valuation methods the valuation analyst will use and the extent of valuation procedures the valuation analyst will perform to estimate the value of the subject interest. A calculation engagement does not include all of the procedures required in a valuation engagement, as that term is defined in the SSVS. Had a valuation engagement been performed, the results might have been different.” Based on the language in SSVS 1, a calculation of value report for a business valuation in a litigation setting would be considered an agreed-upon procedure engagement.

From the perspective of intersecting forensic and valuation services, when one party engages a forensic/valuation expert, it appears a calculation of value report would be prohibited. Yet, when

engaging a forensic/valuation expert as a mutual or court-appointed expert, SSFS 1 gives the idea it is fine to use a calculation of value report.

Accounting practitioners providing forensic and valuation services in a litigation engagement must adhere to the guidance in both SSFS 1 and SSVS 1. Forensic accountants in matrimonial litigation would typically find themselves in a combined situation, therefore, applying both standards. Matrimonial attorneys retaining forensic accounting experts need to understand the application of both standards how the standards affect their cases.

## CONCLUSION

CPA members of the AICPA must comply with SSFS 1 as of January 1, 2020, when retained for litigation and investigative services. SSFS 1 can be perceived as positive for forensic accounting experts because having a specific standard that members must adhere to increases their credibility. Attorneys need to recognize why the standard is essential for expert testimony. There are different types of expert witnesses providing forensic services in matrimonial litigation. For example, it is not uncommon for a university professor in accounting, economics, or finance to be retained for valuation and tax issues in matrimonial litigation. If the expert is not a CPA member, they are not generally subject to a set of professional standards—an area of focus for a cross-examining attorney.

In matrimonial litigation, there are situations when professionals providing expert witness services that can have either commission or contingent based compensation that is typically not exposed. A specific circumstance occurs when a CPA/expert witness decides to refer the matter to a financial planner. If the CPA holds other licenses that allow, he/she to sell life insurance or financial products, and there is a good chance there is a commission

earned for the referral. In higher-income divorces, this more common.

There are times; when business brokers are retained to prepare a business valuation in a matrimonial case. It is typical when one litigant is seeking a higher valuation. The compensation for business brokers is contingent on the valuation. When the opportunity presents itself, it is a rich opportunity to undermine the credibility of the valuation.

Matrimonial attorneys grasping the view that SSFS 1 is a statement that requires care, diligence, and objectivity will navigate these situations quickly. Understanding the standard gives attorneys a clear idea of what to compel CPA/members to do in expert testimony. The standard increases the level of consistency across the profession in providing forensic services<sup>5</sup>.

## NOTES

1. American Institute of Certified Public Accountants (AICPA), 2019. Statement on Standards for Forensic Services No. 1. Durham, NC: AICPA. Available at: <https://www.aicpa.org/content/dam/aicpa/>.
2. CFE Code of Professional Standards [https://www.acfe.com/uploadedFiles/ACFE\\_Website/Content/documents/Guidance-Professional-Standards.pdf](https://www.acfe.com/uploadedFiles/ACFE_Website/Content/documents/Guidance-Professional-Standards.pdf).
3. Internal Revenue Service Manual Part 25.
4. American Institute of Certified Public Accountants (AICPA), Agreed-Upon Procedures Engagements <https://www.aicpa.org/research/standards/auditattest/downloadabledocuments/at-c-00215.pdf>.
5. Statement on Standards for Forensic Services FAQs. <https://www.aicpa.org/content/dam/aicpa/interestareas/forensicandvaluation/resources/downloadabledocuments/statement-on-standards-for-forensic-services-faqs.pdf>.

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# Uniform Family Law Arbitration Act: Adding Another APR Option: Part II of II

BY LINDA D. ELROD

In 2016, the Uniform Law Commission approved a Uniform Family Law Arbitration Act (UFLAA).<sup>1,2</sup> The UFLAA offers states an option for more uniformity and protections for family members choosing to arbitrate disputes. The UFLAA, a free-standing act tailored to family law cases, uses the state's basic arbitration law, UAA or RUAA, as back up for procedure and notice.<sup>3</sup>

## BRIEF HISTORY

Despite the rise in family law arbitration, many states rely on the standards of commercial arbitration law found in the Uniform Arbitration Act (UAA) and the Revised Uniform Arbitration Act (RUAA). As noted earlier, unlike commercial conflicts, family law disputes implicate unique state interests. The state has a *parens patriae* duty to protect children and vulnerable family members and an interest in ensuring that the arbitration process is fair to the participants. Neither the UAA nor the RUAA provides protection for children and victims of family violence during the arbitration process. Neither provides for additional judicial review to ensure that a child's best interests were part of the decision. Additionally, general arbitration law has

limited access to courts or provisions to ensure fairness to the parties.

The Joint Editorial Board on Uniform Family Law recommended setting up a committee to study arbitration in family law cases in December 2011. A Study Committee Report in 2012 unanimously recommended the appointment of a drafting committee for a uniform act for family law arbitration.

*\*\*\* we recommend a free-standing act—not a set of amendments to either version of the Uniform Arbitration Act. At the same time, we believe a family law arbitration act should contain only the features of arbitration law that are essential for family law arbitration and are typically not addressed by commercial arbitration statutes. . . .*

The ULC established a drafting committee in August 2013 appointing Professor Barbara A. Atwood as Chair and Professor Linda D. Elrod as Reporter. The committee's first meeting flushed out some of the major issues to address, such as pre-dispute agreements to arbitrate, subjects to exclude, the standard of judicial review for child-related issues and safeguards for domestic violence.<sup>4</sup> Over a three year period, the drafting committee met nine times face to face, reviewed countless revised drafts, and participated in numerous telephone conferences.

In July 2016, the Uniform Law Commission adopted the Uniform Family Law Arbitration Act (UFLAA). The UFLAA is relatively short with just 29 sections.<sup>5</sup> Many sections, especially the procedural ones, mirror the RUAA. This is because many states still use the UAA as the basic arbitration base.

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## TYPES OF FAMILY LAW DISPUTES

### Generally

The Uniform Family Law Arbitration Act broadly defines a “family law dispute” in Section 2(6) as a contested issue arising under the family or domestic relations law of a state. UFLAA Section 3(a) covers the arbitration of potentially any contested issue arising under the enacting state’s family law. In most states, a family law dispute would include the interpretation and enforcement of premarital, cohabitation, and separation agreements; the characterization, valuation and division of property, and allocation of debt; awards of alimony or spousal support; custody, parenting time and visitation; child support; and an award of attorney’s fees. Recently, pet custody has become an area for arbitration because some states treat animals like property. Many pet owners may want the decisionmaker to be a pet owner who uses a “welfare of the pet” standard.<sup>6</sup>

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*Recently, pet custody has become an area for arbitration.*

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The UFLAA Section 3(b) excludes certain status determinations. The arbitrator cannot divorce the parties, terminate parental rights, grant an adoption or guardianship, or adjudicate a child in need of care or juvenile offender, or the like.

### Child-Related Disputes

The UFLAA treats child-related issues differently than property and support issues. The UFLAA defines child-related disputes in Section 2(4) as those regarding legal custody, physical custody, custodial responsibility, parental responsibility or authority, parenting time, right to access, visitation, or financial support regarding a child. The UFLAA presumptively extends to child-related disputes and contains numerous safeguards to ensure that an arbitrator follows state law and adequately protects the child’s best interests. The UFLAA protects children in various provisions, discussed *infra*, and ensures the arbitrator considered the child’s best interest in making an award. The UFLAA requires a vigorous judicial review of child-related awards that do not exist for property issues.

Because a minority of states oppose arbitration of child-related issues, the UFLAA Section 3 brackets “child-related dispute.” This means that a state may choose to enact the UFLAA but exclude arbitration of children’s issues. If a state excludes arbitration of children’s issues, however, it is unlikely that the huge caseloads facing domestic courts will decrease. Parenting issues make up a large part of the family court docket. If a state does exclude child-related disputes, it would include them under the status exceptions in Section 3(b).

### Agreement to Arbitrate

Arbitration is contractual. A court cannot compel arbitration in the absence of an agreement to arbitrate. A court will order arbitration only after finding that the parties have voluntarily agreed to arbitration and that their agreement covers the dispute.<sup>7</sup> UFLAA Section 5 lists the contents and requirements for the agreement to arbitrate. It must be in writing and must identify the dispute to be arbitrated as well as the arbitrator or a way of selecting the arbitrator. Absolute clarity in describing the family law dispute that the parties want to arbitrate will avoid possible time-consuming litigation down the road.

### Informed Consent

The UFLAA contemplates a voluntary, not a coerced, decision to arbitrate. The agreement to arbitrate a family dispute must be an informed choice of each party. A lawyer advising a client whether to arbitrate should explain the advantages and limitations of arbitration so that the client makes an informed choice. The agreement should clearly establish that the parties are aware of their rights to a judicial determination and have knowingly and voluntarily waived that right. The New Jersey Supreme Court Rules for family arbitration have specific precautions and require that the agreement to arbitrate state:

*(i) the parties understand their entitlement to a judicial adjudication of their dispute and are willing to waive that right; (ii) the parties are aware of the limited circumstances under which a challenge to the award may be advanced and agree to those limitations; (iii) the parties have had sufficient time to consider the implications of their decision to arbitrate; and (iv) the parties have entered into the Agreement or Consent*



*Order freely and voluntarily, after due consideration of the consequences of doing so.*<sup>8</sup>

Family law cases almost always contain private sensitive information about parenting, family finances, and maybe the parties' sex life. The public has no interest in the resolution of others' private family disputes—how much money people have or the custody arrangements for their children.<sup>9</sup> The UFLAA does not include confidentiality provisions, so it is important that the parties include those provisions in the agreement to arbitrate.

### Intimate Partner Violence Issues

To the extent that domestic violence impairs one party's ability to voluntarily choose arbitration or to present evidence, there may be a lack of informed consent. Because arbitration requires an agreement to arbitrate, which is similar to litigation, the parties are more likely to have lawyers than parties in mediation. The presence of a lawyer is a protective factor. UFLAA Section 10(a)(1) makes it clear that each party may be represented by an attorney throughout the arbitration.

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*Arbitration is contractual.*

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The UFLAA also addresses the domestic violence issue in several ways. First, UFLAA Section 12 provides that if a party is subject to an order of protection or if the arbitrator otherwise finds that a party's safety or ability to participate effectively in the arbitration is at risk, the arbitration is suspended unless the party who is at risk reaffirms the desire to arbitrate and a court allows it. Note, a court—not the arbitrator—must decide whether arbitration may proceed. For arbitration to go forward, the party at risk of harm must reaffirm the agreement to arbitrate, and the court must find that adequate procedures are in place to protect the party from risk of harm or intimidation. Under Section 11, the arbitrator is also empowered to issue temporary orders to protect a party if needed. If a party seeks court relief, the court may stay the arbitration and review a determination of temporary award.

UFLAA Section 10 (a)(2) allows a party to have a non-advocating individual present with the party so long as the individual is not a witness in the

case. The provision is crafted to make it possible for victims of domestic violence to choose arbitration with the benefit of a support person.

Although the parties are free to choose any arbitrator they wish, if they do not select an arbitrator, the court appoints one. UFLAA Section 8 protects victims by requiring that a court-appointed arbitrator must be a lawyer or judge (can be retired) who has training in identifying domestic violence and child abuse the same as a judicial officer. Family arbitration is new enough that there exists almost no literature on domestic violence in the context of arbitration. A substantial body of literature does exist about domestic violence in mediation.<sup>10</sup> Most standards for mediators requiring screening for the presence of violence and provide special protocols to protect victims in mediation.<sup>11</sup>

### Pre-dispute Agreements to Arbitrate

Pre-dispute clauses to arbitrate in premarital agreements have been around and enforced for a long time.<sup>12</sup> The UFLAA Section 5(b) allows an agreement to arbitrate issues that arise before, at the time, or after the agreement is made, except on a ground that exists at law or equity for the revocation of the contract (FAA language). Additionally, parties may agree in a separation or marital settlement agreement on a dispute resolution method if there is a disagreement over financial issues.<sup>13</sup>

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*Each party may be represented by an attorney.*

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There was a debate in the drafting committee whether all agreements should be made at the time the issue arises. The use of pre-dispute agreements in consumer contracts (often contracts of adhesion) has sparked widespread criticism. Family law cases, however, are unlikely to have similar concerns because it is the parties themselves who are agreeing, whether in an earlier agreement or an agreement entered into at the time of marital dissolution. In addition, there is no built-in bias favoring one party (like the company) over the other. Instead, the neutral arbitrator is selected by the parties or the court, often providing specialized expertise. Additionally, as noted earlier, the FAA may require enforcement of pre-dispute arbitration agreements of property involved in interstate commerce.

Another concern has been the parties agreeing to go to religious tribunal arbitration. The general rule is that if arbitration is conducted pursuant to a valid agreement, parties of the same religion can have religious authorities resolve their disputes in accordance with religious law.<sup>14</sup> State courts, however, do have settled authority to vacate religious arbitral awards that appear “contrary to public policy.”<sup>15</sup> Additionally, if a state does not allow the subject matter to be arbitrated in the state, the parties cannot agree to arbitration in a religious tribunal to get around it.

Child-related issues present different problems with pre-dispute agreements. At the time of a premarital agreement, there may be no children. Additionally, the issues may not be clear before the dispute arises. UFLAA Section 5(c) generally bars enforcement of an agreement to arbitrate child-related issues unless the agreement is entered into or reaffirmed *after* the dispute has arisen. A parent’s choice to arbitrate is likely to be better informed and based on a fuller understanding of the child’s interests at the time the dispute erupts.

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*Courts have authority to vacate religious arbitral awards.*

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The one exception to the contemporaneous agreement requirement is when the agreement to arbitrate disputes resulted from an agreement incorporated in an earlier court decree—such as a marital settlement agreement or separation agreement. Current parenting plan statutes require that the parties provide a method of dispute resolution that does not require court intervention if the parties cannot agree on matters relating to their children.<sup>16</sup> As with other law, the agreement could be attacked for issues relating to duress, fraud, or unconscionability.

## PROTECTING CHILDREN IN ARBITRATION

Even though New Jersey considers that the parents have a constitutional right to choose the forum for deciding custody issues, New Jersey requires enough of a record to ensure that the arbitrator’s award will not harm the child.<sup>17</sup> The UFLAA stayed with the best interests, rather than the harm to the child, standard. The UFLAA includes several layers of protection to ensure that child-related issues

are handled properly. The UFLAA recognizes the state’s *parens patriae* responsibility for children in several provisions, some non-waivable.

First, predispute agreements for child-related disputes are not permissible unless arbitration is selected in the parties’ parenting plan or separation agreement. Second, UFLAA Section 13(12) allows the arbitrator to appoint a lawyer or guardian ad litem to represent the child. The arbitrator can also meet with or interview the child. Third, if an arbitrator has a reasonable basis to believe that a child is the subject of abuse or neglect, Section 12(c) requires the arbitrator to terminate the arbitration and report the findings to the appropriate state authority. Like mediators, arbitrators are made mandated reporters of abuse.

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*Arbitrators are mandatory reporters of abuse.*

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Section 14(b) requires the arbitrator to cause a verbatim record to be made of any part of an arbitration hearing concerning a child-related dispute. This can be a simple recording or any means of getting a verbatim record. It does not require a court reporter.

Section 15(c) requires that an award determining a child-related dispute must state the reasons on which it is based as required by the law of the state in family law cases. In most states, this means findings of fact and conclusions of law. In contrast to the limited judicial review in commercial arbitration, the UFLAA requires robust judicial scrutiny of child-related awards. Under Sections 16 and 19, a court cannot confirm an award determining child custody or child support unless it finds that the award complies with applicable law and is in the child’s best interests. To confirm an award with a child-related dispute, Section 16(c) requires the court to determine that the award complies with the law of the state and is in the best interests of the child. An award can be vacated if the award did not comply with section 15 or law of state dealing with the best interests of the child. While the state could provide for a *de novo* review, it does not have to.

## ARBITRATION PROCESS

The UFLAA provides a streamlined set of guidelines for family law arbitration. The UFLAA

incorporates by reference each state's arbitration law (UAA or RUAA) for many procedural questions that do not implicate family law concerns, like the basic notice provisions. While the Act is intended to operate against the backdrop of a state's general law on contractual arbitration, it includes provisions essential to a fair and efficient arbitration process. Where a party files suit on a claim covered by an arbitration agreement, the court stays or dismisses the judicial proceeding and issues an order compelling arbitration.

### Qualifications of Arbitrators

The parties are free to pick anyone or a panel of persons to arbitrate their dispute and their choice of arbitrator, arbitration organization, or method of selection of the arbitrator controls. If the parties cannot agree or leave it to the court to appoint an arbitrator, UFLAA Section 8(a) mandates the court appoint an arbitrator who is an attorney in good standing admitted to practice or a retired attorney or judge, trained in domestic violence and child abuse the same as a judicial officer. The UFLAA does not list any minimum training hours or subject matter requirements. This may be an area in which states want to provide more detail as to the training. Having minimum qualifications and training listed as part of an arbitrator's credentials would give the arbitration option a more structured and regulated framework, which would hopefully give litigants, attorneys, and judges more confidence in arbitration and help ensure its success. Potentially, training based on the program currently provided by the AAML could be offered prior to and in conjunction with the adoption of the Uniform Family Law Arbitration Act. The AAML urges that lawyers serving as arbitrators comply with all relevant rules relating to judges, including the ABA Code of Judicial Conduct and the AAML Bounds of Advocacy for Family Lawyers § 9.2 (2000).

Not really part of actual qualifications, but certainly important to the parties is the requirement under UFLAA Section 9 that the arbitrator disclose any known fact a reasonable person would believe is likely to affect impartiality or the ability to make a timely award. The parties are selecting arbitration partly because of the speed. If the arbitrator is planning a two-month cruise, that needs to be disclosed. If a disclosure is not made, the court on motion of a party may suspend the arbitration, vacate an award or grant other appropriate relief. In a recent Texas

case, the court upheld the divorce but vacated the rest of the order based on the arbitration award finding the arbitrator's failure to disclose his close relationship with the husband's attorney could be seen objectively as evident partiality.<sup>18</sup>

### Powers of Arbitrator

The UFLAA Section 13 provides a non-exclusive list of arbitrator powers. Basically, the arbitrator can do anything a family court judge could do unless otherwise agreed by the parties or limited by a state choosing not to allow arbitration of child-related disputes. The powers listed in Section 13 are taken from the Revised Uniform Arbitration Act. These powers include to select the rules for the arbitration; conduct the prehearing conferences and the hearing; administer oaths to parties and witnesses; allow any party to conduct prehearing discovery by interrogatories, deposition, requests for production of documents, or other means; determine the admissibility of evidence; and subpoena witnesses or documents upon the arbitrator's own initiative or request of a party. In addition, the arbitrator is given powers that may be uniquely necessary in the family law context, such as the power to meet with a child, appoint a representative for the child, and impose procedures to protect a party or child from risk of harm.

The parties can set out the powers of the arbitrator in their agreement. The arbitrator does not have power to alter the terms of the arbitration agreement or to award a remedy other than in accordance with the law. Ex parte communications between a party and the arbitrator are prohibited except to the extent permitted under other law. The arbitrator has the power to sanction bad faith conduct according to state law governing misconduct in family law proceedings.

Section 11 allows arbitrators to enter temporary awards as needed under the state's law regarding temporary orders, and resort to court is authorized for urgent matters. These orders typically involve maintaining the status quo—who stays in the house, spousal or child support, custody, and parenting time issues.

### Vacating or Reviewing Award

The trade-off in arbitration has always been the narrow scope of judicial review. By agreeing to arbitrate, a person is giving up the right to go to court. A court may overturn an arbitral award

only where the arbitrator engaged in fraud, corruption, or other serious misconduct (or, in some jurisdictions, also where the arbitrator “manifestly disregarded” the applicable law). Traditionally, awards are vacated only for arbitrator misconduct or grounds going to the fairness of the arbitration process and not for errors of law. The parties lose the right to appeal an arbitral decision they believe misapprehends the law or the facts. To show an arbitrator exceeded his or her powers, the party must show the arbitrator either acted beyond the terms of the arbitration agreement or acted in complete disregard of the law.<sup>19</sup>

The UFLAA Sec. 19 (a) follows the RUAA but adds some additional grounds consistent with family law concerns for vacating arbitration awards. The UFLAA contains a bracketed (optional) subsection (a)(7) authorizing a court to vacate family law arbitration awards on the basis of those additional grounds. If state law permits parties to agree that an award can be challenged for errors of law, the bracketed language would authorize a court to review an award for errors of law if the parties have so agreed.

In family law arbitration, awards of purely financial matters are subject to the same standard as commercial arbitration although in some states, the law may require courts to comply with domestic relations law.<sup>20</sup> The UFLAA allows the parties to agree to not have a reasoned award of property and alimony issues, which could be important to protect confidentiality.<sup>21</sup> One other basis for not enforcing an arbitral award would be violation of clearly defined and dominant public policy.<sup>22</sup>

For child-related issues, however, the award must comply the domestic relations law of the state. This means, in most cases, that there must be a record to review (can be recording), findings of fact, and the award must be in the best interests of the child.

## CONCLUSION

The UFLAA offers parties another, often a more desirable, private option for resolving their dispute. Arbitration preserves family autonomy by allowing the parties to select the decisionmaker based on their specialized expertise. The parties tailor the arbitration process to suit their needs by determining the precise issues to be resolved, the rules to be followed, the timetable for the process. The use of an expert decisionmaker, the more informal,

private procedures, and the faster timeline can ease the trauma and tension of family disputes. Usually, arbitration will usually end up being less expensive than months and years of litigation, even taking into account the arbitrator’s fee.

The UFLAA provides needed standards to ensure that this method of dispute resolution retains the advantages of efficiency while also serving the needs of families in dissolution. The arbitrator, unlike a judge in a court of law, must be compensated by the parties. Arbitration may be an attractive alternative to litigation for couples who are frustrated with crowded court dockets and judges who may have little interest in family law cases. The real advantage to arbitration, however, is probably for post-dissolution disputes between high conflict parents. Post dissolution arbitration has the potential to dramatically reduce relitigation.<sup>23</sup>

## NOTES

1. *Vanderborgh v. Krauth*, 370 P.3d 661 (Colo. App. 2016).

2. See <http://www.uniformlaws.org/Acts.aspx?title=Arbitration>. Arizona, Hawaii and North Dakota have enacted it. Barbara A. Atwood, *The new UFLAA: Providing Needed Standards for Efficiency and Fairness*, 39(4) FAM. ADVOC. 38 (Spring 2017). See also Linda D. Elrod, *The Case for Arbitration in Family Cases—and for the Uniform Act*, 23(2) DISP. RESOL. MAG. 18 (Winter 2017); Barbara A. Atwood & Linda D. Elrod, *Arbitration as a Tool for Family Dispute Resolution*, ABA LITIGATION J. (June 7, 2017).

3. UFLAA Section 4 incorporates by reference a state’s existing law and procedure applicable to arbitration which is the UAA in a majority of states, but the RUAA which contains more detailed procedures than the UAA.

4. Barbara Atwood and Linda Elrod, October 2013 Meetings Issue Memo, Uniform Law Commission (Oct. 22, 2013), <http://www.uniformlaws.org/shared/docs/Family%20law%20arbitration.2013oct>.

5. These section include: definitions (Sec. 2); scope (Sec. 3); applicable law (Sec. 4); agreement requirements (Sec. 5); notice (Sec. 6); motion for judicial relief (Sec. 7); qualifications of arbitrator (Sec. 8); disclosures by arbitrator (Sec. 9); parties (Sec. 10); temporary orders (Sec. 11); protections for vulnerable parties (Sec. 12); powers and duties of arbitrator (Sec. 13); and when a recording

is needed (Sec. 14). Sections 15–19 deal with the unconfirmed award (Sec.15); confirmation (Sec. 16); correction by arbitrator (Sec; 17); correction (Sec. 18); and vacation or amendment by court (Sec. 19). Sections 20–24 go to the confirmed award—clarification (Sec. 20); judgment on the award (Sec. 21); future modification (Sec. 22); enforcement (Sec. 23) and appeal (Sec. 24). Section 25 grants the arbitrator the same immunity as a family court judge. Sections 26–29 deal with housekeeping issues like uniformity (Sec. 26); electronic signatures (Sec. 27); transitional provision (Sec. 28); and effective date (Sec. 29).

6. Alaska, California, and Illinois have enacted statutes allowing judges to consider the welfare of the animal. See also BARBARA J. GISLASON, *PET LAW AND CUSTODY: ESTABLISHING A WORTHY AND EQUITABLE JURISPRUDENCE FOR THE EVOLVING FAMILY* (2017) (suggesting arbitration as a way of resolving pet issues).

7. *Budrawich v. Budrawich*, 115 A.3d 39 (Conn. App. Ct. 2015) (trial court did not have authority to order divorced parties to submit to arbitration to resolve child support dispute where they did not agree to arbitration and statute prohibited arbitration of child support).

8. N.J. SUP. CT. R. 5:5-1(b). If child-custody and parenting-time issues are involved, the Agreement or Consent Order shall provide that: (i) a record of all documentary evidence shall be kept; (ii) all testimony shall be recorded verbatim; and (iii) the award shall state, in writing, findings of fact and conclusions of law with a focus on the best-interests of the child standard. *Id.* at (B). If child support issues are involved, the Agreement or Consent Order shall provide that the award shall state, in writing, findings of fact and conclusions of law with a focus on the best-interests standard and child support guidelines. *Id.* at (C).

9. See Linda D. Elrod, *The Need for Confidentiality in Evaluative Processes: The Case of Arbitration and Med/Arb in Family Law Cases*, 58 FAM. CT. REV. \_\_\_\_ (forthcoming 2019).

10. See Nancy Ver Steegh et al, *Look Before You Leap: Court System Triage of Family Law Cases Involving Intimate Partner Violence*, 95 MARQ. L. REV. 955 (2012).

11. Amy Holtzworth-Munroe et al., *The Mediator's Assessment of Safety Issues and Concerns (MASIC): A Screening Interview for IPV and Abuse Available in the Public Domain*, 48 FAM. CT. REV. 646, 647 (2010).

12. See, e.g., *Kelm v. Kelm*, 623 N.E.2d 39 (Ohio 1993); *LaFrance v. Lodmell*, 144 A.3d 373 (Conn. 2016).

13. *Faherty v. Faherty*, 477 A.2d 1257 (N.J. 1984).

14. See, e.g., *Zar v. Yaghoobzar*, 76 N.Y.S.3d 625 (App. Div. 2018) (confirming rabbinical court's arbitral award in divorce proceedings).

15. See Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. REV. 1231, 1293 (2011) (noting that if the arbitration is conducted pursuant to a valid agreement, parties of the same religion could have religious authorities decide their disputes in accordance with religious law).

16. See e.g. KAN. STAT. ANN. § 23-3213(b)(3).

17. N.J. SUP. CT. R. 5:5-1.

18. *In re Marriage of Piske*, 578 S.W.3d 624 (Tex. App. 2019).

19. See UFLAA Sec. 19(a)(4).

20. MICH. COMP. LAWS ANN. §§ 600.5080(1), 600.5081(2) (c). See *Eppel v. Eppel*, 912 N.W.2d 584 (Mich. App. 2018) (in order for a court to vacate an arbitration award in a divorce action because of an error of law, the error must have been so substantial that, but for the error, the award would have been substantially different).

21. UFLAA Sec. 15(b).

22. See *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29 (1987) (does not include general considerations of public interest).

23. Joan B. Kelly, *Psychological and Legal Interventions for Parent and Children in Custody and Access Disputes: Current Research and Practice*, 10 VA. J. SOC. POL'Y & L. 129, 146–47 (2002). Check.

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## “Magic Words In Military Divorce” (Part II of IV)

BY MARK E. SULLIVAN

The last article on “Magic Words” pointed out the unique language required to effect a valid former-spouse election for the Survivor Benefit Plan. This exploration will cover life, not death. When the military pension is divided by the court, the order which grants lifetime pension division can be a divorce decree, a settlement incorporated into the decree, or a consent order, sometimes called a military pension division order (MPDO). The order is required to have two special phrases (or what you might call “magic words”) to comply with federal law.

### THE FROZEN BENEFIT RULE

The law, of course, is the federal statute that allows the division of military retired pay by state courts; that’s the Uniformed Services Former Spouses’ Protection Act, or USFSPA, located at 10 U.S.C. § 1408. An amendment in 2016 restricted the division of military retired pay to that which exists on the day of divorce. The “Frozen Benefit Rule” thus limits any further growth of the pension by taking a snapshot at the time of divorce. To provide information which the retired pay center needs to make this calculation, the law requires that every

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pension order state *two data points*: a) the High-3 pay of the servicemember on the date of the dissolution and b) the member’s years of creditable service (or, in the case of Guard/Reserve members, the date-of-divorce number of retirement points). This rule applies, pursuant to 10 U.S.C. § 1408 (a)(4)(A), to the military pension division cases where the divorce was granted after December 23, 2016, and the member was not receiving retired pay at divorce.

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*The parties are not free to write their own agreement.*

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There is no exception if you’re within this window. Congress did not leave a loophole for the parties to “consent otherwise.” Thus, the husband and wife are not free to write their own agreement, since Congress has decided to tell them what they can do.

### “HIGH-3” PAY, YEARS OF SERVICE

The High-3 compensation of an individual is his or her highest three years of base pay, stated as a monthly amount (e.g., “John Doe’s High-3 at divorce was \$4,567.89 per month”). That will require a clear understanding of John Doe’s current rank and years of service, as well as his date of initial entry into military service (or DIEMS) and his last promotion date, unless counsel somehow “gets lucky” and obtains the appropriate number of past pay statements from the servicemember. While not on a par with calculus, the computations are not easy for most attorneys.

The *years of creditable service* will depend on pay records (and other documents when there was a

break in service). Counsel must know the difference between DIEMS (*see* above) and the PEBD, or Pay Entry Base Date. The *retirement points calculation* means that counsel must have access to John Doe's annual Reserve/Guard points statement.

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*The computations are not easy for most attorneys.*

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None of this is simple, and it's often a wise idea to hire an attorney who's "been around the block" with these problems a couple of times.

That's what we call a co-pilot or—in the words of Tom Cruise—a "wingman." It's also possible to attempt this alone by reading "Military Pension Division and the *Frozen Benefit Rule: Nuts 'n' Bolts*," a *Silent Partner* infoletter which may be found at [https://www.americanbar.org/groups/family\\_law/](https://www.americanbar.org/groups/family_law/) > Military Law Committee, or at [www.nclamp.gov](http://www.nclamp.gov) > Publications.

\* \* \*

All of this (and more) can be found at "The Frozen Benefit Rule" in Chapter 8 of THE MILITARY DIVORCE HANDBOOK (Am Bar Assn., 3<sup>rd</sup> Ed. 2019).

## DIVORCE CLIENTS

## Needed Advice for Those Getting Divorced

BY BARBARA SHAPIRO

Whether you're an attorney, CPA, or CDFIA, it is easy to lose sight of the fact that regardless of which party initiated the divorce, it is a traumatic experience causing a great deal of stress and angst. Divorce is a death not only of a relationship but also of a way of life. It is difficult under the best of circumstances, but if your client is financially unsophisticated,

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Her firm specializes in comprehensive financial planning with subspecialties in divorce and widowhood that assists clients' transition from marriage to independence with peace of mind and confidence. Learn more at HMS-Financial.com.

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the process is traumatizing. They are expected to make permanent financial decisions without any in-depth understanding of the possible ramifications. Oftentimes they are frozen into indecision and generally unable to process and retain the simplest bit of information.

### FROZEN AND SCARED

We've all had clients that have that deer in the head lights look who can't answer the most basic financial questions such as:

- How much does your spouse make?
- What is the mortgage payment?
- Do you have any investments?

Not to stereotype, but typically it is the woman who has chosen to abdicate her financial responsibility. How do you, as the lawyer, feel comfortable that she is making sound, rational long-term decisions?

### INEXPERIENCED AND EMOTIONAL

Research indicates that 70% of financial decisions are made

emotionally. While that may not be the end of the world, if you're buying a new shirt, it can be devastating if you are dividing assets in a divorce. The unsophisticated spouse is being asked to make long-term decisions with little or no true understanding of the ramifications of those decisions. It is not the job of the attorney to explain the difference between a stock and a bond, plus what are the tax ramifications in selling different types of securities? Nor is it in their responsibility to tell a client when/how they receive Social Security. The job of the attorney is to make sure their client is legally getting a fair deal.

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*Seventy percent of financial decisions are made emotionally.*

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Many divorcing clients seek out therapists that help them through the emotional trauma of divorce. The therapist's job is *not* to recommend whether it makes long-term financial sense to trade retirement assets for the house.

### SMART FINANCIAL DECISIONS

More often than not, a Certified Divorce Financial



Analyst (CDFA) should be part of the team. It is their job to do the calculations, and then along with the attorney and CPA, to determine what, from a financial perspective, maybe the best way to divide the assets.

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*Do you have any investments?*

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In many cases, the unsophisticated spouse is still making far-reaching decisions without any depth of knowledge. Oftentimes it is the CDFAs who educate the client on what the marital estate currently consists of, helps them understand the financial ramifications keeping a particular asset such as the house.

### **MORE ADVANCED ASSISTANCE**

Some CDFAs have additional training as a Certified Financial Transitionist. A CeFT is someone who worked in the financial industry at least five years and is trained to help people through transition.

How can a Financial Transitionist help in the divorcing process?

- Help the other professionals understand the best way to communicate with the client.
  - How do you prefer to receive information?
    - Do you prefer to communicate by phone or email?

- Do you retain information more easily if you see it visually or hear it?
- Knowing how to communicate with the client is critical when working with an unsophisticated spouse. Clearly, in order to make rational choices, the client needs to understand what that asset is supposed to accomplish—*i.e.*, a stock is ownership in a company. If you own a growth stock, you want it to go up in value by increasing its share price. A bond is a debt instrument that will pay you a dividend semi-annually. A growth stock should increase in value, where a bond will pay you an income stream. If someone is a visual learner, just verbally telling them the difference will not stick.
  - In working with the client asking transition questions will help the client prioritize what is important to them
- Help me understand what is most important to you.
  - In the divorcing process, what needs to be protected?
  - *i.e.*, my kids
- What do you need to let go of?
- The idea that we'll retire in 5 years, sell our house and move to warm weather
  - What new needs to be created?
    - How and where I'm going to live going forward?
    - Is keeping the house a good idea for me or am I better off with cash?
- Another technique that the Sudden Money Institute developed to help a client move forward is creating a decision free zone, which is a process of prioritizing decisions.
  - What needs to be decided/completed now?
    - Filing for retirement benefits and making sure insurances are in place
    - Paying taxes on time
  - What needs to be accomplished soon?
    - Creating a financial plan to know what is needed and is possible
  - What decisions can be postponed until the client has more time to plan

- Buying a second home

Incorporated in the process of helping the client make decisions is teaching them—at their

pace—what financial assets they have, why they may have had them, and what the goal of the holding may be.

If the client understands their financial situation and

participates in making the decisions, it makes the divorcing process easier for the team, your client, and hopefully the family unit.

## What's Your Game Plan?

BY GREGORY S. FORMAN

**M**aterial for South Carolina Family Court Hot Tips, September 2016

Per Wikipedia, “The terms tactic and strategy are often confused: tactics are the actual means used to gain an objective, while strategy is the overall campaign plan, which may involve complex operational patterns, activity, and decisionmaking that lead to tactical execution.

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In any litigation, the confusion of tactics with strategy can prevent a client from achieving his or her goals. From goals, strategy develops; from strategy, tactics develop. If one employs tactics without first developing strategy, or if one develops a strategy without realistic tactical means to effectuate that strategy, one is unlikely to achieve one's client's goals—other than from random luck.

This lecture topic was inspired by a young colleague asking me for advice about a Rule 60 motion she had filed, seeking to vacate a court-approved agreement. When I asked her what her plan was to achieve better results for her client if the court vacated the agreement, this attorney had no answer. This attorney knew the client's goal—get a better result than the agreement. This attorney knew tactics—file a Rule 60 motion to vacate the agreement. What this attorney lacked was a strategy to achieve the client's goal.

Two examples of how goals lead to strategy lead to tactics: In a divorce case, a client's goal may be to obtain alimony. The strategy an attorney may employ to achieve that goal might be to prove the client was the supported spouse, prove the other spouse is at fault in the breakup of the marriage, use this information to obtain substantial spousal

support at the temporary hearing, and negotiate an agreement or try the case from a position of strength. The tactics to develop the strategy might be obtaining a private investigator to prove the opposing party's adultery, develop evidence of both parties' incomes and the client's needs, and then file for a fault divorce and seek spousal support at the temporary hearing.

Where a client's goal is to change child custody, the strategy might be to prove educational neglect by the custodial parent. The tactics to develop that strategy might be to obtain affidavits from the child's teachers and school administrators documenting the opposing party's failure to address the child's educational problems and the client's interest in remedying these problems, and then seek a temporary hearing to change custody on that basis.

At the initial conference with a client, one should start by determining the client's goals. After doing so, one should determine the legal and factual basis that might be used to achieve these goals—the strategy. A client who seeks to reclaim custody of a child based on the claim, “I am the mother,” might have a potential claim if custody resides with a third-party. However, if the child resides with the father, this client's basis to change custody

will be unavailing. The first step in any initial consult is to determine whether there is a strategy or strategies that might realistically achieve that client's goals.

The next step is to determine the tactics that might be used to effectuate that strategy. For example, a custody modification case based on educational neglect will be much simpler if the child's educators will provide affidavits indicating the custodial parent is indifferent to remedying a child's serious educational problems but that the other parent has shown an active interest in remedying these problems. In that circumstance, obtaining affidavits from these witnesses, setting a temporary hearing upon filing a custody modification case, getting custody changed on a temporary basis, and attempting to negotiate a final resolution from a position of strength might be a workable strategy.

However, if these witnesses will not supply affidavits, one will likely have to file a custody modification case, obtain an order of discovery, notice and take the depositions of these educational providers, and hope that these educational providers do not mute their concerns about the custodial parent while being deposed, before one can set a temporary hearing that might realistically change custody.

While the goals and strategy aren't different for these two scenarios, the differing tactics will likely require different initial retainers (the second scenario will require a lot more work than the first) and have different likelihoods of success (the first scenario is more likely to achieve the client's goals than the second). In the second scenario, the client might consider

narrowing goals or changing the strategy to achieve these goals. However, if one doesn't consider goals, strategy, and tactics at the initial consultation, how can one quote a reasonable retainer?

One often encounters temporary hearings in which a litigant submits numerous affidavits that have no consistent theme and tell no coherent story. While it is a useful tactic to have a client gather up initial witness statements to turn into temporary hearing affidavits, obtaining these statements without first developing the themes these statements should stress—*i.e.*, strategy—is largely wasted effort. Better to have a few affidavits that provide a compelling explanation of why the court should grant the client his or her requests, than to have numerous affidavits that merely praise the client and damn the opposing party. However, to do this, one has to develop a strategy as to what the client is attempting to communicate to the court and one has to have the client understand the strategy well enough to help implement it.

Throughout the case, one should continually be adjusting goals, strategy, and tactics. If the tactics one intended to effectuate the strategy cannot successfully be deployed (perhaps a vital witness will not cooperate or the evidence does not demonstrate what the client anticipated), one can either change tactics (develop a different way to effectuate the same strategy), change strategy (develop a different strategy to achieve the client's goals) or change goals. If the strategy one has developed isn't working (perhaps, despite obtaining all the affidavits one sought for the temporary hearing, the court did

not change custody), one might consider changing, or augmenting, the strategy, or reducing the client's goals. Blindly following a strategy that isn't achieving the anticipated results or employing that strategy when it is clear that the tactics to employ that strategy are not working is bad lawyering.

An attorney who files a child support modification case based on an increase in the other parent's income without any plan on how to prove the increased income, is engaging in strategy without tactics. An attorney who approaches a modification case by filing a motion for temporary relief with the complaint, gathering up whatever affidavits the client can obtain, and hoping for the best, is engaging in tactics without strategy.

Don't engage in tactics without having a clear strategy. In litigating family court cases, the confusion of tactics and strategy can cause attorneys to waste client funds without furthering client goals. While tactics can be a strategy—when the strategy is to exhaust the opposing party through litigation to the point where (s)he gives up—it's rarely a productive strategy, and likely an unethical one.

Strategy and tactics, a "game plan," are both required to achieve the client's goals. The first question an attorney should answer before quoting a retainer is "what's the game plan?" Until that question is answered, one cannot even intelligently determine what retainer one might quote because one does not know what initial work the case will entail. An attorney without a "game plan" is wasting the client's time and money and may be destroying the client's only opportunity to achieve otherwise achievable goals.

**DIVORCE QUIZ**

**ALIMONY DESPITE ALLEGED FAULT?**

Did the wife's alleged desertion and cruelty preclude her from seeking an award of spousal support? *See Divorce Quiz Answer*, on p. 102.

**DIVORCE QUIZ**

**COMMITMENT CEREMONY AS REMARRIAGE?**

Did the wife's commitment ceremony to her new partner constitute remarriage that would trigger spousal-support-termination provision of the divorce judgment? *See Divorce Quiz Answer*, on p. 102.

**DIVORCE QUIZ**

**WAS A NO-FAULT DIVORCE UNCONSTITUTIONAL?**

Was a no-fault divorce unconstitutional on religious grounds? *See Divorce Quiz Answer*, on p. 102.

## FAIRSHARE CASES

**FAIRSHARE CASES: FAULT-ALIMONY; REMARRIAGE—COMMITMENT CEREMONY; MISSING PRENUPTIAL-ADMISSIBILITY OF COPY; DOUBLE COUNTING; HORSE-RELATED ACTIVITIES; MILITARY PENSION—POST MARITAL SERVICE; PERSONAL INJURY SETTLEMENT; SUPERVISED PARENTING TIME . . .**

**BY RON BROWN**

1. Can a court award alimony despite the alleged fault of the recipient?
2. Does a commitment ceremony constitute a “remarriage?”
3. Was a no-fault divorce unconstitutional?
4. Was the growth in a separate inheritance marital?
5. Was veteran’s disability benefits “gross income?”
6. Was a child’s horse-related extracurriculars covered child support?
7. Was a personal injury award separate property?

These questions and others that arise in the daily practice of Family Law are answered in the *Fairshare Cases* section of this issue of the *American Journal of Family Law* (AJFL). They are from Arizona, Connecticut, Florida, Illinois, Indiana, Michigan, Nebraska, New York, North Dakota, Pennsylvania, and Virginia.

The *AJFL* welcomes recommendations from readers for this Feature.

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## DIVORCE QUIZ

### ANSWER

No, according to a Virginia Court of Appeals decision. In *Wyatt v Wyatt*, 2019 WL 4773133 (Va. 1979), the husband contended that the wife's desertion and cruelty should have barred her from receiving spousal support. Although the court did not award spousal support, it added that she could reserve the right to receive support in the future.

## DIVORCE QUIZ

### ANSWER

No, according to a recent *Michigan* Court of Appeals decision.

In *Lueck v Lueck*, 939 NW2d 729 (Mich App 2019), after 29 years of marriage, the parties entered into a consent divorce settlement agreement awarding the wife \$10,000/month for 10 years (120 months). The wife then participated in a "commitment ceremony" performed at her church. She considered herself a "spiritual person," did not want to "live in sin;" therefore, she decided to have a "private prayer ceremony" without guests or witnesses.

In Michigan, a marriage license was required to recognize a "legal marriage" and to obtain certain legal rights and obligations that came with marriage. Michigan did not recognize common-law marriage. Michigan law required a marriage license to have their union recognized as a "legal marriage."

## DIVORCE QUIZ

### ANSWER

No, according to a recent *Pennsylvania* appellate decision.

*Pankoe v Pankoe*, 222 A3d 443 (Pa Super 2020), rejected the husband's argument that the state's divorce statute violated both the Establishment Clause and his due process rights. The court explained that contrary to the husband's beliefs, trial courts were not entitled to grant divorces based solely on an individual's "viewpoint." The divorce statute provided for a no-fault divorce only after a party filed an affidavit alleging the couple lived separate and apart for the requisite amount of time and affirmed the marriage was irretrievably broken. If the non-filing party objected, the trial court was then required to determine whether (1) the parties had been living separate and apart for the prescribed amount of time; and (2) the marriage was irretrievably broken.

In this case, the Master found, and the trial court agreed, that the marriage was indeed irretrievably broken. The trial court did not; the husband suggested simply accepting the wife's "viewpoint." Instead, it reviewed her testimony and the Master's recommendations and determined that she met her burden of proving the marriage was irretrievably broken.

## SPOTLIGHT

## ADMISSIBILITY OF MISSING POSTNUPTIAL AGREEMENT

Admission of a missing postnuptial agreement into evidence was reversed by a *New York* court. In *Mutlu v Mutlu*, 115 NYS3d 339 (2<sup>nd</sup> Dept 2019), the wife sought equitable distribution of the marital property pursuant to a postnuptial agreement allegedly executed by the parties. For a nonjury trial, the wife offered a copy of the postnuptial agreement into evidence, claiming that she did not have the original and did not know its whereabouts. The husband objected and contended that he did not sign the document and that none of the signatures on the document were his. The court granted the wife's application and admitted a copy of the postnuptial agreement into evidence. But, this ruling was reversed on appeal.

## BEST EVIDENCE RULE

The rule served mainly to protect against fraud, perjury, and inaccuracies derived from faulty memory. Secondary evidence of the contents of an unproduced original may be admitted upon threshold factual findings by the trial court that the proponent of the substitute sufficiently explained the unavailability of the primary evidence and had not procured its loss or destruction in bad faith. Loss may be established upon a showing of a diligent search in the location where the document was last known to have been kept, and through the testimony of the person who last had custody of the original. The more important the document was to the resolution of the ultimate issue in the case,

the stricter the requirement of establishing its loss.

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*The more important the document, the stricter the requirement of loss.*

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In this case, the wife merely testified that she did not possess the original postnuptial agreement and that she believed it was either lost or stolen. Given the significance of the agreement to the issue of equitable distribution, the husband's allegations that his purported signature on the document was forged, and the wife's failure to adequately explain the unavailability of the original document, it was ruled determinative. A new trial was ordered.



## SPOTLIGHT

## IMPERMISSIBLE DOUBLE COUNTING

The trial court impermissibly double-counted the value of the husband's businesses for purposes of property division and spousal support awards, the *Connecticut* Court of appeals has held. In *Oudheusden v Oudheusden*, 209 A3d 1282 (Conn App 2019), the self-employed husband owned two businesses and had gross annual income of \$550,000; the combined value of the two businesses was \$904,000. The court awarded the wife alimony of \$18,000 per month. With respect to the two businesses, the husband was to retain 100-percent ownership but was ordered to pay the wife 50 percent of their fair market value (\$452,000).

## ARGUMENTS OF BOTH PARTIES

On appeal, the husband argued that the court improperly awarded the wife alimony from income that was generated by his

two businesses and also awarded her 50 percent of the value of those businesses. The wife countered that an impermissible double-dip would have occurred here only if the trial court had given 100 percent ownership of the businesses to the wife and then ordered the husband to pay alimony based on income from an asset he no longer had as a result of the transfer making compliance impossible.

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*The court ignored the economic relationship.*

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The appellate court agreed with the husband that the trial court effectively deprived the husband of his ability to pay the \$18,000 monthly alimony award by also distributing to the wife 50 percent of the value of his businesses from which he derived his income. This court elaborated that the general principle

was that a court may not take an income-producing asset into account in its property division and also award alimony based on that same income.

Thus, the trial court failed to take into account that the husband's annual gross income, which the court determined to be \$550,000, was included in the fair market value of his two businesses. The determination of the husband's income flowed solely from his businesses. Nevertheless, the trial court awarded the wife 50 percent of the \$904,000 fair market value of the businesses and awarded the wife \$18,000 per month in lifetime alimony. According to the court, "These orders ignored the economic relationship between the value of the businesses and the [husband's] ability to earn income," because the businesses provided the only significant stream of income by which the husband could meet his alimony obligations.

## FAIRSHARE CASES: MISCELLANY

## HORSE-RELATED ACTIVITIES EXTRACURRICULAR

The parties' daughter's horse-related activities were deemed extracurricular for which the father was ordered to pay half the expenses, by an *Illinois* appellate court. *Marriage of Hamilton*, 128 NE3d 1237 (Ill App 2019), explained that activities were intended to enhance their daughter's educational development, as she pursued her goal of becoming an equine veterinarian. In particular, her participation in contests where she answered questions about hippology or gave speeches about horse-related topics was an activity that was inherently educational in nature, even though it may not be directly related to her current school curriculum.

## PRE-MARITAL MILITARY SERVICE PENSION

A *Florida* appellate court affirmed that the wife was entitled to a portion of the husband's pension attributable to his premarital years of military service.

*Martin v Martin*, 276 So3d (Fla App 2019). This was a matter of *first impression*.

## CHILD'S DEVELOPMENTAL NEEDS

Awarding primary physical custody of the child to the mother due to her developmental needs and the ability

of each parent to meet those needs was affirmed by the *North Dakota* Supreme Court. *Vetter v Vetter*, 938 NW2d 417 (ND 2020), explained that the wife was the child's primary caretaker because of the father's work schedule.

The mother had been convicted of child abuse.

## PERSONAL INJURY SETTLEMENT SEPARATE

The husband's personal injury settlement for two automobile accidents was his separate property, according to an *Arizona* Court of Appeals decision. *Hefner v Hefner*, 456 P3d 20 (Ariz App 2019), reversed the trial court which found these awards to be community property. The appellate court found the personal injury settlements presumptively separate property, and that the wife had the burden to show otherwise. Because the husband's separate property—his body—sustained the injury, the presumption was that any proceeds awarded to him for his "cause of action" remained his separate property until proven otherwise by the non-injured spouse.

## GROWTH IN SEPARATE INHERITANCE MARITAL

The growth in value of investment accounts derived

from the husband's cash inheritance, was marital property, the *Nebraska* Supreme Court has held. *White v White*, 938 NW2d 227 (Iowa 2020), explained that under the active appreciation rule, the husband had the burden to prove that the growth was not due to the active efforts of either spouse, which he failed to do.

## VETERAN'S DISABILITY BENEFITS GROSS INCOME

The husband's veteran's disability benefits were part of his gross income for child support purposes, a *Virginia* appellate court has ruled. *Alwan v Alwan*, 830 SE2d 45 (Va App 2019), explained that veteran's benefits were specifically mentioned in the statutory definition of "gross income."

## EXPIRATION OF STIPULATED SETTLEMENT?

The issue in a recent *Oregon* appellate decision was whether a stipulated settlement that was reduced to a separation judgment automatically expired or ceased to have any legal effect if the parties did not trigger a dissolution proceeding within 24 months or two years of entry of the separation judgment.

*Marriage of Randle*, 445 P3d 1271 (Or App 2019), answered

that the agreement did not expire under these circumstances. The judgment of separation explicitly provided that it was “unlimited” in duration, and there was nothing in the stipulated settlement that set an expiration date. Moreover, the trial court acknowledged that at the time the stipulated settlement was entered into, neither party intended for it to expire two years after the judgment was entered.

#### **LIFE INSURANCE AWARD—FINDINGS**

A *Florida* trial court failed to make the necessary findings when requiring the husband to maintain a life insurance policy for the wife’s benefit, one of the state’s appellate courts has ruled. And, *Fleming v Fleming*, 279 So3d 763 (Fla App 2019) also remanded for additional findings and explanation a \$200,000 award of attorney’s fees.

#### **SUPERVISED PARENTING TIME**

An order requiring the father’s weekly parenting time to be supervised was warranted, according to the *Indiana* Court of appeals. *T.R. v E.R.*, 134 NE3d 409 (Ind App 2019), also found the evidence was sufficient to support the trial court’s order requiring the father to participate in a domestic violence course.

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