The American Academy of Matrimonial Lawyers –
Kentucky Chapter,
in conjunction with the
Kentucky Bar Association Family Law Section,
presents

2023 Family Law Conference

This program has been approved in Kentucky for 12 CLE credits including 2.5 ethics credits.

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2023 Family Law Conference

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PRESENTER BIOGRAPHIES

Judge Jason Shea Fleming
Family Court, 3rd Judicial Circuit, Division 3
Hopkinsville, KY

Judge Jason Shea Fleming serves as circuit judge, Family Court, Division 3 of the 3rd Judicial Circuit, which consists of Christian County. Before his election to the circuit bench in November 2006, Judge Fleming was assistant Christian County attorney from 1998 to 2006. He also served as the director of Christian County Juvenile Services and as a volunteer for the Christian County Juvenile Drug Court from 2000 to 2006. Judge Fleming was in private practice with Thomas, Arvin & Fleming in Hopkinsville from 1997 to 2000 and had a solo practice from 2000 to 2003. Judge Fleming holds a bachelor's degree from the University of Kentucky and a J.D. from University of Kentucky J. David Rosenberg College of Law, where he graduated *cum laude* and member of the *Order of the Coif*. He was articles editor for the *Kentucky Law Journal* and chair of the hearing committee on the UK College of Law Honor Council from 1996 to 1997. Judge Fleming was named the 2011 Outstanding Young Lawyer by the Kentucky Bar Association's Young Lawyers Section. He is also a recipient of the Kentucky Bar Association's CLE Award and Pro Bono Award, both of which he has received multiple times. He is the only prosecutor to receive the Kentucky Public Advocate Award, presented to him in 2006 by the Department of Public Advocacy. He also received the 2007 Meritorious Service Award from the Christian County Juvenile Drug Court and the Advocate for Children Award from the Christian County Child Abuse Council in 2010. He has authored numerous journal articles and has been a presenter at Kentucky Prosecutors Conferences, Kentucky County Attorneys Conferences, CLE seminars statewide, and the Kentucky Bar Association Annual Convention. Judge Fleming has presented educational programs nationally for the Child Welfare League of America and the National Council for Juvenile and Family Court Judges (NCJFCJ). He currently serves as a representative on the Circuit Judge's Continuing Education Committee and the Kentucky AOC Education Oversight Committee. He serves on the NCJFCJ's Military Committee and the KBA's Child Protection and Domestic Violence Committee. Judge Fleming is a past president of the Hopkinsville-Christian County Jaycees and Big Brothers-Big Sisters of the Southern Pennyrile. He is past vice president of the Kentucky State Jaycees and has served as the organization's legal counsel for six years. He was chairman of the board of the Housing Authority of Hopkinsville for six years and chairman of the board of Westwood Senior Homes for two years. Judge Fleming has also served on the Kentucky Baptist Association's Constitution and Bylaws Committee. He is married to Hon. Tonya H. Fleming and has two children.

Mark E. Sullivan
Law Offices of Mark E. Sullivan, P.A.
Raleigh, NC

Mark E. Sullivan is the principal of Law Offices of Mark E. Sullivan, P.A. in Raleigh, North Carolina. A retired Army Reserve JAG colonel and a board-certified specialist in family law, Mr. Sullivan is a fellow of the American Academy of Matrimonial Lawyers and author of *The Military Divorce Handbook* (Am. Bar Assn., 3rd Ed. 2019). He was co-founder of the military committee of the North Carolina State Bar in 1981 and is past chair of the Military Committee of the ABA Family Law Section. He received the ABA's Grassroots Advocacy Award in 2014 for his work on military custody statutes and the Uniform Deployed Parents Custody and Visitation Act. He assists attorneys nationwide in drafting military pension division orders and consulting on military divorce issues.

Dorothy Haraminac
GreenVets, LLC
Houston, TX

Dorothy Haraminac provides economic damage calculations, asset tracing, and valuation in complex disputes; she performs fraud investigations, has testified on bitcoin & cryptocurrency tracing and in commercial oil & gas disputes; and, she performs diligence and compliance analysis for FinTech and M&A. Ms. Haraminac serves on the Advisory Board for Houston Christian University (HCU) and on the editorial board for *The Value Examiner.* She also volunteers her time to train law enforcement officers, attorneys, and accountants on cybercrime risk, blockchain compliance, and cryptocurrency investigations, and services as a professor of cyber engineering. She has served on the Litigation Forensics Board for NACVA, where she spearheaded the direct acknowledgement of military experience in lieu of a degree for the MAFF credential qualifications, making it one of the first NASBA-accredited financial credentials to do so.

Jonathan Gould, Ph.D., ABPP [Forensic]
Charlotte, NC

Jonathan Gould, Ph.D., ABPP [Forensic] is a board-certified forensic psychologist who specializes in psychological aspects of family law matters. Dr. Gould has been court appointed to conduct child custody evaluations in about 380 cases. He has been retained as a trial consultant in approximately 3,500 cases across the country, including approximately 2,200 work product reviews. In addition, he has been retained by one side to conduct an evaluation of a parent or family in approximately 500 cases. He has worked as a parent coordinator in approximately 200 cases. He has assisted attorneys in their preparation of their witnesses for settlement conferences, evaluations, depositions, and trials in approximately 1,000 cases. Dr. Gould received his B.S. from Union College and his Ph.D. from University of Albany, SUNY.

Lori B. Shelburne
Gess, Mattingly & Atchison, PSC
Lexington, KY

Lori B. Shelburne is a member with Gess, Mattingly & Atchison, PSC in Lexington, Kentucky. Ms. Shelburne concentrates her practice in all areas of family law. Prior to joining Gess, Mattingly & Atchison, she worked as an Assistant Fayette County Attorney prosecuting interstate child support matters. Ms. Shelburne received her B.A. from Transylvania University and her J.D. from the University of Kentucky J. David Rosenberg College of Law. She is a past president of the Kentucky chapter of the American Academy of Matrimonial Lawyers and a past chair of the Fayette County Bar Association's Domestic Relations Section.

Judge Denise Brown
Family Court, 30th Judicial Circuit, Division 7
Louisville, KY

Judge Denise Brown serves as family court judge for the 30th Judicial Circuit, Division 7, in Louisville. She received her B.A. from Howard University and her J.D. from the University of Louisville Louis D. Brandeis School of Law. Prior to her election to the bench, Judge Brown gained experience as a prosecutor with the Commonwealth Attorney's Office and as a juvenile prosecutor with the Jefferson County Attorney's Office. In 1992, she was appointed by Louisville Major Jerry

Abramson as the executive director for the Louisville and Jefferson County Human Relations Commission. Judge Brown is a member of the Kentucky Bar Association.

Judge Lisa H. Morgan
Family Court, 14th Judicial Circuit, Division 3
Georgetown, KY

Judge Lisa Morgan serves as family court judge for the 14th Judicial Circuit, Division 3, in Georgetown. She received her undergraduate degree from Murray State University and her J.D. from the University of Kentucky J. David Rosenberg College of Law. Prior to her election to the bench, Judge Morgan practiced law with Stoll Keenon Ogden, PLLC in Lexington. She is a member of the Kentucky Bar Association.

Judge Mica Wood Pence
Family Court, 43rd Judicial Circuit, Division 2
Glasgow, KY

Judge Mica Wood Pence serves as family court judge for the 43rd Judicial Circuit, Division 2, in Glasgow. She received her undergraduate degree from Georgetown College and her J.D. from the University of Kentucky J. David Rosenberg College of Law. Judge Pence is a member of the Kentucky Bar Association.

Judge Bruce Petrie
Family Court, 50th Judicial Circuit, Division 2
Danville, KY

Judge Bruce Petrie is a native of Lancaster, Kentucky. He received his J.D. from the Northern Kentucky University Salmon P. Chase College of Law in 1991. He is a former partner in the law firm of Helton & Petrie. In January 2000, he was appointed district judge in the District Court, First Division, of the 50th Judicial District to serve the unexpired term of his predecessor and was re-elected to that post in November 2002. In December 2002, Judge Petrie was appointed by Kentucky Chief Justice, Hon. Joseph E. Lambert as the first family court judge of the 50th Judicial Circuit comprising Boyle and Mercer Counties. He was re-elected to serve his third full term commencing in January 2023. Judge Petrie is a two-time recipient of the Law Related Education Award presented by the Administrative Office of the Courts, a two-time recipient of the Outstanding Judge Award bestowed by the Kentucky Citizen Foster Care Review Board, the 2008 Judge of the Year Award from the Kentucky Chapter of the American Academy of Matrimonial Lawyers, and the 2007 Kentucky CASA Judge of the Year. He has been a frequent presenter at the Foster Care Review Board's Bi-Annual Conferences as well as the Circuit and District Judges' Judicial Colleges and Kentucky CASA.

Judge Squire N. Williams III
Family Court, 48th Judicial Circuit, Division 3
Frankfort, KY

Judge Squire Williams serves as family court judge for the 48th Judicial Circuit, Division 3, in Frankfort. He received his undergraduate degree from the University of Kentucky and his J.D. from Salmon P. Chase College of Law at Northern Kentucky University. Prior to taking the bench, Judge Williams was a partner with Hazelrigg & Cox in Frankfort. He also previously served as a special master commissioner and as a deputy master commissioner of the Franklin Circuit Court. Judge Williams is a member of the Kentucky Bar Association.

Steven J. Kriegshaber
Bradenton, FL

Steven Kriegshaber is a Supreme Court of Florida certified family law mediator and an American Academy of Matrimonial Lawyers trained arbitrator. He is also a certified guardian *ad litem* in Manatee County, Florida. From 2015-2021, Mr. Kriegshaber was an associate attorney with Goldberg Simpson, LLC in Prospect, KY, and a partner with Conliffe, Sandmann & Sullivan in Louisville, KY from 2002-2015. He also served as GAL in Jefferson County Family Court during this time. He received his B.A. from Indiana University Bloomington and his J.D. from the University of Louisville Brandeis School of Law. Mr. Kriegshaber is a past president of Kentucky Collaborative Family Network, a Fellow of the American Academy of Matrimonial Lawyers, past chair of the Louisville Bar Association's Family Law Section, and co-author of *Guidelines for Attorneys Representing Children* (AAML). He is a member of the Kentucky and Ohio Bar Associations.

Linda J. Ravdin
Pasternak & Fidis, P.C.
Bethesda, MD

Linda J. Ravdin has been a partner in Pasternak & Fidis, P.C. since July 2002. Before that she had her own firm for 28 years. She practices family law exclusively, including premarital agreements, domestic partnership agreements, divorce and dissolution of domestic partnerships, custody and support, and disposition of property. Ms. Ravdin has trained in both mediation and collaborative law. She has a special interest in premarital agreements as well as in disposition of retirement benefits and deferred compensation at divorce, including private retirement plans governed by ERISA, non-qualified plans, governmental plans, and pension plans of international organizations. Since 1995, she has been included in every issue of *Washingtonian* Magazine's Washington area best divorce lawyers. Ms. Ravdin is a member of the Bars of Virginia, Maryland, and the District of Columbia. She is the author of two treatises on premarital agreements, including *Premarital Agreements: Drafting and Negotiation* published by the American Bar Association (1st ed., 2011; 2d ed., 2017; 3d ed. to be published 2023); and *849-2d T.M., Marital Agreements* (BloombergBNA, 2012) (supplemented annually). Ms. Ravdin has taught numerous CLEs and written extensively over the past 30 years on the law of premarital and post marital agreements, the drafting and negotiation of these agreements, and representing parties defending their validity. Her past professional activities include serving as the ABA Section of Family Law Advisor to the Drafting Committee of the Uniform Law Commission on the Uniform Premarital and Marital Agreements Act, as a member of the D.C. Bar Legal Ethics Committee, and as a member of a disciplinary hearing committee of the D.C. Bar Board on Professional Responsibility. Ms. Ravdin is a Fellow of the American Academy of Matrimonial Lawyers. She received her law degree in 1974 from the George Washington University School of Law.

Missy DeArk
Dean Dorton
Louisville, KY

Missy DeArk is an associate director of litigation support and business valuation in the Louisville office of Dean Dorton, one of the largest public accounting firms in the Southeast. Ms. DeArk is a certified public accountant and is certified in financial forensics by the American Institute of Certified Public Accountants. She also holds two certifications from the National Association of Certified Valuation Analysts: Certified Valuation Analyst (CVA) and Master Analyst in Financial Forensics (MAFF). Ms. DeArk leads the Dean Dorton family law practice helping attorneys and

clients understand the financial and tax issues specific to the divorce process including disposable income and cash flow analysis, forensic accounting services, marital estate balance sheets, asset tracing, alimony calculations and business valuations, among others. She and her team specialize in the technical financial expertise of marital dissolutions but are also in tune to the emotional challenges and focus on supporting clients and their attorneys to fully analyze the short and long-term financial implications of divorce settlements. She and her team of certified experts provide expert witness services in courts throughout Kentucky, Indiana, and the U.S. Ms. DeArk is also the President of the Kentucky Collaborative Family Network, a group of attorneys, financial professionals, and coaches that promote a structured alternative resolution process that helps families avoid going to court for divorce settlements. The goal is to promote family peace and economic stability to the greatest extent possible and minimize adversity in the process and reach an equitable solution without court. When she is not testifying or working with clients, she can often be found speaking at events including the American Academy of Matrimonial Lawyers Family Law Seminar and the Kentucky Bar Association's 2019 Kentucky Law Update, presenting on the topic of alternative dispute resolutions. She received her B.A., *magna cum laude*, from Bellarmine University and her M.B.A. from Indiana University Bloomington.

William D. Tingley
Lynch Cox Gillman & Goodman, PSC
Louisville, KY

William D. Tingley is a Fellow of the American Academy of Matrimonial Lawyers. He currently practices law with Lynch, Cox, Gillman & Goodman, P.S.C. in Louisville. Mr. Tingley is also an adjunct professor at Northern Kentucky University Salmon P. Chase College of Law. He was the 2019 chair of the Rules and Comments Subcommittee of the Kentucky Supreme Court's Standing Committee on Family Court Rules of Procedure and Practice. Mr. Tingley served as co-chair of the Jefferson County Advisory Committee for the Kentucky Supreme Court's Family Court Project. He is an AAML Certified-Family Law Arbitrator and is the recipient of the 2014 and 2023 AAML-Kentucky Chapter Raise the Bar Award. For over three decades he has lectured statewide, on behalf of the Kentucky Bar Association and the American Academy of Matrimonial Lawyers, on a variety of family law topics. Mr. Tingley received his B.A. from Asbury University and his J.D. from Capital University Law School. He is a member of the Kentucky (Family Law Section Chair, 1996) and Louisville Bar Associations (Family Law Section Chair, 1996, 2014).

Judge Denise M. Clayton (ret.)
Louisville, KY

Prior to her retirement in January 2023, Judge Denise Clayton served as chief judge of the Kentucky Court of Appeals beginning on June 1, 2018. Judge Clayton became the first black woman to serve on the Kentucky Court of Appeals in October 2007. Prior to her appointment and election to the Court of Appeals, Judge Clayton was chief circuit judge for Jefferson County. She was the first black woman to be a Kentucky Circuit Court judge. She was also chief regional circuit judge for the Metro Region for several months before serving on the Court of Appeals. Judge Clayton previously served in Jefferson County as a judge for District Court, Family Court, and Drug Court. Judge Clayton began her legal career as an attorney with the Internal Revenue Service. She also worked at the University of Louisville as the director of student legal services and maintained a private practice. She was the Legal Aid Society of Louisville's associate director before becoming a Jefferson County District Court judge in 1996. Judge Clayton graduated *cum laude* from Defiance College in Defiance, Ohio. She earned her J.D. from the University of Louisville Louis D. Brandeis School of Law. She served as chairwoman for the Chief Justice's Commission on Racial Fairness for Jefferson County's courts and is a member of the Louisville

Bar Association, Louisville Black Lawyers Association, and Women Lawyers Association. Judge Clayton was selected as the 2012 recipient of the Distinguished Judge Award by the Kentucky Bar Association and has also received the Public Advocate Award from the state's Department of Public Advocacy, the Distinguished Alumna Award from Brandeis School of Law, the Alumni Achievement Award from Defiance College, the Community Service Award from the Optimist Club of Louisville, the Louisville Bar Association Justice William E. McAnulty, Jr. Trailblazer Award, and the Louisville Chapter NAACP Meritorious Service Award.

Justice Daniel J. Venters (ret.)
Somerset, KY

Justice Daniel J. Venters retired from the Supreme Court of Kentucky in January 2019, having served over 10 years on the Court and authoring some 200 published opinions and hundreds of unpublished opinions. His judicial career spanned more than 35 years on the trial and appellate court benches of Kentucky. While on the Court, Justice Venters chaired the Supreme Court Rules Committee, the Family Court Rules Committee, and the Rules of Evidence Committee. Justice Venters entered the practice of law in 1975 in Somerset, Kentucky, where he served as a part-time Assistant Commonwealth's Attorney under then-Commonwealth's Attorney, now Congressman Hal Rogers. He practiced with the Somerset law firm of Rogers & Venters until January 1979, when he became a district court judge for Pulaski and Rockcastle Counties. Elected to the circuit court bench in 1983, Justice Venters served as Chief Circuit Court Judge for the 28th Judicial Circuit (Pulaski, Rockcastle, and Lincoln counties) from January 1984 until June 2003, when he returned to the practice of law in Somerset until 2008, when he was elected to the Kentucky Supreme Court. Justice Venters is a 1975 graduate of the University of Kentucky J. David Rosenberg College of Law and a 1972 graduate of The Ohio State University, where he majored in economics. He is admitted to practice before the U.S. Supreme Court and the U.S. District Courts for Eastern and Western Kentucky. He has served as a member of the Kentucky Board of Bar Examiners and the Kentucky Bar Association Board of Governors. He currently serves as a trustee of the Judicial Form Retirement System, a member of the AppalReD Legal Aid Board of Directors, a commissioner on the Executive Branch Ethics Commission, and chairs the Kentucky Bar Association Client Security Fund.

Mark A. Ogle
Graydon
Fort Mitchell, KY

Mark A. Ogle is a family lawyer with a reputation of treating his clients with compassion. Mr. Ogle has been an integral part of shaping domestic relations law for the Commonwealth of Kentucky. Through his appellate practice, he has helped to establish a new law regarding non-biological third party rights to children where the biological parent failed to act timely to assert his/her rights, and he helped to establish a clearer definition for parties, attorneys, and judges regarding the complicated area of subject-matter jurisdiction and modification of custody under the Uniform Child Custody Jurisdiction Enforcement Act. Mr. Ogle has a growing family law mediation practice that has expanded through the Commonwealth. He currently serves as the immediate past Kentucky Chapter president of the American Academy of Matrimonial Lawyers and is a member of the Family Law Sections of the American Bar Association, Kentucky Bar Association, Northern Kentucky Bar Association, and is a frequent speaker at bar association events. Mr. Ogle is a graduate of Centre College of Kentucky, where he earned all-conference honors in basketball and baseball. He attended Northern Kentucky University Salmon P. Chase College of Law, and currently works as an attorney with Graydon in the Northern Kentucky office.

Jeffery P. Alford
Alford Law Office
Paducah, KY

Jeffery P. Alford was born in Paducah, Kentucky, and grew up in Southern Illinois. He has tried numerous divorce, custody, civil, and criminal cases to final judgment or verdict. He has also presented on issues of family law and divorce law before the Kentucky Justice Association (formerly the Kentucky Academy of Trial Attorneys), the Kentucky Bar Association, the McCracken County Bar Association, and the West Kentucky Paralegals Association. He has also taught classes through the McCracken Family Court and given presentations on child custody issues at the McCracken County Regional Jail. Mr. Alford attended Murray State University as a Presidential Scholar and received his bachelor's degree in political science *cum laude* in the Honors Curriculum. He received his J.D. from Southern Illinois University School of Law. While at SIU, Mr. Alford served as an articles editor for the *SIU Law Journal*, competed in the ABA Regional Negotiation Competition, was selected for membership in the Lincoln's Inn, was a member of the Southern Illinois Inn of Court, and was active in the law school's clinical program providing legal services to elderly residents of the 13 southernmost counties in Illinois. He also handled his first trial before he even graduated from law school with the Williamson County State's Attorney's office. After law school, Mr. Alford worked as an associate in one of the largest firms in Western Kentucky where he quickly was made lead counsel in several felony criminal cases and divorce cases. As a solo practitioner, Mr. Alford has cultivated a reputation in the legal community for maintaining the highest ethics while providing aggressive, zealous representation to his clients. He is licensed in both Kentucky and Illinois and is currently a member of the American, Illinois, Kentucky, and McCracken County Bar Associations. Mr. Alford is a former co-chair of the Membership Section of the Kentucky Justice Association's Domestic Relations Section and a former web editor for the ABA Litigation Section.

Judge Brandi H. Rogers
Family Court, 5th Judicial Circuit, Division 2
Marion, KY

Judge Brandi H. Rogers is the family court judge for the 5th Circuit (Crittenden, Union, and Webster counties). Judge Rogers is a graduate of Western Kentucky University and Northern Kentucky University's Salmon P. Chase College of Law. While in private practice, her law practice focused primarily on domestic relations, and she served regularly as guardian *ad litem* for children in many counties. She also served as master commissioner and school board attorney for two school districts (Crittenden and Webster). Judge Rogers was elected to the 5th Circuit Court bench as family court judge in 2014. She received the Kentucky Citizens Foster Care Review Board Outstanding Family Court Judge Award in 2017 and Kentucky CASA Network Judge of the Year in 2019. She was a NCJFCJ Judicial Engagement Network Fellow (2020) and has served on numerous commissions, including the National CASA Judicial Leadership Council and the Child Support Guidelines Commission. She now serves as faculty for NCJFCJ and the Kentucky Circuit Judges Association.

THE ABBREVIATOR'S GUIDE TO MILITARY PENSION DIVISION

by Mark E. Sullivan*

Military pension division is a complex and confusing field, and the rules are often esoteric and counterintuitive. The statute governing this area is the Uniformed Services Former Spouses' Protection Act (USFSPA), found at 10 U.S.C. §1408. The rules are published in the Department of Defense Financial Management Regulation (DoDFMR) at Vol. 7B, Chapter 29, *Former Spouse Payments from Retired Pay*.

To help lawyers understand the directives for division of retired pay, this chart shows a convenient way of remembering the important points about division of military pensions in a Military Pension Division Order, or MPDO. For all of these items below, you will find a relevant and useful *Silent Partner* infoletter at the website of the North Carolina State Bar's military committee, https://www.nclamp.gov/publications/silent-partners/.

Abbrev.	Standard Meaning	New meaning	Summary and Sources
PBJ	*Peanut Butter and Jelly*	Provide Basis for Jurisdiction	The basis for exercise of jurisdiction must be one of the three items in 10 U.S.C. §1408(c)(4), and the MPDO must state the specific basis. The court may divide the pension if the servicemember [SM] is domiciled in that state, resides there [but not due to military assignment], or consents to the jurisdiction of the court.
ATT	*American Telephone & Telegraph*	Achieve Ten-Ten	The retired pay center[1] cannot implement pension division through a garnishment of the retiree's pension unless the 10/10 Rule is met. This means 10 years of marriage during 10 years of service creditable toward retirement. 10 U.S.C. §1408(d)(2). With 10/10 Rule compliance, the FS will receive direct payments of disposable retired pay from the pay center, and the SM [now retiree] will be able to exclude from taxable income the money that's being paid to the FS.

* Mr. Sullivan is a retired Army Reserve JAG colonel. He practices family law in Raleigh, North Carolina, and is the author of *The Military Divorce Handbook* (Am. Bar Assn., 3rd Ed. 2019) and many internet resources on military family law issues. A Fellow of the American Academy of Matrimonial Lawyers, Mr. Sullivan has been a board-certified specialist in family law for over 30 years. He works with attorneys nationwide as a consultant on military divorce issues and in drafting military pension division orders. He can be reached at (919) 832-8507 and mark.sullivan@ncfamilylaw.com.

[1] The Defense Finance and Accounting Service in Cleveland services the Army, Navy, Air Force, Marine Corps, and the National Guard and Reserves. The Coast Guard Pay & Personnel Center in Topeka, KS services members of the Coast Guard as well as commissioned officers of the Public Health Service and the National Oceanic and Atmospheric Administration.

BFF	*Best Friends Forever*	Basic Findings of Fact	The MPDO should state these essential facts: addresses of the parties, dates of marriage and divorce, county and date of the decree terminating marriage, and "This current order is entered incident to the parties' divorce decree". If state law or rules prevent the insertion of the full Social Security Numbers of the parties, then enter the last four digits only [*e.g.*, xxx-xx-1443].
LOL	*Laughing Out Loud*	Left Out Language	The MPDO must state that the rights of the SM under the Servicemembers Civil Relief Act were honored and observed. The Act is found at Chapter 50 of Title 50, U.S. Code.
FBI	*Federal Bureau of Investigation*	Frozen Benefit Information[2]	Two data points are required for each MPDO that's entered in a case where the divorce was after 12/23/16 and the SM wasn't receiving retired pay at the time of the divorce. These points are the SM's A) High-3 pay [average of the highest three years of compensation], and B) years of creditable service, both as of the divorce date. With a Guard/Reserve SM, the latter is replaced with retirement points as of date of the divorce. 10 U.S.C. §1408(a)(4)(B).
FTC	*Federal Trade Commission*	Four Types of Clauses	There are four pension division clauses allowed by the retired pay center: fixed-dollar amount, formula clause, fraction, and hypothetical clause.[3]
WTF	*What The F***?*	What's the Fraction?	When the SM is still serving, the order usually states the marital fraction as a formula, with the denominator [total creditable service in most states] shown as "X" or "unknown". Be sure to state the numerator. It can be months of marital pension service, or – in a Guard/Reserve case – it can be retirement points earned during marriage. A primary reason for rejection of pension orders is failure to state the numerator.
DIY	*Do It Yourself*	Demand Indemnification? Yes!	When representing the FS, be sure to include an indemnification clause in case disability payments reduce the amount of divisible pension. According to the USFSPA, *disposable retired pay* is all that's divisible, and that means gross pay less [among other

[2] There are five *Silent Partner* infoletters on the Frozen Benefit Rule, all found at the website of the N.C. State Bar's military committee, https://www.nclamp.gov/publications/silent-partners/.

[3] For more information, *see* "Guidance for Lawyers: Military Pension Division" – a *Silent Partner* infoletter at https://www.nclamp.gov/publications/silent-partners/.

			items] the amount of retired pay waived to receive VA disability compensation.[4]
RIP	*Rest in Peace*	Require Interim Payments	The retired pay center is allowed up to 90 days to process the MPDO for garnishment. 10 U.S.C. §1408(d)(1). Make sure that the pension division order specifies how interim payments will be made by the retiree to the FS, such as by allotment or by EFT [electronic fund transfer from one bank to another].
TGIF	*Thank Goodness It's Friday*	Transmit Government's Important Forms	Be sure you have the essential documents to send to the retired pay center: certified copies of the divorce decree and the order for pension division, as well as DD Form 2293 [the application for payment from retired pay], Form 1059 with voided check [for direct deposit] and Treasury Form W-4P [for tax withholding]. The latter three items must be signed by the FS.
NCO	*Non-Commissioned Officer*	Need Clarifying Order?	When you need to amend, revise or supplement a court order, the instrument recognized by the retired pay center is a "clarifying order".
ICU	*Intensive Care Unit*	"I see you"	Need to obtain info on what the retiree is receiving and the deductions taken from gross retired pay? The retiree can give the FS a Limited Access Password to view online the data at the secure DFAS website. If the SM/retiree refuses, the retired pay center will provide the information to a FS with a pension division order pursuant to 65 Fed. Reg. 43298, which authorizes DFAS to release the data.
SOB	*Son of a Bitch*	Survivor Option Benefit	When representing the FS, be sure to require the SM/retiree to elect former-spouse coverage under the Survivor Benefit Plan [an annuity which continues the flow of payments if the SM/retiree dies first], with full retired pay as the base amount.
DND	*Do Not Disturb*	Don't Neglect Deadlines	The deadline for election of SBP is one year from the divorce date; use DD Form 2656-1, signed by both parties. If the SM/retiree fails or refuses to make a timely election, the FS may submit a "deemed election" within one year from the date of the first court order requiring SBP coverage; use DD Form 2656-10.

[4] For more information, *see* "The Death of Indemnification?" – a *Silent Partner* infoletter at https://www.nclamp.gov/publications/silent-partners/.

DWI	*Driving While Impaired*	DFAS Won't Intervene	The retired pay center will not shift the SBP premium to one party or the other. A party can reimburse the other for the cost, or the parties can adjust one party's share to account for full payment of the premium.
TSP	*Teaspoon*	Thrift Savings Plan	This is a defined contribution program – not a pension. It is divided by awarding a percent or a fixed sum to the payee through a Retirement Benefits Court Order, or RBCO. There is a fee of $600 for submission of the order [whether a draft or a filed copy]. The order may be uploaded on the internet. New regulations were posted in the Federal Register on June 1, 2022.[5]

[5] For more information, *see* "A Teaspoon of TSP" – a *Silent Partner* infoletter at https://www.nclamp.gov/publications/silent-partners/.

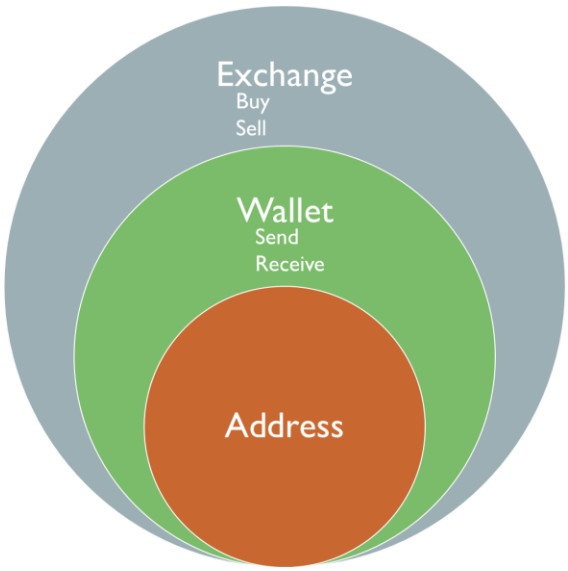
Ask about cryptocurrency on the client intake form: i) describe cryptocurrency holdings you hold or have ever held; and ii) describe cryptocurrency holdings your spouse holds or has ever held.

I. OVERVIEW OF TERMS

Cryptocurrency is a term referring to thousands of different assets such as bitcoin (BTC), ether (ETH), Bitcoin Cash (BCH), and others. Cryptocurrency is a type of asset stored at addresses connected to a wallet. A wallet and its associated addresses generally access only one type of cryptocurrency, with the exception of forks. For instance, a person can hold many bitcoin wallets, each of which can access multiple bitcoin addresses; however, a bitcoin wallet cannot access ether stored at an Ethereum address and an ether wallet cannot access bitcoins stored at a bitcoin address.

Wallets are accessed using a key, generally referred to as a private key; one key can generate and access 2^160 different addresses. One private key can generate many more addresses than the estimated grains of sand on earth.[1] Some wallets also generate additional keys for each subsequent transaction, further compounding the number of public addresses accessible by one wallet. Wallets may also provide the ability to send and receive multiple cryptocurrencies.

An exchange is a third-party provider that offers storage, like a wallet, along with the added ability to buy and sell. Exchanges offer the account holder the ability to access multiple wallets, the ability to send and receive multiple cryptocurrencies, and the ability to buy and sell multiple cryptocurrencies.



Exchange – a third-party provider that allows an account holder access to markets for buying and selling multiple cryptocurrencies and fiat currencies.

Wallet – a group of addresses accessed with a single key. Grouping is not generally visible on public blockchains.

Address – a location on a blockchain that stores an amount of cryptocurrency or executable code, such as a smart contract. Addresses are generally visible on public blockchains.

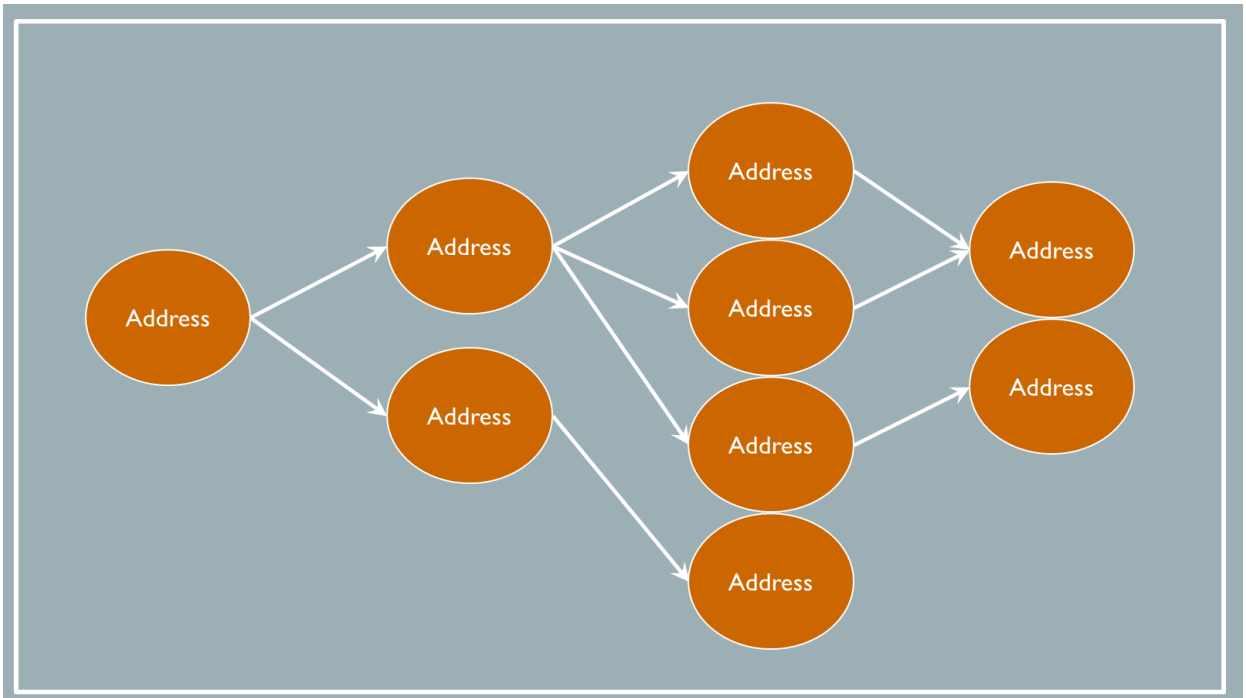
[1] Estimated grains of sand on earth are 7.5x10^18, *Spectrums,* David Blatner, 2012, https://www.npr.org/sections/krulwich/2012/09/17/161096233/which-is-greater-the-number-of-sand-grains-on-earth-or-stars-in-the-sky, as it appeared on Jan. 31, 2021. 2^160 can also be written as 1.4615x10^48.

II. DISCOVERY AND TRACING

Cryptocurrency addresses are not physical boxes in a physical location; they exist only as part of each cryptocurrency's blockchain, which is a collection of data stored at and transactions between addresses. Tools known as block explorers provide the public with a view of different blockchains, although anyone with internet access can also download their own copy.[2] When using a block explorer to search for transactions, results may appear from more than one blockchain. This is because other blockchains listed in the results may be forks of another, older blockchain.

III. FORKS SIDEBAR

The following diagram is a generic view of a blockchain and shows transactions between addresses. A fork is a term that references several different incidents within the blockchain space. Generally, a fork creates a copy of an existing blockchain (separate from that existing blockchain) and creates a new cryptocurrency. At the time of a fork, an amount of the new cryptocurrency is equal to or is some ratio of the original cryptocurrency and it exists on a new, separate blockchain. Eventually it may be used in transactions separate from the original cryptocurrency. For instance, Bitcoin Cash is a fork of Bitcoin and Ethereum Classic is a fork of Ethereum.

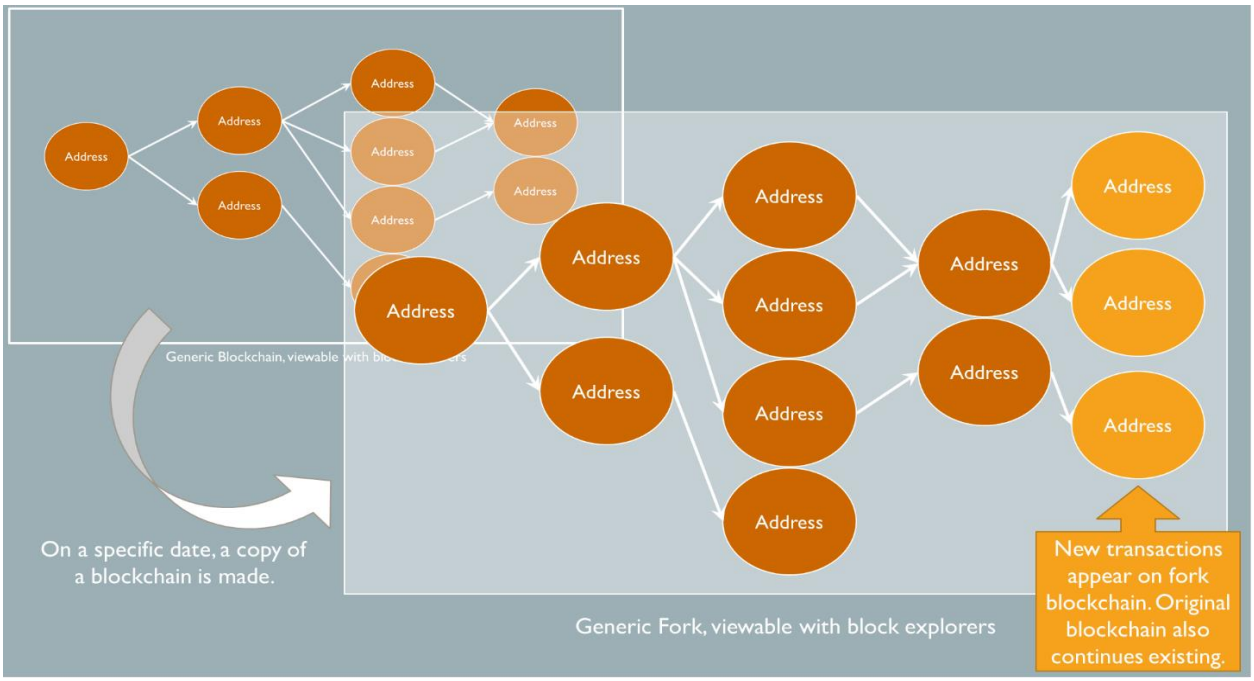


Generic Blockchain, viewable with block explorers

[2] In April 2022, bitcoin's blockchain was 390 gigabytes and expected 15gb/month in growth; by February 2023, it had grown to 456.01 gigabytes. An archive node for Ethereum required 10,800 gigabytes in April 2022 and in February 2023, had increased by an additional two terabytes, to 12,800 gigabytes.

Access to the new forked cryptocurrency is often delayed beyond the fork date, especially when a third-party wallet or exchange is used. Other methods exist to access the new forked cryptocurrency, such as connecting the wallet holding the original cryptocurrency to the new, forked blockchain. This process is known as claiming forks and can put all of the other assets held in that wallet at risk.

In matrimonial disputes, one party may hold the ability to claim forks and may not have done so; these additional cryptocurrencies resulting from forks may have additional value. Because forks exist and because some blockchains are designed to be compatible with others, a single cryptocurrency address may reside on more than one blockchain and may store different assets on each of those blockchains.



IV. BACK TO DISCOVERY AND TRACING

Public block explorers, which are websites providing a view of different blockchains, display information to visitors such as transaction identifiers, dates, times, amounts, fees, and addresses.[3] This information is available to the public for blockchains that are public.[4]

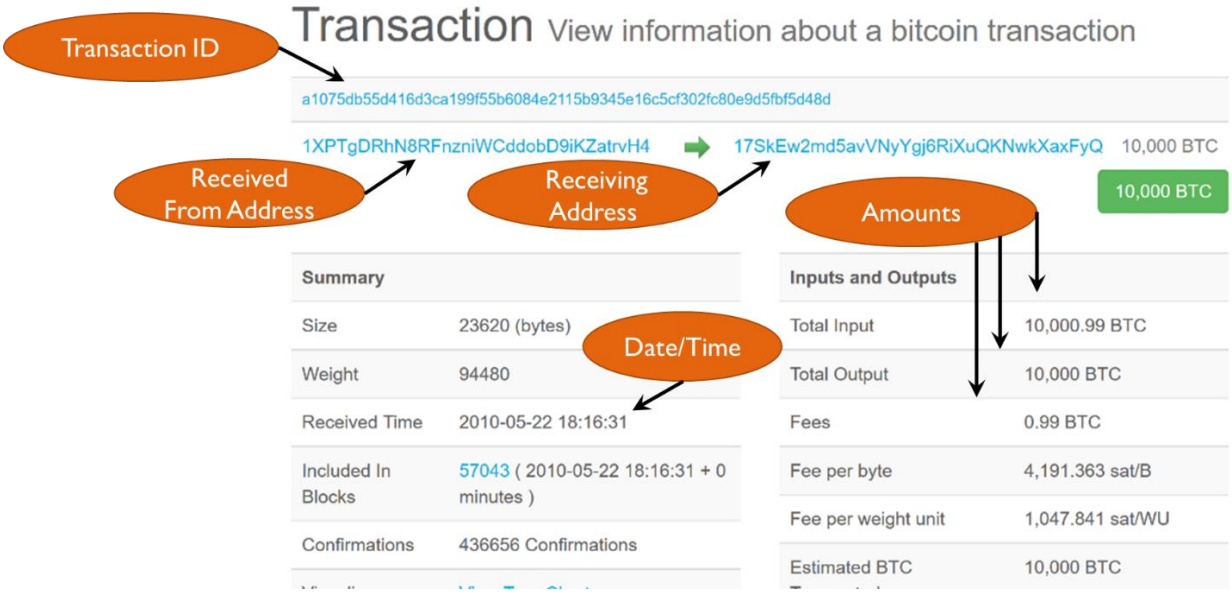
Once indications of cryptocurrency are discovered, an investigator may identify addresses associated to the subject, use public block explorers to validate transaction information provided in discovery, and assist in producing additional discovery requests. This process must be repeated for each cryptocurrency identified, including forks. At the time of writing, over 35 different blockchains exist and over 25,000 different cryptocurrencies are

[3] https://www.blockchain.com/explorer/transactions/btc/a1075db55d416d3ca199f55b6084e2115b9345e16c5cf302fc80e9d5fbf5d48d

[4] Recent industry projects have relied on blockchains that are non-public, which means that read and/or write access has been restricted in some way. The term, public, in the blockchain space means that anyone can participate in both the read and write process of data storage on a blockchain.

transferred on them. Blockchains vary in the types of transactions allowed by and between addresses.

The following figure shows a screenshot of a block explorer and illustrates how the information displayed on this blockchain contains financial information related to the transaction such as the sender, recipient, quantity, fees, a transaction ID, and date and time stamp. This information is traced, aggregated, and summarized along with traditional financial data to determine the quantity and value of assets in dispute.



Users engage with cryptocurrency in many ways including through mining, peer-to-peer transfers, third-party exchanges, and coin offerings (ICOs, SAFT offerings, airdrops).

A. Mining

Miners earn cryptocurrency for participation in a blockchain system (*e.g.* bitcoin miners receive bitcoin fees from transactions and newly minted bitcoins). Fees are earned by miners for their participation and are not generally purchased with cash or another asset. A financial investigation will not show cash output in exchange for bitcoin mining rewards. Indicators of mining may include computers that run loudly and frequently, specialty software installations, specialty equipment, additional cooling equipment, or excessive purchases from retailers who accept bitcoin. If cryptocurrency is earned by mining, all addresses that received mining fees or rewards should be requested; this will allow the expert to verify total digital asset receipts from mining and may allow the expert to determine current disposition and character.

B. Wallets

Wallets enable peer-to-peer transfers; they allow users to send and receive cryptocurrency to and from addresses. All wallets, associated user names, and all associated addresses should be requested in discovery. Some wallet software

providers maintain transaction history within the wallet software so all transaction history associated to any wallet should also be requested.

C. Third-Party Exchanges

Third-party exchanges, such as Coinbase or Kraken, allow users to send, receive, buy, and sell cryptocurrency but, they do not always provide users with all of the addresses used in their transactions. Because these organizations group transactions to conceal senders and recipients, users will have access to some addresses, but not all of them.

If third-party exchanges are involved (and they usually are), all balances from each account as well as all transaction history reports for each account and a list of any addresses generated for use with that account should be requested. These reports may be divided into multiple documents, *e.g.* transfers (send and receive or deposits and withdrawals) and sales (buy and sell), and may be divided among individual holdings, *e.g.* U.S. dollars, bitcoin, and ether. A party may also have used an exchange that no longer exists; in that case, any statements or history of transactions they have, any user names used, any connected bank account information, and an email backup file of the email address associated to the defunct account should be requested.[5] This detail will allow a financial expert to verify transactions through public block explorers, determine property character, and determine property disposition.

Each of these engagement methods indicates that financial data has been generated and can be requested from the subject and from third parties. Some data is also viewable through public block explorers but all of the information is rarely equally available to both parties. Viewing most public blockchains is a straightforward process: navigate to a block explorer website and search for a transaction ID, address, or other identifier. The transactions are also linked so by knowing one address, a person can trace transactions backwards in time and forward to today.[6] However, transactions that occur through exchanges are not readily traceable on a blockchain and some transactions, such as those occurring through decentralized applications (defi, web3, smart contracts, etc.) may contain details that are only accessible by the wallet holder.

For most cryptocurrency and when there are no other indications of asset concealment, providing the addresses involved in storage and transactions along with transaction histories from exchange accounts and wallets is sufficient to determine and verify digital asset holdings. Access to cryptocurrency stored at different addresses is controlled by private keys. Private keys provide direct access to cryptocurrency stored at associated addresses and should not be shared in a public forum, such as court documents. For many wallets, private keys are created from seed words, a set of words displayed to the

[5] Older exchanges issued confirmations of transactions and other notifications by email.

[6] Cryptocurrencies that originate as a fork may have transaction histories that extend into the past beyond their actual creation date.

user when the wallet is created; these seed words should be treated with the same care and privacy concerns as the private key.[7]

Private keys and seed words are not usually required for tracing; however, if an attorney normally asks for login access to bank accounts, asking for private keys and seed words should be a new consideration in the discovery process. Maintaining a high level of security for this information is critical because there are no third parties that can reverse an erroneous transaction or restore the security of a wallet once a private key or seed word list is compromised.[8] *It is my general recommendation to attorneys that they never ask for or take possession of private keys or seed words.*

A template for discovery requests and a template for issuing a subpoena to an exchange is available for download at the GreenVets, LLC website: https://pages.greenvetsllc.com/crypto-analysis.

V. IDENTIFYING APPROPRIATE SKILLS FOR YOUR CASE

Several certifications in cryptocurrency tracing have become available; however, these certifications are awarded by organizations that may not have experience tracing assets, providing testimony, or determining values. Several also rely on specific software released by data aggregation vendors. While specialized cryptocurrency certifications may convey some basic knowledge about cryptocurrency or tracing, traditional financial expertise remains critical in choosing an appropriate expert to assist in asset tracing, valuation, and any other findings such as indications of fraud against the community estate, which are traditional foundational skills for a financial forensics expert.

Cryptocurrency is a financial matter and an expert with financial expertise paired with cryptocurrency expertise is needed – this expertise can be conveyed with credentials or with experience, but the attorney should question the rigor and validity of any credential an expert discloses.[9] Strong credentials are accredited, require an exam, and require continuing education to maintain.

VI. INDICATIONS OF CRYPTOCURRENCY

The simplest indication of cryptocurrency assets is a set of bank account transactions showing the setup of a new account. Notice that this bank account record does not say, “bitcoin purchase”. It simply indicates the setup and funding of a new account at Coinbase. The astute investigator will note all such transactions, then research the identified account

[7] These access controls are similar to the user name and password combination used to log into a bank’s website.

[8] For instance, a bank is a third party that can provide oversight and restoration from a compromise; this kind of protection does not exist in the blockchain space when a person holds their own private keys or seed words and does not use an exchange to conduct cryptocurrency transactions.

[9] A good analogy to expertise requirements is a personal injury case, where a financial expertise foundation paired with specialized knowledge or experience in personal injury models is preferred. Just as being involved in a personal injury incident does not prepare a person to provide financial expert testimony in a personal injury matter, buying and selling cryptocurrency does not prepare a person to provide financial expert testimony about tracing and valuing assets in court. *Full disclaimer: I am a financial forensics expert with specialized cryptocurrency tracing and testifying experience.*

providers to determine if those accounts are cryptocurrency exchanges, payment services, or something else such as PayPal, Venmo, Zelle, Robinhood, Webull, etc.

CHECKCARD 03/01 COINBASE CHEAPSIDE	-350.00	2,208.04
CHECKCARD 03/01 COINBASE CHEAPSIDE	-1.99	2,558.04
CHECKCARD 03/01 COINBASE CHEAPSIDE	-1.94	2,560.03
CHECKCARD 03/01 COINBASE CHEAPSIDE	-1.00	2,561.97
CHECKCARD 03/01 HUGS & DONUTS HOUSTON TX	-18.01	2,562.97
CHECKCARD REVERSAL 03/01 COINBASE CHEAPSIDE	1.00	2,580.98

Another indication of cryptocurrency asset holdings is an increase in goods or services from vendors who have accepted cryptocurrency. Peer-to-peer websites for the exchange of goods and services, such as Craigslist.org, also provide users with the ability to select an "Accepts Cryptocurrency" option.

Thousands of third parties, including retailers, grocery stores, political parties, gambling websites, intermediary payment services, internet services like cloud storage and website hosting, and many more accept cryptocurrency as a form of payment.[10] In addition, cryptocurrency users can purchase gift cards with cryptocurrency and then use those gift cards at their selected retailer. An increase in gift card purchases and use is another indication of cryptocurrency assets.

Other indications of cryptocurrency assets can be found in tax filings, in forms related to depreciated or amortized equipment, in forms related to capital gains (including Form 8949), in forms related to asset transfers (including Form 1031), and elsewhere. Since 2014, the IRS has offered guidance on reporting cryptocurrency and since 2019, the IRS has offered guidance on reporting cryptocurrency forks. If appropriate tax filings do not exist for the subject and his or her cryptocurrency holdings, another level of liability (past due taxes, restatements, fees, and fines) may need to be considered as part of the financial assessment.

VII. DISCLAIMER

This overview is just that, a simplified overview to increase comfort levels with cryptocurrency. It does not substitute for professional, legal, tax, or financial advice. There are caveats, exceptions, and pitfalls to cryptocurrency tracing, valuation, and transfer. Next to concealment, two of the biggest considerations in disputes are tax implications and forks. Simplistic value calculations such as *Price at Date x Volume* may not be appropriate for all cryptocurrency holdings or for litigation but may be sufficient for

[10] https://decrypt.co/34191/everything-you-can-buy-with-bitcoin-right-now and https://hackernoon.com/who-accepts-bitcoin-3e134153ba78 , as accessed on Jan. 31, 2021.

settlement discussions and for market value if the assets in question are liquid. Experts should have the financial forensic expertise and/or valuation expertise to determine appropriate asset values and convey the difference in valuation methods; these are the same qualifications and requirements as traditional financial experts. Cryptocurrency certifications or credentials are not substitutes for financial expertise and may not convey essential knowledge appropriate for testimony in a financial field.

Since the 1980s family courts adjudicating custody disputes have preferred appointment of neutral experts to complete child custody evaluations over the traditional legal practice of allowing each side to present evidence through privately retained experts. Neutral, court-appointed evaluators have been preferred based upon an assumption that their neutrality is less likely to be influenced by either attorney and that their neutrality should allow for better focus on the best interests of the child rather than the perspectives of the parents (Schepard, 2004). Experience has taught us that even court-appointed evaluators can become biased, fail to contact important sources, misinterpret test results, or lack knowledge about the research on the needs of children of divorce or separation (Gould, 2004). Too often, evaluators focus on the parents' conflict rather than on the best interests of the children (Ackerman *et al.,* 2019). The best interests of children are ill-served when decisions by the trier of fact are based upon biased, flawed, incomplete reports (Gould, 2004). While child custody evaluations play an important role in assisting family courts working to resolve disputes over the best interests of the child, considerable controversy exists among legal and mental health professionals about the utility of these evaluations, how they should be conducted, and how they should be weighed by courts.

Family law attorneys have begun to voice more publicly their frustration with the poor quality of reports completed by child custody evaluators. In 2004 in New York, in response to much publicly expressed discontent, Chief Judge Judith S. Kaye appointed a Matrimonial Commission to review all aspects of matrimonial litigation and make recommendations for improving how the courts handle such litigation in both Family Court and Supreme Court (Miller, 2006).

In 2012, attorney Joy Feinberg voiced concerns about the poor and inconsistent quality of child custody evaluations that she and many of her attorney colleagues have begun to voice with increasing frequency:

> Attorneys helped to create the cottage industry of child custody evaluations as early as the 1960's. Both courts and attorneys desperately wanted guidance from mental health professionals to better the lives of children caught in their parents' divorce. By 2012, when the **quality and value** of child custody advisory reports has been consistently attacked, the attorneys and judges who are consumers of your work – will seek to end the child custody assessment cottage industry unless it improves significantly – moving beyond personal beliefs and bias to scientific and factual based opinions. Without quality work product, there is little need to have psychological evaluators in the system.

Results from a 2011 study of the concerns attorneys have about child custody evaluations found that attorneys' most frequent complaints about child custody evaluations "focused on [the] evaluator's indecisiveness, illogical conclusions, ignorance regarding the Best Interests of the Child Standard, and making or not making recommendations" (Bow, Gottlieb, & Gould-Saltman, 2011, pp. 306-307).

The child custody community has identified numerous concerns about evaluations and their uses in court. More professionals, at all educational levels, are performing child custody evaluations without having obtained formal training. Many practitioners are performing evaluations that do not meet the needs of the courts that have appointed them. With increasing frequency, judges have expressed concern over the poor quality of the reports being submitted to them by evaluators;

and problems with the custody evaluation process have become the subject of front-page articles in newspapers as prestigious as *The New York Times* (Eaton, 2004).

In addition, evaluation practices involving familiar but unreliable methods and procedures designed for clinical rather than forensic use are commonplace (Garber & Simon, 2018; Otto, 2012; Rappaport, Gould, & Dale, 2018). Many view the varying quality of child custody evaluations, both locally and nationally, as a problem that devalues evaluators and evaluations, and may lead courts to order fewer evaluations. Evaluations of inconsistent or unpredictable quality are often not helpful. Given the stakes involved in addressing the needs of children from divorcing and separating families, courts, the families in court, and the other professional consumers of child custody evaluations have a right to expect a higher level of competence from forensic mental health professionals who market themselves as experts.

As dissatisfaction with the work of custody evaluators has grown, more and more attorneys have turned to privately retained mental health experts to approach the task of challenging, or defending, the findings and recommendations of court-appointed evaluators.

Child Custody Evaluations: The Most Complex of Evaluations

Child custody evaluations can be more consistent, more predictable, and more helpful if scientific principles and methods are used by the evaluator (Gould, 1998, 2006; Gould & Mulchay, 2023). Scientific method refers to "the rules or standards and community practices by which science proceeds." (Ramsey & Kelly, 2004, p. 5) Both hard science and the social sciences employ the scientific method to produce knowledge (Ramsey & Kelly, 2004).

Scientific methods and procedures are intended to reduce human error. When conducting child custody evaluations, evaluators need to be more concerned with scientific method and process. The scientific methodology used in forensic mental health assessment, in general, and used in child custody evaluations, in particular, places a high value on intellectual honesty. Being as objective and scientific as possible includes an explicit acknowledgement that our beliefs could be wrong and that the scientific process with its emphasis on considering rival alternative hypotheses is designed to protect us from fooling ourselves (Lillenfeld, 2010).

Because child custody evaluations are viewed as the most complex and difficult type of forensic evaluation (Otto *et al.,* 2000), they may be particularly vulnerable to use of poor methodologies and different kinds of biases. This complexity can also make these evaluations difficult for attorneys to understand. In contrast to most examinations that focus on evaluating one person, the typical child custody evaluation involves examination of a number of persons (*e.g.,* mother, father, child or children, and potential or actual stepparents) and interviews with additional collateral informants. Emotions in cases of contested custody typically run high, further compounding what is an already complicated evaluation process (Otto *et al.,* 2000). The high emotions often affect how parents behave during interviews, how they respond to psychological tests, and how they communicate with their children. Parents often attempt to paint an overly positive picture of themselves, a more negative picture of the other parent, and a glowing description of the children's experiences with them (Hynan, 2014).

Given the profound importance of the underlying psycholegal issues (*i.e.,* the best interests of the children and the ability of the parents to meet those interests), the parents, children, and other caretakers must be assessed regarding a variety of behaviors, capacities, and needs. These factors affect not only parent behavior but also the evaluator's ability to accurately assess the family dynamics and assist the court in developing a parenting plan for the families' future.

Forensic mental health evaluators can easily underestimate the prevalence and severity of distorting influences on their work without developing the correct safeguards for minimizing distorting biases.

Scientifically Informed Guidelines and Standards for CCEs

"Science" is a central tenet of psychological practice. "In explaining, predicting, and controlling the world around us, science is by far the most powerful intellectual technique known." (Faigman, 2002, p. 47)

Understanding human behavior begins with the development of systematic procedures used for reliable observation and recording. When child custody evaluators attend to the methodological integrity of their data gathering process, the court is able to place greater weight on the scientific foundation of the evaluation process (Ramsey & Kelly, 2004). What is scientific includes both process and fact.

> Science is not an encyclopedic body of knowledge about the universe. Instead, it represents a *process* for proposing and refining theoretical explanations about the world that are subject to further testing and refinement (American Association for the Advancement of Science and the National Academy of Sciences, 1993).

The task of Federal Rule of Evidence 702 may be best understood as regulating the supply of facts to the judge "in a manner that states a preference for science as the preeminent methods for discovering facts." (Faigman *et al.,* 2002, p. 47) **One important task of a child custody evaluator is as a gatekeeper of reliable psychological data upon which the court may rely.** The reliability that comes from scientifically informed processes is the foundation for both psychological investigation and expert psychological testimony.

Best practice guidelines illustrate how scientific principles can be applied to specific tasks. Reviewers should have intimate knowledge of the relevant guidelines and standards for custody evaluations. These include, but are not limited to, the APA's *Ethical Principles of Psychologists and Code of Conduct* (APA, 2002; 2017), *Guidelines for Child Custody Evaluations in Family Law Proceedings* (APA, 2022), *Standards for Educational and Psychological Testing* (APA, 1985, 1999), and *Record-Keeping Guidelines* (APA, 1993); *The Specialty Guidelines for Forensic Psychology* (American Psychological Association, 2011); and the AFCC's *Guidelines for Parenting Plan Evaluations in Family Law Cases* (AFCC, 2022).

Using Science to Maximize Reliability and Minimize Bias

Experts retained to review the work product of an evaluator can provide the retaining attorney with candid input concerning the strengths and deficiencies of the evaluator's work. A comprehensive review of an evaluation can offer commentary on the methodology employed, the assessment devices utilized, the interpretation of assessment data, and the nexus between information gathered and opinions expressed. In this way, privately retained consulting and testifying experts can help attorneys assure that the most reliable and trustworthy data based upon the professional and scientific knowledge of the child custody profession can be presented in court.

The most common service, and usually the first service, provided by privately retained experts consists of a review of the work product of the court-appointed evaluator. A review usually occurs after an attorney perceives potential problems with the evaluator's methodology, signs of bias

affecting the work product, or that the opinions do not seem to correspond with the facts and circumstances of the case. A reviewer assesses the strengths and weaknesses of a forensic evaluation and the evaluator's report, then communicates findings back to the retaining attorney. Such reviews often serve as a valuable check on the quality and influence of the court's evaluator.

Work product reviews conducted by psychologists in custody and parenting time disputes should be written in a manner that focuses on the reliability and relevance of the information gathered during the evaluation, the manner in which the evaluator integrated current professional and scientific knowledge of the discipline into the body of the report, and the degree to which the expert opinions proffered in the evaluation appear logically or scientifically related to the collected data. A reviewer can examine three broad areas and, within each of these, several specific elements: (1) methodology, (2) formulation of opinions, and (3) communication of findings and opinions to the court.

In examining an evaluator's methodology, a reviewer may develop opinions about the court-appointed expert's methodologies. Below are 12 dimensions or factors that may be the focus of a review:

1. The use (or lack thereof) of appropriate procedural safeguards. Issues in this category include ascertaining whether the purpose of the evaluation, the scope of the evaluation, those to whom the report is to be disseminated, the manner in which the report is to be disseminated, and those to whom the file will be made available have all been specified in writing in advance of the evaluation. Additionally, such issues as the sequence in which evaluative sessions have been conducted should be examined.

2. The techniques employed in interviewing the parents. The reviewer seeks to ascertain whether systematic procedures were employed that would increase the probability that the evaluator will obtain pertinent historical information and current information bearing on functional abilities related to parenting and will not be distracted by information that is not pertinent to the evaluative task.

   Although there is little empirical examination of forensic interviewing of parents engaged in child custody evaluations, the evaluator should gather information sufficient to address the specific questions guiding the evaluation. The specific questions should be identified either in the court order or in correspondence from the attorneys (Gould & Martindale, 2011).

   The reviewer should examine whether the evaluator asked each parent about the allegations posed by the other parent and what additional collateral sources might help support his/her position. The reviewer should also examine whether evaluator asked each parent to address reasonable alternative explanations (plausible rival hypotheses) and their view of how their proposed solutions serve the best interests of their children.

3. The manner by which information has been obtained from children. The reviewer examines the interview techniques that were employed, to see whether they were tailored to the cognitive development and expressive and receptive language abilities of the child. Additionally, the reviewer considers the reliability and validity of any special techniques employed.

The reviewer might inquire about any video or audio tape recordings of the child interviews. Significant research has revealed threats to reliability from notetaking and from attempts to accurately recall who said what during an interview.

4. The methods employed in conducting observational sessions between the two parents and between each parent and the children. In order to be maximally useful, observations should be conducted in some systematic manner, evaluators should know in advance what types of information they wish to gather, and whatever data are gathered should be gathered in a structured manner.

   The reviewer should examine whether the parent-child observations were structured in a manner to gather information useful in answering the specific questions guiding the evaluation. The reviewer should also explore whether the evaluator was engaged in the parent-child observation, thereby changing the parent-child observation to a parent-child-evaluator observation and/or what steps the evaluator took to minimize involvement in the observational interactions.

5. The extent to which pertinent documents were utilized by the evaluator. Evaluators must take great care not to view certain types of documents as constituting verification of oral reports from litigants. Some documents presented to evaluators are no more than written records of oral reports made earlier to different people.

6. The manner in which the evaluator selected collateral sources of information, obtained information from those sources, and assessed the reliability of the information obtained. Austin and Kirkpatrick (2004), for example, have called attention to the fact that as psychological distance from the custody dispute increases, so, too, does objectivity. School personnel are likely to provide more objective information than neighbors. Evaluators who limit their collateral source inquiries to those who are deemed to be objective are likely to overlook information that, despite its delivery by subjective sources, is nevertheless potentially enlightening.

7. The methods employed by the evaluator to corroborate information that he or she relied upon. Despite overwhelming evidence that psychologists are not particularly impressive as human lie detectors (DePaulo, Charlton, Cooper, Lindsay, and Muhlenbruck, 1997; Ekman and O'Sullivan, 1991; Feeley and Young, 1998; Frank and Feeley, 2003), far too many evaluators trust their clinical intuition to tell who is being forth-right and who is being disingenuous. The reviewer should examine which parent assertions were verified through third party information.

8. The criteria employed in the selection of assessment instruments. Although in some jurisdictions the criteria to be employed in assessing custodial suitability are statutorily defined, in many jurisdictions, evaluators must decide for themselves what constitutes effective parenting and what observable indices can be utilized.

9. The manner in which assessment instruments were administered. Evaluators should administer assessment instruments in accordance with the instructions in the manuals that accompany the instruments and should be responsive to the admonitions that appear in the *Standards for Educational and Psychological Testing* (APA, 1985, 1999).

10. The accuracy of the evaluator's scoring and interpretation of assessment data. Many evaluators have become dependent upon computer-generated interpretive reports,

despite the clarity of Ethical Standard 9.09(c), which reminds psychologists that they "retain responsibility for the appropriate application, interpretation, and use of assessment instruments, whether they score and interpret such tests themselves or use automated or other services." (p. 1072) Millon, Davis, and Millon (1997) have called attention to the unfortunate reality that computer-generated interpretive reports have certain intrinsic difficulties, most notably a lack of substantial empirical data to validate which the computer generates its report leads to a product that is inadequately individualized, or "canned." (p. 134)

11. Degree to which the evaluator engaged in activities that protected the integrity of the evaluation process. Model standard 8.1 of the AFCC's *Custody Guidelines* (AFCC, 2022) calls attention to the fact that "[t]he responsible performance of a child custody evaluation requires that evaluators be able to maintain reasonable skepticism, distance, and objectivity." Evaluators are reminded that "their objectivity may be impaired when they currently have, have had, or anticipate having a relationship with those being evaluated, with attorneys for the parties or the children, or with the judges." When forensic psychological activities introduce bias or potential bias or when such activities introduce conflicts of interest, have not been respected, reviewers can call attention to the ways in which evaluator objectivity may have been impaired as a result.

12. The evaluator's compliance with ethical standards, laws, and regulations governing the creation, maintenance, and production of appropriate records. Although it is not the task of a reviewer to pass judgment on the ethical propriety of an evaluator's actions, a knowledgeable reviewer can cite sections of ethics codes and similar documents and explain their pertinence to actions (or failures to act) on the part of the evaluator.

Neal, Slobogin, Saks, Faigman, & Geisinger (2019) recently reviewed the use of psychological assessment tools in the courtroom and concluded: "We find that many of the assessment tools used by psychologists and admitted into legal contexts as scientific evidence actually have poor or unknown scientific foundations. We also find few legal challenges to the admission of this evidence. Attorneys rarely challenge the expert evidence and, when they do, judges tend not to subject psychological assessment evidence to the legal scrutiny required by law." (Neal *et al.,* p. 155)

Neal *et al.* reported that there is no relationship between the psychometric qualities of a test and its likelihood of being challenged in court. Their data suggested that some of the weakest tools tend to get a pass from the courts. "Our bottom-line conclusion is that evidentiary challenges to psychological tools are rare and challenges to the most scientifically suspect tools are even rarer or are nonexistent." (p. 154)

The scope of a reviewer's task is limited and should not be confused with the work of a practitioner conducting a second evaluation. If a reviewer identifies deficiencies in an evaluator's work, the reviewer's task is to articulate those deficiencies and explain why they may have had a significant impact on the process of formulating the opinions that have been communicated to the court by the evaluator in his or her advisory report.

Reviewers cannot opine responsibly on the ultimate issues before the court. Reviewers can call attention to methodological errors, flawed data analyses, and opinions that are not linked to the reported data. They can also point out that sound methodology increases the probability of formulating a supportable opinion and deficient methodology increases the probability of formulating a questionable opinion. No responsible reviewer would deny, however, that in all fields

of endeavor, satisfactory solutions to simple and complex problems have been stumbled upon by individuals who were utilizing substandard methods and unproven problem-solving strategies.

Privately Retained Experts

Attorneys responding to the court's increasing reliance upon social science evidence often engage mental health experts. In addition to offering consultation with the attorney about the quality of forensic mental health evaluations, mental health professionals often provide litigation support for the attorney, educational and emotional support for the client/parent, testimony at trial, or some combination of these activities (Dale & Gould, 2014). Effectively adding an expert mental health consultant to the litigation process requires that the attorney understand not only how the consultant might help develop the factual goals, themes, and theory of the case. Privately-retained experts need to understand that integrating their expertise into an attorney's trial strategy requires familiarity with jurisdiction-specific rules of civil procedure and the rules of evidence regarding attorney-expert communications.

Of particular relevance are the protections of attorney-client privilege and work product doctrine, the extension of these protections to the work of experts, and how these issues impact attorney-expert communications and conduct. States have followed the lead of federal courts in extending a derivative privilege to experts if, as agents of the attorney, their communications with the client assist the attorney in rendering legal advice. For the expert to successfully claim a derivative privilege, four elements must be established with respect to the expert's communications. In determining questions about derivative privilege, courts may also inquire into the purposes for which the expert is retained and how the expert has gone about collecting information for transmission to the attorney. The expert will most likely establish derivative privilege (1) if retained by the attorney rather than by the client, (2) if the communication is with the attorney or client and is confidential, and (3) if the expert's assistance helps the attorney render legal advice. When the expert is paid by the client or the expert's communications involve something other than assisting the attorney in rendering legal advice, courts are unlikely to establish the communication in question as privileged.

Ethics for Privately Retained Experts

Like all witnesses, experts take an oath "to tell the truth, the whole truth, and nothing but the truth." The testifying expert's testimony must prove helpful to the court. Unlike the retaining attorney's duty to the client, no testifying expert has any duty of advocacy to either the retaining attorney or party. Experts, regardless of who has retained them, must always strive for accuracy, honesty, and truthfulness. They must resist partisan pressures and impartially weigh all data, opinions, and rival hypotheses.

A retained expert has a responsibility to accurately present to the court a fair and balanced explanation of the professional and scientific knowledge of the discipline. Whether a neutral evaluator or a retained expert, once on the stand the expert's responsibility is to accurately represent the field, not the client. **The expert witness can advocate for a particular position but also must be prepared to discuss the strengths and weakness of that position and to explain how reasonable alternative hypotheses were considered and why they were rejected.**

Just as incompetent evaluators leave damage in their wake, so, too, do incompetent reviewers. In the portion of the psychologists' ethics code that addresses the issue of competence, psychologists are reminded that they should provide services only within the boundaries of their

competence, based on their education, training, and supervised experience. When assuming forensic roles, psychologists are or become reasonably familiar with the judicial or administrative rules governing their roles [Ethical Standard 2.01(f)], they must "undertake ongoing efforts to develop and maintain their competence" (Ethical Standard 2.03), and their work must be "based upon established scientific and professional knowledge of the discipline." (Ethical Standard 2.04)

Experts who have been retained by one side are often disparagingly referred to as "hired guns." Those who view themselves as dedicated educators often find that they must contend with the hurdle that is created by the negative stereotype. The phrase *ethical review work* is not an oxymoron. Ethical reviewers provide feedback that addresses both the strengths and the deficiencies of the work that has been reviewed. Retaining attorneys then get to decide how, if at all, the expert can be of additional assistance.

Good reviewers are perpetual students. They follow developments in the field, as reported in peer-reviewed professional literature, and they draw upon the knowledge base of the field of psychology. They do not simply compare the work under review with their own favorite way of conducting evaluations. Skilled and ethical reviewers are knowledgeable and familiar with applicable research, able to discern the difference between sound methodology and flawed methodology, and able to interpret test data without computer-generated interpretive reports.

Not surprisingly, knowledge and an active mind led to the formulation of opinions. Inevitably, there will be times when an opinion formulated by a reviewer concerning the methodology employed by an evaluator will turn out to be the opinion that a particular attorney wants a judge to hear. When the ethical reviewer is paid to come to court and explain that opinion to the judge, the reviewer is being paid for time expended and nothing more. The ethical reviewer takes seriously the most basic obligation of an expert witness – the obligation to assist the trier of fact.

Biases in Child Custody Evaluations

In the child custody arena, experts often serve two primary functions. One function is to assist attorneys behind the scenes as a trial consultant. A second function is to provide testimony to the court. For both functions, experts are considered experts precisely because they have developed special abilities or what the law refers to as specialized knowledge. This specialized knowledge is believed to enable experts to perform at much higher levels than non-experts and novices (Dror, 2011). Expertise is conceptualized as a continuum with different levels of performance abilities rather than a dichotomy, suggesting a range of levels of expertise.

Experts develop special abilities and knowledge acquired over time and with repeated exposure to the tasks they perform. They develop schemas that frame the information into relevant and non-relevant information. They develop strategies to detect relevant information and ignore and filter less relevant information (Dror, 2011).

The efficiency and effectiveness in information processing and problem-solving that comes from development of these mental representations and schema come at a cost. These mental representations and schema serve as cognitive processing gatekeepers, allowing some information into the cognitive processing apparatus and keeping other information out of that cognitive processing. Experts learn to consolidate and integrate complex mental operations into a unified routine and the automatic quality of those operations function at a level that is seldom within awareness (Dror, 2011). That is, the manner in which we develop specialized knowledge as experts brings with it a tendency to selectively attend to some information and selectively exclude other information. “The brain changes that occur with expertise reflect optimization of the

brain to carry out cognitive information processing needed for specific expert performance." (Dror, 2011, p. 181) These automatic processing functions, needed as they are for optimal performance, introduce different types of potential errors. Among the errors scientifically informed procedures intend to minimize are confirmatory bias, confirmatory distortion, primacy and recency effects, selective attention to data and other types of bias (Drozd, Olesen, & Saini, 2013; Kahneman, 2011).

Scope of Testimony & Credibility Management

It must be stressed at the outset that reviewers often do not testify. After having conducted a review, the reviewer may often function as an unidentified consultant to the retaining attorney. Ordinarily, in order for reviewers to assist attorneys who have retained them as consultants or to assist triers of fact if the reviewers ultimately offer testimony, reviewers must be familiar with the contents of evaluators' files. In most review work, though a reviewer's preliminary impressions may appropriately be formulated based upon a reading of the report submitted by the evaluator, going forward necessitates having access to the file. Appointment orders, pleadings, evaluators' statements of understanding, contemporaneously taken notes, documents reviewed, and test data are all important.

A first step is to review the report without asking to review the file. There are times when after reading the report, it is relatively clear that the report is adequate, methodology is appropriate, and conclusions drawn from the data seem reasonable. In such situations, it might be appropriate to explain to the retaining attorney that the report appears satisfactory.

Discussion may follow in which the retaining attorney explains how relevant information in the file was excluded from the report and that without file review, it would be unlikely for the reviewer to recognize potential flaws in the custody evaluation. Other times, the attorney might indicate that the evaluator has appropriately identified the relevant information from the file and discussed these data in the report. Decisions are then made about whether it is cost effective for the reviewer to spend time analyzing the evaluator's file.

In some situations, full file reviews are not necessary. Triers of fact can often benefit from educational testimony offered by forensic psychologists whose expertise in methodology enables them to offer useful commentary on the evaluative methodology described by experts in their reports. In such situations, reviewers focus their attention on the information provided by the evaluators in their reports and the reviewers formulate their opinions based upon the evaluators' own information. Reviewers need to be mindful, however, that a frequent challenge on cross-examination points out the reviewer's lack of knowledge of the underlying data upon which the evaluator's report is based.

When there appears to be flaws in the report or it appears some data have been disregarded or neglected, a full file review is performed. Reviewers should not limit their examination of the file to those items identified by evaluators as having played a role in the formulation of their opinions. Particularly when retaining attorneys assert that information provided to the evaluator appears not to have been utilized, that information should be examined with care. It may be as important to review information *excluded* from the report that is in the evaluator's file as it is to review the information that is *included* in the evaluator's report and file.

Reports are most useful when they address the issues of methodology, formulation of opinions, and the communication of findings and opinions to the court. Reviewers should describe the manner in which they were retained, the nature of their assigned task, and the items examined in

formulating their opinions. In discussing the limitations inherent in the review process, reviewers should make it clear that they have had no significant contact with the litigants or with others involved in the evaluative process (aside from attorneys). Reviewers are educators to the attorneys who retain them and, if they testify, to the judges who hear their testimony. For this reason, reviews should contain citations to current peer-reviewed published literature and should provide clear explanations of any criticisms registered (Gould & Martindale, 2008).

There is no consensus in the child custody literature about how best to present information in a written review of another colleague's child custody report. We have structured our written reviews to follow the logical steps taken by attorneys in a *Daubert* challenge.

As a reviewer approaches writing a report, it is important to keep in mind that courts, especially courts operating in *Daubert* and *Daubert*-like jurisdictions, recognize the value of scientific process as the basis of data gathering, data analysis, and opinion development.

> A "key question" is whether the theory or technique can be (and has been) tested. . . Scientific methodology . . . is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry" (*Daubert* at 594).

The first step in writing a review is establishing the basis for the review. We discuss the psychological ethics, professional practice guidelines, peer-reviewed literature, and workshops that support the role of a psychologist reviewing the work of a colleague.

A next step is to address the statutory, regulatory, or standard of care criteria that might exist in the state in which the court order was issued. In several states, a fundamental assumption in assessing the reliability of expert opinion testimony is whether the expert complied with a particular mandated statutory, regulatory, or standard of care. Mandated compliance with statutory, regulatory, or standard of practice criteria is a necessary but not sufficient component of an examination of reliability for expert testimony. Some courts have found that expert opinions that did not consider regulatory performance standards are unreliable and therefore inadmissible. Other courts have determined that, for expert testimony to be viewed as reliable, it must be predicated on "proper legal concepts" governing standard of care.

A third step is to discuss the evaluator's qualifications. The reviewer might look at the evaluator's resumé and request that the retaining attorney obtain from the evaluator a list of continuing education courses taken in the past five years with particular attention to CE courses related to child custody assessment. If the evaluation's focus was on an area requiring specialized knowledge such as relocation, resist-refusal dynamics, or transgender concerns, does the evaluator's background suggest specialized knowledge in those areas relevant to conducting this particular evaluation? Although the reviewer should be careful not to be perceived as venturing into judicial decision-making about whether the evaluator is qualified to testify in this trial about these particular issues, a critical review of an evaluator's credentials, education, and training can help answer the question: "Does the witness have enough expertise to be in a better position than the trier of fact to have an opinion on the subject?" (McGrady at 889)

A fourth step of a written review is examination of each of the data gathering procedures employed in the evaluation. A review of parent interviews, child interviews, and collateral interview data should focus attention on whether the evaluator gathered sufficient relevant information to answer questions guiding the custody evaluation. If there are no questions identified by the court or the attorneys to guide the evaluator's investigation, it might be important to comment about how the

lack of specific questions to guide the evaluation makes it difficult for the reviewer to know – and likely difficult for the court to determine – what the evaluator considered relevant and whether sufficient relevant data were collected during the evaluation.

When there are no specific questions to guide the evaluation, we believe there are three options to address. These options are not mutually exclusive. One option is to discuss the state's best interest criteria that is most often defined in statute or case law. The primary question to be answered is whether the evaluator has gathered sufficient information from multiple sources to address each of the best interest factors.

The second option is to discuss the state's statutes that control conducting child custody evaluations. Some states have statutory requirements defining how to conduct evaluations, what factors must be assessed, how to present the information in reports, and other requirements. The primary questions to be answered are whether the evaluator has gathered sufficient information from multiple sources to address each of the child custody factors and whether the evaluator has conducted the evaluation in a manner consistent with the statutory requirements. For example, in the State of Texas, one required question is whether the evaluator took steps to verify from independent sources statements made by the parties during their interviews.

The third option is to discuss the factors to be assessed in a child custody evaluation as recommended in professional practice guidelines such as those promulgated by the American Psychological Association (2022) and the Association of Family and Conciliation Courts (2022). The primary question to be answered is whether the evaluator has gathered sufficient information from multiple sources to address each of the recommended child custody factors.

A fifth step of a review is the evaluator's selection, administration, scoring, and interpretation of psychological tests. Survey research revealed many colleagues continue to use assessment tools with weak or non-existent psychometric integrity. "The forensic use of psychological tests needs, not only research support on the specific application but also clarity in demonstrating the best interest of the child or children. In other words, forensic custody testing needs to have the type of research support of risk assessment now commonly part of police investigations and court proceedings." (Posthuma, 2016, p. 67) The most recent survey data suggest child custody evaluators are more mindful of administering psychological tests perceived to be capable of surviving a *Daubert* challenge (Ackerman, Bow, & Mathy, 2020).

When examining how psychological tests were used in courtrooms across the country, Neal *et al.* (2019) reported that nearly all of the assessment tools used by psychologists and offered as expert evidence in legal settings have been subjected to empirical testing (90 percent). However, only about 67 percent were identified as generally accepted in the field and only about 40 percent have generally favorable reviews of their psychometric and technical properties in authorities such as the Mental Measurements Yearbook. Furthermore, Neal *et al.* (2019) reported that legal challenges to the admission of psychological test results are infrequent. They found legal challenges to the assessment evidence for any reason occurred in only 5.1 percent of cases in their sample with a little more than half of these challenges focused on the validity of the test. When challenges were raised, they succeeded only about a third of the time. Challenges to the most scientifically suspect tools were found to be almost nonexistent. Neal *et al.* reported that there is no relationship between the psychometric qualities of a test and its likelihood of being challenged in court. Their data suggested that some of the weakest tools tend to get a pass from the courts. "Our bottom-line conclusion is that evidentiary challenges to psychological tools are rare and challenges to the most scientifically suspect tools are even rarer or are nonexistent." (Neal *et al.,* 2019, p. 154)

Another important finding in the Neal *et al.* study was the lack of context-validation studies of the psychological tests being used by psychologists in forensic cases. This refers to the practice of using psychological tests for purposes other than what they were intended to be used. A test developed for one purpose may not be appropriate to be used for a different purpose or in another context. Data need to be available demonstrating the test's reliability and validity when used with the population under scrutiny. That is, are there data to support an evidence-informed understanding of the meaning of test results with a particular population? The Minnesota Multiphasic Personality Inventory in its various iterations (*i.e.,* MMPI, MMPI-2-RF, and MMPI-3), Personality Assessment Inventory (PAI), Millon Clinical Multiaxial Inventory, 3rd Edition (MCMI-III), and Parenting Stress Index, 4th Edition (PSI-4) have normative data describing male and female custody litigants' performance. Similar data should be available for each of the measures employed by the evaluator.

It is critical to look at the nature and quality of the psychological test data. It is dangerous to assume that use of reliable data gathering techniques will yield relevant information. Reliable data gathering techniques such as psychological tests may yield inaccurate or incomplete information. The use of psychological tests in forensic assessment remains somewhat controversial (Rappaport *et al.,* 2018). The evaluator's ability to explain to the court the relevance of each test selected for use in the assessment might be a useful area to explore.

Recall the 1971 U.S. Supreme Court decision in *Griggs v. Duke Power Company*,[1] a matter only remotely related to custody evaluations but with important implications for evaluators and their choice of tests. The *Griggs* case focused on industrial tests used for the purpose of guiding decisions regarding employment, placement, or promotion. The *Griggs* court declared that our assessment "devices and mechanisms" must be demonstrably reasonable measures of job performance (p. 436) and held that "what Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract." (p. 436). The italicized words are critical: Individuals who employ psychological tests must "measure" and describe only those aspects of the person that relate directly to the job for which the person is being evaluated (Gould & Martindale, 2011).

The lesson that custody evaluators can take from the *Griggs* decision is that our attempts to assess the characteristics that bear directly upon parenting are more likely to meet with success if we conceptualize parenting as a job and focus our attention on those attributes, behaviors, attitudes, and skills that are reliably related to the demands of the job. Examining an attribute in the absence of evidence of its connection to parenting effectiveness leaves an evaluator open to criticism on several fronts (Gould & Martindale, 2011). The application of *Griggs* to review of an evaluator's selection of tests pertains to relevance. Some evaluators select assessment techniques that measure behaviors that are not relevant to parenting.

No doubt forensic evaluators need to be aware of the various types of malingering and deception that litigants might bring to bear on psychological testing. Not all tests of malingering, however, are used for all situations. Some specific peer-reviewed literature addresses measures of malingering and deception commonly used in child custody evaluations (Gould, Flens, & Rappaport, 2018). Research findings over more than 60 years demonstrate little validity to the idea that a person can make reliable judgments of another person's credibility in face-to-face interviews. "The evidence from many experimental studies is remarkably consistent: the majority of laypersons and professionals have little or no ability to discriminate between true and false

[1] 401 U.S. 424 (1971).

statements about past events made by either child or adults." (Herman & Freitas, 2010, p. 135) Research clearly documents the inability of psychologists to identify deception in face-to-face interpersonal interactions any more effectively than deception can be reliably identified by others (DePaulo *et al.,*1997; Ekman & O'Sullivan, 1991; Feely & Young, 1998; Frank & Feeley, 2003).

Examining how the psychological test was scored is another area of potentially useful inquiry. Most tests used in forensic assessment have standardized administration and scoring. Scoring is most often done through a computer program with known reliability. Knowing the scoring program used to score the test might yield valuable areas for examination. Some evaluators use non-standard means to score a test. Exploring the scientific basis for using a non-standard scoring procedure might be a fruitful avenue for a reviewer to examine.

Over the past 15 years, the professional and scientific literature addressing the use of psychological tests in child custody evaluations has warned against reliance upon computer-generated reports. **With the exception of the more recent MMPI-2-RF and the MMPI-3, none of the computer-generated reports identify the empirical basis for the interpretive statements.** None of the programs provide information to the evaluator regarding which score, or which set of scores, is associated with specific statements found in the computer-generated reports. Similarly, none of the programs provide information to the evaluator regarding the value of the score or scores upon which the interpretive statements are based, yet evaluators' use of this generalized information often goes unchallenged in court.

The biggest obstacle to the admissibility of interpretive statements drawn from computer-generated reports is the lack of information about their reliability and validity. None of the programs used to produce computer-generated reports have been subject to peer-review. The algorithms used in producing the interpretive statements are proprietary and have yet to be empirically examined in peer-reviewed publications. Simply stated, evaluators who rely on interpretive statements drawn from a computer-generated report are basing their expert opinions on a methodology (the algorithms used in the computer-program) of unknown reliability applied to test data by a person or persons unknown to the evaluator and unknown to the court. Those who have written about concerns using computer-generated reports question the reliance on interpretive statements drawn from the computer-generated reports and opine that such interpretations should be considered inadmissible hearsay evidence (Gould *et al.,* 2009; Rappaport *et al.,* 2018).

A sixth step is to examine the file for whether the evaluator considered plausible alternative hypotheses as described in professional practice guidelines (APA, 2011) and in case law addressing admissibility of expert testimony (*Merrell Dow Pharmaceuticals, Inc. v. Havner*,[2] 1997). Some courts have viewed the failure to consider plausible alternative hypotheses and/or causes turning expert opinion into little more than speculation (*E.I. du Pont de Nemours & Co., Inc. v. Robinson*,[3] 1995). Other courts, such as North Carolina, have cited similar language and asked the trial court to determine whether the expert has adequately accounted for obvious alternative explanations (*McGrady*,[4] 2016).

[2] 953 S.W.2d 706 (Tex. 1997).

[3] 923 S.W.2d 549 (Tex. 1995).

[4] *State v. McGrady*, 787 S.E.2d 1 (N.C. 2016).

A seventh step is examination of whether the evaluator's opinions are reasonably tied to data. A connection must be established between the underlying data and facts relied upon in reaching the conclusion on the one hand and the evaluator's opinion(s) on the other. If the underlying information that forms the basis of opinion testimony is unreliable, or if the underlying data are insufficient, the reviewer should raise concerns about the lack of foundation for the evaluator's opinion.

An eighth step is whether the evaluator has gathered sufficient and relevant information from independent sources to base an opinion. An evaluator who forms an opinion without all the relevant data may form a questionable conclusion. In that circumstance, the evaluator's testimony may be unreliable and excluded from admission into evidence. The reviewer's analysis can identify places where the evaluator's opinions are based upon insufficient information or incomplete information. The reviewer's focus is not to determine the truth or falsity of the evaluator's opinion, but whether the evaluator is relying on a complete set of data as the basis for the expert opinions.

Opinions without substances are not helpful to the court. Or, as the Texas Court ruled in *Havner* (1997): "An expert who supplies nothing but a bottom-line supply nothing of value to the judicial process." Citing *Daubert*, "Expert testimony that is not grounded in methods and procedures acknowledged by scientists in the particular field of study amount to no more than subjective belief or unsupported speculation" (*Daubert*, pp. 589-90). When an expert brings to court little more than his credentials and a subjective opinion, he or she offers no evidence that would support a judgment (*Havner*, 1997). The idea is that if an opinion is fundamentally unsupported, then it offers no expert assistance to the court.

The final area of review pertaining to forensic psychological methods is record review. The reviewer should examine the records provided to the evaluator for review regardless of whether or not the evaluator chose to read the material. The assumption is that a review is permitted to review any and all material provided to the evaluator for review, not whether the evaluator did, in fact, review the material.

Credibility Judgments

We end this paper addressing an issue that we often observe that arises in reviewer's expert witness testimony. We observe many evaluators offering judgments about the credibility of a parent drawn from interview data or the credibility of information drawn from child interviews or collateral interviews. Judgments of credibility are the province of the court, not the expert witness. Evaluators and reviewers focus on the consistency or reliability of information across independent data sources.

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THE COMPLEXITIES OF ASSESSING PERSONALITY DISORDERS IN CHILD CUSTODY ASSESSMENT AND HOW BEST TO APPLY THE RESULTING INFORMATION

Jonathan Gould, Ph.D., ABPP [Forensic] & Chris Mulchay, Ph.D.[1]

We have encountered many custody cases in which the court asks for a DSM diagnosis, or the attorney wields DSM diagnosis as a weapon, arguing that a parent who scores in a manner consistent with a DSM diagnosis is, by definition, unfit. In this presentation we challenge many of the assumptions about mental health diagnosis and offer an alternative way to think about the role of mental health diagnosis. We also propose a dimensional approach to thinking about how diagnostic information might be better utilized in child custody assessment.

Forensic Psychological Assessment is Built upon Solid Clinical Psychological Assessment

The process of forensic assessment is built upon the foundations of clinical assessment. Clinical assessment is composed of clinical interviews and psychological measurement. Clinical interviews often are unstructured and provide for the client to guide the therapist toward client-defined areas of relevance. Although clinical assessment often relies on unstructured interviews and observations to provide efficient and effective information, they are also limited.

> When interviews are unstructured, clinicians overlook certain areas of functioning and focus more exclusively on presenting complaints. When interviews are highly structured, clinicians can lose the forest for the trees and make precise but errant judgments. . . Such mistakes may occur when the clinician focuses on responses to specific interview questions (*e.g.,* diagnostic criteria) without fully considering the salience of these responses in the patient's broader life context or without adequately recognizing how the individual responses fit together into a symptomatically coherent pattern. . . Additional confounds derive from patients, who are often poor historians and/or biased presenters of information. . .[2]

The movement away from unstructured clinical interview procedures toward the use of structured and semi-structured interview procedures reflects the emphasis on interrater reliability.[3] A semi-structured interview emphasizes the evaluator's attention to specific areas of inquiry. When semi-structured interviews are conducted as part of a child custody evaluation, evaluator-attention is on gathering information relevant to the psycho-legal questions before the court and/or answering the specific questions.

> In forensic mental health assessment, the referral question is of primary importance, forming the basis for the evaluation to be conducted. The evaluator must be careful to understand the referral question, clarifying an ambiguous referral with the retaining party when necessary to obtain a clear sense of the legal

[1] This paper is a copy of a draft chapter in the upcoming book written by Gould & Mulchay tentatively entitled: *Child Custody Evaluations: From Checkers to Chess*.

[2] Meyer *et al.* (2001), p. 135.

[3] Khadivi, A. (2021). Clinical interview methods for assessing disordered thinking and perception (pp. 35-47). In I.B. Weiner & J.H. Kleiger (Eds.). *Psychological Assessment of Disordered Thinking and Perception*. Washington, D.C., American Psychological Association.

> issue at hand and the scope of the evaluation being requested . . . The nature and scope of the referral question dictates the scope and focus on the evaluation.[4]

Psychological measurement used in *clinical* assessment may be comprised of standard psychological tests, projective techniques, or other tools which have as their primary purpose the generation of information about the client's internal psychological processes.

Forensic assessment uses a semi-structured interview format that provides guidance to the parent to talk about areas of relevance to the psycho-legal issues before the court. Although forensic interview techniques may provide opportunities for unstructured discussion, a proper forensic interview ought to explore areas of primary interest related to the issues before the court with the evaluator guiding most of the forensic interview.

Forensic interviews are similar in structure to an investigative interview.[5] Forensic interviews include direct questioning and confrontations regarding inconsistent information. The forensic interview is used to obtain information relevant to answering the referral questions being evaluated. Forensic interviews also are often used to assess clinically the response style of the person being evaluated.[6]

> The degree to which the self-report of the interviewee appears to be consistent with or in opposition to third party and collateral information, the consistency of the presentation of the interviewee throughout the interview or from one interview to another, and the degree of consistency between behaviors reported by the interviewee and those observed by the evaluator should be considered by the evaluator in making a determination about the response style. The evaluator will use these observations to make a determination regarding whether additional testing is required to evaluate the response style of the interviewee.[7]

The forensic interview also provides opportunities to assess the parent's current mental state, to make observations of behavior relevant to the psycho-legal issues under investigation, and to pursue areas of relevance to assist the evaluator in formulating opinions that address the referral questions. The evaluator develops detailed and specific questions intended to gather information relevant to the questions guiding the evaluation. Detailed and specific questions reflect the type of structured inquiry that increases reliability and decreases bias in the evaluation process.[8]

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[4] Zapf, P.A., Beltrani, A., & Reed, A.L. (2020). Psychological assessment in forensic settings. In M. Sellbom & J. A. Suhr (Eds.), *The Cambridge Handbook of Clinical Assessment and Diagnosis* (pp. 462-471). Cambridge University Press, p. 463.

[5] Austin, W.G., & Kirkpatrick, H.D. (2004). The investigation component in forensic mental health evaluations: considerations for parenting time assessments. *Journal of Child Custody: Research, Issues, and Practices,* 1(2), 23-46.

[6] Khadivi (2021).

[7] Zapf *et al.* (2020), p. 464.

[8] Rogers, R. (2001). *Handbook of Diagnostic and Structured Interviewing.* Guilford Press; Rogers, R. (2018). Structured interviews and dissimulation. In R. Rogers & S. D. Bender (Eds.), *Clinical Assessment of Malingering and Deception* (pp. 422-448). The Guilford Press; Zapf *et al.,* (2020).

A review of the diagnostic interviewing literature suggests five distinct techniques. The *first* is observational techniques in which the evaluator observes appearance, behavior, level of activity, affect, and thought processes of the person being interviewed. The *second* is facilitating technique that is intended to communicate understanding and is used to establish trust in the assessment alliance. The *third* is the directive technique in which the evaluator takes an active role in shifting from one domain to the next, with the intention of moving the interview along, *i.e.,* "I would like you to talk more about xyz." The *fourth* is the questioning technique that includes closed- and open-ended questions directed specifically at areas of concern relevant to answering the psycho-legal questions guiding the evaluation. The *fifth* is statement technique in which the evaluator offers statements about what has been discussed during the interview.[9]

When these diagnostic interviewing techniques are applied to child custody evaluations, the directive and questioning techniques provide opportunities to challenge the person being interviewed with inconsistencies that may emerge during the interview or parent-child observations, inconsistencies that may emerge from collateral information, and inconsistencies that may emerge from information obtained from the children.

We believe it is also necessary to review with each parent being evaluated his/her psychological test results in order to understand whether the test results might reflect factors associated with the litigation context rather than factors associated with their real-life functioning. Many of the widely used psychological tests list test responses endorsed by the parent in unusual ways. On the MMPI-2 and MMPI-2-RF, these were the Critical Items.

Oftentimes, a parent will endorse items that elevate scales that measure paranoid thinking. Closer inspection of the item responses reveal that the parent's answers are related only to the conflict involving the current custody dispute rather than revealing a true paranoid response set. We describe such test results as reflecting the parent's non-paranoid responses to the litigation process rather than reflecting paranoid functioning.

A psychological test is another form of a self-report measure. A psychometrically sound psychological test is a type of structured interview. Data generated by the test taker are all self-report information. However, psychological tests provide a wealth of information that is unavailable from interview data alone.

Relevance of Psychological Assessment Data

Forensic assessment can circumvent problems commonly associated with clinical assessment by imposing somewhat greater structure and direction on the accumulation of data. One such structure is the use of a psychological test battery. Meyers *et al.* identify several reasons why the use of psychological tests in a comprehensive psychological assessment provides a genuinely unique data set. Their criteria for the use of psychological tests in a clinical evaluation assessment are applied below to the use of psychological tests in a forensic assessment.

Use of a psychological test battery provide an empirically based set of data that allows for more precise measurement of individual characteristics than is usually obtained from interviews alone.

The use of multiple tests that comprise a test battery allows for cross checking of hypotheses. By incorporating multiple measures of multiple dimensions, the evaluator can gather a wide range of

[9] Khadivi (2021).

information to facilitate understanding the parent as well as to facilitate an understanding of the comparative strengths and limitations of each parent, both against each other and against a group of peers.

Another advantage to the use of a psychological test battery is the generation of data from a large number of personality, cognitive, emotional, or other dimensions simultaneously. Test batteries tend to be inclusive and cover a range of functioning domains, many of which may be overlooked during less formal evaluation procedures.

A third advantage to the use of psychological tests is standardized administration and scoring procedures. Each parent is presented with a uniform stimulus that serves as a common yardstick to measure his or her characteristics. Standardization also may reduce legal and ethical problems because it minimizes the prospects that unintended bias may adversely affect the parent and/or the evaluator's interpretation of the parent's responses.

A fourth advantage to the use of psychological tests is the comparison of the parent's scores to norms, permitting each parent to be compared with a relevant group of peers. The information obtained from such normative comparison allows the evaluator to formulate refined inferences about the strengths and weaknesses of a parent compared with a relevant group of peers. For example, both the MMPI-2 and the MCMI III have data reported for male and female custody litigants. Use of these norms allows the evaluator to consider the degree to which a particular parent's scores deviate from the norm group. An experienced evaluator is able to take the obtained data and examine subtle differences in the data which may be relevant to questions about individual functioning along relevant dimensions associated with parenting.

Psychological tests used in a forensic evaluation ought to have information about reliability and validity. Such psychometric information allows the evaluator to consider the strength and limitations of the information obtained from the test. Without such information, evaluators have little ability to gauge the accuracy of the data they process when making judgments.

Multi-trait/Multi-method Assessment

Forensic assessment is premised upon the idea of convergent validity. A competent forensic evaluation is based upon multiple sources of information from independent sources of data. This is referred to as the multi-trait/multi-method model of assessment.

A critical issue in the use of a multi-trait/multi-method model is the extent to which distinct assessment methods provide unique versus redundant information. It is important to recognize that more data does not always mean more accurate results. For example, when using tests that are intercorrelated, it is possible that the predictive power of the two tests combined is lessened compared with the predictive power of the psychometrically more powerful test.

The idea behind multi-trait/multi-method assessment is to increase the predictive power of the data. If a method does not increase the ability of the data to predict the behavior of interest, then there is no incremental validity derived from the use of the method. If there is no incremental validity, there is no reason to administer the test.

On the other hand, it is critical to remember that the use of the same method obtained from different sources of data may produce unique observations. For example, self-report questionnaires which are completed by parents, siblings, aunts, uncles, teacher, coaches, youth

counselors, therapists, and other people outside the family system may provide very different descriptions of the identified behavior.

Assessment Procedures: We Still Have a Long Way to Go

Heilbrun, Otto, and Rogers[10] suggested three categories into which psychological tests and measures fall. The first category is clinical assessment instruments (CAIs). CAIs are psychological and medical tests and other assessment techniques that aid in assessment, diagnosis, and treatment planning in therapeutic contexts. Often, these measures and techniques have been carefully developed with strong evidence-bases for their use in particular situations or with particular populations. Data from CAIs might be helpful in formulating hypotheses about a parent or child's psychological and emotional functioning that could bear on the psycho-legal questions of concern. Data from these measures and techniques might also be helpful in formulating hypotheses about behavioral correlates associated with parenting behavior, parent-to-parent communication and decision-making abilities, and parent-child interactions.

None of the CAIs typically used by child custody evaluators have been developed for use in custody assessment. As a result, results from these measures do not speak directly to questions of parenting, parent-to-parent communication, or parent-child interactions. Framed within the Weiner two-stage inference model, data from these measures are useful when integrated with Symbolic or second-stage inferences. The evaluator might integrate the primary data – Representative inferences – with specific theories or constructs associated with parenting, parent-to-parent communication, or parent-child interactions – Symbolic inferences. When providing interpretation of test results within the context of specific theories or constructs, it is critical for the evaluator to be clear about the inferential steps being taken. The evaluator must be clear that interpretations being offered are based upon inferences drawn from theoretical models or constructs applied to test results and not directly from the test results themselves.

It is also important for the evaluator to clearly state in the report that all inferences taken from psychological test results, whether they are Representative or Symbolic inferences, are explanations based upon nomothetic data, describing group behavior. More data need to be collected from independent information sources before an evaluator can make reasonable ideographic interpretations.

The second category of tests and measures is Forensically Relevant Instruments (FRIs). FRIs measure constructs most relevant to the specific psycho-legal questions of concern, *i.e.,* psychopathy, response style. FRIs are less frequently used by mental health professionals who are not involved in forensic psychological activities and, as a result, tend to be less well researched.[11]

The third category is Forensic Assessment Instruments (FAIs) that are designed for use in the legal process. FAIs assess relevant psycho-legal capacities, abilities, and knowledge.[12] Although

[10] Heilbrun, K., Rogers, R., & Otto, R. (2002). Forensic assessment: Current status and future directions. In J. R. P. Ogloff (Ed.), *Taking Psychology and Law into the Twenty-first Century* (pp. 119-146). Kluwer Academic/Plenum Publishers.

[11] Melton, G.B., Petrila, J., Poythress, N.G., Slobogin, C., Otto, R.K., Mossman, D., & Condie, L.O. (2018). *Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals and Lawyers* (4th ed.). Guilford Press.

[12] Melton *et al.* (2018).

several FAIs have been developed for use in criminal and civil proceedings and have reasonably good psychometric integrity, FAIs developed for use in the child custody area have been shown to have weak or non-existent psychometric integrity, *i.e.,* ASPECT or the Bricklin Scales.

The challenge in child custody assessment is to utilize data from CAIs in a manner consistent with their intended use as supported by the test manual and/or evidence-based research and to develop inferences and hypotheses about the meaning of these results that are reasonable and supported by independent information sources.

Role of Diagnosis

Among the most controversial issues in child custody assessment is the role of mental health diagnosis. Although most, if not all, current child custody textbooks strongly encourage evaluators to refrain from using *DSM-5* diagnostic categories in child custody reports, there remains an interest among attorneys and courts for inclusion of mental health diagnosis in various types of reports provided to family courts.

In this section, we discuss the role of categorical and dimensional classification systems of personality and psychopathology.[13] We begin with examination of the current *DSM-5* and its categorical system of mental health diagnoses.

One of our primary goals in this book is to help you connect your current and future practices to current science. Historically we have linked mental health diagnoses to the *Diagnostic and Statistical Manual* (DSM). However, the science suggests we should take another approach.

Even though two versions of the *DSM* had been published by the late 1960s, the books were obscure, and practitioners were unable to use them to reliably identify diagnoses. Researchers in the 1960s noted that they diagnosed individuals differently in New York than in London, even if the individual had the same symptoms. Robert Spitzer, MD, a psychiatrist at Columbia University, took on the task of codifying the next version of the *DSM*. Spitzer appointed whomever he wanted to a taskforce, and he created 25 new committees that would identify new diagnoses for the upcoming *DSM-III*. One of the task force members, Theodore Millon, PhD., who would go on to create the MCMI, described the lack of research they had to base their decisions.

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[13] Hopwood, C.J., Kotov, R., Krueger, R.F., Watson, D., Widiger, T.A., Althoff, R.R., Ansell, E.B., Bach, B., Bagby, R.M., Blais, M.A., Bornovalova, M.A., Chmielewski, M., Cicero, D.C., Conway, C., De Clercq, B., De Fruyt, F., Docherty, A.R., Eaton, N.R., Edens, J.F., . . . Zimmermann, J. (2018). The time has come for dimensional personality disorder diagnosis. *Personality and Mental Health,* 12(1), 82-86; Kotov, R., Krueger, R.F., Watson, D., Achenbach, T.M., Althoff, R.R., Bagby, R.M., Brown, T.A., Carpenter, W.T., Caspi, A., Clark, L.A., Eaton, N.R., Forbes, M.K., Forbush, K.T., Goldberg, D., Hasin, D., Hyman, S.E., Ivanova, M.Y., Lynam, D.R., Markon, K., . . . Zimmerman, M. (2017). TheHierarchical Taxonomy of Psychopathology (HiTOP): A dimensional alternative to traditional nosologies. *Journal of Abnormal Psychology,* 126(4), 454-477; Krueger, R.F., Kotov, R., Watson, D., Forbes, M.K., Eaton, N.R., Ruggero, C.J., Simms, L.J., Widiger, T.A., Achenbach, T.M., Bach, B., Bagby, R.M., Bornovalova, M.A., Carpenter, W.T., Chmielewski, M., Cicero, D.C., Clark, L.A., Conway, C., DeClercq, B., DeYoung, C.G., . . . Zimmermann, J. (2018). Progress in achieving quantitative classification of psychopathology. *World Psychiatry,* 17(3), 282-293; Widiger, T.A., Sellbom, M., Chmielewski, M., Clark, L.A., DeYoung, C.G., Kotov, R., Krueger, R.F., Lynam, D.R., Miller, J.D., Mullins-Sweatt, S., Samuel, D.B., South, S.C., Tackett, J.L., Thomas, K.M., Watson, D., & Wright, A.G.C. (2019). Personality in a hierarchical model of psychopathology. *Clinical Psychological Science,* 7(1), 77-92.

> There was very little systematic research, and much of the research that existed was really a hodgepodge – scattered, inconsistent, and ambiguous. I think the majority of us recognized that the amount of good, solid science upon which we were making our decisions was pretty modest.[14]

Another task force member, David Shaffer, MD discussed the process with NPR.

> They (all 25 committee chairs) would squeeze into a room… it was much too small, and Bob (Spitzer) would sit with a portable computer. Bob would raise a provocative question, and people would shout out their opinions from all sides of the room. Whoever shouted loudest tended to be heard. My own impression was that it was more like a tobacco auction than a sort of conference.[15]

In this way, the *DSM-III* was created. In these meetings, there was a strong emphasis to move away from psychoanalytic terms such as neurosis. For example, through the tobacco auction-like process, anxiety neurosis became four different anxiety disorders: panic disorder, agoraphobia, generalized anxiety disorder, and posttraumatic stress disorder. The number of diagnoses increased tremendously.

When the *DSM-III* was approved in 1980, it changed psychology in many ways. For the purposes of this chapter, the primary change was that it created a categorical approach to diagnosis. This binary approach identifies problems as existing as either completely present or completely absent. The light switch is either on or off.

The *DSM-5*

A primary assumption of most mental health diagnostic systems is that like medical diagnoses, mental health problems can be placed in independent categories. Just like a physician can differentially diagnosis a cold from a broken arm, an assumption about mental health diagnoses is that it is possible to make accurate differential diagnoses of psychological and emotional problems. Thus, the *DSM-5* lists 157 mental disorders with symptoms, criteria, risk factors, culture and gender-related features, and other important diagnostic information.

In our experience, the most frequently noted diagnostic concerns found in child custody evaluations is a *DSM-5* diagnosis of some type of personality disorder.

Personality disorders are long-term patterns of behavior and inner experiences that differ significantly from what is expected. The pattern of experience and behavior begins by late adolescence or early adulthood and causes distress or problems in functioning.

The *DSM-5* identifies 10 specific types of personality disorders. These *DSM-5* 10 specific personality disorders are: paranoid, schizoid, schizotypal, antisocial, borderline, histrionic, narcissistic, avoidant, dependent and obsessive-compulsive personality disorder.

Over the years, research findings revealed that a simple categorical system such as the *DSM-5* was inadequate to explain psychological and emotional problems. Consistent findings showed

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[14] https://www.newyorker.com/magazine/2005/01/03/the-dictionary-of-disorder.

[15] https://www.npr.org/templates/story/story.php?storyId=1400925.

that oftentimes, a person can be diagnosed with more than just one personality disorder. That is, the *DSM* diagnostic categories were not independent of one another. The psychological and emotional problems described in one diagnostic category were often seen in other diagnostic categories that, over time, have been found to overlap. That is, psychological and emotional problems were not easily placed into independent categories but were found to cluster around common themes. These themes are referred to as clusters.

Research has shown that *there is a tendency for personality disorders within the same cluster to co-occur*. Furthermore, the 10 different personality disorders can be grouped into **three clusters** based on descriptive similarities within each cluster. These clusters are:

- **Cluster A (the "odd, eccentric" cluster);**
- **Cluster B (the "dramatic, emotional, erratic" cluster); and**
- **Cluster C (the "anxious, fearful" cluster).**

Cluster A is called the *odd, eccentric* cluster. It includes:

- Paranoid Personality Disorder,
- Schizoid Personality Disorder, and
- Schizotypal Personality Disorders.

The common features of the personality disorders in this cluster are social awkwardness and social withdrawal. These disorders are *dominated by distorted thinking*.

Cluster B is called the dramatic, emotional, and erratic cluster. It includes:

- Borderline Personality Disorder.
- Narcissistic Personality Disorder.
- Histrionic Personality Disorder.
- Antisocial Personality Disorder.

Disorders in this cluster share problems with *impulse control and emotional regulation*.

Cluster C is called the anxious, fearful cluster. It includes:

- Avoidant,
- Dependent, and
- Obsessive-Compulsive Personality Disorders.

These three personality disorders share a high level of anxiety.

The clustering of psychological and emotional problems has provided a more robust and reliable means of understanding common, underlying dynamics that lay at the core of dysfunctional personality behaviors. However, the scientific basis of much of the *DSM* diagnostic system has been challenged.

Limitations of a Categorical Diagnostic System

There are many reasons to exclude mental health diagnoses in child custody evaluations. The *DSM-5*, as well as its precursors, is based upon a categorical system for which there is little

scientific basis. The *DSM* categorical system reveals frequent diagnostic co-occurrence. A fundamental purpose of any diagnostic manual is to help practitioners identify specific disorders that allow for development of effective treatment recommendations. The *DSM* categorical system has been unsuccessful in this regard as demonstrated in multiple studies demonstrating diagnostic co-occurrence among the 10 personality disorders.[16] The conclusion from these studies is that maladaptive personality functioning does not appear to be adequately described by just one diagnostic classification. The diagnostic co-occurrences among personality disorders suggests problems with discriminant validity[17] that directly affects accurate differential diagnoses.

There is excessive heterogeneity within diagnostic categories. The categorical system displays a lack of meaningful or well-validated boundary between normal and disordered personality,[18] is of questionable temporal stability, and inadequate scientific foundation.[19]

Alternative Model of Personality Assessment and Psychopathology

In a categorical diagnostic system, a person either has a disorder or does not. Categorical classification is most useful for certain types of disorders and conditions such as pregnancy. You either are pregnant, or you are not. It is less useful and less accurate for other types of conditions. Medical conditions often are absolute conditions like pregnancy or a broken leg. In contrast, personality is an abstract concept. Personality is not a single behavior but composed of several different elements, overt behaviors being only one factor that is associated with attempts to classify personality style.

Many clinicians and researchers believe the personality traits associated with a particular personality disorder represent extreme variants of ordinary personality traits. These differences are viewed as differing in a matter of degree along a continuum from healthy to unhealthy. Viewing personality disorders as existing on a healthy-unhealthy continuum is an example of a dimensional or continuous approach. In contrast to a categorical classification diagnostic system, a dimensional system conceptualizes personality features along a continuum.

There are many different dimensional diagnostic systems being researched. Below is a description of the *DSM-5* dimensional model. The *DSM-5* alternative dimensional model is not the officially recognized diagnostic system.

The *DSM-5* Alternative Dimensional Model (ADM) for Diagnosing Personality Disorders

The proposed *DSM-5* alternative dimensional model reflects some of the same essential features of personality disorder diagnosis found in the *DSM-5*. The first criterion is that there must be evidence of impaired functioning. In the dimensional model, the impairments are described in terms of impairment with respect to self and impairment with respect to others.

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[16] Samuel, D.B., & Widiger, T.A. (2010). Comparing personality disorder models: Cross-method assessment of the FFM and *DSM-IV-TR*. *Journal of Personality Disorders,* 24 (6), 721-745.

[17] Samuel & Widiger (2010).

[18] Samuel, D.B., & Widiger, T.A. (2006). Differentiating normal and abnormal personality from the perspective of the *DSM*. In S. Strack (Ed.), *Differentiating Normal and Abnormal Personality* (pp. 165-183). Springer Publishing Company.

[19] Samuel & Widiger (2010).

The second criterion is inflexibility. The impairments and personality traits are viewed as stable across a broad range of situations and across time. Both the *DSM-5* categorical diagnostic model and the alternative dimensional model both require significant impairment and inflexibility.

The *DSM-5* proposed alternative dimensional model includes two dimensions: Criterion A: level of personality functioning; and Criterion B: pathological personality traits.

Criterion A: Level of Personality Functioning

The alternative dimensional model for personality disorder diagnosis offered in *DSM-5* is found in the chapter called Emerging Measures and Models. The alternative dimensional model has two primary factors: level of personality functioning (Criterion A) and pathological personality traits (Criterion B).

Criterion A is divided into four separate factors of personality functioning. These are: 1) identity, 2) self-direction, 3) empathy, 4) intimacy. Each factor is rated along a five-point continuum, from zero (little to no impairment) to some impairment to moderate impairment to severe impairment to extreme impairment.

Identity: Identify is defined as a person's knowledge and awareness of self. A person with little to no impairment readily recognizes his unique characteristics and accurately appraises these characteristics. This individual will have a clear sense of his boundaries and can experience, tolerate, and regulate a full range of emotions. In contrast, a person with impaired identity has varying degrees of difficulty with his sense of self. What awareness he does possess is likely to be inaccurate or distorted.[20]

Often, emotional boundaries with others are confused or lacking entirely. Emotions are fraught with problems including rapidly shifting emotions and/or difficulty regulating or tolerating emotions. At the extreme end of the continuum hatred and aggression may be the dominant affect. However, it may be denied or attributed to others.[21]

Self-direction: Self-direction refers to an individual's internal ability to establish and achieve reasonable self-expectations, personal goals, and standards of personal conduct. A person with little to no impairment sets realistic goals based on an accurate self-appraisal of strengths and limitations. These people are self-directed and are able to reflect upon and process in healthy ways they can reflect on their own internal experiences and they generally attain fulfillment and satisfaction in life.

In contrast, a person with impaired self-direction often becomes excessively preoccupied with personal goals to the exclusion of all else. Others may display a lack goals entirely. Such people may have difficulties with internal motivation and are motivated by external rewards or consequences. They may have a limited or absent ability to reflect on and understand their own internal processes. Life does not provide meaning and satisfaction. Instead, life may be experienced as pointless, or dangerous.[22]

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[20] https://www.mentalhelp.net/personality-disorders/dsm-5-dimensional-approach/.

[21] https://www.mentalhelp.net/personality-disorders/dsm-5-dimensional-approach/.

[22] https://www.mentalhelp.net/personality-disorders/dsm-5-dimensional-approach/.

Empathy: Empathy is defined as the ability to understand and consider another person's experience, including their thoughts, feelings, beliefs, and motivations. Someone with little to no empathy impairment understands and accepts another person's experience, even when such an experience differs from their own. They accurately identify another person's motivations. These people are aware of and have insight into how their actions affect others.

In contrast, an impaired person may have some limited ability to understand others' experiences, but they often discount it as invalid or unimportant. Empathy impaired individuals may be overly concerned about others but only in a self-referential manner. They can be highly threatened by differences of opinion, and they frequently misattribute their own destructive motivations to others. They have little to no ability to understand how their actions affect other people and may be bewildered or hostile when someone attempts to explain how their actions harmed another person.[23]

Intimacy: Intimacy is defined as the desire and ability to form and maintain close, caring, meaningful, and reciprocal relationships. Someone with little to no impairment has the desire and skills needed to form and maintain multiple satisfying relationships. There is a desire for mutual cooperation. These people can respond in a respectful and sensitive manner to other's ideas, emotions, and behaviors.[24]

In contrast, an intimacy impaired person displays a lack of desire and/or ability to form sustained meaningful relationships with others. Emotional connections with others may be superficial and lack reciprocity and mutual cooperation required in healthy intimate relationships. This person may cooperate with others but only for personal gain. In more extreme forms, relationships with others are valuable only to the extent they unilaterally provide some care, comfort, financial resources, or provide opportunities to demonstrate power and control by inflicting pain or suffering.[25]

Criterion B: Pathological Personality Traits

The second factor of the alternative dimensional model is pathological personality traits. Personality traits are defined as a tendency or disposition to behave in a particular way. Traits are considered relatively stable across time and situations. Although traits are relatively immutable, they can and do change throughout the lifespan and their intensity may also vary across time and situation.[26]

Personality traits are generally considered along a continuum ranging from healthy and adaptive to its polar opposite side, unhealthy and maladaptive. A trait is considered maladaptive when it negatively affects someone's success and satisfaction with life. It is important to recognize that a particular trait that is adaptive in one culture may be maladaptive in another.

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[23] https://www.mentalhelp.net/personality-disorders/dsm-5-dimensional-approach/.

[24]https://www.mentalhelp.net/personality-disorders/dsm-5-dimensional-approach/.

[25] https://www.mentalhelp.net/personality-disorders/dsm-5-dimensional-approach/.

[26] https://www.mentalhelp.net/personality-disorders/dsm-5-dimensional-approach/.

Research has consistently validated and replicated five broad personality domains, sometimes called, "The Big Five" or the Five Factor Model (FFM) of personality. On the pathological, unhealthy side of the continuum, these five are:

1. Negative affect (its polar opposite is emotional stability):
- Emotional lability
- Anxiousness
- Separation anxiety
- Submissiveness
- Hostility
- Perseveration

2. Detachment (its polar opposite is extroversion):
- Withdrawal
- Intimacy avoidance
- Anhedonia (lack of enjoyment)
- Depressivity
- Restricted affect (limited emotional range)
- Suspiciousness

3. Antagonism (its polar opposite is agreeableness):
- Manipulativeness
- Deceitfulness
- Grandiosity
- Attention seeking
- Callousness
- Hostility

4. Disinhibition (its polar opposite is conscientiousness):
- Irresponsibility
- Impulsivity
- Distractibility
- Risk taking
- Rigid perfectionism

5. Psychotism (its polar opposite is lucidity):
- Unusual beliefs and experiences
- Eccentricity
- Cognitive and perceptual dysregulation

The polar opposite side of each dimension does not necessarily reflect a healthy adaptive response. For instance, the opposite of disinhibition is conscientiousness. However, extreme conscientious might reveal itself in rigid perfectionism; a pathological trait listed for obsessive-compulsive personality disorder. Another example is extreme agreeableness might reflect an unhealthy level of gullibility or suggestibility to influence, making one an easy target for manipulation and abuse by others. The key to healthy personality and adaptive functioning is flexibility. Responses are varied according to the demands of each situation.

HiTOP Dimensional Model

Among the changes in the field of assessment of personality and psychopathology has been the movement away from models based on theories of personality toward models based upon empirical evidence of stable factors that represent personality factors across time and across

cultures.[27] Both the FFM and the HiTOP model that we will discuss below reflect that movement toward empirically-derived personality factors, which has been described as a quantitative movement.

Instead of using two criteria like the AMPD, Roman Kotov, PhD. proposed a dimensional approach to classification based on factorial analysis. The Hierarchical Taxonomy of Psychopathology (HiTOP) is similar to the AMPD. The HiTOP is a diagnostic system that "organizes psychopathology according to evidence from statistical modeling and validation studies."[28]

Traditional *DMS* diagnoses required *a priori* assumptions. The HiTOP Model relies upon empirical findings drawn from independent work conducted by multiple, independent research groups. Similar to research examining the FFM, the HiTOP Model incorporates factor analytic studies of normal personality.[29]

The HiTOP system was developed to address the limitations that hinder psychiatry, research, and treatment. The HiTOP system identifies mental health as a spectrum. This removes the *DSM*'s artificial boundaries of mental illness that, as described above, made diagnoses more definitive yet less accurate representations of what people experience.

While it may seem counterintuitive at first, the *DSM* complicates diagnostic classification because *DSM-5* diagnoses often co-occur. For example, a parent may have anxiety and depression. Factorial analyses struggle to differentiate anxiety and depression such that in practice, many individuals who receive a diagnosis of anxiety would also receive a diagnosis of depression.

> The HiTOP approaches these problems by conducting an empirical search for psychopathology structures starting from the most basic building blocks and proceeding to the highest level of generality: combining individual signs and symptoms into homogeneous components or traits, assembling them into empirically-derived syndromes, and finally grouping them into psychopathology spectra (*e.g.,* internalizing and externalizing).[30]

A primary goal of the *DSM* is to identify a diagnosis so that treatment can be prescribed. When an individual's symptoms meet the criteria for multiple diagnoses, it complicates the streamlined approach to treatment. Therefore, co-occurring diagnoses are one of the most significant challenges to the *DSM*'s categorical approach.

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[27] Lahey, B.B. (2021). *Dimensions of Psychological Problems: Replacing Diagnostic Categories with a More Science-based and Less Stigmatizing Alternative.* New York: Oxford University Press.

[28] Kotov, R., Krueger, R.F., & Watson, D. (2018). A paradigm shift in psychiatric classification: The Hierarchical Taxonomy of Psychopathology (HiTOP). *World Psychiatry*, 17(1), 24.

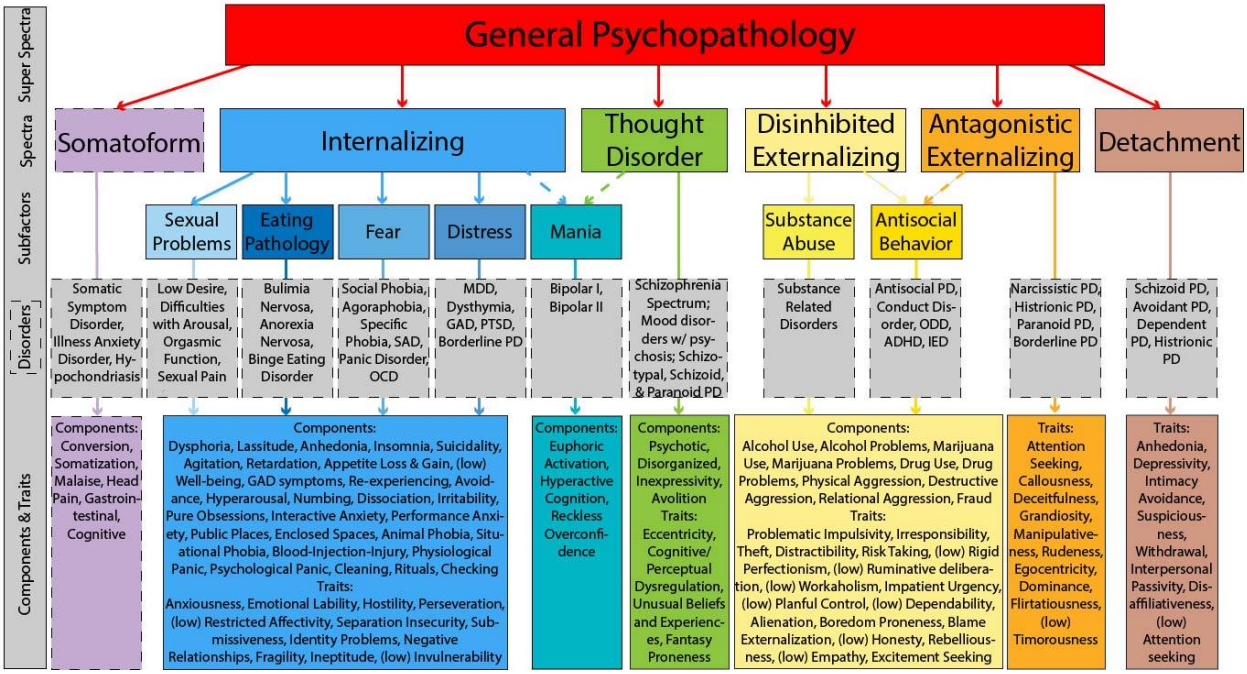
[29] Kotov, R., Krueger, R.F., Watson, D., Achenbach, T.M., Althoff, R.R., Bagby, R.M., ... & Zimmerman, M. (2017). The Hierarchical Taxonomy of Psychopathology (HiTOP): A dimensional alternative to traditional nosologies. *Journal of Abnormal Psychology*, 126(4), 454.

[30] About HiTOP. (n.d.). Retrieved February 07, 2021, from https://renaissance.stonybrookmedicine.edu/HITOP/AboutHiTOP.

Interestingly, the HiTOP system simplifies the classification by identifying psychopathology dimensions at multiple levels of hierarchy. The result is that it allows for a finer description of symptom detail while it also allows for a broader view of the dynamics.

The HiTOP allows for multiple levels of classification and, subsequently, multiple levels of treatment. The HiTOP model integrates the most recent scientific evidence, which is fundamentally different than the process in which the *DSM-III* was created. This is to say its foundation is less reliant on expert opinion (via tobacco auctions) and more reliant on research (via factorial analysis).

The HiTOP pulls from research that differentiates into six dimensions, two of which have been identified in the research since the 1960s as either internalizing or externalizing. Internalizing is best thought of as what occurs in a parent's head, such as depression, anxiety, and posttraumatic stress. Externalizing is best thought of as the behavior you can observe in a parent such as substance use disorders, attention-deficit/hyperactivity disorder, conduct disorder or oppositional defiant disorder. Further research has differentiated the externalizing dimension into either disinhibited or antagonistic. Research has also identified thought disorder spectra, somatoform spectra, and detachment spectra.



We've found it helpful to breakdown this hierarchical approach by level. Let's start at the bottom, where you will see sign/symptom components and maladaptive traits. At the next level of the hierarchy are diagnoses, which are really groups of symptoms and traits that often occur together. Here, on this level, you'll most likely be familiar with terms used in the *DSM*.

On the next level, above the disorders, are subfactors. A good way to think about subfactors is that it is a grouping of small clusters of strongly related symptoms or syndromes. Recall from above, we discussed how the *DSM-III* task force differentiated anxiety neurosis into four or more disorders. In this step we are returning to the level of subfactor. For example, it could be argued that each of those anxiety neurosis may be included in the Fear subfactor.

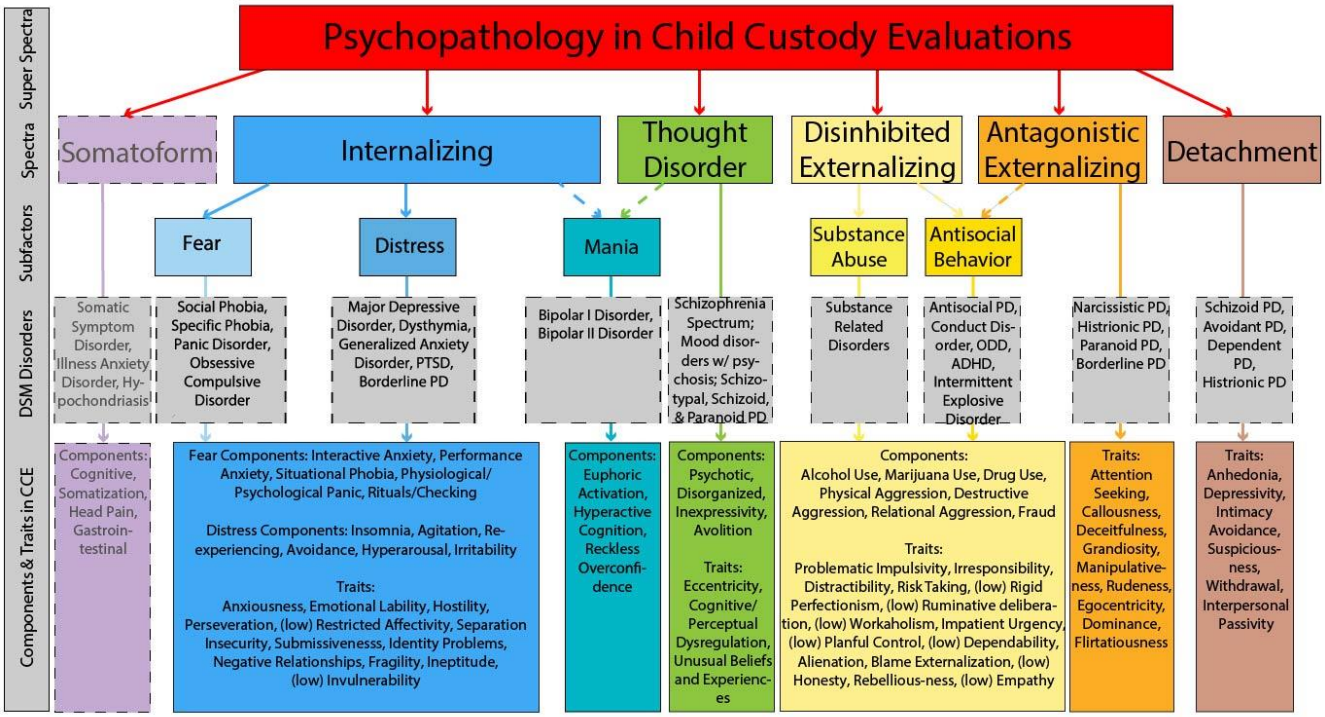
Then we have the six spectra (Somatoform, Internalizing, Thought Disorder, Disinhibited Externalizing, Antagonistic Externalizing, and Detachment) that we discussed above.

Research is quickly demonstrating the use of the HiTOP model. As more research is analyzed, the model must shift to accommodate it. As we wrote this chapter in 2020, researchers have been able to identify factor loadings for many internalizing and externalizing components and traits.

Incorporating HiTOP into Child Custody Evaluations

If you are unclear how you might incorporate the HiTOP into your child custody evaluations, there is a good chance that you already have read evaluations that have used dimensional assessment tools, such as the MMPI-3, or the PAI. For example, the PAI and MCMI assess both traits and symptom components measures.

In child custody evaluations, it is much more helpful to describe traits and components of behavior than to use provide diagnostic labels such as a *DSM* diagnosis. To assist you in using the HiTOP model, we have created a new chart that highlights components and traits we see in child custody evaluations. We have kept the same language from the factor analytic research even though that research was conducted on larger populations, and, to date, there are no factor analytic studies using a sample drawn from parents in child custody disputes. We also have shaded the Somatoform spectra and traits as that is less likely to be identified in a child custody evaluation.



Using the HiTOP is quite simple. For example, instead of describing a parent with generalized anxiety disorder, HiTOP provides guidance about specific behaviors to investigate. Stated differently, the HiTOP model points to specific behaviors associated with generalized anxiety disorder, providing opportunities to develop more specific hypotheses. A parent who experiences

a *DSM-5* diagnosis of social anxiety may on the HiTOP be identified as having mild discomfort in specific situations, like when they see their ex-partner during parenting time transitions.

A parent with borderline personality disorder may be better described using the HiTOP model by identifying their fear components (psychological panic), distress components (agitation, irritability), and traits (emotional lability, hostility, negative relationships, and limited vulnerability).

Attention-deficit/hyperactivity disorder (ADHD) is a common disorder that elicits an image of a young child with Dennis-the-Menace-like behavior. Identifying a parent with ADHD in a child custody evaluation is likely to elicit a similar Dennis-the-Menace image for the judge and attorneys. It would be much more beneficial to describe an individual with ADHD's traits: problematic impulsivity, distractibility, risk-taking, poor planning or poor dependability. As you can tell by reading those traits, an argument could be made that each of those traits has the potential to impact parenting.

Child Development and the HiTOP

Recall, emotion is primarily communicated through nonverbal behavior such as eye movement, facial expressions, body tone, voice tone, and physical reactions. Children are hardwired to closely attend to their parent's nonverbal behavior in order to get their own needs met. Children need affection, attention, and acceptance. Children shape their behavior by watching others. In order to understand social interactions and anticipate a parent's behavior, a child must perceive their parent's intentions and their parent's attentional focus.

This same system allows for a parent to sense her child's inner needs, which maximizes empathic attunement as it creates an attachment bond. This attachment bond "provides increasingly complex layers of external and then internal security for the growing child as he encounters an increasingly challenging world… The child's system requires the parent's attunement to help organize the child's own mind."[31] With each of these experiences the child's mind grows and develops in relation with their parent's behavior. The young child will continue to look for the parent's eye contact and facial expression in order to understand the world. For this reason, we have a huge capacity for learning and remembering facial expressions.

As children grow and develop in relation to their parent's behavior, it is important to think about how each parent's behavior is likely to affect a child. We must look at both the parent's behavior and the child's reaction to that behavior changes the parent-child interactions. For example, the ADHD trait of problematic impulsivity can be identified as poor inhibitory control (an individual's ability to manage their impulses). A parent with poor impulse control may struggle to bite their tongue. When Sally makes a simple mistake, the parent may respond too harshly. Sally internalizes the parent's harsh words, which cause her anxiety. Unfortunately, her anxiety leads her to make more mistakes. The parent who struggles with inhibitory control is likely to continue to struggle to handle these situations well. As the dynamic continues, Sally's sense of safety and security are negatively affected, the nature of the parent-child relationship may be negatively affected.

When we interview the parent, we may hear that sometimes Sally makes careless mistakes. The parent may even acknowledge that he sometimes responds strongly to Sally's errors. As

[31] Siegel, D. (2020). *The Developing Mind: How Relationships and the Brain Interact to Shape Who We Are.* Guilford Press. Page 261.

evaluators we need to understand the dynamic between the parent and the child, and we need to understand how the dynamic may continue to impact their relationship.

As children grow older, they closely watch their parent's behavior. The parent acts as a role model. Children who observe healthy prosocial interactions are most likely to emulate those behaviors, whereas children who observe unhealthy behaviors are more likely to demonstrate those behaviors. The latter creates a feedback loop in which an already under resourced parent is called upon to respond to their child's negative behavior, which, if done ineffectively, may lead the child to demonstrate more negative behavior. This in turn will require the parent to respond more often to the negative behavior. Ultimately, this loop creates a system in which the parent shames the child for negative behavior more often than the parent can praise the child or listen to the child. The system becomes unbalanced. Both the parent and the child experience less affection, positive attention, and acceptance.

In another example, we meet Susan, a parent who acknowledges that she is being treated for depression. Using the HiTOP model, we identify that the HiTOP trait that appears to most impact her parenting is restricted affectivity. If we define restricted affectivity as a clear reduction in the expressive range and intensity of affects, we can hypothesize that limited affect can impact a child who is searching for connection. When Joe does not see his mother smile at him, he does not feel attuned with her and the relationship suffers.

Research suggests the impact of restricted affectivity. A UCLA study indicates that children who have less affection and love experience worse physical health later in life.[32] Most interestingly, the study also indicates that parental warmth and affection can protect a child from the effects of toxic childhood stress. Other studies draw the link between parental warmth and affection to improved health later in life.[33]

Prime Time

A central theme in our article is the connection between the research and the practice. As we discussed, there are many areas in which we may be tempted to use measures or research that are not ready for prime time. Research is guiding new formulations of the model, including further examination using factor analyses and other multivariate statistics.

While we do not have data on child custody litigants that can be directly integrated into the HiTOP, we believe the model is supported by enough research to be used as a conceptual model for identifying behaviors and traits and then to develop hypotheses about the effects of these behaviors on parenting, parent-child interactions, and parent-to-parent communication.

The HiTOP model allows an evaluator to use any level of its hierarchy. There may be times in which an evaluator has inconsistent data. The evaluator may feel confident that a parent has

[32] Carroll, J.E., Gruenewald, T.L., Taylor, S.E., Janicki-Deverts, D., Matthews, K.A., & Seeman, T.E. (2013). Childhood abuse, parental warmth, and adult multisystem biological risk in the Coronary Artery Risk Development in Young Adults study. *PNAS Proceedings of the National Academy of Sciences of the United States of America,* 110(42), 17149-17153; Chen, E., Miller, G.E., Lachman, M.E., Gruenewald, T.L., & Seeman, T.E. (2012). Protective factors for adults from low-childhood socioeconomic circumstances: The benefits of shift-and-persist for allostatic load. *Psychosomatic Medicine,* 74(2), 178-186.

[33] Chen, Y., Kubzansky, L.D., & VanderWeele, T.J. (2019). Parental warmth and flourishing in mid-life. *Social Science & Medicine* 220*,* 65-72.

disinhibited externalizing behaviors, yet the data gathered during the evaluation may be too inconsistent to be more specific. In this example, the evaluator would only use higher levels of the hierarchy. HiTOP also provides flexibility in our ability to communicate in greater or lesser detail depending on the level of review, focusing as appropriate on a relatively small number of elevated spectra or elaborating on specific syndromes, symptoms, or traits.[34]

Most notably, in using a dimensional approach an evaluator does not concern themselves with diagnostic rule-outs. This limits the potential for bias. Recall from Chapter 3, the need for a coherent narrative might create bias. Using the *DSM* creates a need for coherence, which can impact evidence integration. Recall that bias in evidence integration refers to how the final assessment can be biased, putting together the individual puzzle pieces to form a coherent narrative. Instead, by using the HiTOP family members, symptoms and traits are identified where they fall in the hierarchy. Family members are identified as influencing one another. The parents' "symptoms are conceptualized as related to one another, with varying degrees of overlap and specificity, in a hierarchical scheme."[35]

The HiTOP continues to integrate the latest research findings at each level of the hierarchy. By using the HiTOP model, you can use the latest innovations of psychological science to communicate the symptoms, signs, and traits you identify in child custody evaluations.

[34] Ruggero, C.J., Kotov, R., Hopwood, C.J., First, M., Clark, L.A., Skodol, A.E., Mullins-Sweatt, S.N., Patrick, C.J., Bach, B., Cicero, D.C., Docherty, A., Simms, L.J., Bagby, R.M., Krueger, R.F., Callahan, J.L., Chmielewski, M., Conway, C.C., De Clercq, B., Dornbach-Bender, A., . . . Zimmermann, J. (2019). Integrating the Hierarchical Taxonomy of Psychopathology (HiTOP) into clinical practice. *Journal of Consulting and Clinical Psychology,* 87(12), 1069-1084.

[35] Ruggero *et al.,* (2019).

I. CONTEMPT OF COURT

Crandell v. Cabinet for Health and Family Services ex rel. Dilke, 642 S.W.3d 686 (Ky. 2022)

Opinion of the Court by Justice Keller. All sitting. All concur. Gregory Crandell, the Appellant, was held in contempt of court for failure to pay child support. Crandell was in arrears totaling $115,760.20. Because he failed to appear initially in court on this arrearage, he was arrested and incarcerated pending his contempt hearing. While incarcerated, Crandell moved for work release. At his contempt hearing, he was found in contempt and ordered to pay back $251 monthly. If he were to fail in the future to pay this amount each month, then he would be required to spend 20 days in jail. This sanction had no expiration. Crandell appealed the order and its sanction, arguing that the trial court 1) could not find him in contempt due to his inability to pay due to disability; and 2) could not require him to spend 20 days in jail each month he failed to fulfill his child support duty. On appeal, the Supreme Court held that the trial court's finding of contempt was not erroneous because it had substantial evidence regarding Crandell's ability to pay. However, the Court also held the sanction imposed by the order was improper because it sought to punish future contempt rather than merely present contempt. The Supreme Court therefore vacated the contempt order in part and remanded the matter for further findings and proceedings consistent with its opinion.

II. DEPENDENCY, NEGLECT AND ABUSE

Cabinet for Health and Family Services v. Baker, 645 S.W.3d 411 (Ky. 2022)

Opinion of the Court by Justice Hughes. All sitting; all concur. The Cabinet for Health and Family Services (CHFS) filed dependency/neglect/abuse (DNA) petitions in June 2020 in the Bullitt County Family Court alleging, collectively, that three siblings were being abused or neglected by their mother. The CHFS awarded temporary custody of the children, and placed them with a paternal aunt. Although the CHFS had begun evaluating the father for placement, on July 1, 2020, the CHFS learned that the father, without permission, had taken the children to his residence in Florida; the children's mother also accompanied them. The CHFS began working to get the children back to Kentucky. On July 6, 2020, the CHFS communicated the children's status to the Bullitt County Family Court, the guardian *ad litem* (GAL), and the Bullitt County Attorney. At the emergency hearing that same day, held upon the GAL's motion, the Family Court ordered the CHFS to return the children to Kentucky withing 24 hours. Under the supervision of CHFS employees, the children were returned within 48 hours and placed in foster care. The GAL then filed DNA petitions against the CHFS alleging that inaction by the CHFS placed the children at great risk of harm; however, the GAL did not petition to remove the children from the CHFS's temporary custody. The CHFS filed a motion to dismiss the petitions, claiming governmental immunity. The family court overruled the motion and the Court of Appeals, while recognizing DNA petitions against the CHFS are unusual, affirmed that decision. Held: The CHFS's governmental immunity claim was not properly before the Court. At the point the GAL filed the petitions, the GAL's concerns for the children's safety as a result of being with their parents, and criticisms of the CHFS's manner of effectuating their return from

Florida without police involvement, even if deemed an appropriate basis for a DNA petition, were largely moot. If the CHFS was irresponsibly lax in reporting the children's absence or securing their return if deferring to Florida Child Protective Services' judgment regarding the children's safety instead of involving Florida police, or any other aspect of this incident was problematic, those issues were properly addressed in the existing DNA cases.

III. PATERNITY

Cabinet for Health and Family Services ex rel. Child Support Enforcement v. B.N.T., 651 S.W.3d 745 (Ky. 2022)

Opinion of the Court by Justice Lambert. All sitting; all concur. A married man, Barry, had an affair with Krissy. Krissy became pregnant during their affair, and Barry sought to establish the child's paternity. At Barry's request, the Cabinet filed a paternity complaint asserting that Barry was the child's father. In response, Krissy alleged that her fiancé was the father, though she never disclosed the identity of her fiancé. Barry and Krissy entered into an agreed order which stated that Barry was not the child's father, that Krissy's anonymous fiancé was the father, and that both parties waived any genetic testing to determine the child's paternity. Nearly three and a half years after the agreed order was entered, Krissy (who was receiving public benefits for the child) filed an application for Child Support Services alleging that Barry was the child's father. The Cabinet then initiated child support and paternity actions against him. The Cabinet also filed a CR 60.02 motion to set aside the agreed order based on its belief that it was fraudulent. The family court found that the Cabinet's motion was untimely under CR 60.02 and denied it. The Cabinet appealed, and the Court of Appeals affirmed. The Supreme Court reversed. It held that the family court lacked subject matter jurisdiction under KRS 406.021 to enter the agreed order and it was therefore void *ab initio*. The Court reasoned that KRS 406.021 allows the court to determine paternity, but it does not allow for a determination of non-paternity without a corollary determination of actual paternity. Accordingly, because the agreed order established the non-paternity of Barry without any further fact finding that affirmatively established the child's actual paternity, the family court lacked the inherent power to enter it. The Court vacated the order and remanded for further proceedings.

IV. DEPENDENCY, NEGLECT AND ABUSE/PARENTAL ALIENATION

Cabinet for Health and Family Services v. L.G., 653 S.W.3d 93 (Ky. 2022)

Opinion of the Court by Justice Keller. All sitting; all concur. Over the course of several years, L.G. and her son, H.M., made numerous allegations of abuse, including sexual abuse, against H.M.'s father, J.M. Child Protective Services (CPS) did not substantiate any of the allegations until the last one. During its investigation into this last allegation, CPS also began an investigation into L.G. for emotional abuse of H.M. CPS worried that L.G. was manipulating H.M. into making and supporting false claims against his father and using the allegations to get back at J.M. after arguments. After a dependency, neglect, or abuse action was filed against each parent, the Jefferson Family Court found that L.G. emotionally abused H.M. and that J.M. did not abuse him. L.G. appealed the finding of abuse against her and the Court of Appeals reversed. The Supreme Court granted discretionary review. The Supreme Court held that the family court's findings were not clearly erroneous nor were its actions an abuse of discretion. The Court explained that the family court heard and received numerous claims regarding the ways in which L.G.'s behavior served to impair H.M. The trial court found that H.M. was deprived of his ability

to have a stable and appropriate relationship with his father and was encouraged to deceive and manipulate those around him. L.G. intentionally impeded any attempts to remedy these harms in H.M.'s therapy, only worsening his ability to overcome deficits in his ability to "function within a normal range of performance and behavior." Based on this evidence, the Supreme Court reversed the Court of Appeals and reinstated the orders of the family court.

V. MANDY JO'S LAW

Miller v. Bunch, 657 S.W.3d 890 (Ky. 2022)

Opinion of the Court by Justice Lambert reversing and remanding. Questions Presented: Mandy Jo's Law (KRS 391.033 and KRS 411.137). Issues involve whether the biological father of a stillborn child can be deemed to have "willfully abandoned the care and maintenance of his . . . child." Following settlement in a wrongful death action brought against the hospital by the mother of a stillborn child, in which the child's father intervened as plaintiff, the mother requested a hearing to determine division of settlement proceeds, alleging that the father had abandoned the child prior to her birth and was therefore precluded by Mandy Jo's Law from recovering damages for the child's wrongful death. Following the hearing, the circuit court found that the father had abandoned the child and was not entitled to any settlement proceeds. The Court of Appeals affirmed. Father appealed. As a matter of first impression, the Supreme Court reversed, holding that Mandy Jo's Law does not apply to a stillborn child.

VI. AND NOW FOR THE BIG DADDY – UNEQUAL DIVISION OF MARITAL ASSETS, ATTORNEY'S FEES

Thielmeier v. Thielmeier, 2021-SC-0532-DG, 2022 WL 17726617 (Ky. Dec. 15, 2022), To Be Published. (As of the date of preparation of this outline, March 15, 2023, this opinion is not final – motion for reconsideration pending).

Opinion of the Court by Justice Lambert, affirming in part, reversing in part, and remanding. Relevant facts: The parties were married from 1985 to 2019, Husband was an anesthesiologist and Wife was a homemaker. The parties separated in May 2017 when Husband vacated the marital residence. The divorce was final in December 2019. Wife remained in the marital residence to care for the parties' one remaining minor child during the pendency of the action. Appeal from the Circuit Court, 30th Circuit, Jefferson County, Tara Hagerty presiding.

Significant Supreme Court Holdings:

A. *Evidence did not support the trial court's decisions to award to Husband 100 percent of the contributions made to his 401K after separation and 100 percent of the additional shares he acquired in his medical practice post-separation.*

The trial court awarded an equal division of Husband's 401K as of the date of separation but awarded to Husband 100 percent of the contributions he made to the account between the date of separation and the date of entry of the decree, 2.5 years later. The trial court similarly allocated to Husband 100 percent of the post-separation increase in the value and percentage of his ownership of his medical practice. The Supreme Court reversed, reasoning the trial court ignored

the ongoing homemaker spouse contributions by Wife (caring for minor child) between the date of separation and date of divorce. The Supreme Court remanded with instructions for the trial court to re-address the division of both assets as of the date of entry of the decree and to make specific findings after considering the relevant factors in KRS 403.190 to show why any disproportionate allocation to Husband would be just. The mere statement by the trial court that it "finds all post-separation contributions should be awarded to Husband" was insufficient to qualify as findings. Bottom line, all property acquired prior to the date of the decree is marital and trial courts cannot just allocate marital property accumulated by one spouse post-separation to that spouse. The trial court must allocate all of the marital property up to and including property accumulated post-separation and must actually engage in the analysis required by KRS 403.190 in determining just proportions. In this case, the Supreme Court found error because the trial court did not consider the ongoing contributions of the Wife as homemaker spouse after separation. Other factors to keep in mind when litigating this issue include value of property set aside to each spouse, length of marriage, and the economic circumstances of each spouse when the division is to become effective. The opinion offers a strong rebuke to the disproportionate allocation of property acquired post-separation, at least in cases involving a homemaker spouse.

B. *Wife was entitled to award of outstanding attorney's fees and outstanding expert fees.*

During the trial court proceedings, the Husband paid his attorney and two court-appointed experts in full plus he advanced over $33K to Wife's attorneys. At trial, Wife asked for an award of the remaining balance she owed her lawyer of $23K plus $17K for her outstanding expert fees. The trial court denied those requests finding that the Husband had already advanced $33K to Wife's attorneys. This resulted in Husband owing no attorney's fees and Wife owing a total of $40K in attorney's and expert fees. The Supreme Court reversed the trial court and remanded with direct instructions to award Wife her attorney and expert fees in full, reasoning that all resources available to the parties to pay fees prior to entry of the decree were marital, Husband was able to pay all litigation expenses using marital funds, and Wife should likewise have marital funds available to her for litigation expenses. This ruling is equal parts confirmation of the Court's strong rebuke of the trial court's disregard of the marital character of all property accumulated post-separation and precedent for the proposition that if one party has access to marital funds to pay attorney's fees the other party shall likewise have access.

1. Would you have ruled differently? How?

2. Do you think the ruling comports with the directive of our fee shifting statute, KRS 403.220?

3. Could the Court have analyzed the issue differently?

4. What factors other than the other party's access to marital funds to pay litigation expenses might be relevant to this analysis?

5. How will the trial court award these fees to Wife on remand?

C. *The trial court could use the buyout provision in husband's employment agreement to value his ownership interest in his anesthesiology practice.*

The trial court rejected the opinion of all three valuation experts who presented opinions of value and, instead, valued the Husband's interest in his medical practice consistent with the terms of the practices' buy-out provisions. The Supreme Court upheld the trial court's determination in that regard simply finding there was substantial evidence to support it.

1. Bottom line: Always consider the amount that results from a buy-sell agreement when dealing with the issue of valuing of an owner/spouse's interest in a business or professional practice. If there is evidence in the record of the amount that results from application of a buy-sell agreement, then the trial court has discretion to use that valuation and reject expert evidence which results in a different number.

2. Do you think this ruling is consistent with prior precedent which requires an interest in a business be assigned fair market value?

2022 WL 17726617
Only the Westlaw citation is currently available.

Supreme Court of Kentucky.

Lisa THIELMEIER, Appellant

v.

Kenneth THIELMEIER, Appellee

2021-SC-0532-DG
|
December 15, 2022

ON REVIEW FROM COURT OF APPEALS, CASE NO. 2020-CA-0707, JEFFERSON CIRCUIT COURT NO. 17-CI-500023

Attorneys and Law Firms

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COUNSEL FOR APPELLEE: Peter James Catalano, Melanie Lee Straw-Boone, Louisville, Straw-Boone Doheny Banks & Mudd, PLLC.

Opinion

OPINION OF THE COURT BY JUSTICE LAMBERT

Lisa Thielmeier (Lisa) appeals from a decision of the Court of Appeals which affirmed several Jefferson Circuit Court rulings in a dissolution proceeding between Lisa and her former husband Kenneth Thielmeier (Ken). After review, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. FACTUAL AND PROCEDURAL BACKGROUND

Lisa and Ken met when they were seniors in high school and dated throughout college. They were wed on July 19, 1985. At the time, both Ken and Lisa were pursuing post-graduate degrees. Lisa taught elementary school from 1985 through 1989, and worked as a guidance counselor from 1990 to 1991. After the couple's first child was born in 1991, Lisa left the workforce and did not return. Over the ensuing three decades of marriage, Ken and Lisa had five more children to whom Lisa was a full-time stay-at-home mom.

After completing medical school Ken became an anesthesiologist. In 2008, he began an anesthesiology practice, Anesthesiology Consultants Enterprises, Inc. (ACE) with his partner Dr. Patrick Shanahan (Dr. Shanahan). Being both an owner of and practicing physician for ACE required Ken to work 60 to 65-hour work weeks. ACE proved to be lucrative, and the family lived a very comfortable lifestyle throughout the marriage.

By January 1, 2016, Ken and Lisa considered themselves separated, though Ken was still living in the marital home. On November 8, 2016, Ken filed for a dissolution of marriage, and he moved out of the home on April 1, 2017. At that time, only their youngest child, Samuel, was still a minor. Samuel continued living with Lisa after Ken moved out.

After several years of litigation, the divorce action's two-day trial began on October 3, 2019. On the same morning, the parties entered into a set of agreed stipulations. The stipulations settled several issues leaving only the following, in relevant part, for the court to decide: the division of Ken's ACE 401(k); the valuation of Ken's ownership interest in ACE; the division of Ken's ownership interest in ACE; spousal maintenance; and attorney's fees.

A. The division of Ken's ACE 401(k).

The parties had a total of five retirement accounts between them. Under their agreed stipulations, four of those accounts were divided equally. The division of the remaining account, Ken's ACE 401(k), was decided by the court. An accounting of Ken's ACE 401(k) contributions and amounts from May 1, 2017, through September 15, 2019, was entered into evidence. The court's findings of fact and conclusions of law stated the following:

> The largest retirement account owned by the parties is Ken's ACE 401(k). According to documents provided to the Court, the balance of the account as of September 15, 2019, was [$1,481,893.25]. It is Ken's request that the ACE 401(k) be divided equally as of May 1, 2017 (shortly after he vacated the marital residence). He would like to be awarded 100% of the contributions into his retirement account from May 1, 2017, to present. He contends that KRS[1] 403.190(1)(a) permits him to retain 100% of the post-separation contributions to his 401(k). This Court agrees.

The court ordered that the ACE 401(k) be equally divided between Ken and Lisa as of May 1, 2017, and that Ken be awarded 100% of the contributions after May 1, 2017.

B. The valuation and division of Ken's ownership interest in ACE.

ACE is an anesthesiology group started in 2008 by Ken and Dr. Shanahan. ACE is a closely held professional limited liability company that provides anesthesiology services to one hospital, Audubon Hospital. ACE's exclusive contract for services with Audubon Hospital is the company's only contract, and it is renewed every three years. Without this contract with Audubon Hospital, ACE would have no business and no income. The company's only assets are its accounts receivable, its cash account, and a few computers.

During the relevant time period in this case, there were seven other doctor-owners of ACE in addition to Ken. Each of those owners have the same employment contract, which contains a

[1] Kentucky Revised Statute.

buyout clause in the event of voluntary or involuntary termination. As ACE's biggest asset is its accounts receivable, the buyout clause multiplies the net adjusted value of ACE's accounts receivable by the doctor's individual ownership percentage. That amount is then paid out over 18 months.

The court heard testimony from ACE's business manager, Ryan Nunnelly (Nunnelly),[2] regarding the value of Ken's ownership interest using the buyout clause's formula. On the date Dr. Shanahan retired, June 30, 2018, he and Ken each owned a 26% interest in ACE. Using the buyout clause's formula, Nunnelly opined that on June 30, 2018, Ken's 26% would have rendered a buyout amount of $209,721. This was the same amount paid to Dr. Shanahan when he retired on that date. After Dr. Shanahan retired, his 26% interest was distributed amongst ACE's other owners resulting in Ken's ownership interest increasing to 35.14%. Nunnelly further opined, using the same formula, that a year later on June 30, 2019, Ken's 35.14% interest would have resulted in a buyout amount of $232,720.

The court heard testimony from two other experts concerning ACE's valuation. The first, Robert Kester (Kester), was the court's appointed expert. The circuit court's fact findings regarding his valuation are as follows:

> Mr. Kester explained that there are three generally accepted methods for valuing a business – the capitalization of benefits method (sometimes called the income approach), asset approach, and market approach. Mr. Kester considered the asset approach and the income approach; he ultimately relied on the adjusted book value method under the asset approach in determining the value of Ken's interest.
>
> Mr. Kester explained that he disregarded the capitalization of benefits method because the value of the entire practice had a negative value. When the calculation of the capitalization of benefits produces a negative value, the company has no goodwill value. Had Mr. Kester determined that ACE had a value in excess of its tangible assets, or goodwill value, he would have been required under Kentucky law to further determine what portion of the goodwill was personal versus enterprise goodwill. In the present case Mr. Kester determined that ACE does not have any goodwill value.
>
> The primary asset of ACE is the accounts receivable which made up the majority of the book value as calculated under the asset approach. Mr. Kester determined the total value of ACE to be $567,000. He then applied a 5% minority of interest discount and a 5% lack of marketability discount. Mr. Kester explained that the discounts were appropriate because Ken owns a minority interest in ACE and he could not easily sell his interest in the practice because it is not a public company.
>
> Mr. Kester valued Ken's 26% interest in ACE as of June 30, 2018, to be $133,120. Mr. Kester acknowledged that Ken's interest as calculated by the Employment Agreement on the same date would be $209,721. He testified that he had never before performed a valuation when an actual buyout [of] an owner took place on the same day as the valuation.

[2] Nunnelly is not an ACE employee. Nunnelly works for Merrick Management, a professional services organization that ACE contracts with for financial services.

The second expert was Lisa's hired expert, Roman Basi (Basi). The circuit court found the following with regard to his valuation:

> [Basi] ... valued ACE using the capitalization method and came to a significantly higher result. Mr. Kester testified that he believed it was inappropriate to add back expenses for profit-sharing, the cost of life and disability insurance policies for all employees, and a portion of Ken's salary [which Basi did in his calculation]. In addition, Mr. Basi did not deduct minority of interest or lack of marketability discounts.
>
> Mr. Basi valued Ken's [35.14%] interest in ACE at $1,350,456. However, the court found Mr. Kester's testimony about the method and calculation of valuing ACE to be persuasive. Ken agreed to value this ownership interest in ACE according to the Employment Agreement as calculated by Mr. Nunnelly even though the result is higher than Mr. Kester's evaluation.

After considering all three valuation methods and results, the circuit court found "that the value of Ken's ownership interest in ACE is the value as calculated in his Employment Agreement." The court reasoned that there was "no reason to believe that the amount actually paid to Dr. Shanahan for his interest in ACE was anything other than fair market value." Accordingly, the court found that Ken's 26% ownership interest as of June 30, 2018, was valued at $209,721, while his 35.14% ownership interest as of June 30, 2019, was worth $232,720.

Regarding the division of Ken's ownership interest, Ken requested that his ownership interest as of June 30, 2018, be divided equally between himself and Lisa. But he further asked that the increase in value after June 30, 2018, be awarded to him solely. He acknowledged that the increase was marital property, but argued that by June 30, 2018, he and Lisa were already separated, and she therefore did not contribute to his attaining the increase in value. Lisa argued that the percentage to be divided was 35.14% because that would be the ownership percentage on the date the divorce decree would later be entered. The circuit court ruled:

> [T]he court finds that it is appropriate to value Ken's ownership interest as of June 30, 2018, when Dr. Shanahan retired. Even though Ken currently owns a greater share of ACE, the Court finds that the additional shares acquired in 2018 should be awarded to him solely. The parties shall equally divide the value of Ken's ownership interest in ACE as calculated by his Employment Agreement as of June 30, 2018.

C. Spousal Maintenance

Lisa also requested that she be awarded spousal maintenance. Pursuant to KRS 403.200(1), an award of maintenance is only appropriate if the spouse seeking it: (1) lacks sufficient property to provide for his or her reasonable needs, and (2) is unable to support himself or herself through appropriate employment.

To determine Lisa's ability to work and earn money, the court appointed Linda Jones (Jones) of Vocational Economics, Inc. Jones testified that Lisa had previously attained a bachelor's degree in elementary education, a master's degree in guidance and counseling, a Rank I in guidance counseling, as well as three lifetime certificates and endorsements in teaching and counseling. Jones opined that, given Lisa's qualifications and previous work experience, returning to work as an elementary teacher would be Lisa's best option for employment. Jones predicted that Lisa

could earn between $53,000 and $59,000 per year working as a full-time teacher. In the alternative, Lisa could earn roughly $15,000 per year ($1,250 per month) as a substitute teacher working three days a week. Jones acknowledged that Lisa would likely need to take additional college courses to update herself on teaching practices and technology beforehand.

Lisa disputed her ability to return to the workforce primarily because of her youngest son Samuel's medical condition. In April 2018, a year after Ken left the marital home, Samuel developed a rare condition called Moyamoya disease. The disease caused two of the four major arteries that supplied blood to Samuel's brain to become partially or entirely blocked. Samuel went through three brain surgeries to correct the issue, which were successful. At the time of the trial, Samuel was still experiencing daily headaches which varied in severity. Samuel was able to attend high school, but frequently had to come home early due to headaches (impressively, Samuel was able to maintain an A and B average in school throughout his entire ordeal). Ken testified that Samuel's headaches were likely to diminish as his condition stabilized, and he had recently responded very well to Botox injections as a form of treatment.

Lisa argued that she was unsure of her ability to have a full-time job due to her role as Samuel's primary caregiver. She testified that she must be available at a moment's notice to pick Samuel up from school if his headaches become too severe, which was a frequent occurrence. Ken countered that either he or the parties' other adult children who live in Louisville could pick Samuel up from school if Lisa was unavailable. Lisa also cited her age, 57, and several medical conditions as reasons that returning to teaching was not feasible. However, as the court noted in its order, "she did not provide the court with any documentation of a medical condition that would prevent her from maintaining gainful employment."

The court's order stated that it was "skeptical that Lisa could return to teaching full time at her age after thirty years away from the classroom." It further stated it was "not certain how realistic it [was] to expect Lisa to work full time as a classroom teacher, a job which typically has very little flexibility, given the unpredictable nature and frequency of Samuel's needs." Nevertheless, the court imputed an income of $1,500 per month to Lisa.

Concerning whether Lisa had sufficient property to pay for her reasonable needs, Lisa provided a list of her monthly expenses prepared by her financial planner, Brian Haehl (Haehl). Haehl prepared his report by utilizing the parties' joint checking account records and Lisa's credit card history. The court found that both parties provided significant financial support for their adult children. The court consequently deducted expenses totaling $1,591 "for fuel, restaurants, and groceries for the parties' adult children" from Lisa's monthly expenses. The court also deducted several expenses that Lisa was no longer paying. Finally, the court deducted $700 per month "for savings" and $2,083 per month "for retirement contributions."

After making the foregoing deductions, the court found that Lisa's reasonable monthly expenses were approximately $13,000, and that she did not have sufficient property or income to meet her monthly financial needs. It accordingly found that an award of maintenance was appropriate.

As for the amount of Lisa's maintenance, the court cited KRS 403.200(2)'s list of factors that it was mandated to consider in awarding maintenance. It then applied the following analysis under those factors:

> Ken is also 57 years old. He has Type 1 diabetes; his condition is well managed and does not currently impede his ability to work as an anesthesiologist. During the parties' marriage, Ken was the family's sole source of income. The parties

> maintained a comfortable lifestyle, provided their children with private educations and other amenities. The result is that the parties have not accumulated much joint savings. The parties' retirement accounts will be equally divided as will the equity in their marital residence. Ken's income is the remaining asset of value. While there has been some fluctuation in Ken's annual gross income in recent years, in 2018, he had gross monthly income of $65,040 and net (after tax) income of $37,387.
>
> The court has reviewed Ken's list of monthly expenses. He included expenses he pays for the parties' adult children and Samuel's tuition at Trinity High School. The court will also consider Ken's obligation to pay child support and a proportional share of Samuel's extraordinary medical expenses as set out herein. The Court finds that Ken's regular monthly expenses are approximately $14,000, including his child support obligation. The court finds that Ken's income is sufficient to meet his reasonable needs and to pay child support and maintenance to Lisa.
>
> Lisa is awarded significant property herein, including retirement benefits which will be a future source of regular income. Given the length of the parties' marriage and Ken's financial support for Lisa during the parties' separation, the court finds that it is appropriate to award Lisa maintenance for a period of eight years. At that time, both parties will be over 65 and eligible to withdraw retirement benefits. During the period of Lisa's maintenance award, she will be receiving significant income, which she can supplement through her own employment to plan for her retirement.

The court awarded Lisa maintenance of $12,500 per month to be paid for 96 months.

D. Attorney's Fees

Finally, Lisa requested that the outstanding balance of her attorney's fees as well as the $17,500 loan she received from her brother to pay her expert. The court made the following findings:

> Under KRS 403.220, this Court is authorized to award attorney's fees after considering the financial resources of the parties. In the present case ... Ken has paid $47,108.00 to his own attorney and advanced $33,074.00 to Lisa's attorney. In addition, Ken paid $16,630.00 to Blue & Co. for Mr. Kester's report and testimony and $3,100.00 to Linda Jones.
>
> Lisa has incurred attorney's fees of $52,624.37, of which $23,673.37 is outstanding. Lisa also incurred $23,500 in expert witness costs.
>
> This Court ordered Ken to advance $25,000 to Lisa's attorney in March 2019 after having ordered a previous advance of $8,074.15. The allocation of prior advances was reserved. Ken is requesting that $10,000 of the monies advanced be allocated to Lisa's share of the marital estate.

The court ruled that each party was responsible for his or her own outstanding attorney's fees, and that Ken was not responsible for paying Lisa's expert witness or repaying the loan from her brother.

Following the entry of the circuit court's order, Lisa filed both a motion for specific factual findings and a motion to alter, amend, or vacate pursuant to CR[3] 59.05. In her motion for specific factual findings, Lisa requested more specific findings regarding the financial needs of the parties. Specifically, "in the deductions taken and specific dollar amounts." In her motion to alter, amend, or vacate, Lisa argued: that the court erred by awarding 100% of Ken's 401(k) contributions to Ken after April 1, 2017; that the court erred by awarding 100% of the ACE's ownership interest to Ken after June 30, 2018; that the court should reconsider "the valuation of the practice as a whole"; that the court should revisit the issue of maintenance, taking into consideration how the $68,379.50 in equalization payments Lisa owed Ken under the court's order,[4] as well as the court's ruling on attorney's fees, impacted Lisa's monthly expenses; and that the court's ruling on attorney's fees was error as Ken was able to pay all of his litigation expenses with marital funds, but Lisa was not.

In a subsequent order, the circuit court overruled both of Lisa's motions. First, regarding the valuation and division of Ken's ownership interest in ACE, the court ruled:

> As to the valuation of [ACE], this Court affirms the valuation of the marital share of Ken's interest as co-owner of that medical practice. The Court, as stated in the February 21, 2020, Findings of Fact and Conclusions of Law, used the fair market value as determined by [the] buyout of one of the partners in 2018. The court's explanation of this calculation in that Order clearly references consideration of the testimony of both experts who testified at the hearing with due consideration given to each approach. The Court declines to make further findings or to alter previous findings on the issue of valuation of the marital share of the medical practice.
>
> The Court recognizes that the value of Ken's interest in ACE at the date of the Decree of Dissolution is a marital asset under *Stallings v. Stallings*, 606 S.W.2d 163 (Ky. 1980). However, it is within this Court's discretion to divide marital assets as it deems equitable. The Court awarded Ken the increase in value of his interest in the ACE post-separation as sanctioned by the Kentucky Court of Appeals in *Story v. Story*, [2008-CA-001301-MR, 2009 WL 3486667 (Ky. App. Oct. 30, 2009)]. The Court does not believe that valuation was an error and declines to alter that finding.

Concerning the award of maintenance, the court stated:

> [T]he Court rests on the five pages of detailed findings, including reference to and consideration of the factors as set forth in KRS 403.200 contained in the February 21, 2020 Order. The Court points out to Lisa that while the court-appointed expert testified about Lisa's ability to earn up to $59,000 per year, the Court found that unlikely and, in its calculations, only attributed $1,500 per month for [Lisa's] income. The Court was not presented with any medical evidence during the trial that Lisa is physically unable to do any type of work. The parties had been

[3] Kentucky Rule of Civil Procedure.

[4] The court's order recounts that Lisa owed Ken $178,154.00 for his share of the equity in the marital residence in accordance with their agreed stipulations, while Ken owed Lisa $104,860.50 as her share of his ownership interest in ACE plus $4,914 for the life insurance policies awarded to him under the order. Lisa accordingly owed Ken an equalization debt of $68,379.50.

> separated for over two years before the Decree of Dissolution was entered; in that time, Lisa made no efforts to obtain gainful employment of any kind. The Court affirms the award of $150,000 per year to Lisa in maintenance payments for the next 96 months.

Finally, the court simply stated that it reaffirmed its rulings with regard to the allocation of attorney's fees. It did not address Lisa's arguments concerning division of the ACE 401(k). The circuit court entered a limited decree of dissolution of marriage on December 19, 2019.

On appeal, a split Court of Appeals panel affirmed the circuit court's rulings in full.[5] In her dissent, Judge Caldwell agreed with the majority opinion save for three issues.[6] First, with regard to the division of the ACE 401(k) and the division of the ACE ownership interest, she argued that the circuit court's fact findings did "not support an allocation of marital assets being based on the date [Ken] decided to move out of the marital home."[7] Further, the circuit court's order was fundamentally at odds with itself. Specifically, the circuit court declined to rule that Lisa could return to full-time work, in part, due to Samuel's ongoing needs.[8] And yet, it awarded 100% of the post-separation assets to Ken based on his argument that Lisa contributed nothing to the marital assets post-separation.[9] The dissent asserted that this division of the assets clearly showed that the circuit court "could not have considered [Lisa's] contribution as a homemaker as required by KRS 403.190(1)(a)."[10] The circuit court also failed to provide sufficient fact findings as to why the unequal division of the assets was equitable.[11]

Judge Caldwell also would have held that the trial court abused its discretion by allowing Ken to use marital funds to pay all of his attorney's fees while Lisa had to borrow funds and use post-divorce assets awarded to her to pay her legal fees.[12] Again, Judge Caldwell would have held that the circuit court did not provide a sufficient analysis regarding how the facts of the case led to that ruling.[13]

Lisa now appeals to this Court. Additional facts are discussed below as necessary.

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[5] *Thielmeier v. Thielmeier*, 2020-CA-0707-MR, 2021 WL 4126889, at *6 (Ky. App. Sept. 10, 2021).

[6] *Id.* at *7 (Caldwell, J., dissenting).

[7] *Id.* at *6.

[8] *Id.* at *7.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.* at *8.

[13] *Id.*

II. ANALYSIS

Lisa renews her arguments before this Court concerning the circuit court's division of Ken's ACE 401(k); its valuation of Ken's ownership interest in ACE; its division of Ken's ownership interest in ACE; its award of maintenance; and its ruling on attorney's fees. We will discuss each in turn.

A. The circuit court erred in its division of Ken's ACE 401(k).

When dividing marital property in a dissolution proceeding, a trial court must perform the following steps: (1) categorize each piece of contested property as either marital or nonmarital; (2) assign each party's nonmarital property to that party; and (3) equitably divide the parties' marital property.[14] Trial courts have broad discretion in dividing marital property, and this Court may not disturb a trial court's ruling on the division of marital property unless it has abused its discretion.[15] "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles."[16]

Here, it was undisputed that Ken's ACE 401(k) was marital property. The circuit court noted at the outset in its findings of fact and conclusions of law that "[t]he parties stipulate that all of their property is marital," except for a non-marital piece of real estate that is not at issue. Even absent such a stipulation, the account was without question marital property under KRS 403.190[17] and applicable case law.[18] Accordingly, the circuit court first erred by dividing the ACE 401(k) as of May 1, 2017. Instead, it should have divided it as of December 19, 2019, the date of the divorce decree.

The circuit court further erred in awarding Lisa nothing of the contributions Ken made to the 401(k) account after separation. The court agreed with Ken "that KRS 403.190(1)(a) permits him to retain 100% of the post-separation to his 401(k) contributions." But it did not engage in any analysis as to why it considered that division just under the facts before it. This alone is grounds for reversal, as a trial court must actually engage with the KRS 403.190(1) factors when dividing marital property; simply citing the statute is not enough.[19]

In addition, KRS 403.190(1)(a) states that when dividing marital property, the trial court must consider the "[c]ontribution of each spouse to acquisition of the marital property, including contribution of a spouse as a homemaker[.]" Based on the circuit court's citation to KRS 403.190(1)(a), it seemed to rely upon Ken's sole argument that Lisa did not contribute to the

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[14] *See, e.g., Travis v. Travis*, 59 S.W.3d 904, 908-09 (Ky. 2001).

[15] *See, e.g., Smith v. Smith*, 235 S.W.3d 1, 6 (Ky. Ct. App. 2006).

[16] *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

[17] KRS 409.190(3) ("All property acquired by either spouse after the marriage and before a decree of legal separation is presumed to be marital property[.]"). Neither party asserted that any of the exceptions to this statute applied to the ACE 401(k).

[18] *Stallings*, 606 S.W.2d at 164 (holding that all property acquired during a period of separation is marital unless one of the exceptions under KRS 403.190(2) applies).

[19] *Id.* at 164 ("[I]n distributing the marital property, the trial court shall consider the factors in KRS 403.190(1)(a)-(d).").

401(k) after he left the marital residence. This is fundamentally at odds with the court's other findings. When addressing spousal maintenance, the court declined to find that Lisa could return to the workforce full-time, in part, due to "the unpredictable nature and frequency of Samuel's medical needs." Consequently, under the court's own finding, Lisa was still contributing to Ken's ability to contribute to the 401(k) after he left the marital residence by being Samuel's primary caregiver. It is well-established that "the contribution of a spouse as a homemaker does not necessarily cease when the other spouse leaves, especially when minor children remain with the homemaker-spouse."[20]

For the foregoing reasons, the circuit court's division of Ken's ACE 401(k) account after May 1, 2017, was an abuse of discretion and we reverse. On remand, the circuit court shall readdress the division of the ACE 401(k) as of December 19, 2019, the date the divorce decree was entered, and shall explain why its chosen division is just under KRS 403.190(1)(a)-(d).

B. The circuit court did not err in its valuation of Ken's ACE ownership interest, but it did err in its distribution of that ownership interest.

Lisa next asserts that the circuit court erred with respect to the method it adopted in valuing Ken's ACE ownership interest. She further contends that the court erred by awarding Ken 100% of the value of his ownership interest after June 30, 2018. We will discuss each argument in turn.

An appellate court may not disturb a trial court's ruling on the valuation of a business in a dissolution proceeding unless it was clearly contrary to the weight of the evidence.[21] This Commonwealth has historically declined to adopt a particular method for valuing an ownership interest in the dissolution context.[22] Rather, appellate courts ask only whether "the trial court's approach reasonably approximated the net value of the partnership interest."[23]

Lisa first asserts that the circuit court improperly disregarded Basi's determination that ACE had goodwill. While it is true that *Heller, supra*, held that a business' goodwill should be considered when determining a business' value,[24] it did not hold that all businesses have goodwill.[25]

Here, the buyout provision's formula did not account for goodwill. However, Kester explained that among the three different methods used to value a business – the capitalization of income approach, the asset approach, and the market approach – the adjusted book value method under the asset approach was the best approach given the nature of ACE as a business. In reaching this conclusion, Kester also ran the numbers using the capitalization of income approach. He determined that ACE had a negative value using the capitalization of income approach, and that it therefore had no goodwill. Basi, using the capitalization of income approach, found that ACE

[20] *Id.*

[21] *Clark v. Clark*, 782 S.W.2d 56, 58 (Ky. Ct. App. 1990) (*citing Heller v. Heller*, 672 S.W.2d 945 (Ky. Ct. App. 1984)).

[22] *Clark*, 782 S.W.2d at 59.

[23] *Id.*

[24] *Heller*, 672 S.W.2d at 947.

[25] *Gomez v. Gomez*, 168 S.W.3d 51, 55 (Ky. Ct. App. 2005).

had goodwill only after adding back expenses for ACE's 401(k) plan, the cost of life and disability insurance plans for all employees, and what he felt was Ken's excess salary. Kester believed that each of those add backs were inappropriate and resulted in an inflated value. The circuit court found that Kester's method of valuation was persuasive, *i.e.,* it agreed with Kester that ACE had no goodwill to consider when determining its value. This was not clearly contrary to the weight of the evidence.

Next, Lisa argues that the circuit court erred by using the buyout provision in Ken's employment agreement to value his ownership interest. She argues that it should have used Basi's valuation instead. As noted, the circuit court did not find Basi's calculations appropriate. And, in addition to Kester's testimony regarding why Basi's valuation was flawed, Basi also admitted during cross-examination that he did not know basic things about ACE. For example, he did not know how many hospitals ACE contracted with or the duration of those contracts. Further, Basi's valuation of ACE as a whole was incredibly high compared to the values reached under the buyout provision and Kester's analysis, respectively. As of June 30, 2018, ACE's overall value was $806,621 under the buyout provision, and was $567,000 under Kester's valuation. Basi's valuation of $3,843,073 as of June 30, 2018, was well-over quadruple either of those amounts. We cannot say that the circuit court's refusal to use Basi's valuation was clearly contrary to the weight of the evidence.

This leaves the circuit court's decision to value Ken's ownership interest in accordance with ACE's buyout provision. We note first that the valuation of ACE under the buyout provision was greater than Kester's valuation, and in that sense actually benefitted Lisa considering that the court appropriately declined to use Basi's valuation. With that said, in general

> while buy-sell agreements or corporate by-laws have been rejected as the basis for valuing a professional practice where this would not accurately reflect the value of the business, *Clark, supra*, 782 S.W.2d at 60, they may be used as a factor in reaching a determination regarding the value of a professional business.[26]

For example, in *Gomez, supra*, the Court of Appeals reviewed a trial court's valuation of a husband's 1/3 interest in a radiology practice in a dissolution proceeding.[27] The trial court heard evidence from two experts.[28] The husband's expert valued his interest in the practice at just over $100,000, and did not include an amount for goodwill.[29] The wife's expert valued the ownership interest at $932,880, and included a calculation for goodwill based on the capitalization of excess earnings approach.[30] The trial court adopted the husband's expert's valuation, finding the radiology company's practice "with respect to those physicians entering or exiting the practice to be significant."[31] Specifically, the husband submitted

[26] *Gomez*, 168 S.W.3d at 56.

[27] *Id.* at 53.

[28] *Id.* at 55.

[29] *Id.*

[30] *Id.*

[31] *Id.* at 56.

> affidavits from other physicians who had left the practice that when a physician joined or left the group an evaluation of the current accounts receivable was done. Based on that value a physician entering or leaving the practice had to pay or was paid a percentage of the accounts receivable value.[32]

The Court of Appeals affirmed, reasoning:

> while we would have reached a different conclusion on the evidence presented in this case, the trial court's determination that no goodwill existed because of the historical way in which the practice valued itself is supported by substantial evidence. Further, a review of the expert testimony in this case reveals that [the wife's] expert's valuation suffered from some problems according to [the husband's] experts. Our task is to determine whether the trial court's finding of fact as to valuation of the business is clearly erroneous. If substantial evidence exists to support the decision, then we are bound to affirm and we do so here.[33]

In this case, substantial evidence supported the circuit court's decision to use the buyout provision to value Ken's ownership percentage in ACE. The circuit court thoroughly recounted the evidence produced by all three experts and found the buyout provision to be the most appropriate method to value Ken's ownership. We cannot hold that this was clearly contrary to the weight of the evidence and must accordingly affirm.

However, the circuit court did err in its division of Ken's ownership interest. Again, we review a trial court's decision on the division of marital property for abuse of discretion.[34] First, the trial court erred by dividing the ownership interest as of June 30, 2018. The increase in the accounts value was indisputably marital property, and should have therefore been divided as of the date the dissolution decree was entered. Further, the court provided absolutely no reasoning as to why it awarded Ken 100% of the ownership interest. It simply stated, "[e]ven though Ken currently owns a greater share of ACE, the Court finds that the additional shares acquired in 2018 should be awarded to him solely." Similar to the division of the ACE 401(k), the circuit court was required to address why its chosen division was just under the factors enumerated in KRS 403.190(1)(a)-(d), and its failure to do so was error.

On remand, the circuit court shall readdress the division of Ken's ownership interest. It shall divide the interest as of December 19, 2019, and shall explain why its chosen division is just under KRS 403.190(1)(a)-(d), taking into consideration Lisa's continued contributions as Samuel's primary caregiver.

C. The circuit court erred in its ruling on attorney's fees.

Lisa also argues that the circuit court erred by failing to award her the outstanding balance on her attorney's and expert's fees. Pursuant to KRS 403.220

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[32] *Id.*

[33] *Id.*

[34] *Smith*, 235 S.W.3d at 6.

> [t]he court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for attorney's fees, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or after entry of judgment.

A trial court's ruling concerning an award of attorney's fees in a dissolution action will not be disturbed on appeal absent an abuse of discretion.[35]

Lisa requested that the court award her outstanding attorney's fees totaling $23,673.37, and outstanding expert fees totaling $17,500, *i.e.,* money to repay her brother for the loan he gave her to pay for her expert. The court denied her request, citing that Ken paid for both of the court's appointed experts, and had already "advanced $33,074.00 to Lisa's attorney." This ruling resulted in Ken owing no outstanding balance to his attorneys, while Lisa owes her attorneys and expert $41,174.

Lisa's argument is simple: until the divorce decree was entered, all of the funds used to pay lawyers and experts were marital property. Ken was therefore able to pay for all of his litigation expenses using marital funds, but Lisa was not. We agree with Lisa that this decision was unreasonable and unfair and was accordingly an abuse of discretion. We reverse and order that on remand Lisa be awarded $23,673.37 for her outstanding attorney's fees, and $17,500 for her outstanding expert fee.

D. Given this Court's other holdings herein, reconsideration of maintenance is required.

Lisa also alleges that the circuit court made several errors in its award of maintenance. We decline to address those arguments here, as maintenance will necessarily have to be re-addressed by the court after it rules on the division of the ACE 401(k), the ownership interest in ACE, and awards Lisa attorney and expert fees consistent with this opinion. We hold only that the circuit court did not err by deducting expenses from Lisa's monthly expenditures for expenses related to the parties' adult children. Even if such expenses were part of the parties' standard of living during the marriage, spousal maintenance only contemplates necessary living expenses for the spouse, not the spouse's adult children. Lisa is free to raise all other arguments raised before this Court to the circuit court for consideration. The circuit court is directed on remand to reconsider the award of spousal maintenance by applying the appropriate statutory factors under KRS 403.200.

III. CONCLUSION

Based on the foregoing, we affirm in part and reverse in part. We remand to the circuit court for further proceedings, as the court deems appropriate, consistent with this opinion.

All sitting. All concur.

All Citations

--- S.W.3d ---, 2022 WL 17726617

[35] *Sexton v. Sexton*, 125 S.W.3d 258, 272 (Ky. 2004).

Several years ago, if you represented a client seeking a divorce the norm was to wait 30 days from the date of decree for the appeal time to pass and then close the file. Now, most attorneys keep the file handy to address a barrage of post decree motions. The courts are overwhelmed with post decree motions filed by one or both parties. These motions demand the court enforce its original orders or, alter amend or vacate prior orders. Our panel of Family Court Judges will address some of the procedural and tactical aspects of the most common post decree motions filed in their courts including the following:

I. MOTIONS UNDER CR 59.01

A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes:

A. Irregularity in the proceedings of the court, jury or prevailing party, or any order of the court, or abuse of discretion, by which the party was prevented from having a fair trial.

B. Misconduct of the jury, of the prevailing party, or the attorney.

C. Accident or surprise which ordinary prudence could not have guarded against.

D. Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice, or in disregard of the evidence or the instructions of the court.

E. Error in the assessment of the amount of recovery whether too large or too small.

F. That the verdict is not sustained by sufficient evidence or is contrary to law.

G. Newly discovered evidence, material for the party applying, which could not, with reasonable diligence, have been discovered at trial.

H. Errors of law occurring at the trial and objected to by the party under the provisions of these rules.

II. MOTIONS UNDER CR 59.02 FOR A NEW TRIAL MUST BE FILED WITHIN 10 DAYS OF THE ENTRY OF THE DECREE

The 10-day period is calculated as stated in KRS 446.030 and if not in compliance will result in the motion for a new trial being rejected by the court. In addition, the court on its own accord pursuant to CR 59.04 may no later than 10 days after the entry of judgment order a new trial for any reason for which it might have granted a new trial on motion of a party.

III. MOTIONS UNDER CR 60.01 FOR CLERICAL MISTAKES

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

IV. MOTIONS UNDER CR 60.02 TO ALTER, AMEND OR VACATE AN ORDER

On motion a court may, upon such terms as are just, relieve a party or the party's legal representative from its final judgment, order or proceeding upon the following grounds:

A. Mistake, inadvertence, surprise, or excusable neglect;

B. Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under CR 59.02;

C. Perjury or falsified evidence;

D. Fraud affecting the proceedings, other than perjury or falsified evidence;

E. The judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

F. Any other reason of an extraordinary nature justifying relief.

V. TIME FOR FILING A MOTION UNDER CR 60.02

CR 60.02(f) requires the motion to be filed within a reasonable time, and on grounds (a), (b), and (c) not one year after the judgment, order or proceeding was entered or taken. Under grounds (d), (e), and (f) there is no time limit other than "within a reasonable time" which is under the court's discretion. Under CR 60.03 the court may take an independent action to relieve a person from a judgment, order, or proceeding on appropriate equitable grounds as defined under CR 60.02, or which would be barred because not brought in time under the provisions of that rule. Note that under CR 60.04, if a motion is filed under CR 60.02, while an appeal is pending from the original judgment and prior to the time an opinion is rendered by the appellate court, the party filing the motion shall promptly move the appellate court to abate the appeal until a final order is entered.

VI. MOTIONS PURSUANT TO CONTINUING JURISDICTION OF THE COURT

The courts in Kentucky retain jurisdiction of certain matters post decree including the ability to modify child support (KRS 403.213), to modify spousal support unless specifically made non-modifiable pursuant to an agreement of the parties (KRS 403.200 and FCRPP 5(3)), and to modify custody of minors (KRS 403.340). Regarding a motion to modify custody, the motion cannot be made within the first two years of the decree unless the child's mental, physical, or emotional health is at risk. After two years the standard becomes "the best interest of the child." Motions to modify parenting time may be made at any time pursuant to Kentucky Family Court Rules (FCRPP 8).

VII. RELOCATION

Pursuant to FCRPP 7(2)(a), if either parent or custodian intends to move the children from their present residence, written notice must be given to the other parent or custodian at least 60 days prior to such a move. Either party or custodian can then file a motion to modify custody or visitation. The factors the court must consider are set forth in KRS 403.270.

I. INTRODUCTION

The material below discusses ethical issues in representing parties in premarital agreements. Lawyer malpractice is a closely related, but not entirely overlapping, subject. Though lawyer misconduct rarely dooms an agreement, the client and the lawyer will always be better served by adherence to the highest standards of practice.

Unethical, or arguably unethical, behavior on the part of a lawyer for one of the parties is not an independent basis for attacking the validity of a premarital agreement. However, lawyer misconduct may be a factor in a court finding that an agreement was the product of undue influence.[1] The combination of improper joint representation and other factors, such as inadequate disclosure, can result in invalidity.[2] Similarly, the incompetence of a party's lawyer, which could constitute both malpractice and an ethical lapse, is not an independent ground on which a court may invalidate an agreement.[3] However, it may expose the lawyer to a claim.

Estate of Campbell v. Chaney,[4] was a malpractice action against a drafting attorney filed after the deceased husband's estate settled the widow's challenge to the validity of a premarital agreement. The attorney's experts testified the widow's claim would have failed had it been tried. The court rejected the attorney's summary judgment motion, holding that the deficiencies in the process leading to execution provided a basis on which a trier of fact could find that the estate suffered a loss when it settled a case whose outcome was not certain. The estate did not have to prove the widow's claim would have succeeded in order to prevail against the lawyer. Rather, the court held:

> *[T]he negligence of an attorney does not depend on whether the agreement can be enforced.* If an attorney drafts a prenuptial agreement without attaching a financial statement, the fact-finder could conclude that the attorney failed to use reasonable care; that is, that the attorney was negligent. It is immaterial that the agreement might later be enforced after a finding that the widow already knew the financial information. The fact-finder could still find that the attorney failed to exercise reasonable care in drafting the agreement. If that failure caused the estate to settle a claim that a proper agreement would have made meritless, then the attorney may be held liable.[5]

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[1] *See Hale v. Hale*, 539 A.2d 247 (Md. Ct. Spec. App. 1988).

[2] *See Matter of Benker's Estate*, 331 N.W.2d 193 (Mich. 1982).

[3] *See Friezo v. Friezo*, 914 A.2d 533 (Conn. 2007); *Rostanzo v. Rostanzo*, 900 N.E.2d 101 (Mass. App. Ct. 2009); *DeMatteo v. DeMatteo*, 762 N.E.2d 797 (Mass. 2002); *Price v. Price*, 289 A.D.2d 11 (N.Y. App. Div. 2001); *Casto v. Casto*, 508 So.2d 330 (Fla. 1987).

[4] 485 N.W.2d 421 (Wis. Ct. App. 1992).

[5] *Id.* at 410, 425 (emphasis added); *see also Brust v. Newton*, 852 P.2d 1092 (Wash. Ct. App. 1993) (lack of disclosure and other factors caused husband to settle wife's suit over validity of agreement resulting in

II. OBLIGATIONS OF COUNSEL FOR THE ECONOMICALLY STRONGER PARTY

Ky. SCR Rule 1.1 (Competence) provides: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."

Ky. SCR Rule 1.3 (Diligence) provides: "A lawyer shall act with reasonable diligence and promptness in representing a client."

A. The Obligation of Competence

Rule 1.1 does not define competence. It seems obvious enough that competence requires, at a minimum, that the lawyer for the proponent conduct the process to insulate the proponent from a claim the agreement is invalid to the extent the client cooperates in that effort.[6] Those efforts should include assisting the client to provide adequate financial disclosure and managing the process to afford the weaker party a meaningful opportunity for input into the terms, in other words, to enter into the agreement voluntarily.

Even the most experienced and skilled lawyer may not be able to provide competent representation when the client seeking a premarital agreement waits until the 11th hour to engage a lawyer for that purpose. The lawyer may have to decline the engagement under these circumstances unless the parties can postpone the wedding.[7]

B. The Obligation of Diligence

The reporters are full of cases where a court upheld a premarital agreement presented for the first time within days of the wedding. However, proponents in these cases incurred the cost of a defense and were exposed to the risk of an adverse result. To the extent it is within the lawyer's control, he or she should treat the drafting as a high priority; when the wedding is two to four months away, the drafting job should get immediate attention so that the other party can receive it well in advance and the process does not turn into a crisis. Time creates both a meaningful opportunity for legal advice and for an actual negotiation. No time creates the opposite and puts the client's best interests at risk.

C. Legal Fees and Competence

The lawyer taking on a representation for a premarital agreement should charge a reasonable fee, but not an excessive one. The fee should reflect the expertise, effort, and time required to competently represent the client. Doing a competent

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jury verdict against husband's lawyer).

[6] And the lawyer will of course need to document in writing his or her efforts to get client compliance.

[7] Another option is to persuade the proponent to wait until after the wedding and enter into a postmarital agreement. Postmarital agreements present many of the same ethical and malpractice issues as premarital agreements but are beyond the scope of this paper.

and effective job regarding a premarital agreement is demanding work. Among other things, the potential exposure to a malpractice claim has a very long tail; think of a 35 year-old couple getting married with a premarital agreement who may be together for 30 years before a claim arises at divorce or after a death.

Ky. SCR Rule 1.5 (Fees) provides in part:

> (a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee . . . . The factors to be considered in determining the reasonableness of a fee include the following:
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> (2) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;
> (3) the fee customarily charged in the locality for similar legal services;
> (4) the amount involved and the results obtained;
> (5) the time limitations imposed by the client or by the circumstances;
> (6) the nature and length of the professional relationship with the client;
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
> (8) whether the fee is fixed or contingent.

Many potential clients seem to think a premarital agreement is a fill-in-the blank form, a commodity, and something anyone with a law license (or without one) can do. Forms of this type are readily available for purchase for people who want to handle it themselves. However, these form agreements are grossly deficient. It is in the potential client's best interests to hire a lawyer who charges a reasonable fee and drafts the agreement, rather than just filling out a template form that might not address all needs and concerns, or even fit the situation.

D. Persuade the Weaker Party to Retain Independent Counsel

The most important thing the lawyer for the proponent can do to enhance enforceability of a premarital agreement is to persuade the other party to retain independent counsel. As one court observed: "[I]nequality of [bargaining positions] may be cured by access to legal counsel by the party in the less advantageous bargaining position."[8] A strong recommendation can be a significant factor in a finding of validity.[9] A failure to recommend independent counsel emphatically enough when the situation calls for it may cause a court to void an agreement; even when the proponent prevails, he or she will be exposed to the risk of an adverse result and the expense of a defense.[10] Some circumstances call for a more

[8] *Harbom v. Harbom*, 760 A.2d 272, 277 (Md. Ct. Spec. App. 2000).

[9] *See Marsh v. Marsh*, 949 S.W.2d 734 (Tex. App. 1997).

[10] *See Hale v. Hale*, 539 A.2d 247 (Md. Ct. Spec. App. 1988).

aggressive effort to persuade the weaker party to obtain independent advice. These include:

1. Where the proposed terms substantially disadvantage the weaker party.[11]

2. Where there is a significant imbalance in bargaining power, where the proponent is a sophisticated businessperson and the other party is not, the weaker party is a recent immigrant with a language barrier, the woman is pregnant, or the proponent is unusually domineering.

3. Where the weaker party may be mentally incapacitated. That party need not be totally lacking in legal capacity to warrant insistence on independent counsel to the extent feasible.

E. Assistance to Unrepresented Party in Selection of Counsel

How involved should the proponent's counsel be in assisting the unrepresented party to select counsel? Many lawyers seem to believe that the lawyer for the proponent should do nothing to assist the other party to identify competent counsel. The case law encourages such assistance. The proponent's lawyer can provide enough assistance to ensure that the weaker party has a meaningful opportunity for independent advice but should not interfere with the selection or with the independence of counsel for that party. Providing a list of competent lawyers, information about referral services, or the availability of online databases of lawyers, will be adequate in many cases. It will further the interest of the proponent in enforceability by making the weaker party's opportunity for advice meaningful and not merely a formality.[12] The over-involvement of the proponent's lawyer in the selection of counsel can put validity at risk. For example, in *Sogg v. Nevada State Bank*,[13] the husband's lawyer selected a lawyer for the wife, made an appointment for her to meet the lawyer on the day before the planned wedding, and escorted her to the lawyer's office in the same building. This and other factors caused the court to void the premarital agreement.

There are many examples in the reports of courts upholding a premarital agreement where the lawyer for the proponent handpicked the lawyer for the other party.[14] However, this manner of selection of counsel for the weaker party creates avoidable litigation risk for the proponent. The fact that in many cases the lawyer and his or her client got away with it does not make it a good idea.

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[11] *See Fletcher v. Fletcher*, 628 N.E.2d 1343 (Ohio 1994); *Sogg v. Nevada State Bank*, 832 P.2d 781 (Nev. 1992); *Matter of Estate of Crawford*, 730 P.2d 675 (Wash. 1986).

[12] *See Matter of Marriage of Yager*, 963 P.2d 137 (Or. Ct. App. 1998) (premarital agreement upheld where wife consulted with one of three lawyers recommended by husband's lawyer); *see also Barocas v. Barocas*, 94 A.D.3d 551 (N.Y. App. Div. 2012) (that proponent's lawyer recommended counsel and proponent paid legal fees does not demonstrate duress or overreaching).

[13] 832 P.2d 781 (Nev. 1992).

[14] *See, e.g., Tyler v. Tyler*, 990 So.2d 423 (Ala. Civ. App. 2008); *Friezo v. Friezo*, 914 A.2d 533 (Conn. 2007).

F. Financial Assistance to the Weaker Party to Retain Counsel

Should counsel recommend that the stronger party pay the weaker party's legal fees? The authorities support and even encourage the stronger party to do so.[15] It is in both parties' interests that the weaker party have independent counsel. If offering to pay some or all of the weaker party's fees will cause a party who would otherwise forego independent representation to retain counsel, a party with substantial interests to protect should offer to pay. Some lawyers seem to think that the only proper way for the stronger party to pay the weaker party's fees is for him or her to give money to pay the fees to the weaker party so that he or she can pay them, versus the stronger party directly paying the lawyer, but there is no support in the case law for this idea.

G. Assistance in Preparing Financial Disclosure

A fair and adequate financial disclosure is a key factor in establishing validity of a premarital agreement if challenged. Therefore, competent representation should include assisting the client to prepare a financial disclosure that is adequate under the circumstances and is accurate. The lawyer for the proponent should pay particular attention to assets a client may have overlooked. For example, many federal employees seem to be only dimly aware that they will be entitled to a defined benefit pension (the Federal Employees Retirement System, or FERS, pension) upon retirement and will omit to disclose it. For some parties it will be important to qualify certain statements, such as a statement of the value of a business or other hard-to-value assets. Such a statement may save an agreement from a successful attack; omission puts the client at risk.[16]

H. Create and Maintain a Record for Future Litigation

It is in the best interests of the client and the lawyer that the lawyer maintain a file that includes the following, to the extent they exist:

1. A signed copy or a signed original of the agreement;

2. All drafts shown to the opposing party (or his or her counsel) and all notations reflecting changes made at the request of that party;

3. All correspondence to and from the other party or his or her counsel;

4. Notes of all oral communications to and from the other party or counsel;

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[15] *See Restatement (Third) of Property: Wills and Other Donative Transfers* §9.4(c)(3)(i); UPMAA §9(b)(2).

[16] *See Head v. Head*, 477 A.2d 282 (Md. Ct. Spec. App. 1983); (marital settlement resolving dispute over premarital agreement was valid where husband sold company for 17 times book value soon after settlement, but where he disclosed book value with statement that actual value could be much higher); *Orgler v. Orgler*, 568 A.2d 67 (N.J. Super. Ct. App. Div. 1989) (husband's use of book rather than fair market value, which husband knew was less than true value, rendered premarital agreement invalid); *Dion v. Dion*, 1984 Pa. Dist. & Cnty. Dec. Lexis 52 (husband's use of book value of company when he knew company worth several times that, was material misrepresentation; premarital agreement invalid).

5. All documents evidencing financial disclosures provided to the other party;

6. All notes or other documents evidencing any information provided an unrepresented party explaining the marital rights that would apply in the absence of agreement and how the agreement would affect those rights;

7. All documents and notes of any oral communications evidencing advice to an unrepresented party to retain counsel, explaining the reasons why he or she should retain counsel, or advising that party about where to find a lawyer; and

8. All notes or memoranda recording the circumstances surrounding execution and, if used, any video or audiotape of the execution ceremony.

I. Unconscionability and Advice to the Client of the Risks of Driving Too Hard a Bargain

Ky. SCR Rule 1.2 (Scope of representation and allocation of authority between client and lawyer), provides: "(a) …[A] lawyer shall abide by a client's decisions concerning the objectives of the representation and … shall consult with the client as to the means by which they are to be pursued…."

Ky. SCR Rule 2.1 (Advisor), provides:

> In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Kentucky law allows the trial judge at divorce to consider whether a premarital agreement has become unconscionable and to invalidate all or part of the agreement.[17] The trial judge's decision is discretionary and is therefore entitled to deference. As a consequence, a stronger party who drives a hard bargain is more vulnerable to a successful challenge. The lawyer for that party can serve him or her best by recommending terms that will afford a weaker party some financial security.

Appropriate advice to the client may include:

1. An agreement that is likely to produce a harsh result at death or divorce is more vulnerable to attack than one that provides reasonable financial security to a weaker party.

2. An agreement that is unfair to one party may undermine the stability of the parties' relationship with each other.

[17] *Lane v. Lane*, 202 S.W.3d 577 (Ky. 2006); *Gentry v. Gentry*, 798 S.W.2d 928 (Ky. 1990); *Edwardson v. Edwardson*, 798 S.W.2d 941 (Ky. 1990).

3. The law about what constitutes an unconscionable agreement as of divorce may evolve during the marriage in a way that favors the weaker party and makes validity more vulnerable.

4. The parties may move to a state with validity criteria that are more favorable to the weaker party, and a court in that state may decide to use its criteria to determine validity.

5. The parties may move to a state with validity criteria similar to Kentucky's but where trial judges are more likely to formulate a remedy more favorable to the weaker party, or even to void the agreement in its entirety, when the agreement is unconscionable at divorce.

6. Everything within reason should be done to encourage the weaker party to retain independent counsel.

7. The economic cost of making reasonable concessions in negotiations may well be less than the economic cost of defending the agreement in court at a later date.

III. DEALING WITH A CLIENT WHOSE CAPACITY TO CONTRACT MAY BE DIMINISHED

Ky. SCR Rule 1.14 (Client with diminished capacity) provides:

> (a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished whether because of minority, mental impairment, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
>
> (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial, or other harm unless action is taken, and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator, or guardian.
>
> (c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6 to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

The lawyer may be called upon to represent a wealthy client who wants a premarital agreement that appears unusually generous to a spouse-to-be and where there are reasons to question legal capacity. The proper conduct of a representation when the client's mental capacity may be diminished is a difficult problem with no easy solution. The question of client capacity may present itself under a variety of circumstances, including:

- A potential client with whom the lawyer has no prior relationship, and who the lawyer suspects may be impaired, seeks representation in connection with a premarital agreement, or the other party to the proposed agreement, or a third party, such as an adult child, seeks such representation on behalf of the client. The first question the lawyer faces is whether the potential client has the capacity to form a lawyer-client relationship.[18]

- An existing client who evidences some diminution in mental capacity seeks representation in connection with an agreement.

- A couple with whom the lawyer has an existing client-lawyer relationship (*e.g.,* for estate planning) seeks representation in connection with an amendment or revocation of their premarital agreement and where it appears one member of the couple may have diminished capacity. In this situation the lawyer must assess his or her role *vis à vis* the possibly incapacitated client as well as whether a conflict of interest between the parties has developed such that continued joint representation is no longer possible.

The question is not simply whether the client is entirely lacking in legal capacity to contract. A client's capacity may be diminished, but not entirely lacking. Such a person may be vulnerable to fraud or undue influence. The issues that a lawyer for a client whose capacity may be diminished must consider include:

- Does a new client with whom the lawyer has no prior relationship have sufficient capacity to form a lawyer-client relationship?

- Can the lawyer continue a lawyer-client relationship with an existing client whose capacity may be diminished?

- Can the lawyer engage in, or continue, a joint representation?

- What steps can the lawyer take to assess client capacity?

- What information can the lawyer reveal, and to whom, to assess client capacity?

- What steps can the lawyer take to protect the client if the lawyer determines that protective steps are necessary, and what information can the lawyer reveal to take protective action?

There may be some circumstances where the client is so incapacitated that he or she cannot form or continue a lawyer-client relationship.[19] Where the client does not wholly

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[18] Proceedings of the Conference on Ethical Issues in Representing Older Clients; “Report of the Working Group on Client Capacity," 62 *Fordham L. Rev.* 1003, 1004 (Mar. 1994) (hereafter, "Report of the Working Group on Client Capacity"); ABA Formal Op. 96-404 (1996); *see also* Sabatino, "Representing a Client With Diminished Capacity: How Do You Know It and What Do You Do About It?" 16 *J.A.A.M.L.* 481 (2000).

[19] "Report of the Working Group on Client Capacity" at 1004; *see also Donnelly v. Parker*, 486 F.2d 402, 407 fn. 20 (D.C. Cir. 1973) (client's insanity or severe mental difficulty may operate to suspend or terminate pre-existing lawyer-client relationship); *In re Houts*, 499 P.2d 1276 (Wash. App. 1972) (client's incompetency terminates lawyer's authority to act).

lack capacity, or where the lawyer already has a relationship with the client when diminution in capacity comes to light, most authorities advocate staying with the representation rather than withdrawing.[20] This necessarily means the lawyer must "accept responsibility for determining when to question capacity and how to respond appropriately to the situation."[21] In questioning capacity, lawyers are advised to consider:

- The client's ability to articulate reasoning behind the decision;
- The variability of the client's state of mind;
- The client's ability to appreciate consequences of the decision;
- The irreversibility of the decision;
- The substantive fairness of the decision; and
- The consistency of the decision with lifetime commitments of the client.[22]

The lawyer is further advised to speak with the client alone.[23] This is particularly important when there are any indicators that the client may be under pressure from a family member, the fiancé(e) or someone else in a position of trust. The factors identified above recognize that "when the consequences of a decision are greater in terms of irreversibility, fairness to interested parties, and deviance from lifetime commitments of the client, then it is clinically and ethically appropriate to expect a higher level of functioning on the first three variables."[24]

Rule 1.14 addresses the lawyer's role in dealing with client incapacity in several important respects. First, the rule allows the lawyer to act to protect a client's interests when the client's capacity is diminished; the client need not be wholly lacking in legal capacity. Second, the lawyer's options for protecting the client include taking actions short of seeking appointment of a guardian, which may be far more intrusive than necessary, such as consulting with family members and seeking guidance from a medical provider. Third, the lawyer may reveal client confidences to the extent necessary to protect the client's interests.

In deciding whether to take protective action, and what action to take, the lawyer should be guided by:

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[20] ABA Formal Op. 96-404 (1996) (Client Under a Disability); "Report of the Working Group on Client Capacity" at 1009.

[21] "Report of the Working Group on Client Capacity" at 1005.

[22] *Id.* at 1007; Md. Rule 19.301.14, cmt. [6].

[23] "Report of the Working Group on Client Capacity" at 1007.

[24] *Id.*

- The wishes and values of the client to the extent known; otherwise, according to the client's best interest;

- The goal of intruding into the client's decision-making autonomy to the least extent possible;

- The goal of maximizing client capacities;

- The goal of maximizing family and social connections and community resources.[25]

In sum, a lawyer faced with a client seeking to execute a premarital agreement, or to amend or cancel an agreement,[26] must weigh the extent of the client's functioning with the assistance of a diagnostician in appropriate cases,[27] as it relates to the particular terms sought, and other relevant factors. For example, when the client has been asked to execute a premarital agreement that appears highly unfavorable to the client, or to his or her children, the situation calls for caution.[28]

IV. LAWYER'S ROLE IN DEALING WITH AN UNREPRESENTED PARTY

When the weaker party is not represented by counsel, the lawyer for the proponent must take care in dealing with him or her in order to further the interest of the proponent in securing the agreement from a successful attack on validity.

Ky. SCR Rule 4.3 (Dealing with unrepresented person) provides:

> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the attorney is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person. The lawyer may suggest that the unrepresented person secure counsel.

The comments add the following:

> [1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that an attorney is disinterested in loyalties or is a disinterested authority on the law even when the attorney

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[25] "Report of the Working Group on Client Capacity" at 1009; Rule 301.14, cmt. [5].

[26] *See Estate of Goldberg*, 582 N.Y.S.2d 617 (N.Y. Sur. Ct. 1992) (higher contractual capacity, rather than lower testamentary capacity, required to execute postmarital agreement cancelling premarital agreement).

[27] *See* ABA Informal Op. 89-1530, 5 ABA/BNA *Lawyers' Manual of Professional Conduct* 360 (10/8/89) (advising that lawyer may consult client's physician to determine whether client is able to make informed decisions about representation and that disclosures to physician of otherwise confidential information is impliedly authorized by Model Rule 1.6 to carry out representation).

[28] *See Farnum v. Silvano*, 540 N.E.2d 202 (Mass. App. Ct. 1989); *Knowlton v. Mudd*, 775 P.2d 154 (Idaho Ct. App. 1989).

> represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. . . . [T]his Rule provides that under no circumstances shall a lawyer give legal advice to an unrepresented person.
>
> [2] The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the suggestion to obtain counsel. . . .

Counsel should explain his or her role as lawyer solely for the proponent and should encourage the other party to obtain independent advice concerning the agreement.[29] Moreover, the advice to retain counsel should be unequivocal. It should not be coupled with contradictory messages that may discourage the unrepresented party from getting independent advice. For example, in *Matter of Marriage of Matson*,[30] the parties met with the husband's lawyer twice. Only at the second meeting the day before the wedding, scheduled for the purpose of executing the agreement, did the lawyer suggest that either party could have "someone else"[31] look at it. The effect of the agreement was to eliminate any accumulation of community property. The lawyer never explained that to the wife, and she did not understand, how much she was disadvantaged by the agreement. Her lack of understanding rendered her execution involuntary. Here the lawyer's equivocal, 11th-hour suggestion to the wife that she get independent advice fell far short of what was called for under the circumstances to protect the interests of the husband.[32] Had the lawyer urged the wife to get independent counsel at the first meeting, the result might have been different.

In *Matter of Marriage of Foran*,[33] the court discussed what the court characterized as the dilemma faced by a lawyer for the economically stronger party. It noted the primary purpose of independent counsel for the weaker party is to negotiate a fair contract, not merely to explain how unfair the proposed agreement is. Thus, if the stronger party's lawyer is successful in convincing the weaker party to obtain counsel, the stronger party may have to make economic concessions as a result of negotiation. However, as the court

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[29] *See McKee-Johnson v. Johnson*, 444 N.W.2d 259 (Minn. 1989) (premarital agreement valid where both husband and his lawyer advised wife to retain separate counsel, although she declined to do so); *see also Matter of Estate of Lutz*, 563 N.W.2d 90, 98 (N.D. 1997) ("[l]ack of adequate legal advice to a prospective spouse to obtain independent counsel is a significant factual factor in weighing the voluntariness of a premarital agreement.").

[30] 730 P.2d 668 (Wash. 1986).

[31] *Id.* at 669.

[32] *See also Button v. Button*, 388 N.W.2d 546 (Wis. 1986) (husband's lawyer told wife she could have independent counsel, but that doing so would show she did not trust husband or his lawyer; agreement invalid).

[33] 834 P.2d 1081 (Wash. Ct. App. 1992).

also noted, domestic tranquility is not enhanced by an agreement that will leave a party destitute after a death or divorce. Moreover, the alternative, not advising the party forcefully enough to get counsel, may undermine the validity of the entire agreement.

A. Meeting with Unrepresented Party; Providing Explanation of Rights

If the other party to an agreement opts not to retain counsel, despite being urged to do so, the proponent's lawyer must consider whether to meet with the unrepresented party, and whether to meet with that party alone or together with the proponent, for the purpose of explaining the agreement and answering questions. Meeting with the unrepresented party alone poses risks for both the lawyer and his or her client. For example, in *Sumpter v. Kosinski*,[34] the lawyer met with the wife alone. The wife later claimed the lawyer told her she would be well provided for through a new will — a claim the lawyer denied. Had the court credited the wife's claim, it may well have invalidated the agreement. By contrast, in *McKee-Johnson v. Johnson*,[35] the court upheld a premarital agreement and appeared to approve of the husband's lawyer meeting with the wife privately to explain the agreement without interference from the husband.

Kentucky's version of Rule 4.3 and the comments present a stark contrast between what judges in a number of cases have found supportable in relation to validity and the ethical constraints on the lawyer. In a number of cases, the lawyer's having met with and explained the agreement to the unrepresented party was a factor permitting a finding of voluntariness.[36] Other cases have held that the failure to explain the terms and effect of the agreement was a factor in a finding of involuntariness or lack of adequate knowledge of the marital rights being waived.[37] Kentucky Rule 4.3 appears to foreclose such an explanation.

In any event, counsel for one party should never advise the other party as to whether the agreement is fair or reasonable, whether it is in the best interests of that party to sign it, whether disclosure is adequate or whether the agreement will be enforceable. The giving of advice creates a lawyer-client relationship.[38] Discussing the subject of the transaction with an unrepresented party does not create such a relationship.[39]

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[34] 419 N.W.2d 463 (Mich. Ct. App. 1988).

[35] 444 N.W.2d 259 (Minn. 1989).

[36] *In re Marriage of Bonds*, 5 P.3d 815 (Cal. 2000); *Penhallow v. Penhallow*, 649 A.2d 1016 (R.I. 1994); *Martin v. Martin*, 612 So.2d 1230 (Ala. Civ. App. 1992); *Matter of Marriage of Leathers by and through Leathers*, 789 P.2d 263 (Or. 1990); *In re Estate of Hartman*, 582 A.2d 648 (Pa. 1990); *McKee-Johnson v. Johnson*, 444 N.W.2d 259 (Minn. 1989); *Warren v. Warren*, 523 N.E.2d 680 (Ill. App. Ct. 1988); *Serbus' Estate v. Serbus*, 324 N.W.2d 381 (Minn. 1982).

[37] *Randolph v. Randolph*, 937 S.W.2d 815 (Tenn. 1996); *Friedlander v. Friedlander*, 494 P.2d 208 (Wash. 1972).

[38] *Bohn v. Cody*, 832 P.2d 71, 75 (Wash. 1992).

[39] *Id.* at 75.

Some authorities outside of Kentucky say the lawyer may explain the terms of the agreement to the unrepresented party in lay language face-to-face or in writing. As one court observed:

> [I]t is consistent with a lawyer's duty to further the interest of his or her client for the attorney to take steps to ensure that the premarital agreement will be enforceable. After discussing the matter with his or her client, a lawyer may convey such information to the other party as will assist in having the agreement upheld, as long as he or she does not violate the duty of loyalty to the client or undertake to represent both parties without an appropriate waiver of the conflict of interest.[40]

Apart from whether it is ethically permissible, it's a bad idea for the proponent's lawyer to meet with the unrepresented party to explain the agreement.

The Uniform Premarital and Marital Agreements Act, adopted by the Uniform Law Commission, but to date only enacted in two states, Colorado and North Dakota, proposes a safe harbor option under which a drafting lawyer may either include in the agreement a plain language explanation of marital rights being waived, or may include a notice, "conspicuously displayed" like the following:

> SPOUSE TWO acknowledges the following Notice:
> If you sign the Premarital Agreement, you may be:
> - Giving up your right to be supported by your spouse;
> - Giving up your right to ownership or control of money and property;
> - Giving up your right to money and property if your marriage ends or your spouse dies;
> - Agreeing to pay bills and debts of your spouse;
> - Giving up your right to ask a court to order your spouse to pay legal fees.[41]

Such a notice could be placed on the first page of the agreement, where the unrepresented party would be bound to see it, or it could be in a separate appendix that requires a separate signature of the unrepresented party.

In communicating with the unrepresented party, the lawyer must take care not to leave the impression that he or she is acting for both parties or is acting as a neutral.[42]

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[40] *In re Marriage of Bonds*, 5 P.3d 815, 833 (Cal. 2000).

[41] UPMAA §9(c).

[42] *See Rowland v. Rowland*, 599 N.E.2d 315 (Ohio Ct. App. 1991) (husband's lawyer blurred his role by meeting with wife and inviting questions; agreement invalid).

B. Dealing with an Unrepresented Party with Whom the Lawyer Has a Prior Relationship

Ky. SCR Rule 1.9 (Duties to former clients) provides:

> (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.
>
> …
>
> (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
>
> > (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
> >
> > (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

The lawyer's ethical obligations are implicated when the other party to a premarital agreement is a former client for whom the lawyer provided domestic relations or estate planning services and possibly other kinds of services. In such a situation, the former client may misunderstand the lawyer's obligation of loyalty to the lawyer's client and may mistakenly believe the lawyer will act to protect the interests of both. In *Fletcher v. Fletcher*,[43] for example, the parties had been represented in their divorces from their previous spouses by members of the same law firm, one of whom then represented the husband in connection with the premarital agreement. The wife was advised she could have separate counsel, but she declined. The agreement was upheld, but the appellate court observed that there was sufficient evidence to support a decision voiding the agreement had the trial court so ruled. The husband's lawyer met with the wife and gave her some explanation of the terms of the agreement, but he did not fully explain her marital rights and how those rights would be affected by the agreement. The wife claimed the husband's lawyer gave her misleading information about her right to equitable distribution upon divorce. Because of the wife's prior relationship with the law firm, had the trial court credited her claim, it might well have ruled in her favor.

Under some circumstances, a representation like that which occurred in *Fletcher* might be deemed substantially related or to involve the use of client confidences. Such a conflict is waivable, but only with informed consent. In the *Fletcher* opinion, for example, there was a discussion about whether the wife knew her rights

[43] 628 N.E.2d 1343 (Ohio 1994).

incident to divorce. Had that been a determinative issue in the case, her prior divorce counsel's knowledge of the extent of her understanding of marital rights at divorce, knowledge he would have gained in the professional relationship, could have been relevant in the future dispute over the premarital agreement in which his firm represented the husband.

The lawyer should not undertake a representation like that which occurred in *Fletcher* without taking precautions, including advising the now-adverse former client clearly and **in writing**:

1. That the lawyer only represents the other party;

2. That the former client should retain independent counsel;

3. Of the reasons why independent counsel is necessary; and

4. Of the lawyer's role as advocate solely for his or her client.

Further, the lawyer should obtain, expressly and in writing, the consent of both the current client and the former client to the representation.

C. Lawyer's Duty to the Truth

Ky. SCR Rule 1.2 (Scope of representation . . .) provides in relevant part:

> (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the attorney knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Ky. SCR Rule 4.1 (Truthfulness in statements to others) provides:

> In the course of representing a client a lawyer:
>
> > (a) shall not knowingly make a false statement of material fact or law to a third person; and
> >
> > (b) if a false statement of material fact or law has been made, shall take reasonable remedial measures to avoid assisting a fraudulent or criminal act by a client including, if necessary, disclosure of a material fact, unless prohibited by Rule 1.6.

The lawyer should not include any statement of fact in the agreement that the lawyer knows to be untrue. In *Owen v. Owen*,[44] the husband's lawyer drafted the premarital agreement. The agreement recited that the wife had counsel but that was untrue. The court held that the agreement was invalid. Agreement templates

[44] 759 S.E.2d 468 (W.Va. 2014).

typically recite that each party got legal advice and that the parties made financial disclosure. The lawyer should not retain such statements without verifying their accuracy.

The lawyer is not the guarantor of the accuracy of his or her client's financial disclosure. But neither may the lawyer knowingly protect the client from having to make a disclosure that is accurate and not misleading. The client is certainly entitled to ask the lawyer questions about the extent of disclosure required to enter into a valid premarital agreement and the lawyer's job certainly includes exercising judgment about disclosure. For example, a business owner may need help stating the basis for the statement of value of the business. What the lawyer cannot do without violating Rule 4.1 is participate in the client's fraudulent disclosure. A client who, for example, tells his or her lawyer about a recent purchase offer for a price that exceeds the value he or she intends to disclose must be advised to disclose the offer. His or her failure to do so puts the validity of the agreement at risk[45] and involves the lawyer in fraud.

V. COUNSEL FOR THE ECONOMICALLY WEAKER CLIENT

A. The Decision to Undertake the Representation; Time and Money

Ky. SCR Rule 1.1 (Competence) provides in relevant part: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

The first question a lawyer asked to represent a weaker party in connection with a premarital agreement must confront is whether to agree to take on the representation. It appears to be quite common for proponents to present a proposed premarital agreement close to the wedding date. Even a lawyer who has the necessary expertise may not be able to make adequate use of it when the agreement is presented at the 11th hour. When the wedding date is looming, the lawyer must evaluate whether he or she has sufficient time to devote to reviewing the proposed agreement, advising the client, obtaining financial disclosure, and conducting negotiations. Many experienced lawyers simply refuse to accept a representation that is too close to the wedding date unless the parties can agree to postpone the ceremony.

If the lawyer undertakes the representation, he or she must be prepared to give the matter the attention it deserves.

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[45] *See Kwon v. Kwon*, 775 S.E.2d 611 (Ga. 2015) (waiver did not save premarital agreement where husband's disclosure omitted two LLCs); *In re Estate of Cassidy*, 356 S.W.3d 339 (Mo. Ct. App. 2011) (gross undervaluation of farmland was fraudulent; premarital agreement invalid); *Schechter v. Schechter*, 37 N.E.3d 632 (Mass. 2015) (husband's misleading statement about ownership of business rendered premarital agreement invalid). There is no suggestion in these cases that the lawyer knew of the client's fraud.

The question of fees under Rule 1.5 is equally present and, in some ways, more compelling, with the representation of a weaker party. The stakes are high; a weaker party could become impoverished if the parties divorce or after a spouse's death unless the lawyer is able to negotiate terms for his or her financial security. The timeline for getting the agreement done may be short but the timeline for discovery of flaws that may constitute malpractice is potentially very long. As is the case when representing the stronger party, the lawyer should charge a fee that will enable him or her to do a fully competent job.

B. Third-Party Payment and Conflicts of Interest

Ky. SCR Rule 1.8 (Conflict of interest; current clients; specific rules) provides in part:

> (f) A lawyer shall not accept compensation for representing a client from one other than the client unless:
> (1) the client gives informed consent;
> (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
> (3) information relating to representation of a client is protected as required by Rule 1.6.

The weaker party's right to independent counsel will not be meaningful if that party does not have adequate funds to pay counsel to do a fully competent job. Therefore, in some cases it will be appropriate for the proponent to agree to pay the weaker party's fees. In other cases, the client's parents, or sometimes even the future in-laws, will pay the weaker party's fees. When a third party pays the lawyer directly, it implicates Rule 1.8(f). The client must consent to third-party payment. The lawyer may not permit the third party to interfere with his or her independence.

Third-party payment may also implicate Rule 1.6 (Confidentiality of information). The client is entitled to confidentiality regardless of the source of funds for payment of the lawyer's fees. Some lawyers customarily provide detailed invoices to clients that include descriptions of services that may disclose protected confidences. The lawyer may need to alter that protocol and use more cryptic descriptions of the services – *e.g.,* "conference with client" vs. "conference with client to discuss the extreme unfairness of the proposed premarital agreement" – that do not reveal the particulars of the discussions and advice. Alternatively, the engagement agreement could provide that the lawyer will render an invoice to the third-party payor showing only the amount due while providing the detailed description of services to the client.

C. Conduct of the Representation; What Does Competence Look Like in this Context?

The negotiation and drafting stage is the only realistic point at which a lawyer can reasonably hope to do anything for the weaker party to an agreement. That lawyer's role can include:

1. Attempting to make sure the disadvantaged party has no illusions that he or she will be able to undo a bad bargain later on;

2. Insisting on an adequate disclosure of assets and sources of income early in the negotiations;

3. Exploring the opportunity to negotiate a more acceptable disposition of property than may have been proposed;

4. Suggesting additional terms or modifications that may enhance financial security for the weaker party;

5. Explaining the terms of the agreement in a manner that a reasonably intelligent adult with no legal training can understand;

6. Making sure the weaker party understands that an oral promise, *e.g.,* an oral promise to cancel the agreement after the marriage, or to write a will providing more generously for him or her, will be unenforceable;

7. Advising the party about what steps he or she may take during the marriage to obtain financial security otherwise unavailable through the other party; this may include not leaving the workforce to stay home with children or to care for the other party, not moving to further the other party's career, preserving his or her separate estate, and obtaining adequate disability and other types of insurance;

8. Advising the party about opportunities to alter, amend or modify the agreement to better provide for that party, or to cancel the agreement entirely;

9. Advising the weaker party that disadvantageous financial decisions he or she may make during the marriage, even decisions made under pressure from the other spouse, will not necessarily result in the agreement being held invalid;

10. Advising the party not to make nonmonetary contributions to the acquisition or improvement of property in which he or she has no financial interest;

11. Advising the party not to make monetary contributions to property in which he or she has no financial interest; and

12. Creating a paper record that the lawyer has given appropriate advice.

D. The Client's Decision to Sign against Legal Advice

Ky. SCR Rule 1.2 (Scope of representation and allocation of authority between client and lawyer), provides: "(a) …[A lawyer shall abide by a client's decisions concerning the objectives of the representation and . . . shall consult with the client as to the means by which they are to be pursued. …"

The very presence of counsel for the economically weaker party insulates the agreement from later attack.[46] The more forcefully the lawyer advises against

[46] *See Harbom v. Harbom*, 760 A.2d 272 (Md. 2000); *Matter of Estate of Lutz*, 563 N.W.2d 90 (N.D. 1997);

signing, and the more clearly he or she explains the disadvantages of the agreement, the more likely it is that the agreement will be enforceable over a claim of duress.[47] Nevertheless, after receiving competent, appropriate advice, if the client decides to sign, so be it. The lawyer must abide by the client's decision.

VI. JOINT REPRESENTATION

Ideally, each party to a premarital agreement will have independent counsel. However, some parties will want to use one lawyer for the agreement for financial reasons, because they do not see the need for separate counsel, because they perceive the use of separate counsel as creating animosity where none existed previously, or because they have developed a professional relationship with one lawyer whom they both trust. There are some situations where joint representation is not possible. There are others where the rules of professional conduct appear to permit joint representation with adequate safeguards. The wrong decision about joint representation can frustrate the objectives of one or both parties by rendering the agreement unenforceable or by forcing a party, or his or her heirs, to prove validity to a court.[48] The outcome of such a dispute can call the lawyer's ethics and competence into question.[49]

The decision about joint representation requires a balancing act. On the one hand, the clients assert their desire for joint representation. The lawyer wishes to accommodate their desires; indeed, he or she risks losing both clients for refusing to bow to their wishes. On the other hand, the lawyer may be held responsible for a wrong decision that leaves a client, or his or her heirs, exposed to the risks and the cost of litigation.

A. Directly Adverse Joint Representation

The rules appear to permit joint representation for a premarital agreement with safeguards. However joint representation, even with these safeguards, is almost always a bad idea. Ky. SCR Rule 1.7 (Conflict of interest: current clients) precludes a representation of one client that is directly adverse to the interests of another, but permits the clients to waive the conflict with certain safeguards:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a conflict of interest. A concurrent conflict of interest exists if:

Gardner v. Gardner, 527 N.W.2d 701 (Wis. 1994); *see also Price v. Price*, 289 A.D.2d 11 (N.Y. 2001).

[47] *See In re Marriage of Spiegel*, 553 N.W.2d 309 (Iowa 1996); *In re Estate of Arbeitman*, 886 S.W.2d 644 (Mo. Ct. App. 1994); *Gardner v. Gardner*, 527 N.W.2d 701 (Wis. 1994); *Hamilton v. Hamilton*, 591 A.2d 720 (Pa. 1991).

[48] *See, e.g., Sumpter v. Kosinski*, 419 N.W.2d 463 (Mich. 1988).

[49] *See Parr v. Parr*, 635 N.E.2d 1124 (Ind. Ct. App. 1994) (actions of husband's lawyer in meeting with both parties, failing to send draft agreement to wife's lawyer, and supervising inadequate oral financial disclosure resulted in finding of invalidity); *Matter of Benker's Estate*, 331 N.W.2d 193 (Mich. 1982) (lawyer's representation of both parties without informed consent and in absence of evidence of asset disclosure rendered premarital agreement invalid).

> (1) the representation of one client will be directly averse to another client; or
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the attorney's responsibilities to another client … .
> (b) Notwithstanding the existence of a conflict of interest under section (a) of this rule, a lawyer may represent a client if:
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
> ….
> (4) each affected client gives informed consent, confirmed in writing. The consultation shall include an explanation of the implications of the common representation and the advantages and risks involved.

Where the parties' interests are in direct conflict, consent to a joint representation is insufficient. "The lawyer must also objectively determine that … joint representation of one [party] will not adversely affect the relationship with, or representation of the other."[50] The West Virginia Supreme Court has held that joint representation for a premarital agreement is not possible, the interests of the parties are fundamentally antagonistic, and the conflict is not waivable.[51]

The parties themselves may not be the best judges of the risks to their interests in a joint representation. As one authority has observed, the parties may "have expectations about their future partner that may disarm their capacity for self-protective judgment, or their inclination to exercise it …"[52] When the parties to the agreement are in a long-term relationship, they may have developed a confidential relationship that similarly causes them to be less vigilant to protect their rights and less willing to consider the ways in which the agreement may harm their interests.

It is the lawyer's responsibility, in the first instance, to evaluate whether he or she can adequately serve the interests of both clients in a joint representation. There are some circumstances in which directly adverse joint representation should be ruled out even with client consent:

1. When parties have substantially disparate assets (which is the case more often than not);

2. When one party intends to propose terms that are disadvantageous to the other party, which includes the more common situation where the economically weaker party is asked to accept very little upon death or

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[50] Pearce, "Family Values and Legal Ethics: Competing Approaches to Conflicts in Representing Spouses," 62 *Fordham L. Rev.* 1253, 1259 (Mar. 1994) (hereafter, "Family Values and Legal Ethics"); *see also* Rule 1.7, cmt. [15] (“representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation.”).

[51] *Ware v. Ware*, 687 S.E.2d 382 (W. Va. 2009).

[52] *Principles of the Law of Family Dissolution* §7.02, cmt. c.

dissolution and the less common one where the economically stronger party proposes to make overly generous provisions for the weaker party; In the latter situation, if the wealthier party is elderly or ill, a plan to be overly generous to a fiancé(e) may suggest diminished capacity or undue influence that the lawyer should be free to consider without divided loyalty;

3. When the lawyer has a pre-existing significant personal or client-lawyer relationship with one of the parties such that the lawyer has a greater stake in maintaining the existing relationship with that party than with the other party;

4. When, prior to agreeing to meet with both parties, the lawyer has received from one party confidences which that party does not want disclosed to the other party and which are material to the representation; and

5. When there is reason to believe that one party is unable to adequately protect his or her own interests due to youth, naiveté, lack of education or experience, or dominance by the other party.

Joint representation implicates two important values in the lawyer-client relationship, the client's right to confidentiality, and the client's right to the lawyer's loyalty. The duty of loyalty requires the lawyer to exercise independent judgment on behalf of, and to give independent advice to, the client free of any conflicting claims on the lawyer's loyalty from any other source. As the comments point out:

> Even where there is no direct adverseness, a conflict of interests exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests… The conflict in effect forecloses alternatives that would otherwise be available to the client.[53]

In the examples cited above, the lawyer's ability to be loyal to both clients is likely to be tested to the breaking point. In the language of Rule 1.7, the lawyer will not be able to form a reasonable belief that the representation of one client will not be "directly adverse to another client."[54] Moreover, there is little benefit to either party in joint representation in these scenarios. The greater the disparity in assets or bargaining power at the execution stage, the more vulnerable is the agreement to a challenge at enforcement. The stronger party is likely to be better off if the lawyer agrees to represent only that party and takes the steps appropriate to dealing with an unrepresented party. Similarly, the weaker party is likely to be better off if the lawyer rejects joint representation, urges the weaker party to retain independent counsel, explains why, and in appropriate cases recommends that the stronger party agree to pay the weaker party's legal fees.

[53] Ky. SCR Rule 1.7, cmt. [8].

[54] Ky. SCR Rule 1.7(a)(1).

B. Joint Representation: Lawyer as Mere Scrivener

Some authorities describe a possible role for the lawyer in the preparation of an agreement as that of mere scrivener, or scribe, suggesting that where the lawyer does no more than take what the parties say they want and create a document with the usual legal terminology, the scribe need not necessarily give any advice or counsel or inquire into the underlying facts. For example, in *Hutchins v. Hutchins*,[55] the court rejected the wife's attempt to invalidate a premarital agreement on the ground that one lawyer drafted it on behalf of both parties.[56] The agreement recited that the parties agreed to retain a single lawyer for drafting.

However appealing joint representation may be it can often be disadvantageous to the stronger party. In *Dion v. Dion*,[57] for example, the husband's lawyer met with both parties and thought he represented both parties to the premarital agreement. The husband disclosed his business at book value when the actual value was much higher. The court voided the premarital agreement. Had the wife had independent representation, the outcome might well have been different. In *Delaney v. Delaney*,[58] the husband hired a lawyer to draft a premarital agreement, but the lawyer met with both parties and the agreement recited that he represented both. The husband's financial disclosure was inadequate and the lawyer did not advise the wife she had a right to ask for more information. The trial court rejected the husband's argument that the wife waived further disclosure even though the agreement had an express waiver; rather, the court dismissed the waiver as mere boilerplate. Like *Dion*, the outcome might have been different had the wife had independent counsel.

Kentucky law allows the court at divorce to consider whether a premarital agreement has become unconscionable.[59] This creates additional risk for the proponent. The lawyer should be free to evaluate that risk with the client and to discuss with him or her ideas for terms to benefit the weaker party to mitigate the risk while adhering to the client's primary objective of protecting his or her property rights.

Joint representation can disadvantage a weaker party as well. In *Gentry v. Gentry*,[60] the agreement included the following:[61]

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[55] 430 P.3d 502 (Mont. 2018).

[56] *See also Mabus v. Mabus*, 890 So.2d 806 (Miss. 2003) (premarital agreement was valid where lawyer clearly limited role to drafting and told parties to get separate counsel if they disagreed with terms); *Hill v. Hill*, 356 N.W.2d 49 (Minn. Ct. App. 1984) (lawyer considered himself as representing both parties, drafted agreement as instructed without providing advice to either; premarital agreement valid).

[57] 1984 Pa. Dist. Cnty. Dec. Lexis 52.

[58] 726 N.W.2d 356 (Wis. 2006) (unpublished).

[59] *Edwardson v. Edwardson*, 798 S.W.2d 941 (Ky. 1990).

[60] 798 S.W.2d 928 (Ky. 1990).

[61] *Id.* at 931. The agreement had mirror language waiving the husband's rights.

> Kathy hereby renounces and releases to Tom, his heirs and assigns, any and all right, title and interest or right of dower and courtesy [sic] to any property, both real and personal, of which Tom may now be seized [sic] or that he may hereafter acquire.

The court noted that the agreement was drafted by an attorney and mutual friend. It was upheld over the wife's challenge to validity. Among other things the court found that it was not unconscionable at divorce and that there was no fraud, duress, or mistake of material fact at execution.[62] *The court did not comment on the language quoted above and it did not figure into the decision. But note the use of words that a lay person is unlikely to understand: "dower and courtesy [sic]"; "seized [sic]." Had the wife had an independent lawyer, she would at least have understood the rights she was giving up.*

C. Avoiding Unintentional Joint Representation

Whether a lawyer-client relationship is formed turns on the subjective belief of the client if that belief is reasonable under the surrounding circumstances.[63] Thus, under some circumstances, a court may deem a lawyer's conduct to constitute joint representation even when the attorney did not intend such. Where this occurs, and where the attorney did not give adequate explanation, and obtain informed consent to the joint representation, the agreement is vulnerable to a claim of overreaching. For example, in *Rowland v. Rowland*,[64] the husband's attorney met with both parties, did not advise the 18-year-old woman of her right to independent counsel, offered to answer questions, but did not volunteer any explanation of the terms of the premarital agreement. The court treated the lawyer's conduct as if he had engaged in a joint representation; and because he failed to get informed consent, the agreement was held to be the product of overreaching. Highly significant to the court's decision was the fact that the lawyer met with the parties together but failed to make his role clear. The husband would have been better off, according to the court, if the lawyer had merely handed the wife the agreement and told her to sign it. If she had signed, she would have been bound by the agreement, whether or not she read or understood it.

Another circumstance in which the lawyer's blurring of his or her role may have unintended consequences occurs when the lawyer prepares wills for both parties but purports to represent only one of them in the preparation of a premarital agreement without making the distinction clear. In *Matter of Estate of Lutz*,[65] a summary judgment for the deceased husband's estate was reversed where the wife alleged she was not adequately advised of her right to independent counsel in connection with the parties' premarital agreement. The husband's lawyer had prepared wills for both of them. She believed the lawyer represented both of them

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[62] *Id.* at 936.

[63] *Bohn v. Cody*, 832 P.2d 71 (Wash. 1992).

[64] 599 N.E.2d 315 (Ohio 1991).

[65] 563 N.W.2d 90 (N.D. 1997).

for all purposes. The lawyer's representation of both of them for one purpose, but only the husband for a related purpose, put the validity of the premarital agreement at risk.

Another twist on the unintended joint representation scenario can occur where one of the parties is a lawyer and purports to give legal advice to the other party or discourages the other party from retaining separate counsel. For example, in *Cook v. Cook*,[66] the husband drafted a property settlement agreement for the parties in which he retained all of the community interest in his law practice. In voiding the agreement, the court observed that a lawyer-client relationship may be formed even if the parties are related, that when a lawyer-party prepares an agreement and represents that it is fair, the agreement is the product of a lawyer-client relationship.[67] As such, it is subject to close scrutiny, the attorney has a duty of full disclosure, and the transaction must be "fundamentally fair and free of professional overreaching."[68] The agreement in *Cook* did not meet this standard.[69]

VII. CONCLUSION

The case law of validity evidences a high degree of tolerance of lawyer conduct that seems to hover close to the minimum standards of ethics and competence. The client will be better served by adherence to best practices.

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[66] 912 P.2d 264 (Nev. 1996).

[67] *Id.* at 184, 267; *see also Sanford v. Sanford*, 137 S.W.3d 391 (Ark. 2003) (husband breached fiduciary duty to wife when he acted as her attorney in preparation of property settlement agreement, and as trustee of the trust created to manage joint assets, discouraged her from hiring separate counsel, and did not explain his conflict of interest).

[68] *Cook*, 912 P.2d at 267.

[69] *See also In re Marriage of Tamraz*, 2005 Cal. App. Unpub. Lexis 5686, 2005 WL 1524199 (Cal Ct. App. June 29, 2005) (premarital agreement was not enforceable where lawyer-husband drafted it, provided inadequate and misleading explanation of terms, and did not advise wife to get independent counsel).

FIRST LETTER TO UNREPRESENTED PARTY

Dear _____:

Enclosed is a proposed Premarital Agreement I drafted on behalf of _____. Please take this draft to your lawyer at your earliest convenience and ask him or her to advise you about the terms and answer any questions you may have about it.

The agreement has _____'s financial disclosure attached. _____ believes the financial disclosure presents a fair and accurate picture of ____ [his/her] financial affairs. However, if you would like any additional information or if you would like to receive documents, such as tax returns or account statements, verifying the financial disclosure, please have your lawyer contact me and I will arrange to have _____ provide what you need.

It is in your best interests to receive legal advice before you decide whether to sign the agreement. Therefore, I urge you to set up an appointment with a lawyer as soon as possible.

Very truly yours,

SECOND LETTER TO UNREPRESENTED PARTY

Dear _____:

I understand you are ready to sign the premarital agreement I drafted on behalf of _____ and that you do not plan to get independent legal advice before doing so. While _____ does appreciate your willingness to sign the agreement as presented I urge you to reconsider your decision not to get legal advice before you sign the agreement.

The premarital agreement addresses important matters relating to your legal rights and you should get advice from a lawyer who can explain what your rights would be if you and _____ were to marry without a premarital agreement and how the agreement affects those rights. There may be features of the existing draft that affect you in ways that are not obvious. If you get legal advice your lawyer will be able to answer any questions you may have and to make sure you understand the terms of the agreement and how they affect you. **I urge you to get independent legal advice before you sign the agreement.**

The draft agreement provides that you give up any right to a share of property owned by _____ in the event he/she dies before you. He/she gives up the same rights in the event you die first. This agreement would permit each of you to make a will to benefit the other, but neither of you is required to do so. It permits each of you to decide who will be the beneficiary of your life insurance, retirement benefits, and other assets. It does not require either of you to provide for the other party at death although you may each choose to do so. In other words, the surviving spouse will not have any automatic rights upon the death of the first to die. In the absence of a premarital agreement, a surviving spouse would have certain automatic property rights under the law.

Further, the draft agreement provides that, in the event the marriage does not work out and you and _____ become separated, neither of you will have any rights to share in property acquired by the other during the marriage unless the property is titled jointly with right of survivorship or as tenants by the entirety. Each of you will have the right to keep as your separate property any money earned during marriage and any assets acquired with money earned during marriage so long as you maintain these assets separately. Neither of you will have a right to ask a court to award spousal support (also known as alimony) in the event of separation or divorce. (The draft agreement has no effect on the support rights of a child or children of the marriage.) In the absence of a premarital agreement, in the event of divorce, you would each have rights regarding property acquired during the marriage and you would each have the right to ask a court to award you spousal support.

The above is no more than a brief summary of the key features of the agreement. It is not legal advice. It does not address whether the agreement is fair or whether it is in your best interests to sign it.

You should obtain legal advice from an independent lawyer about whether the agreement is in your best interests before you make a final decision to sign it. [*Add, if appropriate* _____ is willing to pay your legal fees to enable you to get legal advice.] If you need assistance to find a lawyer with expertise in premarital agreements, please let me know and I will give you a list of names of lawyers I consider competent and experienced in this area of the law.

Please have your lawyer contact me at his or her earliest convenience to discuss the agreement and any questions or concerns you may have about it.

Very truly yours,

CLIENT LETTER – ADVICE NOT TO SIGN

Dear _____:

Based on my discussions with your fiancé(e)'s lawyer, I do not believe _____ will agree to make any further revisions to your premarital agreement. He/she has made it clear that you must sign the premarital agreement in its present form or he/she will call off the wedding.

In my opinion, **it is not in your economic interest to sign the agreement** even though that would mean _____ will cancel the wedding. There is a huge disparity between your assets and _____'s. Yet, the agreement makes no provisions for your financial security after _____'s death or in the event the marriage does not work out and you and _____ separate. In my opinion, this is not reasonable.

Given your present resources, you are at risk of becoming impoverished at the end of the marriage if you sign the agreement. Accordingly, **I advise you not to sign the agreement**. However, if you do decide to sign the agreement, I advise you of the following:

- After you and _____ have been married for several years, you should consider asking him/her to amend the agreement to provide for you. Keep in mind, however, that he/she will have the absolute right to refuse to do so.
- Similarly, after you and _____ have been married for several years, you could ask him/her to consider transferring title to the marital home into joint names. Keep in mind, however, that he/she will have the absolute right to refuse to do so.
- _____ may make a will to benefit you. However, he/she can change his/her will at any time. Therefore, this is not something you can count on.
- You should not quit your job to travel with _____ or to care for him/her during an extended illness. As the agreement is currently written, you would be giving up your only source of financial security to benefit _____ but would not be able to count on substitute provisions to make up for that loss.
- You should not agree to work for _____'s company unless he/she gives you an employment contract that provides for a market rate salary and the same employee benefits he/she provides the other employees of the company, including a retirement plan and severance pay in the event he/she decides to terminate your employment.
- You should contribute the maximum amount allowed by law to your retirement plan and should save as much of your employment earnings as you can. Under the current terms of agreement, the only opportunity you will have to create savings for your retirement and your future security is through your own savings and investment.
- If you receive an inheritance from your parents or other family members, you should preserve and invest it to meet your future needs. You should not deposit inherited money or securities into a joint account, and you should not use it for common expenses, to pay down the mortgage on _____'s solely titled home, or for any purpose other than savings and investment for yourself.
- You should not contribute any of your earnings to the mortgage on the marital home because you do not have an ownership interest in it.
- You should not use your earnings or income to support the household, pay for common expenses, or to help support _____'s children. For example, if you and _____ were to allocate financial responsibility so that he/she pays the

mortgage and you pay for groceries and utilities, he/she would be able to build equity in his/her home, in which you have no interest, while your earnings would go toward consumption and not to build savings. This is not in your best interests.

- You and _____ could agree during the marriage to amend the premarital agreement to provide some financial security for you at the end of the marriage. You could ask _____ to consider such an amendment after several years of marriage. To be valid and enforceable, an amendment must be in writing and both of you must sign it. [*add if agreement requires amendments to be notarized:* You and _____ must sign the amendment in front of a notary.] You should call me for legal advice if you and _____ start to discuss an amendment.
- An oral promise that _____ may make during the marriage to provide for you by will, or by another means, such as a life insurance beneficiary designation, is not enforceable. _____ can change his/her mind and write a new will or revoke a beneficiary designation. Therefore, you should not make a change in your circumstances, such as leaving your job, on the basis of such a promise. Rather, you and _____ should amend the premarital agreement in writing so that the promise becomes an enforceable contract.

Please let me know if you have any questions about the advice in this letter.

Very truly yours,

I. OBJECTIVES

A. Identify types of assets (marital and non-marital).

B. Compare issues by engagement type.

C. Identify types and relevance of source documents.

D. Formulate analysis and conclusions against standard of clear and convincing evidence standard.

E. Analyze case studies.

II. SOURCES OF MARITAL ASSETS

A. Anything that is not non-marital:

1. Inherited.

2. Premarital.

3. Gift.

4. Prenuptial agreement.

5. Earned after a legal separation.

B. Burden is on the party trying to prove the presence of a nonmarital asset, so assume everything is a marital asset until shown otherwise.

III. KRS 403.190

All marital property is to be divided in just proportions considering:

A. Contribution of each spouse to acquisition of the marital property;

B. Value of the property set aside to each spouse;

C. Duration of the marriage; and

D. Economic circumstances of the parties when the division of property is to become effective, including leaving custodian with the home.

IV. TRACING OWNERSHIP OF BUSINESS INTERESTS

A. Understand the nature of the business interest(s).

1. Real estate holding company.

2. Asset holding company.

3. Operating company.

B. Identify how was the ownership interest(s) was acquired.

1. Premarital ownership.

2. During the marriage.

3. After separation.

4. Inherited.

5. Critical to understand the timing of the acquisition and how the interest was purchased, *i.e.,* the source of funds.

C. Business documents to request:

1. Tax returns.

2. Financial statements.

3. Stock ledgers.

4. Minutes.

5. Bank statements.

6. Buy/sell agreements.

7. Organizational documents.

8. Operating agreement.

D. Personal documents to request:

1. Bank statements with copies of checks showing purchases.

2. Stock certificates.

3. Will.

4. Estate return.

5. Gift tax return.

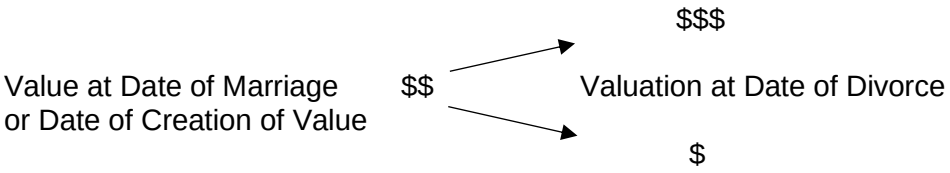
E. Follow the interest.

1. How?

2. Who?

3. Conditions?

F. Analyze appreciation (depreciation):



V. ACTIVE VERSUS PASSIVE PARTICIPATION

VI. VALUATION OF NONMARITAL COMPONENTS

A. Must value each component at the date of creation of value **and** today.

B. Must prove clearly and convincingly.

C. Must prove that any increase in value is **not** due to marital contribution.

VII. COMMINGLING

A. Commingling an asset is when a particular asset has elements of both marital and nonmarital assets within.

B. All assets are presumed marital until proven otherwise.

C. Assets must be proven nonmarital ***clearly and convincingly*** (heightened standard).

VIII. TRACING OF PREMARITAL HOME

A. The largest piece of equity in the marriage is often real estate.

B. Typically, a premarital home is not the home the parties reside in at the date of divorce.

C. Common commingling issues involving marital home:

1. Selling premarital home and using as a down payment on the marital home.

2. Subsequent sale of marital home (withdrawal of equity).

3. Refinances with money withdrawn from home.

4. Use of nonmarital funds to pay off mortgage.

D. Documents to request:

1. Closing statements.

2. Bank statements with copies of deposits or checks.

3. Real estate appraisals for date of marriage and date of divorce.

4. Refinancing documents, if applicable.

5. Loan amortization schedules.

IX. CASE STUDIES

A. Asset Management Company: Scenario 1[1]

1. Jason and Jemma have been married for 15 years and are getting divorced.

2. Jason is an executive at Marriott and sits on the board of another public company, Eleven Software, Inc.

3. Jemma is a partner of Jem Hedge Asset Management, which is a hedge fund that she started with her father prior to the parties' marriage.

4. The parties also own limited partnership interests in a Domino's pizza franchise and a local hotel.

5. The parties agree that the business interests need to be valued but disagree how the value should be divided.

6. Additional facts:

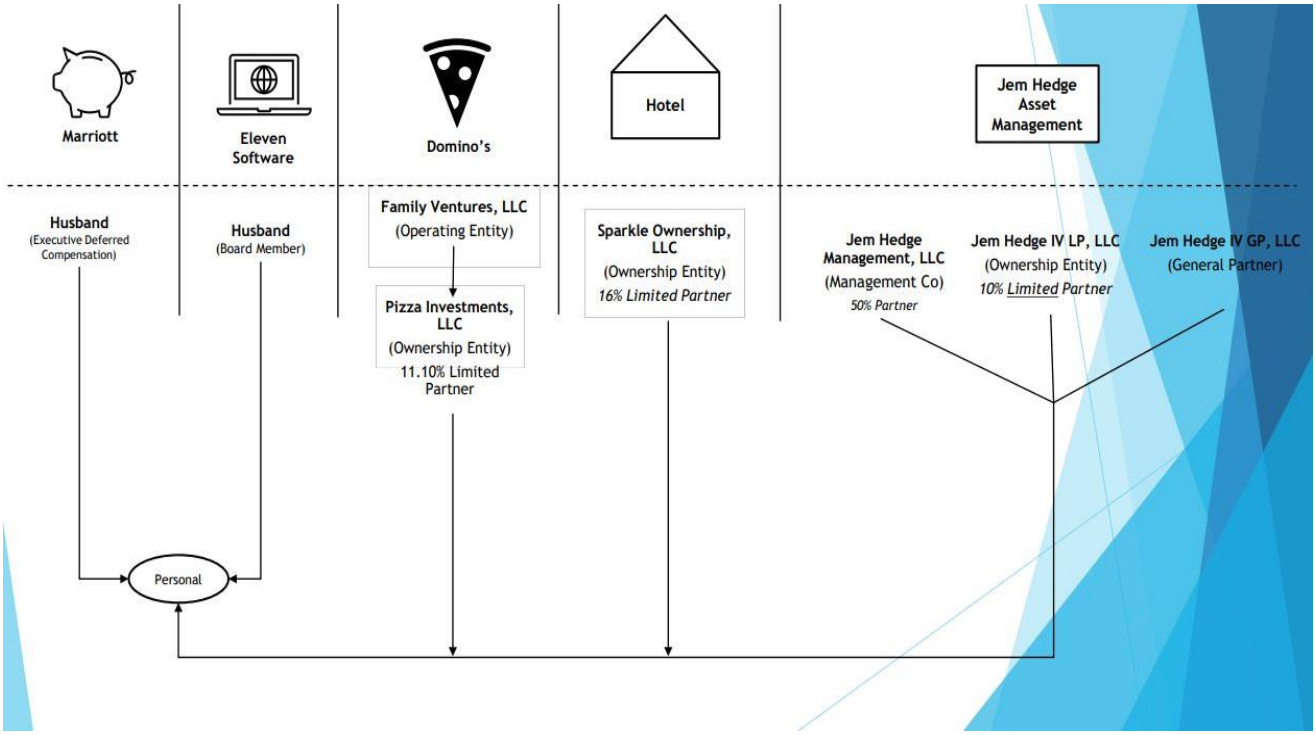
a. Jemma and her father started Jem Hedge Asset Management prior to the parties' marriage, and her father has been the managing partner since inception.

b. Jemma is the director of HR and Administration and is not involved with investment decisions.

c. The parties purchased the limited partnership interest in the Domino's pizza franchise with funds that were distributed from Jem Hedge's first fund, which was started before the marriage and was closed a year after the parties were married.

d. The parties purchased the limited partnership interest in the local hotel using funds from their personal (joint) bank account.

[1] 2022 AICPA & CIMA Forensic & Valuation Conference, "Complex Business Asset Tracing," Stefanie Jedra, CPA/AM/CFE and Josh Shilts, CPA/ABV/CFF/CGMA/CFE.



B. Asset Management Company: Scenario 2[2]

1. Jason and Jemma have been married for 15 years and are getting divorced.

2. Jason is an executive at Marriott and sits on the board of another public company, Eleven Software, Inc.

3. Jemma is a partner of Jem Hedge Asset Management, which is a hedge fund that she started with her father prior to the parties' marriage.

4. The parties also own limited partnership interests in a Domino's pizza franchise and a local hotel.

5. The parties agree that the business interests need to be valued but disagree how the value should be divided.

6. Additional facts:

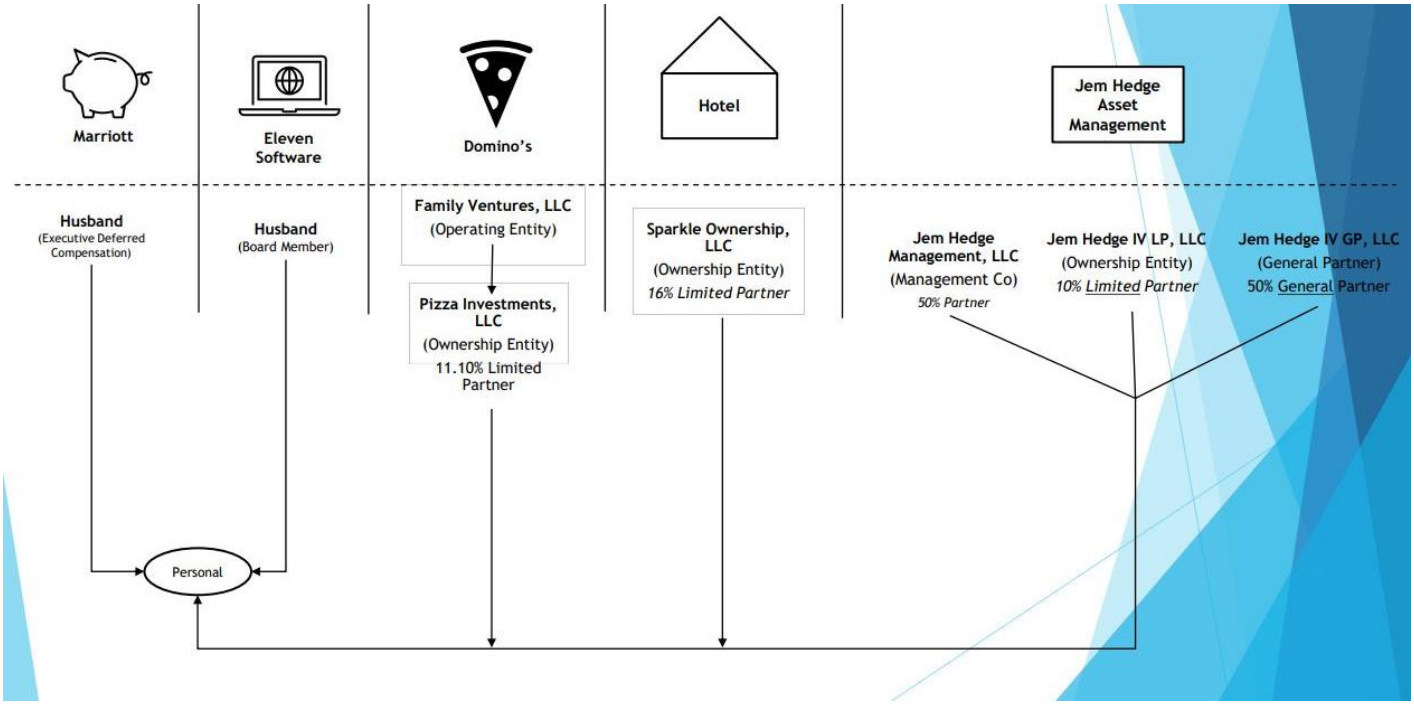
   a. Jemma and her father started Jem Hedge Asset Management prior to the parties' marriage, and ***Jemma has been a co-managing partner since inception.***

[2] 2022 AICPA & CIMA Forensic & Valuation Conference, "Complex Business Asset Tracing," Stefanie Jedra, CPA/AM/CFE and Josh Shilts, CPA/ABV/CFF/CGMA/CFE.

b. ***Jemma is primarily responsible for investment decisions.***

c. The parties purchased the limited partnership interest in the Domino's pizza franchise with funds that were distributed from Jem Hedge's second fund, which was started ***after the marriage*** and was ***closed last year.***

d. The parties purchased the limited partnership interest in the local hotel using funds from their personal (joint) bank account.



C. Analysis

1. Break this up into manageable portions; There is ***a lot*** going on.

2. Consider the following:

a. Active versus passive involvement.

b. Source of funds for capital contributions.

c. Timing of capital contributions and distributions.

d. Opening and closing of funds (and legal entities).

D. Premarital Home

Smith v. Smith
Allocation of nonmarital and marital analysis
454 Green Street

Assumptions:
*Mr. Smith owned property prior to marriage – 5/8/95 Purchased for $282,500
*Mr. Smith sold 123 Red Street on 11/14/95. Net proceeds of $63,505 were put into Big Bank Savings in 1995
*Date of marriage 10/28/99
*Refinanced 5/6/13

Current Value		$ 500,000	[1]
Less: Debt		$ (50,000)	
Total Equity		$ 450,000	
Non-Marital Contribution [H]		$147,499	
Equity at time of Purchase 5/8/95 - $282,500 less mortgage of $203,000 less	$ 79,500		
Increase in value per appraisal from 1995 to 1999	$ 40,000		
Mortgage payments made prior to marriage – $203,000-$195,477	$ 7,523		
Mortgage principal payments during marriage until November 2006 with non-marital Big Bank Savings $195,498-$175,022	$ 20,476		
	$ 147,499		
Marital Contributions		$125,022	
Mortgage principal payments during marriage before 2013 refinance $175,022-$152,100	$ 22,922		
Mortgage principal payments during marriage after 2013 refinance $152,100-$50,000	$ 102,100		
	$ 125,022		
Total Contributions		$272,521	
Non-Marital Contribution Percentage [H]		54.12%	[2]
Non-Marital Property Interest [H]		$ 243,540	
Non-Marital Property Interest [W]		$ --	

Marital Contribution Percentage	45.88%	[3]
Total Marital Property Interest	$ 204,450	
Times Assumed 50% Allocation	50%	
Apportioned Marital Property Interest	$ 103,230	
Husband's Total Property Interest	$ 346,770	77.06%
Wife's Total Property Interest	$ 103,230	22.94%
Total Property Interest	$ 450,000	100.00%

Notes:

[1] Fair Market Value based on appraisal by Done Appraisal Company, March 31, 2023.
[2] Non-Marital Contribution Percentage was calculated by dividing Non-Marital Contribution by Total Contributions.
[3] Marital Contribution Percentage was calculated by dividing Marital Contributions by Total Contributions.

The "Six Ps of Appellate Practice" is a memory tool for evaluating the advisability of filing an appeal and appellate brief drafting. The panel will discuss these and related appellate issues from the perspective of the Kentucky Supreme Court and the Kentucky Court of Appeals. Even though both panelists are retired, they cannot opine on cases before either of Kentucky's appellate courts.

I. PRESERVATION OF ERROR

A. *Norton Healthcare, Inc. v. Deng*

> We have long endorsed a rule that "specific grounds not raised before the trial court, but raised for the first time on appeal will not support a favorable ruling on appeal." When a trial court never has the opportunity to rule on a legal question presented to an appellate court, an appellant presents a different case to the appellate court than the one decided by the trial court. Indeed, an appellate court is "without authority to review issues not raised in or decided by the trial court." The proper role for an appellate court is to review for error – and there can be no error when the issue has not been presented to the trial court for decision.

Norton Healthcare, Inc. v. Deng, 487 S.W.3d 846, 852 (Ky. 2016) (footnotes omitted).

B. *Kennedy v. Commonwealth*

> The failure of the trial court to hold an in chambers hearing to determine the voluntariness of the confessions as required by KRS 422.110(2) is not properly preserved for appellate review. The appellants raised no question before the trial court as to the voluntary nature of these statements. Their objections were limited to their inconsistency and the lack of knowledge on the part of counsel for the appellants of their existence. *The appellants will not be permitted to feed one can of worms to the trial judge and another to the appellate court.* [citations omitted]

Kennedy v. Com., 544 S.W.2d 219, 222 (Ky. 1976), *overruled on other grounds by Wilburn v. Com.*, 312 S.W.3d 321 (Ky. 2010) (emphasis added).

II. PALPABLE ERROR

A. *Brewer v. Commonwealth*.

> Appellant concedes that this issue is unpreserved for appellate review by contemporaneous objection. So our review is governed by the palpable error standard found at Kentucky Rules of Criminal Procedure (RCr) 10.26. For an error to be palpable, it must be "easily perceptible, plain, obvious and readily noticeable." A

> palpable error "must involve prejudice more egregious than that occurring in reversible error[.]" A palpable error must be so grave in nature that if it were uncorrected, it would seriously affect the fairness of the proceedings. Thus, what a palpable error analysis "boils down to" is whether the reviewing court believes there is a "substantial possibility" that the result in the case would have been different without the error. If not, the error cannot be palpable.

Brewer v. Com., 206 S.W.3d 343, 348-49 (Ky. 2006) (footnotes omitted).

B. "Its effect on the proceeding must be 'manifestly unjust' *i.e.*, it must be 'shocking or jurisprudentially intolerable.'" CR 61.02; RCr 10.26; *Iraola-Lovaco v. Com.*, 586 S.W.3d 241 (Ky. 2019). Or, it must be determined that but for the error, which will need to be at the level of a deprivation of fundamental due process, a different result was probable. *Com. v. Reider*, 474 S.W.3d 143, 145 (Ky. 2015)."[1]

III. PREJUDICE TO OUTCOME

> Lastly, pursuant to KRE 103(a) and CR 61.01, we cannot vacate a family court's judgment unless a substantial right of a party has been affected. A substantial right has been defined as a right "which is essential and that potentially affects the outcome of a lawsuit and is capable of legal enforcement and protection, as distinguished from a mere technical or procedural right." *Shane v. Commonwealth*, 243 S.W.3d 336, 344 (Ky. 2007) (Scott, J., concurring in part and dissenting in part) (*citing Black's Law Dictionary* (7th ed. 1999)). As discussed above, the exclusion of attorney Lowry deprived Wade's right to call a third fact witness regarding an issue where the only previous fact witnesses were the parties with opposing views of Wade's donative intent. This exclusion had the potential to affect the outcome of the lawsuit, especially considering the impact the gift finding had on multiple subsequent issues. Therefore, the family court abused its discretion and committed reversible error when it did not allow attorney Lowry's testimony when determining whether there was an *inter vivos* gift from Wade to Laura of the $1,700,000 LRF Trust corpus.

Lewis v. Fulkerson, 555 S.W.3d 432, 440-41 (Ky. Ct. App. 2017).

IV. PRECISION IN ARGUMENT/WORD CHOICE

> The technical requirements for appellate briefs are set out in *CR 76.12* and *CR 98(4)*/RAP 31 and 32 and will be discussed in detail *infra*. The polestar case on this topic is *Hallis v. Hallis*, 328 S.W.3d 694 (Ky. Ct. App. 2010). Though lengthy, the following case excerpt provides crystal clear insight into the court's briefing expectations:
>
> > It is a dangerous precedent to permit appellate advocates to

[1] William D. Tingley, *Kentucky Practice and Procedure Deskbook*, §3.2, (UK/CLE) (2023) (Note, in this publication an italicized citation to a Civil Rule, *e.g., CR 76.12*, signals the rule has been replaced or deleted by the Kentucky Rules of Appellate Practice ("RAP")).

> ignore procedural [briefing] rules. Procedural rules 'do not exist for the mere sake of form and style. They are lights and buoys to mark the channels of safe passage and assure an expeditious voyage to the right destination. Their importance simply cannot be disdained or denigrated.' Enforcement of procedural rules is a judicial responsibility of the highest order because without such rules '[s]ubstantive rights, even of constitutional magnitude, ... would smother in chaos and could not survive.' *Id.* Therefore, we are not inclined to disregard Vaughn's procedural [briefing] deficiencies.
>
> ***** ***** *****
>
> Compliance with this rule [*CR 76.12*/RAP 1 and 32] permits a meaningful and efficient review by directing the reviewing court to the most important aspects of the appeal: what facts are important and where they can be found in the record; what legal reasoning supports the argument and where it can be found in jurisprudence; and where in the record the preceding court had an opportunity to correct its own error before the reviewing court considers the error itself. The parties, when acting *pro se*, or their attorneys who appear before us have typically spent considerable time, sometimes even years, creating and studying the record of their case. On the other hand, the record that arrives on the desk of the judges of the reviewing court is entirely unknown to them. To do justice, the reviewing court must become familiar with that record. To that end, appellate advocates must separate the chaff from the wheat and direct the court to those portions of the record which matter to their argument. When appellate advocates perform that role effectively, the quality of the opinion in their case is improved, Kentucky jurisprudence evolves more confidently, and the millstones of justice, while still grinding exceedingly fine, can grind a little faster.
>
> But the rules are not only a matter of judicial convenience. They help assure the reviewing court that the arguments are intellectually and ethically honest. Adherence to those rules reduces the likelihood that the advocates will rely on red herrings and straw-men arguments – typically unsuccessful strategies. Adherence enables opposing counsel to respond in a meaningfully way to the arguments so that dispute about the issues on appeal is honed to a finer point.
> Finally, the brief typically is the first impression upon the reviewing court that an appellate advocate makes for himself, or on behalf of his client. *Id.* at 696-97.

The warning "abandon hope all ye who enter here," from Dante's *Inferno*, comes to mind when considering the prospects for success for the

appellate brief that does not comply with *CR 76.12*/RAP 31 and 32. *Kentucky Bar Ass'n v. Brown*, 14 S.W.3d 916 (Ky. 2000) (60 days suspension for failure to file adequate appellant's brief); *Miller v. Armstrong*, 622 S.W.3d 661 (Ky. Ct. App. 2021) (appeal dismissed for failure to include ample citations to the record and failure to comply with CR 98(4)(b) evidentiary appendix requirements); *Clark v. Workman*, 604 S.W.3d 616 (Ky. Ct. App. 2020) (violation of eleven (11) subsections of CR 76.12 results in review only under manifest injustice standard); *City of St. Matthews v. McGalin*, 528 S.W.2d 667 (Ky. Ct. App. 1975) (appeal dismissed for failure to file appellant's brief); *Koester v. Koester*, 569 S.W.3d 412 (Ky. Ct. App. 2019) (brief struck and appeal dismissed for failure to comply with CR 76.12(4) (iii), (iv), and (v)); *Yocom v. Jackson*, 502 S.W.2d 524 (Ky. Ct. App. 1973) (brief stricken and appeal dismissed for failure to concisely state assignment of error); *Hogg v. Com.*, 848 S.W.2d 449 (Ky. Ct. App. 1992) (counsel found in contempt and fined for ignoring order denying motion to file brief in excess of CR 76.12(4)(b)(i) page limitations).[2]

Policy considerations behind controlling law: Behind every law, procedural or substantive, is a policy consideration. The policy consideration(s) behind controlling authority should be identified, and legal conclusions should either state how they follow the underlying policy(ies) or are logical extensions, or exceptions, thereto.

V. PERSUASION

Regarding the substantive content of an appellate brief, although persuasion is always the ultimate goal, the key to a successfully persuasive brief lies in the brief's analytical structure. Ruggero J. Aldisert, former Senior United States Circuit Judge, and Chief Judge Emeritus of the United States Court of Appeals for the Third Circuit, cited by the *Hallis* court, said this in his book *Winning on Appeal*:

> In law, as in formal logic, the "argument" takes on a special meaning. An argument is a group of propositions of which one is claimed to follow from the others, which are regarded as support or grounds for the truth of that one. *An argument is not a loose collection of propositions*; it has a formal structure that one trained in the law recognizes.
>
> ***** ***** *****
>
> Your brief is nothing more or less than an expanded categorical syllogism containing premises (propositions). The conclusion you urge in your brief can only be true when (1) the other propositions (premises) are true, and (2) these propositions imply the conclusion; in other words, the conclusion is inferred from the premises.

[2] *Id.* at §7.6.

Aldisert, *Winning on Appeal* (NITA 2d ed. 2003), pp. 20-21 (emphasis added). With these considerations in mind, this chapter will review the mechanical requirements of an appellate brief. For a more exhaustive discussion of the analytical structure of an effective appellate brief, *see* Aldisert, *Winning on Appeal*, *supra*.[3]

VI. APPENDIX

A. Page Number Guide to Kentucky Rules of Appellate Procedure

B. Cross-reference Guide from Former Civil Rules for Appellate Practice to Kentucky Rules of Appellate Procedure

C. Kentucky Rules of Appellate Procedure Page Number and Word Count Guide

[3] *Id.*

KENTUCKY
RULES OF APPELLATE PROCEDURE
2023

These rules incorporate various provisions of Rules of Civil Procedure and Rules of Criminal Procedure, consolidating all rules of appellate procedure into a single location. Some rules were amended to reflect developments in case law and the federal rules of appellate procedure. In the proposed draft commentary was included for select rules, but the commentaries are not included as part of the final rules. Behind Tab 1 is a cross-reference table, cross-referencing the former appellate Rule of Civil Procedure with the new rule.[1] The new rules are behind Tab 2.[2]

[1] This information is included in Appendix 2, *infra.*

[2] The Kentucky Rules of Appellate Procedure are available online at https://kycourts.gov/Courts/Supreme-Court/Supreme%20Court%20Orders/202249.pdf.

Ky. Appellate Practice & Procedure

XIV. Cross-Reference Sheet

A. Cross-Reference Sheet for Ky. Rules of Civil Procedure to Ky. Rules of Appellate Practice[6]

CR/RCr/FRAP/KRS Reference	RAP Number	Name of Rule
CR 1, CR 87	RAP 1	Applicability, Title, and Amendment
CR 73.01, 73.02(1), 73.02(2), (3), and (4), 73.03 **RCr 12.02**, 12.04	RAP 2	Appeal as of Right • Filing NOA • Contents of NOA • Clerk's Service NOA • Criminal Appeals • Joinder • Payment of Fees
CR 73.02(1), **77.04(2), (4)** RCr 12.04 FRAP 4(a)(2)	RAP 3	Appeal as of Right • Time for Filing • *Pro Se* Inmate Appeal • Failure to Serve • Extension of Time • Effect of Motion on NOA
CR 74.01	RAP 4	Cross Appeals • Who May Take • Timing • Parties • Contents • Payment of Fees • Clerk's Duties
CR 5.01, 5.02, 5.03, 5.05 7.02, 10.01, *76.40(2)*	RAP 5	Service, Form, and Filing
CR 6.01, 6.02, *76.34(1)*	RAP 6	Computing and Extending Time
CR 7.02, 7.03, *76.34*	RAP 7	Motions
CR 76.24	RAP 8	Death, Substitutions, and Amendment to Parties
CR 24.01-24.03	RAP 9	Intervention on Appeal
CR 73.02(2)	RAP 10	Failure to Timely File or Comply with Rules

[6] This cross-reference tool was created by William D. Tingley and Hillary A. Hunt. Italicized rules reflect those rules which were deleted per Kentucky Supreme Court Order 2022-49 (October 25, 2022) and are effective January 1, 2023. Rules in boldface reflect those rules which were amended by the same order.

CR/RCr/FRAP/KRS Reference	RAP Number	Name of Rule
CR 11, *73.02(2)*	RAP 11	Obligation of Counsel and Self Represented Parties; Frivolous Filings
NEW RULE	RAP 12	Appearance, Substitution, or Withdrawal of Attorneys
CR 3.03, *CR 76.42*	RAP 13	Costs and Filing Fees
CR 76.43	RAP 14	Number of Documents Required
NEW RULE	RAP 15	Word Count Certificate • Page Limitations • Word Limitations • Exclusions
----------	RAP 16	RESERVED
CR 74.02	RAP 17	Preliminary Procedure and Interlocutory Relief • Death Penalty • Transfers • Running of Time
----------	RAP 18	RESERVED
----------	RAP 19	RESERVED
CR 65.07, 65.08, and 65.09	RAP 20	Motion for Relief from Order Granting or Denying an Injunction • Filing Requirements • Relief Requests • Relief Permanent Injunction • Emergency Relief • Review by Supreme Court
CR 76.33	RAP 21	Motion for Immediate Relief During Pendency of Appeal
CR 76.03	RAP 22	Prehearing Procedure • Running of Time • Prehearing Statement/Supplemental
----------	RAP 23	RESERVED
CR 75.01, 75.11, and **CR 98**	RAP 24	Contents and Designation of Record on Appeal
CR 75.08, 75.13, 75.14	RAP 25	Unavailable or Omitted Proceedings • Narrative Statement • Effect of Omitted Record • Circuit Clerk Corrections • Power of Court to Correct • Deadlines

CR/RCr/FRAP/KRS Reference	RAP Number	Name of Rule
CR 73.08, 75.07, 76.03, 98(3) RCr 12.04(5)	RAP 26	Duties of Circuit Clerks • Upon Filing NOA • Preparing/Certifying Record • Time for Certification • Several Appeals • Transmitting Record • Writs of *Habeas Corpus* • *In Forma Pauperis*
CR 79.06, 76.46	RAP 27	Appellate Clerk's Duties
NEW RULE	RAP 28	Access to Record on Appeal • Sealed Documents
----------	RAP 29	RESERVED
CR 76.12, 98(4)	RAP 30	Time for Filing and Serving Brief • Civil Cases • Cross Appeals • Criminal Cases • Expedited Appeals
CR 76.12, 98(4) FRAP 28(d)	RAP 31	Format and Number of Briefs
CR 76.12(4), 76.28(4)(c) and 98(4)	RAP 32	Organization and Content of Brief
----------	RAP 33	RESERVED
CR 76.12(7); 76.16(3)	RAP 34	*Amicus Curiae*
NEW RULE	RAP 35	Supplemental Authority
----------	RAP 36	RESERVED
CR 76.26	RAP 37	Submission
CR 76.12	RAP 38	Oral Argument
----------	RAP 39	RESERVED
CR 76.28, 76.30, 76.38(1)	RAP 40	Opinions and Orders • Written Opinions/Orders • Publication • Withdrawal of Opinions • Effective Date • Finality
CR 76.28(4)	RAP 41	Citations of Unpublished Opinions
CR 76.44	RAP 42	Stay Pending Review by U.S. Supreme Court
CR 76.32	RAP 43	Petition for Rehearing or Other Relief
CR 76.20	RAP 44	Motion for Discretionary Review • Time • Contents • Costs

CR/RCr/FRAP/KRS Reference	RAP Number	Name of Rule
NEW RULE	RAP 45	*Amicus Curiae* in Support or Opposition of Discretionary Review
CR 76.21	RAP 46	Cross Motion for Discretionary Review
RCr 12.05	RAP 47	Neither Petition for Rehearing nor Motion Discretionary Review Required for Exhaustion in Criminal Appeals
CR 72.02, 72.04, 72.06, 72.08, 72.10, 72.12, 72.13, 73.02(1)(c) **RCr 12.02**, 12.04	RAP 48	Appeals from District Court • Starting the Appeal • NOA Acts as Stay in Criminal Case • Cross Appeals • Record on Appeal • Time for Filing Contents of Statement of Appeal/Counter Statement • Oral Argument • Reconsideration • Costs
CR 76.05	RAP 49	Appeals from Workers' Comp Board • Time for Petition • Contents of Petition • Format • Record • Response • Certification • Cross Petition
CR 76.37	RAP 50	Certification of Question of Law to or from Supreme Court • Procedure • Contents • Certification • Disposition • Briefs/Arguments • Opinion
RCr 4.43, **12.06**, 12.82	RAP 51	Review of Decisions Concerning Bail
KRS 419.130	RAP 52	*Habeas Corpus* Appeals
----------	RAP 53	RESERVED
CR 76.42(2)(b) KRS 453.190	RAP 54	Motions to Proceed *In Forma Pauperis*/Appoint Counsel

CR/RCr/FRAP/KRS Reference	RAP Number	Name of Rule
NEW RULE	RAP 55	Appeal of a Denial of *In Forma Pauperis*
----------	RAP 56	RESERVED
----------	RAP 57	RESERVED
----------	RAP 58	RESERVED
----------	RAP 59	RESERVED
CR 76.36, 81	RAP 60	Original Proceedings in Appellate Courts
----------	RAP 61	RESERVED
NEW RULE	RAP 62	Stays and Bail in Criminal Cases
CR 62.03, 73.04, 73.06, 73.07, 81A	RAP 63	Bonds in Civil Actions

Ky. Appellate Practice & Procedure

D. [7.7] Page Limitations

Since the enactment of the Kentucky Rules of Appellate Procedure, the page limitations on appellate briefs have changed. Those changes are reflected in the following chart. Not included in the page or word count are the (1) cover, (2) introduction, (3) statement concerning oral arguments, (4) statement of points and authorities, (5) signature block, (6) exhibits, and (7) appendices. *CR 76.12(4)(a)(i)*/RAP 31(G)(5).

Court of Appeals					
	Appellant	Appellee	Reply	Appellee/ Cross Appellant	Appellant/ Cross-Appellee Reply
CR 76.12(4)(i)	25	25	5	40	30
RAP 31(G)(2)	20	20	4	30	25
Word Count	8,750	8,750	1,750	14,000	10,500

Supreme Court					
	Appellant	Appellee	Reply	Appellee/ Cross Appellant	Appellant/ Cross-Appellee Reply
CR 76.12(4)(ii)	50	50	10	65	25
RAP 31(G)(3)	40	40	7	50	20
Word Count	17,500	17,500	3,500	22,750	8,750

Death Penalty Cases (upon motion)		
	Appellant	Appellee
CR 76.12(4)(iii)	150	150
RAP 31(G)(4)	120	120
Word Count	52,500	52,500

Note, these limitations are per appellate brief. For example, if in the Court of Appeals the reply brief addresses two separate appellee briefs, then the reply may be twice the allotted page numbers or word count. RAP 31(G)(2)(b). In the Supreme Court, the additional reply brief page allotment is 4 pages or 1,750 words per additional appellee brief.

A word-count certificate, conforming to RAP 15, must be included with any brief exceeding the page number limitation. RAP 31(G).

As of this writing (February 20, 2023), after multiple attempts, the Kentucky Legislature is poised to modify the Kentucky Child Support Statutes once again in the 2023 legislative session. If they do, this will be the fourth revision in five years and the 11th attempt in 14 years. Did they get it right this time?

I. CHILD SUPPORT

A. Calculated based on gross income of both parents being applied to the Kentucky Child Support Guidelines. Health care costs and childcare are then added. Then each parent would be responsible for their percentage share of the combined parental income of the obligation.

B. Kentucky Child Support Interactive at **csws.chfs.ky.gov/csws/**.

1. You can view your case info, apply for child support, locate a local office, make a payment, and estimate support.

2. The estimate allows you to enter all the information and then print a worksheet.

II. CHILD SUPPORT HISTORY

A. Family Support Act of 1988 started the process.

B. KRS 403.212 was enacted in 1990 based on data from 1987.

C. Some changes in 1994 included adding a minimum obligation at $60 and deductions of maintenance and support to other children.

D. 2000 language was added to address split custody (each parent has one child).

- *Recommendations by Policy Studies, Inc.* were not implemented.

E. *2006, 2010, 2011, 2013, 2014, 2015, 2016, 2018 (died somewhere in the legislative process).*

F. **2016:** 45 CFR §302.56 requires that states receiving funding MUST 1) establish guidelines that are reviewed and revised, if appropriate, at least every four years; 2) analyze case data regarding applications of the Guidelines; and 3) consider family income below 200 percent of poverty level and other factors.

G. In 2018, Kentucky passed a historic shared parenting law. **KRS 403.270** has a rebuttable presumption for joint custody and equal parenting time.

H. 2019 bill eliminated the ability to determine potential income for an incarcerated parent; KRS 403.212(2)(d). **The bill had new guidelines but they were removed before passage – only administrative changes were signed by the Governor.**

III. 2021 HB 404

A. Updated the guidelines and extended to include combined parental adjusted gross income to $30,000 per month (over 30 years).

B. Increased the amount in definition of extraordinary medical expenses in KRS 403.211(9) as uninsured expenses in excess of $250 per child per calendar year.

C. Added guidelines for imputing potential income:

1. Assets and residence;

2. Employment, earning history, and job skills;

3. Education level, literacy, age, health, and criminal record that could impair ability to gain or continue employment;

4. Record of seeking work;

5. Local labor market, including availability of employment for which the parent may be qualified and employable;

6. Prevailing earnings in the local labor market; and

7. Other relevant background factors including employment barriers.

D. Reduced the liability for child support to attach in paternity actions from four years to two years.

E. Established requirement for child support to be addressed when a DNA action places the child outside the home.

F. Established the **Self-Support Reserve (SSR)**.

1. This was required to comply with 45 CFR §302.56(c)(1)(ii), which requires child support guidelines to take into consideration the basic subsistence needs of noncustodial parents who have a limited ability to pay by incorporating a low-income adjustment.

2. Kentucky's SSR is $915 per month, which is the 2019 federal poverty amount ($1,041) multiplied by Kentucky's price party (0.879).

3. The monthly adjusted gross income of the obligated parent and number of children for whom support is being calculated determines if the SSR is applicable.

4. If the SSR is applicable, only the obligated parent's monthly adjusted gross income is used to determine the support obligation. *The online calculators will do it for you.*

G. **PROBLEMS**

1. Wrong definition of split custody – **corrected in 2022 HB 501**.

2. The use of SSR is higher than at least one straight calculation – **corrected in 2022 HB 501**.

3. Requirement of this bill to institute child support (without deference to UIFSA) in DNA action – **corrected in 2022 HB 501 to instead inquire and take action with consideration of UIFSA**.

4. Issue with SSR – **2022 HB 501 makes it clear to use SSR if lower than straight calculation**.

IV. 2022 HB 501 REQUIRES CHFS TO PROMULGATE A MANUAL WITH EXAMPLES

V. 2021 VERSION OF KRS 403.212 EFFECTIVE JUNE 29, 2021 (SHARED PART WAS DELAYED UNTIL MARCH 2022)

The idea was that the 2022 legislation would FIX the shared parenting language but while there was a 2022 bill passed, it had delayed implementation until March 2023 and failed to repeal the 2021 language.

VI. SHARED PARENTING DEVIATIONS IN CHILD SUPPORT BEFORE 2021

A. **Previously**: No statutory guidelines. Courts were all different.

1. **Off set**. Determine parent obligations and subtract.

2. **Colorado Rule**. Calculate base support and multiply by 1.5 before other adjustments (daycare, health) and parents' shares are determined. Multipliers are based on the fact that shared physical care presumes that certain basic expenses for the children will be duplicated. An adjustment for shared physical care is made by multiplying the basic child support obligation by one and fifty hundredths. THEN, each parent's share is multiplied by the percentage of overnights that the children spend with the *other parent*. Finally, the parent's support obligations are offset against one another in a shared custody situation.

   a. **There were several op-eds in the *Courier-Journal* authored by the National Parents Organization of Kentucky stating the 2021 legislation removed the "shared parenting penalty multiplier" and that previous courts were using a random 1.5 multiplier that artificially inflated incomes and inflated conflict. They further stated that overnight stays were not factored in and the payor will now get credit (*Courier-Journal* February 9, 2022).**

   b. It is not a penalty multiplier.

   c. It does not cause a CLIFF EFFECT – it's just complicated math. It only seems like a cliff if wait till 50/50 time.

B. **Child Support Commission recommended OREGON's METHOD.**

1. Credit percentage = 1/(1+e^(-7.14*((overnights/365)-0.5)))-2.74%+ (2*2.74%*(overnights/365)).

   - *Mimics cross-credit.*

2. No cliff effect but complicated math.

3. Allows for the use of an actuary table like straight calculation.

4. Easy elimination of disputes and reduces litigation.

5. Straightforward and clean even though adjustments begin at day one.

VII. 2021 SHARED PARENTING LAW, KRS 403.2121

A. If parents have equal time, the parent with the greater obligation shall pay the parent with the lesser obligation the difference.

B. If unequal parenting time, the court shall:

1. Calculate the child support obligation (CSO);

2. Determine percentage of overnight stays the child spends with each parent on an annual basis based on the order or agreement;

3. Multiply each parent's obligation by the percentage of the other parent's overnights;

4. Set the difference between the amounts as the monetary transfer or credit necessary between the parents for the care of the child; and

5. Use discretion in adjusting each parent's CSO in accordance with factors:

   a. Income;

   b. Likelihood either parent will exercise the time-sharing schedule;

   c. Whether all children are exercising same schedule; and

   d. Whether the time-sharing plan results in fewer overnights due to significant geographical distance between the parties that may affect the CSO.

6. Overnight stay includes costs… Merely providing a place to sleep doesn't count.

7. CHFS shall make a worksheet.

8. This section does not apply if the children receive KCHIP, K-TAP, food stamps or Medicaid. (NOT FIXED IN HB 501)

C. **HB 501 repeals and reenacts KRS 403.2121 (effective March 2023).**

1. Gives a definition for "day" (more than 12 consecutive hours in a 24-hour period).

2. Keep in mind the Legislature's intention was that "guideline child support" (*i.e.* child support without application of a parenting time credit) would be used for parents who were essentially absentee parents with little contact with the children.

3. Sets a minimum of 73 days before shared parenting time credit.

4. KRS 403.2121(3): The CSO *shall* be subject to further adjustment upon motion for parents who share parenting time.

5. Adds that this and SSR don't get applied together.

6. **PARENTING TIME CREDIT (PTC) CHART:**

DAYS	**% ADJUSTMENT**
73-87	10.5%
88-115	15%
116-129	20.5%
130-142	25%
143-152	30.5%
153-162	36%
163-172	42%
173-181	48.5%
182-182.5	50%

7. The failure of a party to consistently comply shall be grounds for modification.

8. Allows modification if timesharing changes by 15 percent.

VIII. APPLICATION

A. Calculate CSO

B. Determine Number of *Days* on an Annual Basis for each Parent

C. Determine PTC Using Chart

D. Multiple the Base Support Obligation by the PTC

E. Subtract that from the Obligor's Obligation

IX. JUDICIAL DISCRETION

Courts may use discretion to still adjust the CSO after considering:

A. Obligor's income and ability to maintain basic necessities of the home for the child;

B. The likelihood either parent will exercise the parenting time schedule;

C. Whether all the children are subject to the same parenting time schedule;

D. Whether the parenting time schedule results in fewer overnights due to a significant geographical distance between the parties that may affect the CSO;

E. Military deployments or extended service obligations;

F. Health insurance or medical care provided by either parent.

G. If an obligee receives KCHIP, KTAP, SNAP or Medicaid, the court has discretion in awarding PTC.

X. WHAT IF A PARENT FAILS TO CONSISTENTLY EXERCISE THEIR PARENTING TIME?

A. Failure by a party to consistently comply with the parenting time schedule shall be grounds for the other to seek modification.

B. A party may seek modification following a 15 percent change in the number of timesharing days and has the burden of proving a material change in circumstances.

C. KRS 403.213(2) is still applicable.

CAN YOU REPRESENT YOUR CLIENT WITH A HEALTHY DETACHMENT AND COMPASSION?

Mark A. Ogle, Esq.

IS IT REALLY POSSIBLE?

Yes! In fact, it is required.

The phone rings and you see on the caller I.D. that it is a colleague of yours from your law school days who is representing the opposite side of a difficult post-decree motion regarding parenting time issues. You answer the phone in a manner that you are expecting to have a pleasant exchange with your law school classmate. “Good morning lawyer SHARK.” For the next several minutes, lawyer SHARK proceeds to yell at you using profanity and taking personal shots at your client. You attempt to ask lawyer SHARK to calm down and talk to you in a tone and at a volume that you can understand. After a few more minutes of being yelled at, you finally reach your boiling point and react by yelling yourself. “Shut the _____ up!” Lawyer SHARK replies, “_____ you” and hangs up.

WHAT JUST HAPPENED AND WHY?

I. HOW TO KNOW THE PROPER BOUNDARIES WHEN REPRESENTING YOUR CLIENT AND WHEN YOU HAVE CROSSED THEM

Start by looking at the Rules of Professional Conduct and Code of Professional Courtesy and then let your conscience be your guide.

A. Kentucky Rules of Professional Conduct SCR 3.130 (Preamble)

Section III:

> As a representative of clients, a lawyer performs various functions. As an advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As an advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As a negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

This section suggests that a lawyer is to provide the client an informed understanding of the client’s legal rights and obligations and explain their practical implications. If a lawyer has crossed the boundary of a healthy detachment with the client, the lawyer runs the risk of not being able to provide an informed understanding of the client’s rights and obligations, due to the lawyer’s bias.

Section VI:

> A lawyer's conduct shall conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer shall use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer shall demonstrate respect for the legal system and for those who serve it, including judges, other lawyers, and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

This section suggests that a lawyer shall demonstrate respect for the legal system, and for those who serve it, including judges, other lawyers, and public officials. The inability to think clearly due to assuming the client's emotional state will almost always cause the lawyer act in a disrespectful manner.

Section X:

> In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

This section again suggests that while lawyers have an obligation to zealously protect and pursue a client's legitimate interests, they must do so while maintaining a professional, courteous, and civil attitude toward all persons involved in the legal system.

B. Kentucky Rules of Professional Conduct SCR 3.130(1.1) Competence

SCR 3.130(1.1): "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

When a lawyer's judgment becomes compromised by the lawyer's emotional state due to an unhealthy attachment to the client's emotional state, it becomes almost impossible to represent the client with competence. Acting or giving advice while as emotional as your client can lead to mistakes.

C. Kentucky Bar Association Code of Professional Courtesy

1. Rule 5: “A lawyer should not engage in intentionally discourteous behavior.”

2. Rule 10: “A lawyer should recognize that the conflicts within a legal matter are professional and not personal and should endeavor to maintain a friendly and professional relationship with other attorneys in the matter. In other words, ‘leave the matter in the courtroom.’”

II. WHY DO LAWYERS ALLOW THEMSELVES TO BECOME TOO EMOTIONALLY ATTACHED TO THEIR CLIENT’S CASE?

Most of the time, the lawyer allows the client to create an environment resulting in the lawyer feeling like he/she must protect the client at all costs.

A. Victim Client – this client presents him/herself as always being the victim. Someone has done them wrong and you, the lawyer, must fix it.

B. Fight Client – this client adds pressure to the lawyer by always demanding that the lawyer must fight for him/her or their children.

C. Always Unsatisfied Client – this client constantly tells the lawyer that he/she is not doing enough for the client. Primarily, this client does not take the advice or like the advice of the lawyer.

D. Important Referral Source/Important Client – this client came to lawyer from a good friend or another highly respected client or attorney. This client could also be a high-profile client, and the lawyer feels extra pressure to perform at the lawyer’s best.

E. There are many more types of clients that add unnecessary pressure to the lawyer that I am sure many of you can describe.

I want to leave you with this thought – learn to develop a healthy emotional detachment from your clients and represent them with compassion and passion within the confines of the law and Rules of Professional Conduct.

Finally, if lawyers cannot represent their client with a healthy emotional detachment and therefore become one with their client, the lawyer should withdraw from the case. The client deserves to have competent legal representation.

A lawyer that represents him/herself has a fool for a client.

Can You

REPRESENT YOUR CLIENT
with a healthy detachment & compassion

PRESENTED BY:
Mark A. Ogle, Esq.

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IS IT REALLY POSSIBLE?

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What

JUST HAPPENED AND

Why

GRAYDON

How to know the proper boundaries when representing your client and

When you have crossed them

Start with looking at the **Rules of Professional Conduct** and **Code of Professional Courtesy** and then let your conscience be your guide

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SECTION III

Kentucky Rules of Professional Conduct SCR 3.130 (Preamble)

AS A REPRESENTATIVE OF CLIENTS

a lawyer performs various functions

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SECTION III

Kentucky Rules of Professional Conduct SCR 3.130 (Preamble)

AS ADVISOR

A lawyer provides a client with an informed understanding of the client's legal rights and obligations & explains their practical implications

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SECTION III

Kentucky Rules of Professional Conduct SCR 3.130 (Preamble)

AS ADVOCATE

a lawyer zealously asserts the client's position under the rules of the adversary system

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SECTION III

Kentucky Rules of Professional Conduct SCR 3.130 (Preamble)

AS NEGOTIATOR

A lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others

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SECTION III

Kentucky Rules of Professional Conduct SCR 3.130 (Preamble)

AS AN EVALUATOR

A lawyer acts by examining a client's legal affairs and reporting about them to the client or to others

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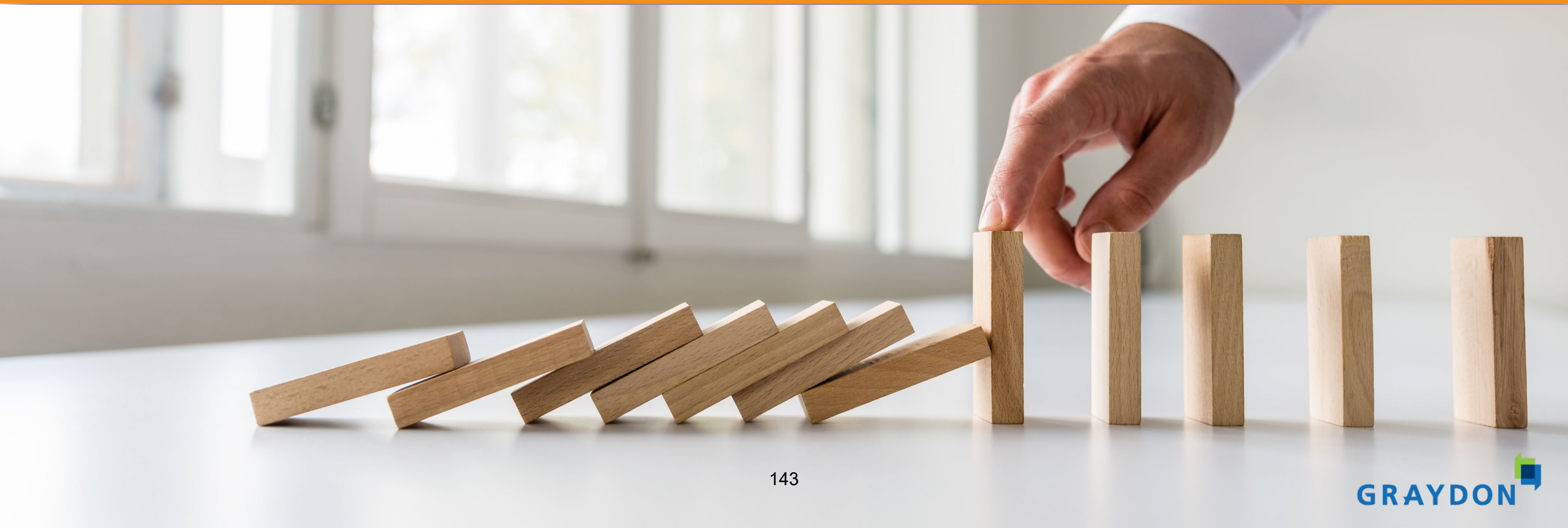
This section *suggests* that a lawyer is to provide the client an informed understanding of the client's legal rights and obligations and explains their practical implications

IF A LAWYER HAS CROSSED THE BOUNDARY OF A HEALTHY DETACHMENT WITH THE CLIENT, the lawyer *runs the risk* of not being able to provide an informed understanding of the client's rights and obligations, due to the **LAWYER'S BIAS**



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SECTION VI

Kentucky Rules of Professional Conduct SCR 3.130 (Preamble)

A lawyer's **CONDUCT** shall conform to the requirements of the law

both in professional service to clients and in the lawyer's business and personal affairs

SECTION IV

Kentucky Rules of Professional Conduct SCR 3.130 (Preamble)

A lawyer **SHALL USE THE LAW'S PROCEDURES** only for legitimate purposes and not to harass or intimidate others

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SECTION IV

Kentucky Rules of Professional Conduct SCR 3.130 (Preamble)

A lawyer shall **DEMONSTRATE RESPECT** for the legal system and for those who serve it

including judges, other lawyers and public officials

This section *suggests* that a lawyer shall **DEMONSTRATE RESPECT** for the legal system, and for those who serve it, including judges, other lawyers and public officials

The *inability to think clearly* due to assuming the client's emotional state will almost always cause the lawyer to act in a **DISRESPECTFUL MANNER**

SECTION X

Kentucky Rules of Professional Conduct SCR 3.130 (Preamble)

LAWYERS ENCOUNTER CONFLICTING RESPONSIBILITIES

Difficult ethical problems arise from conflict between

- a lawyer's responsibilities to clients
- to the legal system
- to the lawyer's own interest in remaining an ethical person while earning a satisfactory living

SECTION X

Kentucky Rules of Professional Conduct SCR 3.130 (Preamble)

RULES OF PROFESSIONAL CONDUCT ➞ **prescribe terms for resolving conflicts**

DIFFICULT ISSUES OF PROFESSIONAL DISCRETION CAN ARISE
must be **resolved** through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules

THESE PRINCIPLES INCLUDE the lawyer's obligation to zealously protect and pursue a client's legitimate interests (within the bounds of the law) while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system

This section again *suggests* that while lawyers have an **OBLIGATION TO ZEALOUSLY PROTECT AND PURSUE A CLIENT'S LEGITIMATE INTERESTS,** they must do so all while *maintaining* a **professional, courteous** and **civil attitude** toward all persons involved in the legal system

SCR 3.120 (1.1)

Kentucky Rules of Professional Conduct SCR 3.130 (1.1) Competence

A LAWYER SHALL PROVIDE COMPETENT REPRESENTATION TO A CLIENT

Competent representation requires:

- legal knowledge
- skill
- thoroughness
- preparation reasonably necessary for the representation

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When a lawyer's judgment **BECOMES COMPROMISED** by the lawyer's emotional state due to an *unhealthy attachment to the client's emotional state*, it becomes **almost impossible** to **REPRESENT THE CLIENT WITH COMPETENCE**

TAKING ACTION or **GIVING ADVICE** while as emotional as your client can lead to mistakes

Kentucky Bar Association Code of Professional Courtesy

RULE 5:
A lawyer **SHOULD NOT ENGAGE** in *intentionally* discourteous behavior

RULE 10:
A lawyer **SHOULD RECOGNIZE** that the conflicts within a legal matter are *professional* and *not personal* and should endeavor to maintain a friendly and professional relationship with other attorneys in the matter

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Why do lawyers allow themselves to become too emotionally attached to their client's case?

Most of the time, the lawyer **ALLOWS THE CLIENT** to create an environment resulting in the lawyer feeling like the lawyer **MUST PROTECT THE CLIENT AT ALL COSTS**

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VICTIM CLIENT

This client presents him/herself as **ALWAYS BEING THE VICTIM**

*Someone has done them wrong and you, **LAWYER**, must fix it*

FIGHT CLIENT

This client **ADDS PRESSURE** to the LAWYER

*Always demanding that the LAWYER must **FIGHT FOR** him/her or their children*

ALWAYS UNSATISFIED CLIENT

This client **CONSTANTLY TELLS** the LAWYER that the LAWYER **IS NOT DOING ENOUGH** for the client

*Primarily, this **client does not take** the advice or **like** the advice of the LAWYER*

IMPORTANT REFERRAL SOURCE/IMPORTANT CLIENT

This client came to LAWYER from a good friend or another highly respected client or attorney

This client could also be a high profile client and the LAWYER feels **EXTRA PRESSURE** to perform at the LAWYER'S best


There are many more types of clients that add unnecessary pressure to the LAWYER that I am sure many of you can describe

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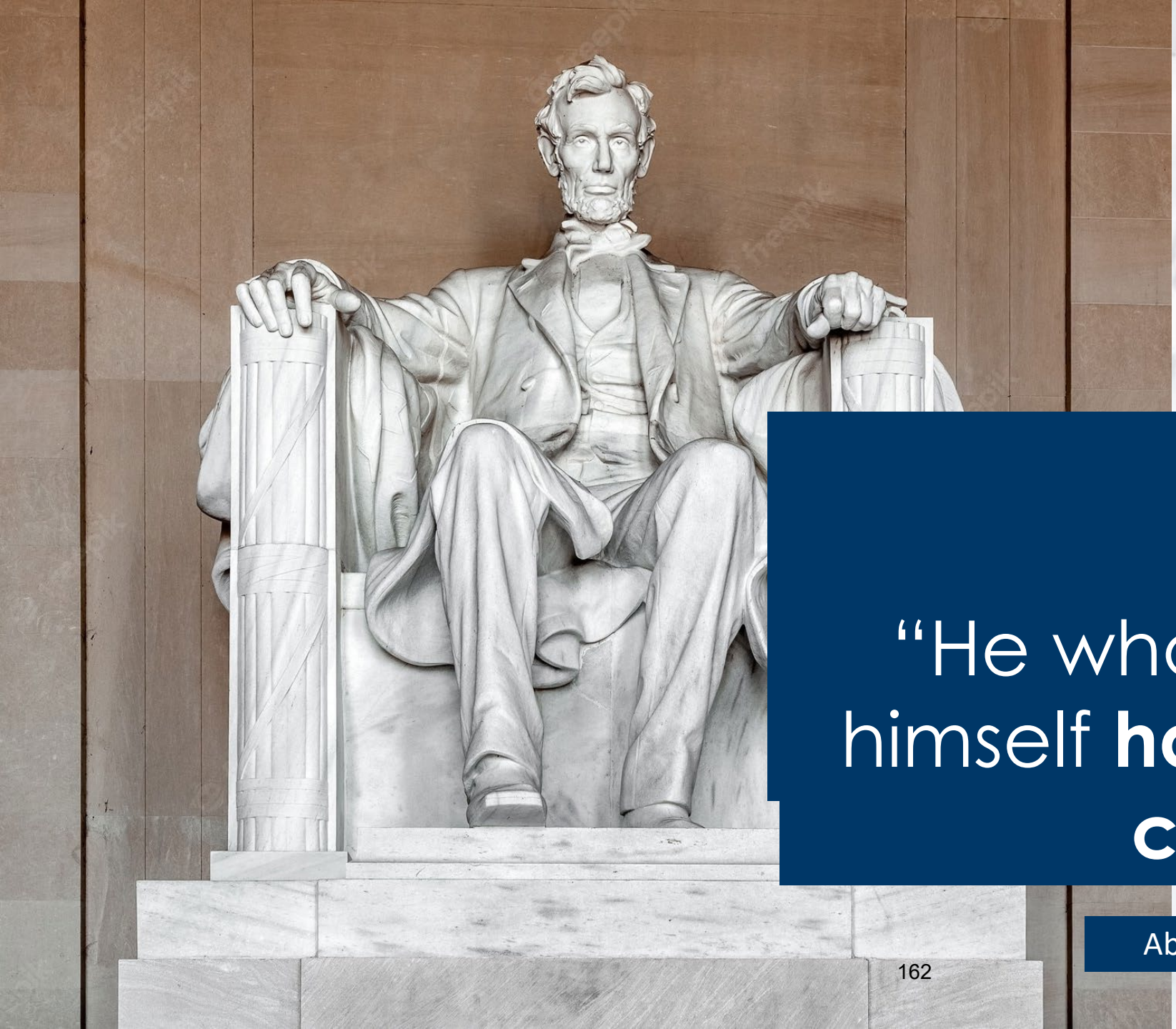
Learn to develop a
healthy emotional detachment
from your clients
and represent them with
compassion and passion
within the confines of the law
and code of professional conduct

If lawyers cannot represent their clients with a HEALTHY EMOTIONAL DETACHMENT and, therefore, **BECOME ONE WITH THEIR CLIENT**

the lawyer should withdraw from the case

THE CLIENT DESERVES TO HAVE COMPETENT LEGAL REPRESENTATION



"He who represents himself **has a fool for a client**"

Abraham Lincoln

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THANK YOU

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