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A warm welcome to all our readers!

There is a rich and varied tapestry of articles and news in our latest edition, and I am really grateful to our contributors.

We have heard a lot about equality between the sexes over the recent past. I urge you to read Geoff Wilson’s piece, which raises the spectre of the feminisation of poverty.

And Larry Moskowitz’s piece on how we should deal with difficult opponents is a tour-de-force from the top of the profession.

There are topical articles about Bitcoin, cryptocurrency, spyware and the wiping of evidence.

There is also a lovely comparison chart showing the way in which key jurisdictions handle client attorney privilege and discovery.

There are lots of other valuable contributions, including introductions to new joiners - enjoy.

Simon Bruce

Editor
May 2018
President’s Message

We have become a finely tuned machine in the years I have been on the executive committee.

Summary of main events since Iceland:
The period since Iceland has been very busy and productive, largely due to the creative energy of Rachael Kelsey for expansion and structure; Suzanne Kingston’s vision and guidance for committees and long range planning; Donna Goddard who holds our toes to the fire and with Tom Sasser keeps a close watch on our purse; and William Longrigg and Cheryl Hepfer give us the gentle guidance we need to stay close to our course.

We have monthly conference calls that can last up to 2 hours to review our activities and plan the future.

We made money in Iceland! Which is the good news since we anticipate that Tokyo will be less financially predictable. Tokyo is important because it is there that we will launch our new chapter, IAFL Asia Pacific.

Our amicus committee, headed by the amazing Ed Freedman, has submitted two briefs on behalf of the IAFL that we believe will make significant differences in US law in Hague proceedings on the “well settled” defense.

Status of Current Initiatives
Sandra Verburgt, chair of The Hague Committee, reports that we have observer status at The Hague Conference. This means we can designate a fellow to attend Special Commission meetings, working group meetings, HCCH conferences or any other meeting for which the HCCH has sent an invitation to the IAFL. Last year fellow Edwin Freedman (Israel) was the IAFL Observer and attended in this role the Seventh Special Commission on the Practical Operation of the 1980 and 1996 Hague Conventions, which was held from 10-17 October 2017 in The Hague. Edwin was accompanied by fellows Robert Arenstein (New York, USA), Lawrence Katz (Florida, USA), Fabiana Quaini (Argentina) and Suzanne Harris (California, USA).

In furtherance of our commitment to the good work of The Hague Conference, with the guidance of fellow Suzanne Harris (California) a foundation has been established in the United States, the U.S Friends of The Hague Conference Foundation. As President and Secretary of the Foundation Suzanne and tax counsel Marilyn Barrett attended the Special Commission on 1980 Child Abduction Convention at The Hague in October as invitees of HCCH. Suzanne and Marilyn attended plenary sessions and some working sessions re judicial communications.

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The U.S. Friends of The Hague Conference was formed in 2018 to raise private funding for HCCH projects and received its IRS 501(c)(3) status in October 2018. Suzanne and Marilyn, by attending the Special Commission, could identify several vital projects needing financial support from private sources, notably the rejuvenation of INCADAT, the legal database on international child abduction law. I encourage every fellow to make a donation to our Foundation to support these critical initiatives such as INCADAT, which make our practicing lives easier.

Our forced marriage initiative is continuing to take hold in the U.S. where Peter Buchbauer, (Virginia) Abed Awad (New Jersey) and Jorge Cestero, Florida have led the fight to change laws permitting marriage under age 18 working with our informal partner, The Tahirih Justice Center, http://www.tahirih.org/. We are pleased to report that, thanks to Jorge, Florida passed a law in early February prohibiting underage marriage. Sally Oldham (Connecticut) has also agreed to work on this project in her state.

The Asia Pacific Chapter now exists, thanks to the hard work of Nigel Nicholls (Australia) and his committee, Max Meyer (Australia), Poonam Mirchandani (Singapore), Rita Ku (Hong Kong) and Geoff Wilson (Australia) and the executive liaison, Tom Sasser (Florida).

The Brexit seminar in London last June has significantly enhanced the public recognition and appreciation for the IAFL. The papers, found on our website, have been republished around the world.

Events
Rachel Kelsey (Scotland) and I travelled to Cape Town, South Africa and will return to Lagos, Nigeria and other African countries this year to top off my commitment to build our fellowship in Africa.

We are having a mini-meeting in Dubai in November 2018 to enhance our presence in the Middle East.

We are a vibrant, healthy organization prepared to take on all challenges in these turbulent times. When I first joined the IAFL I was alarmed to discover the U.S. State Department had never heard of us. I believe in the past 10 years we have more than remedied that situation and more. As ever, we on the Board of Governors and Executive Committee see our most important job as giving value to fellows for their dues. I believe the role we now play at The Hague Conference, along with the special conferences and symposiums, such as Brexit and ARTS, have significantly enhanced our role on the world stage and gives greater opportunity to fellows to play more significant roles in their own jurisdictions.

“We are a vibrant healthy organization prepared to take on all challenges in these turbulent times.”
Dealing with difficult opponents: tactical and practical solutions

Over the years, we’ve all had to deal with difficult opposing counsel, and it’s frustrating. Their antics are often distracting. We want to focus on the issues, determine where the disagreements are, and start trying to figure out how to resolve them.

The other side just wants to take verbal potshots. And, of course, when we finally learn their positions on the issues, we find that they are supported by flimsy legal reasoning, at best, and few or no real facts.

They drive our clients crazy. We want to give advice about the issues and guide our clients through the process, and we’re spending an awful lot of time peeling them off the ceiling. Sometimes a difficult opponent will get our client so upset that he or she engages in behavior that the other side can legitimately criticize, like closing a bank account or freezing a credit card account without warning.

Difficult opponents make more work for us, and the work is usually unsatisfying. We have to respond to snarky, ill-reasoned pleadings, letters and e-mails. We have to respond to motions that have little or no merit, but which arise out of the other side’s anger or cynical desire to try to bludgeon our client into submission. We would rather just identify the issues, try to resolve them, and identify the ones for which litigation may be required because the parties are just too far apart.

This article is not about the internal challenges that we face in dealing with difficult opponents.

There will be no exhortations to “take a deep breath and soldier on.”

There will be no calming words, such as “think about the calm blue ocean.”

There be no homespun musings about the “Golden Rule.”

Instead, there will be a list of specific things you can do when you are actually faced with “bad boy” or “bad girl” behavior.
I. FIVE POSSIBLE REASONS WHY AN OPPONENT MAY BE DIFFICULT:

In order to have the best possible chance of dealing successfully with difficult opponents, it is first helpful to develop a sense of why they are doing what they are doing. There are several possible explanations, more than one of which can apply in any given case.

Intrapsychic Issues
It should not come as a surprise to anyone that there are attorneys who have emotional issues which are manifested in their conduct. Such conduct is often accompanied by an inability to choose tactful language or filter out inappropriate behavior. From these attorneys come a string of nasty letters, frivolous motions, and outrageous conduct in depositions. Courtroom conduct is sometimes not as bad, but that is only because the judge is watching. It is not necessary to make a specific diagnosis of an opponent like this (most of us are not qualified to do that anyway), but for our purposes, it is enough to “know it when we see it.” It is very difficult to get such an opponent to modify his or her behavior. Effective responses will tend to come under the heading of asking the Court to impose consequences.

Your Opponent is “Churning” the case to Maximize His or Her Fees
This behavior tends to occur when the opposing party is wealthy, or when your client is wealthy and your opponent is looking for a large “need-based” fee award. This type of opponent will make no effort to look for cost-effective ways of obtaining or exchanging information. She or he will send four-page letters or lengthy e-mails when one page, or one or two paragraphs, will do. You will ask for, but not receive, cooperation on procedural issues or routine matters, such as short discovery extensions, or stipulations to the admissibility of clearly admissible documents.

Your Opponent Thinks that He or She Can Gain an Advantage by Engaging in Psychological Warfare Against Your Client
This reason is often combined with the two previously discussed reasons, though the “psy ops” are usually calculated, not merely incidental to other bad behavior. This opponent’s goal may be to demoralize your client or goad your client into engaging conduct that results in sanctions against your side. You may see this tactic when the case is relatively simple and the facts and/or applicable law are relatively straightforward and in your favor. But rather than settling (“giving in), your opponent prefers to try to force some errors from your client. This type of opponent requires vigilance, as well as constantly educating your client to be vigilant as well – to see the opponent coming and avoid the numerous traps that he or she will set.

Your Opponent is Emotionally Invested in His/Her Client’s Case
This attorney will do anything – ANYTHING – to please the client. This excessive desire to please will prevent the lawyer from exercising sound legal judgment regarding the substantive and procedural issues in the case. This often happens when the opposing client presents as emotionally vulnerable, but it may occur in other cases as well. If “win-win” solutions can be found, it may be helpful to suggest them. Showing your opponent how your suggested solutions will help his/her client (and thus make him or her look good) can go a long way here.

Personal Animosity Between Counsel
Sometimes opposing counsel may just have it in for you. The reasons may include some history between counsel; history between you and opposing counsel’s partner or associate; or your...
opponent’s over identification with his/her client. You are not going to solve personal conflicts like this over the course of the case, so this is another situation where the responses are likely to be in the area of asking the Court to impose consequences.

II. CALIFORNIA LAW REGARDING ATTORNEY FEES AND SANCTIONS

Conduct issues most often come up in connection with issues of attorney fees and sanctions, but there is interplay between an opponent’s conduct and strategy on any issue (i.e., using children for financial leverage, unreasonable settlement negotiations, failure to disclose factual information, failure to cooperate procedurally). We will turn here to an examination of California’s rules concerning conduct-based fees and then discuss the court decision which has led its trial courts to look at attorney conduct more critically in recent years.

Statutes

There are three leading California statutes pertaining to attorney fees and costs that are applicable in family law cases. The first two apply in all civil cases.

California Code of Civil Procedure §128.5, amended effective August 7, 2017, states:

(a) A trial court may order a party, the party’s attorney, or both, to pay the reasonable expenses, including attorney’s fees, incurred by another party as a result of actions or tactics, made in bad faith, that are frivolous or solely intended to cause unnecessary delay. This section also applies to judicial arbitration proceedings under Chapter 2.5 (commencing with Section 1141.10) of Title 3 of Part 3.

(b) For purposes of this section:

(1) “Actions or tactics” include, but are not limited to, the making or opposing of motions or the filing and service of a complaint, cross-complaint, answer, or other responsive pleading. The mere filing of a complaint without service thereof on an opposing party does not constitute “actions or tactics” for purposes of this section.

(2) “Frivolous” means totally and completely without merit or for the sole purpose of harassing an opposing party.

(c) Expenses pursuant to this section shall not be imposed except on notice contained in a party’s moving or responding papers or, on the court’s own motion, after notice and opportunity to be heard. An order imposing expenses shall be in writing and shall recite in detail the action or tactic or circumstances justifying the order.

(d) In addition to any award pursuant to this section for an action or tactic described in subdivision (a), the court may assess punitive damages against the plaintiff on a determination by the court that the plaintiff’s action was an action maintained by a person convicted of a felony against the person’s victim, or the victim’s heirs, relatives, estate, or personal representative, for injuries arising from the acts for which the person was convicted of a felony, and that the plaintiff is guilty of fraud, oppression, or malice in maintaining the action.

(e) This section shall not apply to disclosures and discovery requests, responses, objections, and motions.

(f) Sanctions ordered pursuant to this section shall be ordered pursuant to the following conditions and procedures:

1 Although the changes became law on August 7, 2017, when the bill was signed, they apply to all actions or tactics that were part of a civil case filed on or after January 1, 2015. California Code of Civil Procedure §128.5(i), discussed below.
(1) If, after notice and a reasonable opportunity to respond, the court issues an order pursuant to subdivision (a), the court may, subject to the conditions stated below, impose an appropriate sanction upon the party, the party’s attorneys, or both, for an action or tactic described in subdivision (a). In determining what sanctions, if any, should be ordered, the court shall consider whether a party seeking sanctions exercised due diligence.

(A) A motion for sanctions under this section shall be made separately from other motions or requests and shall describe the specific alleged action or tactic, made in bad faith, that is frivolous or solely intended to cause unnecessary delay.

(B) If the alleged action or tactic is the making or opposing of a written motion or the filing and service of a complaint, cross-complaint, answer or other responsive pleading that can be withdrawn or appropriately corrected, a notice of motion shall be served as provided in Section 1010 but shall not be filed with or presented to the court, unless 21 days after service of the motion or any other period as the court may prescribe, the challenged action or tactic is not withdrawn or appropriately corrected.

(C) If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney’s fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(D) If the alleged action or tactic is the making or opposing of a written motion or the filing and service of a complaint, cross-complaint, answer, or the responsive pleading that can be withdrawn or appropriately corrected, the court on its own motion may enter an order describing the specific action or tactic, made in bad faith, that is frivolous or solely intended to cause unnecessary delay, and direct an attorney, law firm, or party to show cause why it has made an action or tactic as defined in subdivision (b) unless, within 21 days of service of the order to show cause, the challenged action or tactic is withdrawn or appropriately corrected.

(2) An order for sanctions pursuant to this section shall be limited to what is sufficient to deter repetition of the action or tactic or comparable action or tactic by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorney’s fees and other expenses incurred as a direct result of the action or tactic described in subdivision (a).

(A) Monetary sanctions may not be awarded against a represented party for a violation of presenting a claim, defense, and other legal contentions that are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

(B) Monetary sanctions may not be awarded on the court’s motion unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party.
that is, or whose attorneys are, to be sanctioned.

(g) A motion for sanctions brought by a party or a party's attorney primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation, shall itself be subject to a motion for sanctions. It is the intent of the Legislature that courts shall vigorously use its sanction authority to deter the improper actions or tactics or comparable actions or tactics of others similarly situated.

(h) The liability imposed by this section is in addition to any other liability imposed by law for acts or omissions within the purview of this section.

(i) This section applies to actions or tactics that were part of a civil case filed on or after January 1, 2015.

The 2017 amendments to §128.5 changed the statute to refer to “actions or tactics,” rather than merely “actions.” The amendment also added new subsection (g), which expresses the intent of the Legislature that courts “vigorously” use their sanction authority to deter improper actions or tactics. Anecdotally, it has been difficult to obtain sanctions in a family law case under the former version of §128.5. The bar for showing that an action was frivolous, or undertaken solely for the purpose of delay, has been an extremely high one. However, the standard now is “bad faith,” which, arguably, is easier to show.

California Code of Civil Procedure §128.7 states:

(a) Every pleading, petition, written notice of motion, or other similar paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer’s address and telephone number, if any. Except when otherwise provided by law, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) By presenting to the court, whether by signing, filing, submitting, or later advocating, a pleading, petition, written notice of motion, or other similar paper, an attorney or unrepresented party is certifying that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, all of the following conditions are met:

1. It is not being presented primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

2. The claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

3. The allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

4. The denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may,
subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation. In determining what sanctions, if any, should be ordered, the court shall consider whether a party seeking sanctions has exercised due diligence.

(1) A motion for sanctions under this section shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). Notice of motion shall be served as provided in Section 1010, but shall not be filed with or presented to the court unless, within 21 days after service of the motion, or any other period as the court may prescribe, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorneys fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(2) On its own motion, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b), unless, within 21 days of service of the order to show cause, the challenged paper, claim, defense, contention, allegation, or denial is withdrawn or appropriately corrected.

(d) A sanction imposed for violation of subdivision (b) shall be limited to what is sufficient to deter repetition of this conduct or comparable conduct by others similarly situated. Subject to the limitations in paragraphs (1) and (2), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys fees and other expenses incurred as a direct result of the violation.

(e) When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this section and explain the basis for the sanction imposed.

(f) In addition to any award pursuant to this section for conduct described in subdivision (b), the court may assess punitive damages against the plaintiff upon a determination by the court that the plaintiffs action was an action maintained by a person convicted of a felony against the persons victim, or the victims heirs, relatives, estate, or personal representative, for injuries arising from the acts for which the person was convicted of a felony, and that the plaintiff is guilty of fraud, oppression, or malice in maintaining the action.

(g) This section shall not apply to disclosures and discovery requests, responses, objections, and motions.
A motion for sanctions brought by a party or a party’s attorney primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation, shall itself be subject to a motion for sanctions. It is the intent of the Legislature that courts shall vigorously use its sanctions authority to deter that improper conduct or comparable conduct by others similarly situated.

This section shall apply to a complaint or petition filed on or after January 1, 1995, and any other pleading, written notice of motion, or other similar paper filed in that matter.

The third code section is limited to family law cases. California Family Code §271 states:

(a) Notwithstanding any other provision of this code, the court may base an award of attorneys fees and costs on the extent to which the conduct of each party or attorney furthers or frustrates the policy of the law to promote settlement of litigation and, where possible, to reduce the cost of litigation by encouraging cooperation between the parties and attorneys. An award of attorney’s fees and costs pursuant to this section is in the nature of a sanction. In making an award pursuant to this section, the court shall take into consideration all evidence concerning the parties’ incomes, assets, and liabilities. The court shall not impose a sanction pursuant to this section that imposes an unreasonable financial burden on the party against whom the sanction is imposed. In order to obtain an award under this section, the party requesting an award of attorney’s fees and costs is not required to demonstrate any financial need for the award.

(b) An award of attorney’s fees and costs as a sanction pursuant to this section shall be imposed only after notice to the party against whom the sanction is proposed to be imposed and opportunity for that party to be heard.

(c) An award of attorney’s fees and costs as a sanction pursuant to this section is payable only from the property or income of the party against whom the sanction is imposed, except that the award may be against the sanctioned party’s share of the community property.

Some family law judges do not like to use even the milder statute, §271. It is understandable for a judge to desire to make a ruling without having to “point the finger” at anyone. However, two California cases decided with reference to §271 that the appellate courts expect trial judges to take that section seriously, just as the California Legislature has expressed with respect to the current version of Code of Civil Procedure §128.5.

**Feldman**

A series of California statutes require both parties in a divorce to make a full disclosure of their respective assets and liabilities. (Cal. Fam. Code §§2100-2113.) This requirement is in keeping with a rule that spouses owe each other a fiduciary duty with respect to the disclosure of financial information and the management of marital property. (Cal. Fam. Code §§721, 1100-1103.)

In *Marriage of Feldman* (2007) 153 Cal.App.4th 1470, 64 Cal. Rptr.3d 29, a husband was ordered to pay $250,000 in sanctions pursuant to Family Code §271 as a result of the following conduct:

i. Failing to disclose a $1,000,000 Israeli bond;

ii. Disguising his ownership of a...
residence worth $6,000,000 by acquiring it through an intricate maze of companies;

iii. Failing to disclose property in Mexico acquired through a set of corporations he owned;

iv. Failing to disclose nine new business entities created after the date of separation; and

v. Failing to disclose a retirement account.

Feldman did not involve conduct by the attorney, but its holding paved the way for the breach of fiduciary duty allegations that were made in Marriage of Davenport (2011) 194 Cal.App.4th 1507, 125 Cal. Rptr.3d 292. Davenport has become the leading California case on sanctions for inappropriate conduct of counsel, although the sanctions in that case could only have been assessed, and were in fact assessed, against the misbehaving attorney’s client.

C. Davenport

In Davenport, the parties owned millions of dollars’ worth of (mostly commercial) real estate, business entities, investments, and cash. They had liquid assets worth about $7,000,000, which from the outset of the case were largely under the wife’s control. The husband managed the real estate and business entities.

Although the parties had separated in 1990, the case did not proceed in the trial court until 2008. At that time, the American stock and real estate markets were plummeting.

In May 2008, the wife filed a pre-trial motion for accounting by the husband, and for $933,000 in sanctions per Feldman and Family Code §271. She alleged that the husband had breached his fiduciary duty regarding the management of the community property by:

i. Failing to list values of assets in his formal disclosure document (“Preliminary Declaration of Disclosure,” “PDD”);

ii. Omitting assets entirely from his PDD;

iii. Misrepresenting values of assets in financial statements provided to third parties; and

iv. Failing to provide accountings relating to assets he was managing.

These are all very serious allegations, and if proven, would likely have been governed by Feldman. In fact, in the wife’s moving papers, her attorney referred to the case as “Feldman: the Sequel.” The husband opposed the motion and sought sanctions in response.

The motion required a five-day evidentiary hearing. The trial court denied the wife’s request for sanctions and awarded the husband $400,000 in sanctions payable by the wife.

How did this happen?

• The evidence at the hearing showed that the husband had offered to stipulate to a neutral forensic accountant to investigate, analyze, and report to the Court on all “matters of concern” to the wife. That offer was made within a few days after the motion had been filed, but the wife never responded to it.

• The husband had also offered to make his two forensic accountants available to answer any and all accounting questions that the wife and her attorneys might have had. That offer had been made even before the wife’s motion had been filed. The offer was rejected. The husband made the same offer again after the motion was filed. The wife’s attorney rejected it again. Then the husband made the offer three more times. It was rejected each time.

• The last of these offers was made the day before a Case Management Conference held
in front of the judge who would later hear Wife’s motion. At the Case Management Conference, the judge ordered the parties and attorneys to meet and confer, with Husband’s experts to be present. Note that this meant that the husband’s attorney had to plead, first with the wife’s attorney and then with the judge, to get his own experts ordered to attend a settlement meeting.)

- At the hearing, the husband submitted correspondence from the wife’s lawyers showing that, even before the husband made his supposedly false representations regarding these assets, the wife had intended to obtain her own appraisals. He also offered to use a joint appraiser for the real estate. This offer was rejected.

- At the hearing, the husband also submitted a Declaration from an AAML and IAFL Fellow, Thomas Wolfrum, which stated in part: “In my opinion, it is not customary for experienced family law attorneys in a dissolution action to rely on the opinion of the opposing spouse as to the values of property or businesses when multi-million-dollar properties are involved.”

- At the hearing also showed that, going back to five months before the motion was filed, the husband had made numerous settlement offers, and that the responses to those offers were in the negative, and often disrespectful. Here is an example of a letter from opposing counsel to the husband’s attorney, discussing the husband’s numerous settlement offers:

  It’s no surprise, then, that your letter of 8/7/08 appears to be an attempt to create a false and misleading exhibit for use at a later law and motion hearing so that your client can sit in court with a halo over his head, and so you can say “Look how many times Ken offered to settle!” That wouldn’t surprise us at all, given your practice of attaching a large pile of exhibits to your declarations without any testimony from you concerning their truth.

- Legal bills submitted in support of Wife’s request for attorney fees as sanctions included numerous references to meetings involving Wife, her attorneys, and other members of her team. Those meetings were described in the bills as “War Councils.”

  The Court of Appeal held that the wife’s refusal to participate in cooperative efforts to provide her with the information she claimed he was concealing; her summary rejection of his settlement offers without even attempting to consider the information he had offered; and her attorney’s disrespectful correspondence to his attorney (the quotation above is but one example) warranted the trial court’s denial of her motions and its imposition of the $400,000 in sanctions against her.

III. TAKEAWAYS

The result and holding in Davenport, and the conduct of the husband’s attorney in that case, suggest some strategies that we can adopt in dealing with difficult opposing counsel.

- Learn how to recognize obstreperous behavior. We all have a sense of what reasonable conduct is. We also know how to distinguish conduct and statements that are client-driven and those that are attorney-driven. If
we make a practical suggestion to our opponent about how to move forward procedurally in a case, or if we make a reasonable substantive offer, we all have a good idea of what a reasonable response would be and what an unreasonable response is. If we see a consistent pattern of unreasonable responses that appear to be attorney-driven and not client-driven, we know that we are dealing with a difficult attorney.

- **React with your brain, not with your gut.** It is a natural tendency, when we feel attacked, to react emotionally. That tendency cannot be eliminated, but it can be overcome. And we need to overcome it before responding. Before we speak with our client about the latest nasty missive or pleading from opposing counsel, and before we respond to it, we need to step back, recognize our feelings, and think critically about the response that will be most effective for our client.

- **Formulate a strategy for responding.** Look for what your knowledge and experience tell you is a reasonable response. Implement your strategy, even if it involves offers of cooperation that you know the other side is not going to accept. As the husband’s attorney in Davenport did, keep offering to cooperate; then document each offer and each response.

- **Be respectful to the other side at all times, even if they are not being respectful to you.** This suggestion should require no explanation, other than to point out that it worked in spectacular fashion for Mr. Davenport’s lawyer.

- **Make sure that your client understands what’s happening, why you are responding the way you are, and does not overreach himself or herself.** Remember that uncooperative behavior by your client may reduce his/her (and your) credibility and lead to unfavorable rulings. Even if your client’s behavior doesn’t harm the case, any overreaction on the client’s part, if visible to the other side, will only encourage more provocation.

- **Look for ways to use your opponent’s own words and conduct for the benefit of your side.** See the letter from wife’s counsel to the husband’s counsel, and the wife’s legal bills, in Davenport. Using documents that way may be better than simply writing back.

 When our emotional “buttons” have not been pushed, we are very good at thinking strategically and coming up with tactics to suit our strategies. If we can find a way to do the same things when our buttons are being pushed – or if we can learn to step away and be the dispassionate, critical thinkers that our clients expect us to be, the results can be better for our clients, as well as professionally – and emotionally – satisfying to us.
Bitcoin and Divorce: Are You Ready?

The first wave of Bitcoin divorces has arrived, with an increasing number of clients and their lawyers beginning to consider the implications for financial settlements where one of the matrimonial assets is (or may be) a cryptocurrency holding.

All cryptocurrencies, the most well-known of which are Bitcoin*, Ether and Lightcoin are digital currencies based on block chain technology originally developed in 2009 which, as a result of their volatility as well as their unregulated and decentralised nature, carry with them intrinsic difficulties of disclosure, tracing and valuation.

**How is Crypto different from regular currency?**

A “normal” currency like the US dollar is ultimately underpinned by the state. Once the currency has been issued the state has no automatic record of who owns what. The state and others can, however, often find this out if they wish, as anything other than cash has to be kept in the banking system. Given that banks are now being forced to become ever more transparent with regard to beneficial ownership, anonymity can no longer be guaranteed. At the same time there is a general crackdown on large cash transactions which has made it increasingly unattractive to keep large amounts of cash under the mattress as it is becoming difficult to spend.

Transactions in cryptocurrencies such as Bitcoin and Ether are recorded on public distributed ledgers. These are available to anyone who wishes to (and have the bandwidth) to download them. These transaction records are supplemented and updated each time a transaction is entered between participants. It is decentralised. However, at any one time every computer in the chain holds a record of who owns what. The details of the owner can, however, only be divined if you know their key. In the case of Bitcoin the key is the Bitcoin address which will look something like this:196h6EKRnBW4q8aLbqHdk ee4fqqo6YMW or will consist of a unique QR code that contains this information. And unlike a holding of dollars, a holding of Bitcoins will not be kept in a bank. All the owners need to access their coins are their keys. Accordingly, crypto was initially thought of as an ideal currency for those who wanted to protect their anonymity and keep their wealth and transactions secret. While this had certain attractions to terrorists and drug dealers it could, unsurprisingly, also be of interest to tech-savvy individuals looking to hide assets from their spouses and the divorce courts.
Disclosure

Disclosing conventional currency holdings on a divorce is usually comparatively easy. All one needs are dated bank statements displaying the account holder’s name showing the latest balances. By contrast, the fact that proof of ownership rests in the key to the Bitcoin presents a difficulty. If that is literally all one has, simply reeling off the long alpha numeric code is not going to leave anyone much wiser about the extent or value of the holding. It also creates a vulnerability as, if someone else has access to the key they also, potentially, have unfettered access to the Bitcoins. However, these days most legitimate holders of Bitcoins will not just have a key. They will have a wallet. And although it is quite possible to have a paper wallet (i.e. a piece of paper on which you have printed out all your keys) most people will use either a standalone digital wallet (kept encrypted on their computer) or an online wallet provided by an exchange like Coinbase. Anecdotal evidence suggests that new investors are increasingly using wallets provided by trading platforms like Coinbase or online providers like Exodus to store their Bitcoins as these provide easy to use real-time at-a-glance information about their holdings. Typically such information includes the current holding and value of each type of cryptocurrency held and recent transaction information. This makes disclosure far simpler as a dated print out or screenshot of the wallet should suffice.

Concealed assets

Although ownership is hard to trace (there are, for example, no tell-tale dividends and crypto can even be bought for cash through an ATM) because all transactions are recorded on the public ledger, Bitcoin is strictly speaking only a pseudo-anonymous currency. If you know someone's Bitcoin address, it is possible, if you know how, to see all of their transactions and the resulting balance held by that address. There are a number of ways in which Bitcoin owners can reveal the fact that they have a crypto holding including buying currency using their regular bank accounts or credit cards, and purchasing items with their Bitcoins. In the latter case, if proof of purchase is requested then the fact that the transaction was completed in Bitcoins may become evident.

Sophisticated owners may, however, try to keep all of their transactions out of sight. Those who are determined to remain anonymous have to go through further hurdles to try to hide their transactions by using additional layers of security such as “bitcoin mixers”, Tor - Onion routers, logless VPN service providers or using alternative crypto-currencies such as Dash and Monero that offer core anonymity features. However, the fact that someone has been using these services (which usually require payments which may well show up on credit cards or bank statements) can be a significant...
‘Due to such volatility it is possible that a sale will be the most sensible route to explore.’

clue to the fact that they own crypto and are trying to hide it. Any payments to service providers such as: Bitmixer and Helix (mixers); Windscribe, VPNArea, Mullvad and AirVPN (Virtual Private Network Providers recommended for Crypto users ); Ledger Nano S, MyCelium and Trezor (wallets); or Coinbase, Bitfinex, CoinSecure, LocalBitcoins and Bitsquare (exchanges) should accordingly set alarm bells ringing and lead to further questions.

Ultimately what you are looking for is a copy of the spouse’s wallet (in whatever form that takes) and then a documented explanation of their crypto purchases, mining history (currency can be “mined” as well as bought), and trading history. If they have been using an exchange, the easiest means of verifying some of this information may be by seeking a print out of their trading history from the exchange. Obtaining this information from some exchanges direct (mainly ones based in Europe or the US) by way of a third-party summons may be possible if this information is not forthcoming from the owner. Many exchanges are, however, beyond the reach of the courts in Europe and the US (for example in China) and other means of discovery may need to be considered.

In extremis, where there is good evidence that very substantial wealth is being concealed, an application to seize and search the computer of the owner (and, possibly, their safe or safebox if it is thought that they have a paper wallet) could be considered. Clearly expert digital forensic assistance would then be required to analyse the content of any wallets discovered.

**Valuation**

Once it has been established that there is a crypto holding it will be necessary to determine its value. The difficulty of doing so is demonstrated by an English crypto case last year that involved an initial investment of £80,000 in Bitcoins. This was valued at £1,000,000 in December 2017, but by January the value had dropped to £600,000. Crypto currencies are notoriously volatile. Movements in value of 10 or 15% in a day are not uncommon. Due to such volatility it is possible that a sale will be the most sensible route to explore. This is particularly the case given capital gains tax does not currently appear to be payable on the gains (although HMRC are reviewing the situation).
That said, if there is very large holding (there are said to be about 1000 “Bitcoin whales” who own 40% of the market) the court will need take into account that a sudden large sale may drive the market down and devalue the holding. Time will, therefore, be required to allow for an orderly disposal.

Alternatively, a transfer of some of the holding to the claimant spouse may be more sensible. That said, while English courts are likely to consider dividing a holding to ensure that risks are fairly divided, the possibility of a restriction on the disposal of a very large holding should be considered. If it is not there could end up being a race to dispose of the Bitcoins that destroys the value of the holding of the spouse who is slower to sell.

The Future

It is predicted that a third of millennials will have invested in crypto by the end of this year. This surge in popularity and awareness is inevitably going to pose new problems requiring bespoke solutions from family lawyers and the courts. As practitioners we need to be informed about this asset class and have some understanding of what we should be looking for when a client comes through our door and tells us that they think their spouse may have hidden crypto- assets.

* There are at the time of writing 1565 different types of crypto with a total market capitalisation of just under $300bn. The most well-known other than Bitcoin include, Etherium, Ripple, Bitcoin Cash, EOS and Litecoin. If you are looking for hidden crypto it would be as well to familiarise yourself with some of the better known currencies so that you know what you are looking for.

‘It is predicted that a third of millennials will have invested in crypto by the end of this year.’
Taxing Times in the United States: Tax Reform and the Alimony Deduction

Tax reform was a significant topic in the United States Congress during the fall of last year, and as most know, the American president signed the "Tax Cuts and Jobs Act of 2017" into law on December 22, 2017. Included among many changes in American tax law is a significant change to the tax treatment of spousal support, known as alimony under the American tax code.

For many, many years in the United States, alimony has been deductible from income of the obligor, and taxable as ordinary income to the recipient spouse. Although the specific requirements of the law have changed over the past 60 years, deductibility has long been achievable in almost all divorce cases in which alimony is awarded by the court – to the extent that most practitioners have likely taken it for granted that alimony will always be deductible.

Prior to 1984, the U.S. tax code allowed alimony to be deducted if the payments were clearly “in discharge of a duty of support”, and if they met the “periodicity” requirement, i.e. they extended for a sufficient period of time such that they were considered deductible alimony. The law changed in 1984, and again in 1986, re-working the specific requirements for deductibility. However, alimony remained taxable to the recipient and deductible from the taxable income of the obligor.

By allowing the obligor to deduct spousal support payments from taxable income, more cash typically remains available to apply to the needs of the recipient. This is because in the usual case, the obligor is in a higher tax bracket than the recipient. By allowing the obligor to deduct maintenance paid from taxable income, the U.S. government receives less tax revenue, because the recipient spouse pays taxes on the money received at a lower rate than the obligor would have had to pay. By straddling the tax brackets in this manner, using the transfer of funds via alimony from one former spouse to the other, more of the family income could remain available to pay for family needs after divorce.

It is easier to negotiate settlement agreements in divorce cases when it can be demonstrated to the obligor that the “real cost” of, say, $8,000 per month in alimony to a former spouse, is actually less than $5,000, due to the ability to deduct, from income for tax purposes, the amount of the alimony payments made.
The 2017 tax act ends this by stating that alimony will no longer be deductible to the obligor, nor taxable to the recipient, for any judgments entered after December 31, 2018. If this holds and is not changed by Congress during the 2018 congressional year, alimony deductibility will be eliminated.

The change in tax treatment will not affect judgments entered prior to December 31, 2018 unless upon modification of such judgments, the new order expressly provides that the new tax law apply to the modified judgment.

The original tax bill proposed in the House of Representatives ended the alimony deduction for judgments entered after December 31, 2017; thus, the final bill signed by President Trump delays the repeal of the alimony deduction by a year. Certainly, this leaves open the possibility that further changes could occur in the 2018 year.

What will the net effect of the repeal of the alimony deduction be? It is hard to predict, but it is possible that it may ultimately mean that in the aggregate, alimony awards will be a bit lower. The recipient will not have to pay taxes on the alimony received, but the amount of alimony received may be less than it might have otherwise been, if the obligor could have deducted it for tax purposes.

It may also be a little more difficult to negotiate settlements of alimony disputes, because the obligor will be asked to pay with dollars that are entirely post-tax, and therefore, with no “subsidy” due to deductibility. We won’t really know until it starts to happen - but that’s still some time away. Nevertheless, when negotiating settlements involving U.S. law, and when preparing settlement agreements or prenuptial agreements which will be governed by U.S. law, it is advisable to consider this impending change in the tax treatment of alimony in both calculating alimony agreements, and in drafting language that contemplates the tax treatment of alimony in the future.

Editor’s Note: We will be interested to see how practitioners and Courts interpret alimony amounts contained in pre-reform pre-nups. Will they be deductible and taxable?!
Out of the five grounds for divorce in South Carolina, adultery is likely the most often alleged “fault-based” ground and usually the most exciting one.

To prove a claim of adultery, a party only need demonstrate that the other party had the inclination and opportunity to commit or engage in sexual acts with a person other than his/her spouse. These factors can be demonstrated circumstantially by a preponderance of the evidence.

While the basis and proof of adultery are likely similar in most jurisdictions, there are some aspects of adultery that are unique to South Carolina jurisprudence: (1) adultery is an absolute bar to alimony; (2) adultery is a criminal offense; and (3) pleading the Fifth Amendment protection against self-incrimination is treated as an adverse inference that a party committed adultery.

**Adultery is an Absolute Bar to Alimony**

South Carolina Code § 20-3-130(A) states: “No alimony may be awarded [to] a spouse who commits adultery before the earliest of these two events: (1) the formal signing of a written property or marital settlement agreement or (2) entry of a permanent order of separate maintenance and support, or of a permanent order approving a property or marital settlement agreement between the parties.”

This statute means that one party can demonstrate that the other has committed adultery prior to the either of the events listed above, the adulterous party is permanently barred from the receipt of alimony. Obviously, this creates great incentive for economically advantaged spouses to prove the other spouse has committed adultery. Also, it is important to note that the trial court cannot use division of the marital estate to get around the bar to alimony. See Wanamaker v. Wanamaker, 305 S.C. 36, 406 S.E.2d 180 (Ct. App. 1991).

**Adultery is a Crime**

Under Chapter 15 (“Offenses Against Morality and Decency”) of Title 16 of the South Carolina Code, adultery is still included as a crime punishable by “… a fine of not less than one hundred dollars, nor more than five hundred dollars, or imprisonment for not less than six months nor more than one year, or by both fine and imprisonment, at the discretion of the court.” See S.C. Code Ann. § 16-15-60. The same Chapter of the Code defines the act of adultery as “living together and carnal intercourse with each other or habitual carnal intercourse with each other.”

3 Interesting Facts About Adultery in South Carolina

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intercourse with each other without living together of a man and woman when either is lawfully married to some other person.” See S.C. Code Ann. § 16-15-70. While the likelihood that someone would actually be charged with the crime of adultery is minimal, the fact that adultery is still a crime under South Carolina jurisprudence is particularly important, in light of the factor discussed next.

Pleading the Fifth Amendment Protection Against Self-Incrimination Equals Adverse Inference

The Fifth Amendment to the Constitution of the United States dictates that “no person shall be compelled in any criminal case to be a witness against himself…” See U.S. Const. Amend. V.

In Griffith v. Griffith, the South Carolina Court of Appeals held: “Under the laws of this state, adultery is a criminal offense. S.C. Code § 16-15-60 & 70 (1985). A conviction of adultery subjects the violator to punishment of up to a five hundred dollar fine, one year imprisonment, or both. Id. ‘The Framers of the Bill of Rights recognized the dangers inherent in self-incrimination, and as a result, placed in the Fifth Amendment a prohibition against compelling a witness to testify against himself. This prohibition against compelled self-incrimination is a basic constitutional mandate which is not a mere technical rule, but rather, a fundamental right of every citizen in our free society.’ State v. Thrift, 312 S.C. 282, 296, 440 S.E.2d 341, 349 (1994). Therefore, it is legally proper for persons facing criminal prosecution for adultery to invoke their Fifth Amendment privilege against self-incrimination.” 332 S.C. 630, 673, 506 S.E.2d 526, 530 (1998).

The Court went on to hold: “The parties have stipulated that they had been granted immunity from prosecution for adultery. Thus, there was no legal justification for the wife’s refusal to answer the questions. Her assertions of the privilege clearly denied the husband legitimate access to information which was relevant on the issues of divorce and her entitlement to alimony. Under these circumstances, we hold the family court did not abuse its discretion by ruling that the immunized wife could not invoke her Fifth Amendment privilege against self-incrimination, refusing to answer questions concerning her alleged adulterous conduct, and continue to seek the affirmative relief of alimony.” Id. at 639, 531.

In determining that the wife could not invoke this privilege, the Court ultimately held: “We join these jurisdictions in concluding that it is permissible for the fact finder to draw an adverse inference in a civil case against a party invoking the Fifth Amendment against self-incrimination. Having so concluded, we draw the inescapable conclusion that the trial judge was in error when she refused to consider an adverse inference from the wife’s refusal to answer questions concerning her alleged adultery.” Id. at 640-41, 531-532.

Considering these three facts about adultery in South Carolina, it is evident that this fault ground is an important factor to consider in any action for divorce. It can be used as both a shield and a sword, and it can result in a draconian outcome for one spouse over the other. Thus, there is a heavy penalty for committing adultery in South Carolina – a permanent bar to alimony.
5 Key Principles to Setting Up a Hong Kong Family Law Firm

In March 2017 we decided to retire from the much-respected Hong Kong Firm of Hampton, Winter & Glynn (“HWG”) (for a mixture of personal and professional reasons) to set up our own family law practice. We negotiated successfully with the continuing partners of HWG to carry forward with us the ongoing business of HWG’s Family Department.

We launched CRB on 1st October 2017 and seven months later, we are thriving with our busy practice, and thrilled to be building a strong brand, providing the highest quality advice to families in times of difficulty.

So what did it take and how did we do it?

1. Have a clear vision and a detailed business plan

We were determined to be in charge of our own future, in offering the best possible family law advice to our clients. We shared a vision of creating an innovative firm specialising in family law, and dedicated to providing families with practical solutions to complex issues that lead to positive outcomes.

We were fortunate to be supported in great measure by our husbands, both commercial executives, who were able to provide strategic advice from their combined years of experience in operating various businesses. This was invaluable to us; whilst we are skilled lawyers, we were cognizant of the reality that at that time we were not businesswomen and not experienced in running a business on our own. They helped us build the necessary forecasts and models we would require for the corporate establishment, raising capital, company secretarial arrangements, setting up banking facilities, insurances, computer systems, telephones, email, employment compensation schemes, pensions, professional indemnity, staff medical schemes, public relations, branding, logo design, website, business cards, etc. These all have to be thought through, with timelines generated and then executed. Creating a detailed plan that you can measure as you go along is vital to success.
2. Understand cashflow
Having a thorough understanding of the importance of cashflow is critical to any business’ success. We had, and continue to use today, a very detailed cashflow forecast that allows us to realistically consider our finances, make good use of any surpluses, or anticipate and take pre-emptive steps to minimise or prevent any downturns in cashflow. We modelled multiple scenarios to determine what capital would be required to set up the firm and thereafter run the business. Where possible, leverage your capital invested in the business and ensure at all times there are contingent funds available for unexpected needs.

3. Build your team – both professionally and operationally
Once your plan is drafted, redrafted and has had the tyres kicked as many times as possible, start to build the team who will get it done for you. Most of the key elements surrounding the execution and deployment of the business were outsourced and we would recommend to anyone trying to do this to get a good team prepared well in advance. Securing reliable and effective outsourced partners that are a good “fit” to you and your team is worth spending a great deal of time researching.

HSBC, our bankers, were outstanding in the level of support and assistance in providing all the products we required on time. We had a terrific IT consultant who co-ordinated the systems implementation; a wonderful brand and web designer who assisted with all the signage and legal stationery ensuring consistency of the brand; a great interior designer who helped us capture our brand identity in the office renovation, and a good billing systems manager who we flew in from overseas to handhold us during our opening week to ensure we had immediate support with any initial hiccups, which paved the way for quick and smooth uptake of the new time keeping and billing programme. From our company secretary to our insurance broker, we had a comprehensive team of professionals that provided speedy and bespoke assistance, so we could make prompt decisions, and then get back to practicing law.

Naturally, our fee earning and support personnel were handpicked carefully over a period of a few months. Each one is an invaluable component to the practice and we go out of our way to create a team culture, which is key to CRB creating a positive and collegiate environment.
4. Be ready to change how you work

Once your teams are staged and in place, you have to prepare to think and act differently. Essentially, we had to change how we spent our time and elevate how we communicated. We now allocate more time to the day-to-day running of the Firm’s business. During the set-up whilst working to complex inter-related deadlines, we had to ensure we allocated time each day to read and discuss the many emails containing an immense amount of information that had to be digested, then decided upon. We also had to accept that we are not experts in all matters and learned to delegate to those with specific skills and then leave them alone to get on with the job once the executive decision had been made.

We had weekly operations and finance meetings to review all of the commercial and operational aspects of the business and we continue to do so. We have hired a fantastic operations manager and have solid finance professionals in place with whom we stay in close consultation, and who help manage much of the day-to-day for us. Communicating with your team on a frequent basis is critical to good leadership.

5. Remember why you’re doing this and take time to reflect and enjoy

There is no point in going through all the hard work setting up your own practice if you are not able to enjoy it. To create a positive and enjoyable work environment, we invest time and are engaged in hiring the right people; we appreciate our team by spending time with them and asking about their issues, involving them as much as practical so they feel that they are part of CRB. We try to create a work life balance with everyone; just as we work together, we also relax together with team meetings, after hour drinks and office parties. We have now learned to allocate time out to reflect on our firm’s achievements and we believe that ultimately it is as important as the work itself.

‘To create a positive and enjoyable work environment, we invest time and are engaged in hiring the right people; we appreciate our team by spending time with them and asking about their issues, involving them as much as practical so they feel that they are part of CRB’.
How to Improve IAFL Meetings

When I was asked to provide some input as to how IAFL meetings could be improved, I thought “Aren’t they great already?” They are great. They are informative, fun, collaborative, and occur in some pretty amazing and beautiful locations.

In addition, they provide the opportunity to meet intelligent, accomplished, and wonderful people from all over the globe. Attending the meetings, however, can be daunting to someone new to the IAFL. I know it was for me even though I was fortunate enough to be accompanied by my law partners, Marcia Maddox and Katharine Maddox. Since my first meeting in Miami, I have attended at least 8 other meetings. Despite having 9 or so meetings under my belt, there are times that I still feel very new and anxious, worried that I won’t know anyone or that I might forget someone I previously met. It is through these lenses that I offer the following suggestions.

With respect to current efforts, I believe that the first-timers dinner is a fantastic opportunity to meet veteran fellows and should be continued. Also, if I recall correctly, first-time attendees have name tags that identify them as same. That should continue. More recently, I am aware that first-time attendees are paired up with more veteran fellows to help welcome them to their first meeting, to be a resource to the new fellow, and to help introduce the new fellow to other fellows. I believe this latter development is key and should be extended well past the first meeting.

Although the first meeting is by far the most difficult, I would submit that more effort should be concentrated on fellows who have attended less than 5 meetings or who have been fellows for less than 5 years. It is during this period of time that newer fellows are trying to navigate through the organization, develop new relationships, and figure out where they fit it. This can be particularly difficult when fellows who have been attending meetings for quite some time have already established their own networks which are often a challenge to break into.

One way to try to bridge the gap that typically follows after the first meeting could be for fellows who were assigned to welcome a first-time attendee to continue to reach out to that attendee at subsequent meetings and continue to help that newer fellow in his/her IAFL journey. In addition, I believe it would be helpful, perhaps at the same time as the first-time attendees dinner, to have a separate dinner or reception for the under-5 fellows. The under-5 fellows dinner could include several...
more veteran fellows to provide additional opportunities to get to know more veteran fellows and for the under-5 fellows to get to know one another better.

Another suggestion is to develop an under-5 group, much like a young lawyer’s section or group, and facilitate opportunities for the under-5 fellows to create their own networks and friendship within the under-5 group. A listserv would be a great idea. In fact, a listserv for the entire organization would be a great idea. However, a separate under-5 listserv could become a safe place for younger or less experienced fellows to ask questions, obtain advice or simply stay in touch with one another. To assist with these endeavors, an under-5 task force or committee could be established to implement these ideas and to consider other ideas.

At meetings, I believe it would be helpful to have name tags for all fellows with color-coded flags or bars based on the number of years of fellowship. For example, first-time attendees may have a red flag, under-5 may have green, under 10 may have yellow, and 10 and over may have purple. I think such a system would be helpful to veteran fellows in clueing them in to younger or newer fellows, and to younger fellows in clueing them in to those who have been involved in the IAFL for a significant period of time.

One event where I think it is particularly difficult for newer fellows is at the President’s Reception. I believe that there should be one or two newer fellows at each table and more veteran fellows should be encouraged to leave space for newer fellows.

While it is understandable to want to sit with one’s friends, I have often found that tables are already “reserved” before even stepping in to the reception which can make one feel unwelcomed or excluded. I am not suggesting reserved tables, but would discourage fellows from saving an entire table for his/her inner circle.

Overall, I think the IAFL has improved its efforts over the last several years to welcome new fellows and I would encourage the continuation of those efforts so that we continue to have an enriching and diverse experience.
New Fellow Profile – Mary Kay Kisthardt

Mary Kay Kisthardt is a new associate fellow of the IAFL and currently serves as the Tiera M. Farrow Faculty Scholar and Professor of Law at the University of Missouri – Kansas City School of Law. She is a graduate of Penn State and the Yale Law Schools. She currently teaches Family Law, Children in the Law, Elder Law and Mediation. She is also the Faculty Co-Director of the UMKC Child and Family Services Clinic.

Professor Kisthardt has been the Executive Editor of the Journal of the American Academy of Matrimonial Lawyers since 1990 and also assisted the Executive Editor of the Journal of the International Academy of Matrimonial Lawyers for many years. She served as the Reporter for the AAML Best Practices Committee. As the Reporter for the AAML ALI Principles of Family Dissolution Commission she contributed to the drafting of the AAML Model Parenting Plan and the AAML Considerations in Determining Spousal Support. She co-authored (with Joan Kelly) the AAML publication entitled, “What Do We Tell the Children?” She also served as the Reporter for the AAML’s Cohabitation Agreement Committee and in that capacity assisted in the drafting of the AAML Model Cohabitation Agreement. She served as the Reporter for the AAML Impact of Divorce on Children with Special Needs Committee and is currently the Reporter for the AAML Committee on Families Today. She is proud to have been the recipient of the AAML’s President’s Award in 2008 and again in 2011 for her service to the AAML.

Professor Kisthardt has authored numerous articles and book chapters on family law matters. She is a frequent lecturer in the United States and has also taught and presented in China, Ireland, New Zealand, Great Britain, Hungary, Portugal and South Africa. She currently serves as the regular family law columnist for the National Law Journal.

Both my parents were college professors so teaching came naturally to me. I have always enjoyed being a student and in fact, like learning new things more than using the knowledge I already have. Teaching is a way for me to do so.

On a typical day I might teach a class, meet with students who are working on the Journal or are in my classes, attend faculty meetings and conduct a mediation. In addition to mediating family disputes I am also the director of our campus mediation service.

I enjoy teaching family law because it is so dynamic and I particularly like to incorporate perspectives from different countries. Of all of the areas of law I think that family law is one that most reflects the culture of a society, so studying the family law
of another country gives you some insight into its people and practices. Like so many other areas of the law, globalization has clearly affected family law. We continually see an increased emphasis on, among other things, international treaties such as the Hague Convention.

When not traveling, I enjoy spending time with my husband, also a professor, my three children and my five adorable grandchildren. Other than travel, my favorite hobby is reading. Because I spend so much time reading nonfiction for my work, my pleasure reading focuses generally on literary fiction. Not surprisingly I most enjoy stories set in foreign countries and often in past eras where I can learn a bit of history along the way. I am currently reading Pachinko.

The causes I care about most frequently involve children and families. I serve on the ethics committee of our local Children’s Hospital and volunteer for organizations committed to helping children. On an international level, I have been to El Salvador many times, often bringing teenagers including my own children to visit a sister community sponsored by our parish.

I thoroughly enjoy meeting people from different places and am very much looking forward to making new friends in the IAFL.

‘On an international level, I have been to El Salvador many times, often bringing teenagers including my own children to visit a sister community sponsored by our parish.’
The U.S.A. travel studentship program
An update

The U.S.A. travel studentship program was conceived in 2013 and launched in 2015 as a way to give young American law students the opportunity to travel to other jurisdictions to intern and learn from fellows and their firms about practice in other parts of the world.

We were looking for primarily 2nd and 3rd year law school students who showed academic excellence and who could not otherwise afford to travel and to have these opportunities. These students would function as interns at law firms in which we have fellows of IAFL and would be hosted in the homes of fellows and their families.

We spent some time in the beginning designing both criteria for the selection of candidates and in designing what would be expected of the students and what would be expected of the hosts. Once we felt we had the framework we approached the U.S.A. chapter which funded our first year of operation with $5,000.00.

Our first student, in 2016, was a New Yorker who stayed at the home of fellow William Longrigg and his family in London and David Salter and his family in Leeds, and she interned with David Salter at his firm, Mills Reeve, and with Simon Bruce and his firm, Farrer & Co LLP. She wrote a report which has been posted online and she was thrilled to have the experience.

Our second student, in 2017, was from Missouri and she stayed at the homes of fellows Rachael Kelsey and her family in Edinburgh and Simon Bruce and his family in London. She interned in Edinburgh with Rachael and in London with Jane Keir and her firm, Kingsley Napley LLC. She also reported a very positive experience.

Having selected a student from the East Coast the first year and one from the Midwest the second year our goal this year is to select one from the West Coast. We are actively recruiting host families and host firms at this time and hoping to have some volunteers to host our next young scholar for the summer of 2018.
New Joiners 2017/2018

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Discovery in Matrimonial Cases in New York

Note from the Editor:
It was a real pleasure to hear the presentation on discovery from Susan Moss, at the Savannah meeting in March 2018. She has been so kind as to permit publication of her notes for the meeting, pay particular attention to the robust way in which the court deal with spyware, and the wiping of evidence.

1. Compulsory Financial Disclosure
   a. DRL Section 236(B)(4) provides for compulsory financial disclosure in all matrimonial actions in which alimony, maintenance or support is an issue.
   b. 22 NYCRR Section 202.16(a) provides for compulsory financial disclosure when equitable distribution of property is an issue.
   c. No showing of special circumstances is required for discovery to be ordered. DRL Section 236(B)(4).
   d. Under the equitable distribution laws, the search for relevant financial information may be extensive and the entire financial history of the marriage must be open for inspection so that the parties can assess the marital/separate nature of property, uncover hidden assets and gain necessary information bearing upon maintenance and child support.
   e. Failure to comply with compulsory financial disclosure pursuant to DRL Section 263(B)(4) or 22 NYCRR Section 202.16(a) can result in the preclusion of evidence at trial. Kandel v. Kandel, 129 A.D.2d 940 (1987)(holding that the husband was properly precluded from presenting evidence of his finances at trial where he failed to comply with compulsory financial disclosure requirements of DRL Section 236(B)(4).

2. Disclosure on the Merits – a point of contention between judicial departments
   a. First and Second Department: Restrictive View
   i. General prohibition in these departments against discovery on the merits which stems from a historical view that courts should exercise their broad, discretionary powers to prevent unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice to any person. Wegman v. Wegman, 37 N.Y.2d 940 (1975); Garvin v. Garvin, 162 A.D.2d 497 (2d Dept 1990).
   ii. Notwithstanding this general prohibition, the Court of Appeals stated that discovery into marital fault may be proper in
a “limited set of circumstances involving egregious conduct.” Howard S. v. Lillian S., 14 N.Y.3d 431 (2010). See also Eileen G. v. Frank G., 934 N.Y.S.2d 785 (Nassau Co., Sup. Ct. 2011) (holding that defendant-husband’s conduct in allegedly sexually molesting the wife’s eight-year-old granddaughter was sufficiently “outrageous” or “conscious shocking” to warrant pre-trial discovery of marital fault as a potential factor in equitable distribution).

b. Third and Fourth Departments: Expansive View

i. No general prohibition against discovery into the merits.

ii. Discovery matters should be determined on a case by case basis, with the trial court having broad discretion to prevent abuse by limiting its use. Semon v. Semon, 125 A.D.2d 882 (3d Dept 1986); Schaefer v. Connors, 159 A.D.2d 780 (3d Dept 1990).

iii. With respect to custody issues, Courts in these departments have allowed such discovery and reasoned that the failure to fully “flesh out” the issues of custody may represent a potential long-term danger to the child. Stukes v. Ryan, 289 A.D.2d 263 (3rd Dept 2001); Lemke v. Lemke, 100 A.D.2d 735 (4th Dept 1984).

3. Scope of Disclosure

a. Party Disclosure - CPLR 3101(a) (1)

i. Parties to a matrimonial action must fully disclose all matters material and necessary in the prosecution or defense of the action, regardless of the burden of proof.

ii. Absent an unreasonable request, disclosure pertaining to the value and nature of assets in a matrimonial proceeding should span the entire period of the marriage (Goldsmith v. Goldsmith, 184 A.D.2d 619 (2d Dept 1992)).

b. Non-Party Disclosure - CPLR 3101(a)(2)

i. Parties to a divorce action may seek disclosure from a non-party, provided that the information sought is material and necessary to the action, and the request for such information is not overly broad or unduly burdensome. Haron v. Azoulay, 132 A.D.475, 2015 WL 5927765 (1st Dept 2015) (granting third-party’s motion to quash and finding that the wife’s discovery requests were overly broad and improper because the information sought was utterly irrelevant and would not uncover any legitimate material).

ii. Non-party disclosure may be obtained through written interrogatories or oral deposition.

iii. Any party issuing a third-party subpoena must serve a copy on all other parties to the action and give an opportunity to inspect and copy and documentation received in response. Failure to do so can result in severe penalties such as suppression of evidence and even the declaration of a mistrial. Matter of Beiny, 129 A.D.2d 126 (1st Dept 1987) (when an attorney did not notify the other side when issuing a third party subpoena or upon receipt of responsive documents, the trial court suppressed all documents at trial, disqualified the firm and reported the lawyer to the grievance committee); Weinberg v. Remyco, Inc., 9 A.D.3d 425 (2d Dept, 2004) (when attorney did not notify the other parties of receipt of medical records received pursuant to third party subpoena, the court declared a mistrial).

c. Non-Discoverable Matter

i. Privileged matter (CPLR 3101[b]) and attorney work product (CPLR 3101[c]) are not discoverable.
ii. Pursuant to CPLR 3101(d), materials prepared in anticipation of litigation are generally not discoverable and may only be obtained upon a showing of substantial need and an undue hardship to obtain their substantial equivalent by other means.

iii. The burden of establishing an exemption from disclosure rests upon the party resisting discovery. The mere assertion that items constitute non-discoverable material will not suffice. Brown v. Brown, 162 A.D.2d 429 (2d Dept 1990).

4. Objecting to Discovery
   i. Failure to state an objection to a discovery request within 20 days of receipt does not constitute a waiver of objection, however it “significantly limits the grounds on which a party can make objections.” Anonymous v. High School for Environmental Studies, 32 A.D.3d (1st Dept 2006)

5. Electronic Discovery
   a. Electronically stored information is subject to the same disclosure rules and requirements as paper records. Zubulake v. UBS Warburg LLC, 217 F.R.D. 309 (S.D.N.Y 2003); Ball v. State of New York, 101 Misc.2d 554 (Court of Claims 1979).
   b. Information sought must be material and necessary, and the demand for information may not be overly broad or unduly burdensome.
   c. Pursuant to 22 NYCRR 202.12, the court should address whether electronic discovery is appropriate at the Preliminary Conference. Where the court deems it proper, the method, scope and preservation of electronic discovery should be set forth in the Preliminary Conference Order.
   d. Electronic documents, e-mails, raw computer data and even deleted electronic files are but some of the electronically stored information that may be discoverable.
   e. It may be necessary to hire computer experts may to insure the complete and accurate discovery of relevant data. The court may also appoint a referee to oversee electronic discovery and rule on matters arising from the same. Etzion v. Etzion, 7 Misc.3d 940 (Supreme Ct. Nassau Co. 2005)(Stack, J).
   f. Electronic information stored on a shared computer may be discoverable provided that it satisfies the material and relevant analysis. Byrne v. Byrne, 168 Misc.2d 321 (Supreme Ct. Kings Co. 1996, Rigler, J) (finding that the wife should have access to the information stored on a family computer, just as she would have access to the contents of a file cabinet in the marital home, and that information stored on the computer about the husband’s finances is discoverable).

6. Spoliation of Evidence
   b. It is well established that parties (and potential parties) have a duty to preserve key evidence once put on notice that it may be needed for future litigation. DiDomenico v. C & S Aeromatik Supplies, Inc., 252 A.D.2d 41 (2d Dept 1998). Such duty exists even prior to commencement of an action where that litigation is “reasonably foreseeable.” VOOM HD Holdings LLC v. EchoStar Satellite LLC, 93 A.D.3d 33 (1st Dept 2012).
   c. With respect to electronically stored information, once a party “reasonably anticipates” litigation, it must, at a minimum, take the appropriate steps to prevent the routine destruction of electronic data relevant to the litigation. VOOM HD Holdings LLC v. EchoStar Satellite LLC, 93 A.D.3d 33 (1st Dept 2012).
7. Spoliation Remedies

a. Once a Court determines that a party had an obligation to preserve evidence and that the party spoliated the evidence, the Court then must determine the appropriate remedy so as to restore the innocent party’s equal footing in the litigation. Common spoliation remedies are the drawing of the adverse inference, issue preclusion, striking of pleadings and, in the most egregious cases, dismissal of the action. Crocker C. v. Anne R., 2018 N.Y. Misc. LEXIS 430 (Supreme Ct. Kings Co., 2018) (Sunshine, J).

b. In Crocker C. v. Anne R., 2018 N.Y. Misc. LEXIS 430, (Supreme Ct. Kings Co., 2018) (Sunshine, J), the Court found it appropriate to strike the plaintiff-husband’s pleadings related to all financial relief (except for the issue of child support). The facts and circumstances of the case, which the Court noted are unprecedented by a plaintiff in a matrimonial action, are set forth below in relevant part.

Plaintiff-husband installed a sophisticated spyware software on the wife’s iPhone, which he used for 4 months to monitor all of her conversations, including hundreds of attorney-client privileged communications. Upon discovering the spyware, the wife made an emergency ex parte application in response to which the Court issued orders, inter alia, directing that the husband to turn over to the Sheriff all electronic devices in his possession and that he not delete, destroy or otherwise alter the information stored on the devices or in the “cloud.” Notwithstanding the Courts orders, husband installed at least 3 data wiping programs on his devices and used them to delete traces of his spyware activities, thus completely destroying the most relevant evidence available related to the wife’s claim that the husband violated her attorney client-privilege so extensively that she could never be restored to a level playing field in the litigation.

In determining the adequate remedy for the husband’s violations of the wife’s attorney client privilege and spoliation of evidence, the Court averred that dismissal of the action was inappropriate in a matrimonial action for two reasons, (i) dismissing the action would prejudice the wife’s right to continue litigating the divorce and to obtain a divorce from her husband and (ii) issues of custody and parenting were before the Court and dismissing the action would deprive the children’s right to financial support and meaningful access with their father.

As such, the Court found it appropriate to strike husband’s pleadings seeking spousal support equitable distribution and counsel fees. The Court did not strike those relating to requests for child support explaining that the right to child support belongs to the children, and not the husband.
New Fellow Profile – Mukhtar Gharib

Mukhtar Gharib, born and raised in Dubai, United Arab Emirates. The founder and senior partner of Al Gharib & Associates Advocates and Legal Consultants.

“I completed my degree in Law in 1995 and started my career as a Family Lawyer in 1998. It makes a difference to be a family lawyer. Helping an individual is more likely personally fulfilling than making more money in corporate cases and the like. It is quite satisfactory when you help people in resolving their problems. I started and chose family law as my specialization, for the mere fact that I put focus on women’s and children’s rights. Many of them have been deprived of their rights and they are the victims of deception and injustice. I believe in equality in justice, and equality between the two genders; because women are givers of life and must be respected and taken care of.

I want to share with you how I deal with the stress and pressure of the job. I react to situations rather than to stress. I believe that my ability to handle the situation and communicate with the clients effectively will somehow reduce my own stress and also any anxiety and the stress that the client may feel.

The proudest accomplishment in my career was when my client who was an expatriate won a full child custody battle after 4 years of proceedings. Simultaneously, what makes it very unique was that the child was adopted and that was the FIRST kind of verdict has been issued in entire GCC.

I have read a lot of books, I have followed a lot of leaders in the world and their contributions in the world. But there’s one who struck me the most, and for me he is the noblest person on earth. He is Mahatma Ghandi. Ghandi came from a very poor family, and he proved that anyone can be a leader regardless your status in the society. Determined and motivated, he led India to independence and inspired movements for civil rights and freedom across the word.

The world is full of undiscovered facts – go and read.

The biggest motivating factor in my life is my Family. They are my inspiration, they are the reason why I strived hard, and they are my stone and foundation. To my wife and children, thank you so much to keeping me motivated and working hard.”

Mukhtar Gharib
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Part Company: Spousal Maintenance under the Australian Family Law Act

Background
The “clean break” principle to spousal maintenance is enshrined in sections 81 and 90ST of the Family Law Act 1975 (Commonwealth of Australia) which provides:

“the court shall, as far as practicable, make such orders as will finally determine the financial relationships between the parties to the marriage and avoid further proceedings between them.”

The current approach to spousal maintenance in Australia was held by the High Court of Australia in Hall and Hall (2016) FLC ¶93-709 [2016] HCA 23 at [3]-[5] to be as follows:

1. The gateway to the operation of Part VIII (for marriages) and Part VIIIAB (for de facto relationships) of the Family Law Act which provides:

   “A party to a marriage is liable to maintain the other party, to the extent that the first-mentioned party is reasonably able to do so, if, and only if, that other party is unable to support herself or himself adequately whether:

a. by reason of having the care and control of a child of the marriage who has not attained the age of 18 years;

b. by reason of age or physical or mental incapacity for appropriate gainful employment; or

c. for any other adequate reason;

having regard to any relevant matter referred to in subsection 75(2).”

This requires a threshold finding of:

a. The applicant having a maintenance need (their reasonable needs and expenses exceed their income and earning capacity); and

b. The respondent having the capacity to pay (their income, earning capacity or resources exceed their reasonable needs and expenses)

c. Unless both of these conditions are satisfied there is no maintenance liability between spouses (Budding [2009] FamCAFC 165)

As to “adequate support” refer to Brown (2007) FLC ¶93-316; Bevan (1995) FLC ¶92-600; Nutting (1978) FLC ¶90-410 and the following:

a. There is no fettering principle that pre-separation standard of living must automatically be awarded where the respondent’s means permit it (Bevan);

b. The word ‘adequately’ is not to be determined according to any fixed or absolute standard but

‘Note the concern about “Feminization of poverty” that pervades maintenance in Australia.’
having regard to the matters referred to in sec 75(2) (Mitchell (1995) FLC ¶92-601);
c. The idea that ‘adequate’ means a subsistence level has been firmly rejected and should pay proper regard to the factors set out in section 75(2) (Budding [2009] FamCAFC 165);
d. Where possible both spouses should continue to live after separation at the level which they previously enjoyed if this is reasonable, although the parties’ standard of living may have to be lower if financial resources are insufficient to maintain that standard;
e. In some circumstances it may be reasonable for the parties to live at a higher standard than previously enjoyed;
f. It is not necessary for an applicant for spousal maintenance to use up all capital in order to satisfy the requirement of adequate support.

Where the line is drawn depends on the circumstances of the case (Mitchell);
g. An applicant is not entitled to live at a level of considerable luxury or comfort merely because the other party is very wealthy (Brady (1978) FLC ¶90–513) and there is no general rule that the pre-separation standard of living should be maintained simply because the other spouse can afford to do so: (Bevan)
The respondent’s capacity to pay spousal maintenance is not assessed merely on income, but also on property, financial resources and earning capacity and “an order may be made notwithstanding that the liable spouse could only satisfy the order out of capital or borrowings against capital assets”: (Maroney [2009] FamCAFC 45).

2. The liability of a party to a marriage to maintain the other party that is imposed by sections 72(1) / 90SF(1) is crystalized by the making of an order under section 74(1) / 90SE(1) which provides:

“In proceedings with respect to the maintenance of a party to a marriage [After the breakdown of a de facto relationship], the court may make such order as it considers proper for the provision of maintenance in accordance with this Part.”

3. A court exercising the power conferred by section 74(1) / 90SE(1) is obliged by section 75(2) / 90SF(3) to take into account the matters referred to in section 75(2) / 90SF(3) and only those matters. Those matters are presented as a comprehensive checklist or shopping list. Some of the factors listed include:

“(a) the age and state of health of each of the parties; and
(b) the income, property and financial resources of each of the parties and the physical and mental capacity of each of them for appropriate gainful employment; and

(g) where the parties have separated or divorced, a standard of living that in all the circumstances is reasonable; and

(h) the extent to which the payment of maintenance to the party whose maintenance is under consideration would increase the earning capacity of that party by enabling that party to undertake a course of education or training or to establish himself or herself in a business or otherwise to obtain an adequate income; and

(k) the duration of the marriage and the extent to which it has affected the earning capacity of the party whose maintenance is under consideration; [Note Nygh J in Hirst & Rosen (1982) FLC ¶91-230 held: “It is not the impact of the celebration of the marriage by itself, but the erosion which the duration of the marriage has upon the earning capacity which is referred to”]

(n) the terms of any order made or proposed to be made under section 79 in relation to:

(i) the property of the parties;
(o) any fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account; and

(p) the terms of any financial agreement that is binding."

These factors affect the quantum of a maintenance order. As Professor Chisholm notes, many of the factors listed express a policy or objective of spousal maintenance law and "The Act does not indicate the relative importance of the various factors, nor does it include any rule for choosing between different policies in a particular case. " For this reason, spousal maintenance law might be characterised as "incoherent"." Notably for the purposes of this article, these factors import other approaches to maintenance beside the clean break and needs and capacity approaches that have been predominantly the approach of the Australian Courts and practitioners.

The court has very wide power under sections 80 and 90SS to make orders including:

1. Urgent (or stop gap) maintenance (distinguished from interim) orders under sections 77 and 90SG: (Chapman (1979) FLC ¶90-671; Sadlier (2015) FLC ¶93-658).


3. Final / permanent maintenance orders: [Note: A spousal maintenance order can only be “final” in the sense that it is final until a successful application is made to vary or discharge the order (CCH “Australian Family Law & Practice” ¶125-320).


5. Lump sum orders (Vautin (1998) FLC ¶92-827; Tyson v Tyson (1996) 70 ALJR 285; (1996) HCATrans 55 where McHugh J pondered: “Why can one not say, ‘Your present requirements are that you need a lump sum now to pay off these pressing debts which are due and immediately payable, but in terms of ordinary living you only need X dollars a week’? Why does that not satisfy section 72?”; Brown (2007) FLC ¶93-316 where the Full Court ordered a lump sum maintenance payment of $2.25m.

6. Discharge, suspension, revival or variation of spousal maintenance orders under Sections 83 and 90S(1): (Atkins & Hunt (2016) FLC ¶93-746, there must be “in force an order”).


In approaching spousal maintenance matters, the Family Court has held:

1. The discretion is exercised in accordance with the provisions of section 74, with “reasonableness in the circumstances” as the guiding principle (Bevan);

2. When determining a spousal maintenance application on a final basis, the court is required to determine any outstanding property settlement (Clauson (1995) FLC ¶92- 595; Figgins (2002) FLC ¶93-122) and child support review (Massoud (2016) FLC ¶93-68) before making maintenance orders. Maintenance was referred to as the fifth step in the property settlement exercise. Sections 75(2)(n) and 90SF(3) (n) required the Court to take account of any property order. The clean break principles are also supported by sections 44(3) and (5). The court also takes into account the parties’ property and resources in addition to their income and earning capacity. Whilst a party may have a need due to lack of income, the court may find they have sufficient property which if properly invested could earn sufficient income to support them without the need for maintenance and thereby decline to make an order;

3. There is an obligation on the recipient of spousal maintenance to exercise that person’s capacity to earn an income and to mitigate their maintenance need (Taguchi (1987) FLC ¶91-836; Gyopar (1986) FLC ¶91-769);

4. The maintenance component of a property settlement with regard to sections 75(2) and 90SF(3) is not to be confused with spousal maintenance (see Anast and Anastopoulos (1982) FLC ¶91-201).

A maintenance order will continue until the death of either party; the remarriage of the recipient (subject to special circumstances) and changes to the financial circumstances of the parties.

Parties to a financial agreement (and its predecessor, the section 87 maintenance agreement) can contract out of the right to claim future maintenance subject to a party’s ability to apply for a maintenance order where a party was entitled to an income tested pension, allowance or benefit when the agreement came into effect (sections 90F(1) and 90UI(1)). Unlike maintenance orders a maintenance provision under a financial agreement continues to operate after the death of a party unless there is specific provision for cessation (sections 90H and 90UK).

Proceedings for a maintenance order cannot be instituted after the death of a party or where there is a financial agreement excluding maintenance claims that is binding.

Trends

Leading into the 1990s there was a plethora of research and reports about spousal maintenance and its impact upon separated couples and their families post introduction of the Family Law Act on 5 January 1976. The surveys of the Australian Law Reform Commission reported in A Survey of Family Court Property Cases in Australia (R.P. No 1, July 1985) and of the Australian Institute of Family Studies report Settling Up (1986, P McDonald, ed.) found that overt and identifiable long-term spousal maintenance was being ordered or agreed upon in only 6% of the couples surveyed.

Professor Chisholm in 1992 summarises some of the findings of the surveys and research:

• Spousal maintenance orders (including consent orders) are made only in a small minority of divorces: the Australian Law Reform Commission found that in the mid-1980s it was 6% in contested hearings. These orders tended to be made in the cases of more wealthy couples;

• Two thirds of consent orders involving the support of a spouse are not for periodical payments: they are either lump sum awards or “maintenance” components of property orders.
• It seems that payments of spousal maintenance typically decline within a few years after separation. Over a three year period, the proportion of cases involving payment of spousal maintenance might decline from, say, 25% to 5%;

• There is evidence from court statistics suggesting striking differences between registries. In the late 1980s, spousal maintenance awards were apparently “rarely made at all” except in Brisbane and Melbourne, where they were made at the rate of about 10 orders per month.

• In practice, if fathers do pay substantial amounts by way of child support, there is likely to be nothing left for spouse maintenance.

Juliet Brehrens and Bruce Smyth in a study they conducted in 1999 ("Spousal Support in Australia: A Study of Incidents and Attitudes" Working Paper 16, AIFDS, Melbourne 1999) found that periodic spousal maintenance occurred in only around 7% of divorces in Australia and only lasted around two years. The study found that 65% of those surveyed believed spousal maintenance should be awarded for a short time until the applicant is on their feet; 20% believed it should be awarded until the applicant re-partnered and a small number (more women than men) stated it should be paid indefinitely. “The attitudes of Australian respondents to the survey appear to be in stark contrast to the results seen in the so called ‘footballer’s wives’ case”. (Reitmuller and Smith).

Frankly, whilst such results are nearly 30 years old, I expect a survey today will produce like outcomes.


In Best, the Full Court of the Family Court of Australia held:

“that the ‘clean break’ concept may have been taken to extremes in the past and requires careful reconsideration in the light of changing economic and social circumstances and values and the benefit of experience over the past decade or so see, for example, the discussion in Moge’s case ...”

In Mitchell the Full Court held:

“Importantly, and particularly in more recent times, there is the notorious circumstance that there is a significant gap between theory and reality for employment, especially for people in middle age, lacking experience and confidence, and who have been out of the skilled work- force for many years, and in the context of current high unemployment. Loss of security, missed promotion opportunities, loss of retraining in developing skills in an increasingly skilled work- force with the loss of confidence which this brings, particularly in times of high unemployment, are notorious circumstances of which the Court must take notice and apply in a realistic way. In this regard, we refer to the detailed analysis of comparable problems in Canada by the Supreme Court of Canada in Moge v Moge (1992) 3 SCR 813, (1992) 43 RFL (3d.) 345 and the discussion by this Full Court in Best, supra, esp. at 80,295 and the reference in those cases to the “feminization of poverty” and to some of the numerous articles
upon that subject both here and overseas to that time. For useful articles discussing the judgment in Moge see also Toward an Equitable Distribution of Resources: Support after Moge and Moge (1994) 16 Advocates Quarterly 452 and Equality and Support for Spouses (1994) 57 Mod.L.R. 681.... Like Canada, Australia has a body of research indicating that mothers who are the primary carers of dependent children inevitably drop out of the paid work-force and consequently suffer financial deprivation which is exacerbated by marriage breakdown: see the

Australian Institute of Family Studies publications, McDonald (Ed.) (1986) Setting Up: Property and Income Distribution on Divorce in Australia; Funder Harrison and Weston (1993) Settling Down: Pathways of Parents After Divorce. In our view there are significant advantages to the Court being able to take judicial notice of research concerning the economic consequence of marriage and its dissolution.”

In Bevan (1995) FLC ¶92-600, the Full Court held:

“We have considered s 81 in making this order, but we feel that the expression of legislative policy which it contains must give way to the requirement of s 74, that the Court is to make such order as it considers proper, once the threshold tests of s 72 [now s 72(1)] are overcome.”

Unfortunately in most instances beyond the 1990s despite the good intent, the Courts have tended to pay lip service to the compensation for economic disadvantage approach to spousal maintenance adhering to the clean break and needs and capacity approach to maintenance. What promised to be a more sympathetic attitude towards maintenance faded? The Federal Government, in its discussion paper Property and Family Law: Options for Change (1999, AGPS) considered spousal maintenance was a temporary measure. The Hon Justice Catherine Fraser in her article referred to below makes the following observation:

“In other words, in both countries, the relevant criteria disclose a number of philosophical bases upon which a judge might award spousal support. However, what is interesting from my brief review of the Australian jurisprudence and how it relates to Canadian support law is the extent to which the judiciary in both countries have emphasised “clean break” or self-sufficiency almost to the exclusion of the other statutorily- mandated factors....Moreover, one cannot ignore that the greatest Asset coming out of many marriages is the income stream of the husband’s career. If all that happens on marriage dissolution is to divide what has been bought 50-50, the husband will still have his income stream (a valuable asset in its own right) and the wife may have nothing (unless she can immediately launch herself into a career earning at least as much as her husband).”

Thus, echoing the sentiments of the Full Court in Best.

Professor Rebecca Bailey-Harris in her article referred to below advocates that spousal maintenance awards “should take greater account of lost opportunity costs, labour market conditions and the difficulties facing those who wish to re-enter the workforce”. She observes “the reported case law since 1995 does not reveal any discernible indications of a more robust usage by the Family Court of spouse maintenance orders to redress economic inequalities stemming from marriage and its breakdown.” Indeed I think such could be extrapolated beyond 1998 (when the paper was written) to date. In practice in Australia:

• It is common for interim spousal maintenance orders to be made pending a property settlement to maintain the financial status quo for the family in the transition and to meet funding of litigation;

• Due to the requirements of the clean break approach of the legislation and the obligation to determine property settlement before considering a final maintenance award (on the
basis that a combination of the parties investment of the property received and their earning capacity may meet their reasonable maintenance needs), it is unusual for a final spousal maintenance order to be made or agreed:

- It is rare for a Court to award ongoing final maintenance in a periodic form (cf Willacott [2014] FamCA 5). In over 30 years of practice I can only recall one case I was involved in where such an order was made and the circumstances were very unique: the wife was a professional and suffered an embolism during the birth of the parties’ son. She had no earning capacity and significant needs. The husband was a successful medical specialist).

- If final maintenance is ordered or agreed then it will usually be:
  - A lump sum; or
  - Arbitrarily capped for a limited period of time (say no more than 2-3 years) for retraining or enhancement of the recipient’s earning capacity or for property settlement to be finally effected [see Strahan & Strahan (No4) [2017] FamCA 949 where by way of final maintenance order the interim order of $26,021 per calendar month would be discharged upon the transfer of 5 properties to the wife]; and

- Not adequate to meet the maintenance needs of the party.

The cost of litigating a maintenance claim is prohibitive and counter-productive on a cost benefit basis. The litigant often throws away significant good money chasing bad.

- Parties tend to negotiate a financial settlement trading off property settlement with little or no maintenance provision. The party with risk and exposure to a final maintenance award seeks and generally obtains a financial agreement where each party contracts out of their right to claim future maintenance from the other, drafting the agreement in such a way to skirt around the pension provisions that leave them potentially vulnerable.

Future

Whilst there was a body of research and reports about maintenance between 1976 and the 1990s, since that time it has dropped off.

Subsequently changes to child support (1st July 2006) resulting in reductions of the amount received and other economic circumstances (including the GFC, wages freezes and increased costs of living) particularly for women have once again shone a light on the adequacy of the level of maintenance awards and agreements, the financial inequality post separation and the philosophy of the Courts approach to maintenance in Australia.

Professor Chisholm in his 1992 paper observed:

“We have seen that with non-fault divorce, significant workforce participation by married women and a revaluing of independence for women, the pendulum swung against maintenance, which became severely limited: women were in general expected to become self-supporting, and the most they could expect was a bit of help to get started. This narrow approach to maintenance, however, now seems to be productive of injustice. There does seem to be a need to find a satisfactory basis on which to award more than temporary relief, in at least some cases. It is not enough simply to say that maintenance should enable both parties to achieve a “reasonable” standard of living.”

Professor Chisholm offers suggestions for reform including:

- Approach One: reducing discretion in maintenance and introducing a formula / scheme. Likewise Grant Reithmuller and Robin Smith some 14 years later have recommended the possible role of guidelines as a method of providing greater predictability and certainty:
“There appears to be no real impediment to the development of similar “bottom up” guidelines (as used in Canada) in Australia to reflect current decisions of the courts, if the outcomes fall within a range that can be reasonably predicted, and important exceptions identified”.

- Approach Two: a “compensation” approach for both maintenance and property adjustment.

Professor Rebecca Bailey-Harris recommends:

“It may well be the existing provisions of Pt VIII of the Family Law Act 1975 (Cth) are insufficient to achieve this purpose and therefore there is a persuasive argument that the issue should be addressed in a new bill amending that Part...what is needed is a reformulation of ss72 and 75(2) to articulate more clearly the Moge objective of equalisation between spouses of the economic effects of the marriage and its breakdown, and specific reference, as relevant factors, to lost opportunity costs and employment market conditions. The Australian law of spouse maintenance has long been criticised for its failure to articulate a clear policy; now is the ideal opportunity to remedy this defect.”

Further, Grant Reithmuller and Robin Smith complain that the “law relating to spousal maintenance in Australia remains seriously fragmented. The legislation provides little real guidance to the courts as to the underlying principles that support an award...we found that there was little recent evidence about the actual orders being made by the courts. We also found that the principles in the reported cases and texts gave little assistance in predicting the outcome of a particular case.”

Whilst there has been a dearth of recent research and literature concerning spousal maintenance in Australia a recent AIFS research paper by Vaus, Gray, Qu and Stanton, referred to below confirms both static and concerning statistics that underpin this article and the concern about “feminization of poverty” that pervades maintenance in Australia, namely:

- In the UK, Germany, Australia and Switzerland, divorce had a substantial short-term negative effect, although smaller than that experienced by women in Korea and the USA. In the UK, Germany and Australia, women’s incomes started to recover, but their incomes were still substantially lower six years after divorce than they would have been had they remained married.

- In all of the study countries, the effects of divorce on the equivalised household income of men were smaller than the effects on women in terms of post- separation income relative to pre- separation income and the income it would have been had they remained married:
  - Divorce had little short-term negative effect on the equivalised household incomes of men in the UK, Germany, Australia and Switzerland. Over the medium term, in Australia and Switzerland, men’s post-divorce equivalised household incomes were similar to what they would have been had they remained married. In Australia and Switzerland, divorce had only a very small effect upon men’s incomes, although there was a moderate short-run fall in Australia that was quickly recovered.
  - In all countries except Korea, in the short term following divorce, women experienced a substantial fall in equivalised household incomes compared to their pre-divorce incomes. The falls in income compared to pre-divorce income were:
    - Australia, 21%. In all of the countries except the USA and Germany, women’s equivalised household incomes returned relatively quickly to their pre-divorce levels, and in Australia and Korea they were higher than their pre-divorced levels. However, when post-divorce incomes are compared to what we estimate household incomes were similar to
incomes would have been in the absence of divorce... In Australia the initial (T1) substantial relative effect of divorce reduces so that six years later the effect is only half the initial effect (measured relative to what was estimated their income would have been in the absence of divorce). In the short-run, divorce had a substantial negative effect on the equivalised household incomes of women in all six countries examined. In all countries, with the exception of Switzerland, the negative effects of divorce on income persisted six years after divorce. In the UK, Germany and Australia, the negative effects of divorce on equivalised household incomes was roughly halved six years after divorce compared to the effect in the year following divorce;

- In the UK, Germany and Australia, government benefits are very important in reducing the effects of divorce on women’s equivalised household incomes.
- In all of the study countries the main source of income pre-divorce was partner income (ranging from, an average of 45% of household income in Australia to 58% in Switzerland) and the second largest contributor was own income. There were substantial differences in the contribution of government benefits pre-divorce, with government benefits contributing the largest proportion to women’s pre-divorce household incomes in Australia (20%).
- In Australia, while divorce had an initial substantial negative effect on women’s equivalised household incomes, there was fairly rapid partial recovery in income to what it was estimated income would have been in the absence of divorce. The proportion of income derived from government payments peaked at 34% at two years following divorce and declined to 25% six years after divorce. This decline was due to the increase in the contribution of women’s own incomes to their household income and the relatively high rates of re-partnering, which resulted in partner’s income becoming an important contributor to post-divorce incomes six-years after divorce (18% of household incomes).

- In Germany and the USA, partner income makes a relatively small contribution to women’s post-divorce household income, while it is much more significant in Switzerland and Australia, and to a lesser extent in the UK and Korea.
- There are also differences between the countries in whether it is a requirement for spousal maintenance (alimony) to be paid. In Australia, spousal maintenance is generally not paid.

Those results were consistent with the findings of Belinda Fehlberg and Christine Millward (see their article referred to below):

“As a group, the mothers in our study were more financially disadvantaged than fathers due to their lower incomes, the lower share of property they received relative to the amount of time spent with children (most were primary time parents, but few received more than half of the property), and the volatility of child support payments, which did not always keep in step with parenting changes (especially when mothers’ care percentage increased) and so could cause hardship. Even so, some mothers said they now had more personal financial control. These findings are consistent with recent analysis by AIFS (de Vaus, Gray, Qu, & Stanton, 2012) and were also reflected in our children data.”

On 9th May 2017 the Turnbull Government announced it would undertake the first comprehensive review into the family law system in Australia since the commencement of the Family Law Act. On 27 September 2017 it provided its
terms of reference to the Australian Law Reform Commission ("ALRC") tasked with the Inquiry. Professor Helen Rhoades was appointed Commissioner and she is assisted by two part time commissioners, the Hon. John Faulks (retired Family Court judge) and Geoff Sinclair a leading family law practitioner and a fellow of the IAFL.

The terms of reference include:

“... having regard to:

- .... profound social changes and changes to the needs of families in Australia over the past 40 years;....
- the importance of ensuring the Act meets the contemporary needs of families and individuals who need to have resort to the family law system;....
- the desirability of finality in the resolution of family disputes and the need to ensure compliance with family law orders and outcomes;....

...for inquiry and report...a consideration of whether, and if so what, reforms to the family law system are necessary or desirable, in particular in relation to the following matters:....

- improving the clarity and accessibility of the law....
- that the ALRC consider what changes, if any, should be made to the family law system; in particular, by amendments to the Family Law Act and other related legislation”

The ALRC is required to provide its report by 31st March 2019. It is time for reflection and change including:

- Changing the order for determining final maintenance and property settlement:
  - Cutting the umbilical cord between maintenance and property. The relief ought to be stand alone;
  - Deal with maintenance before property [cf Raine & Creed [2015] FamCAFC 133];
  - Rather than blending the two remedies ensuring each is given discrete attention; or
  - In 1992 taking up a recommendation of Professor Richard Chisholm to abandon the dichotomy between property and maintenance and have a single approach to financial adjustment, Steven Strickland QC (now judge) in his paper referred to below stated:

    “To return though to the plot, as it presently stands the inter-relationship between property settlement and spousal maintenance no more provides an answer to whether spousal maintenance should be finite or infinite than any other aspect, but I suggest that if the distinction between property adjustment and spousal maintenance is abandoned then there may not be the minefield to which I referred in the introduction. As Professor Chisholm says in his paper, “there would be an identified purpose in making a financial readjustment.

That purpose could be achieved by whatever set of orders the Court considered most appropriate in the circumstances. It would cease to be appropriate to have one set of criteria for “property orders” and a different set for “maintenance orders”.

- Give real effect to:
  - the section 75(2) and 90SF(3) factors in particular:
    - (j) the extent to which the party whose maintenance is under consideration has contributed to the income, earning capacity, property and financial resources of the other party; and
    - (k) the duration of the marriage and the extent to which it has affected the earning capacity of the party whose maintenance is under consideration; and
- A paradigm shift to the various other approaches to maintenance imported by those factors including:
  - the compensation for economic disadvantage;
  - status, minimum loss or expectation damages principles;
  - rehabilitation approaches.
- David Hodson and Ciara Tyson in their article referred to below drawing upon distinctions with the UK (and cases of Parlour and McFarlane) properly entreat: “Does s72 give any room in Australia for the provision of maintenance where the income of one party is significantly in excess of needs and / or to reflect contribution; and if not, should the law change here?” They conclude their article:
  “In Australia, the following needs close and urgent consideration:
  • Should the just and equitable test be extended to spousal maintenance?
  • Should the basis of spousal maintenance be explicitly extended beyond mere ability to support oneself?
  • How much should contribution be reflected in maintenance, whether the impact of the contribution is past or, especially, ongoing?
  • Should the Australian courts have clear powers to dismiss maintenance claims, to grant term orders including bars on extensions, and in other ways to bring about clean breaks?
  • How can the inconsistency in law be overcome between clean breaks available in Financial Agreements and unavailable with absolute confidence in court orders?”
- Jettisoning the clean break “at all cost” approach: labouring the point I highlight the following observation made by Annemarie Lanteri in her paper referred to below:
  “The effect of the clean break if it is applied inappropriately is that, despite achieving some of these desired objectives, it compounds the structural poverty of the unemployed, the poorly paid and the sole parent. This is because the effect of Section 81 is to generally reduce the availability of financial support to dependant spouses by discouraging the consideration of ongoing support as appropriate, by focusing attention on capital rather than income, even in situations where capital may not be sufficient to provide a division of property with appropriate allocation for future support, and focussing on equality of treatment rather than equality of outcome.”
  • Ensuring spousal maintenance provisions are reasonable, realistic, more generous and not arbitrary, and enforceable. Grant Reithmuller and Robin Smith in their paper referred to below comment:
  “Since the commencement of the Family Law Act over 30 years ago there have been regular claims that the spousal maintenance provisions are underutilized and uncertain. The concerns continue and the number of spousal maintenance orders are low…”
  • Both judicial and practitioners mindsets to maintenance. The Hon Jennifer Boland in her paper below reviews a survey of the legal profession in 1997 / 1998. She reported:
  “The Family Law Council (“the Council”) was at the forefront of the examination of this question when it produced its discussion paper entitled “Spousal Maintenance” in 1989. (“the Kay Report”).
  In 1996, the Council decided to build on the work started with the Kay Report and is again examining the question of spousal maintenance in association with its project “Section 81 - The Clean Break Revisited”.
  The Council decided to survey the profession and to conduct a survey of Judges and Registrars
of the Family Court of Australia and the Family Court of Western Australia to obtain their views and experiences on spousal maintenance and the clean-break principle as a fact finding background exercise.

Both male and female lawyers overwhelmingly supported the application of the clean break principle and all lawyers were strongly against the indefinite payment of spousal maintenance but males more so than females (81% male - 70% female).

Notwithstanding the academic writings referred to in the beginning of this paper, significant gender differences emerged in the views of the respondents which suggest that female lawyers may be more aware of the data on the feminisation of poverty following divorce or separation and of the responsibility this places on the other partner to provide support.

Thus it appears the “clean break” principle is a well established and regarded concept by Australian lawyers and no doubt is reflected in the relatively low number of spousal maintenance applications.”

It seems those views in the profession remain as relevant today and inform our approach to maintenance.

• Better awareness of entitlement and rights to maintenance by our clients.

Perhaps the ALRC will consider changes to the approach to spousal maintenance as part of its review of the family law system in Australia. The ALRC may respond to a number of the challenges and suggestions referred to above. Watch this space.

Finally the High Court of Australia in its leading decision on property settlement and maintenance in Stanford (2012) FLC ¶93-518 found that before determining what property order should be made, the court must first determine that it is just and equitable to make any order at all. That has ramifications for maintenance proceedings yet to be tapped into.

Further reading

• “Footballers’ Wives: Enjoying the Champagne of Contribution or the Castor Oil of a Clean Break” by David Hodson and Ciara Tyson, Vol 18 No 1 Australian Family Lawyer 1, Summer 2005

• “Spousal Support and Equality - the Australian and Canadian Experience” by Hon Justice Catherine Fraser, Vol 11 No 1 Australian Family Lawyer 1, Autumn 1996


• “The Economic Consequences of Divorce in Canada: Moge and Beyond” by the Hon Claire L’Heureux-Dubé, paper delivered to the 9th National Family Law Conference, Sydney, July 2000

• “Spousal Maintenance - The How, What, When and Why of Spousal Maintenance” by Jennifer Boland (retired judge of the Family Court of Australia), paper delivered to the 8th National Family Law Conference, Hobart, October 1998

• “Spousal Maintenance - Finite or Infinite” by Steven Strickland QC (current judge of the Family Court of Australia), paper delivered to the 5th National Family Law Conference, 1992

• “Spousal Maintenance” by Assoc. Professor Richard Chisholm (retired judge of the Family Court of Australia), paper delivered to the 5th National Family Law Conference, 1992

• “Spousal Maintenance” by Graeme Hearl, paper delivered to Television Education Network, 15th July 2014

• “Enforcement of Spousal Maintenance Orders” by Monica Blizzard, presentation and paper for Television Education Network, September 2012

• “Maintenance Applications” by David Berman (now judge of the Family Court of Australia), presentation and paper for Television Education Network, August 1999
• “Property and Spousal Maintenance” by Annemarie Lanteri, presentation and paper for Television Education Network, April 1997


• “Spousal Maintenance: Is it time to roast this old chesnut?” by Grant Reithmuller (now judge of the Federal Circuit Court of Australia) and Robin Smith, paper delivered to the 13th National Family Law Conference, Adelaide 2006

• “The economic consequences of divorce in six OECD countries”. Australian Institute of Family Studies research report no 31 by Professor David de Vaus, Professor Matthew Gray, Dr Lixia Qu and David Stanton, March 2015, https://aifs.gov.au/publications/economic-consequences-divorce-six-oecd-countries [For Australia the data source was Household, Income and Labour Dynamics in Australia (HILDA) for the period 2001 to 2011]


Please do not hesitate to contact me for a copy of the above papers.
Japan acceded to the Hague Convention on the Civil Aspects of International Child Abduction ("Convention") in 2014 after experiencing years of diplomatic pressure and from left behind parents and non-governmental organizations. Of significant concern was whether Japan would promulgate provisions of its Implementing Act to create loopholes and overcome the resistance in its society to the accession of the Convention.

Unfortunately, as anticipated, the Implementing Act provides: (a) expansion of the "grave risk" exception/defense of Article 13(b) of the Convention. Japanese courts may consider economic and psychological factors about the taking parent and child; creates a broad defense as opposed to a narrow one; and, does not consider whether the habitual residence could provide support and protection for the child: (b) enforcement provisions or return orders are ineffective; and, (c) trial and appellate courts may reverse a return order if "it is no longer appropriate to maintain said order due to change of circumstances", which in effect encourages delay to enable a change in circumstances and then treats it as a custody case in violation of the Convention.

On December 21, 2017, Japan’s Supreme Court in the case of Cook and Arimitusu, upheld the Osaka High Court’s revocation of its prior return order of children to Minnesota, USA. That decision was rendered 3 years after the abduction and 2 years after the Hague case was filed. The facts follow.

The father, James Cook, attempted to enforce the initial return order and learned that Japanese family court orders involving children are generally unenforceable. The mother, Hitomi Arimitsu, refused to comply with the return order of pay the fine imposed by the court. The Implementing Act prohibits the use of force against the child(ren); however, it permits the ability of the losing party to seek a new trial even after losing an appeal. The mother then petitioned the Osaka High Court alleging a change of circumstances since the father’s house had been foreclosed and he did not have the financial support. She prevailed, the prior return order was vacated finding that the return of the children would place them in “grave risk”. The Osaka court conducted a custody evaluation about the best interests of the children, which is one of the basic things not supposed to happen in a Hague case.
Notwithstanding the Cook case, in March 2017 the Japan Supreme Court ruled for a Japanese husband seeking to return his teenage son to the U.S. who had been abducted by his wife in 2016. A Tokyo court issued a return order but the wife “refused to unlock the door” causing the officer to enter her residence via a second-story window. She put up a fierce fight to retain the child who stated he wanted to remain in Japan. Consequently, a Nagoya High Court ruled that the child could remain.

The Japanese Supreme Court remanded the case finding that the child was “in a difficult position to make a multifaceted, objective judgment about whether to remain under the control of his mother”, citing his “heavy reliance” on her and the “undue psychological influence” of his mother. The court also said that the child’s lack of free will meant the mother’s attempt to keep the child equated to detention.

In April 2018 hearings were held by Congressman Chris Smith (R-N.J.) in the U.S. House of Representatives. He stated that since 1994, between 300-400 children of international marriages have been abducted from the U.S. to Japan. He then opined since Japan acceded to the Convention almost zero have returned or even have access with their left behind parents.

Also, in April 2018, the U.S. Senate Judiciary Committee held hearings and quired the Assistant Secretary of State for Consular Affairs about the fact that Japan is not listed as non-compliant nor has it sought punishment for various nations under the 2014 Goldman Act. His response was: “Continued diplomatic engagement is our best tool to promote long-term institutional changes in foreign governments.” Senators from both parties opined that they wanted to see more done.

The issue with Japan has been growing in the past months. In March, all EU Ambassadors to Japan signed an official letter of diplomatic protest to pressure Japan to follow international law and enforce Hague orders/decisions that provide for a return of children to their habitual residence and provide for access under Article 21 of the Convention.
Client Attorney Privilege and Discovery – A Comparative Perspective – France – England – U.S.A. - Switzerland
1.1 Client attorney privilege
Correspondence Between Attorneys and their Clients

“Professional secrecy”
Covers material and immaterial communication (paper, fax, electronic documents)
Includes consultations sent to clients or intended for them; all documents, all information and confidences received by the lawyer in the practice of the profession
Article 226-15 of the Criminal Code; Article 66-5 of the law of 31 December 1971
Limit: Self-defense

“Legal advice privilege”
Covers communications between lawyer (acting in capacity as client’s lawyer) and client for the purpose of giving or receiving legal advice for the client, in both the litigation and non-litigation context
Limits: Does not apply if no confidentiality or confidentiality lost
May be waived
Crime/fraud exception

Written and verbal communication in giving/obtaining legal advice
Applies in all contexts, not just relating to judicial proceedings
Attorney has a separate duty to maintain client confidences
Limits: Waived by providing such information to a 3rd party
Limits of application to in-house counsel
Does not protect communications in furtherance of a crime/fraud

“Attorney secrecy”
Liability of attorney who discloses confidential information (Art. 321 Crim. Code and 13 AFMA)
Applies to any piece of information of any form
Limits: Information not in the public domain
Typical attorney activity (not in-house counsels)
## I.2 Private correspondence between clients

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<th>Law</th>
<th>Description</th>
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<tbody>
<tr>
<td>France</td>
<td>No confidentiality</td>
<td>When parties with a <strong>common interest</strong> and a <strong>common solicitor</strong> exchange information on facts, issues, advice received in respect to litigation, <strong>the documents</strong> and copies containing that information are privileged from production in the hands of each</td>
</tr>
<tr>
<td>England</td>
<td><strong>common interest</strong></td>
<td>Where clients have a <strong>common interest</strong> against a common adversary, attorney-client privileged information can be shared between and among parties and their counsel <strong>without waiver of the privilege</strong></td>
</tr>
<tr>
<td>Switzerland</td>
<td>No confidentiality</td>
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1.3 Confidentiality/privilege of Correspondence between Attorneys (and third parties in the case of England & Wales)

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**Between attorneys**
- Immaterial and material correspondence exchanged between attorneys
- **Limit:** correspondence with the “official” mention
  - equivalent to a procedural act;
  - not referring to any writing, comments or previous confidential elements

**Cross-border exchanges**
- Article 5.3 of the Code of European bars:
  - **Rule:** non-confidentiality
  - **Limit:** “confidential”/“without prejudice”

**No confidentiality with third parties**

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**Between lawyers**
- **Between lawyers** = no privilege unless **without prejudice privilege** (i.e. related to settlement) or **common interest privilege** apply
- **With third parties = if “Litigation privilege” applies**
  - Covers any document generated for the **dominant purpose of actual or anticipated litigation**
  - Applies to confidential communications between the client or their lawyer (on the one hand) and **third parties** (on the other)

**No Confidentiality for Communications between counsel for opposing parties other than settlement materials.**
- Settlement offers exchanged between counsel generally may not be used to prove or disprove validity or amount of a claim, or for impeachment/prior inconsistent statement. But may in various circumstances be admitted for various other purposes. See Federal Rule Evidence 408
- Settlement materials should be marked “without prejudice/for settlement purposes only/not for use in litigation” or similar language.

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<td>Switzerland</td>
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**No confidentiality with third parties or other attorneys**
- **But:** Settlement correspondence with other attorneys can be labeled “confidential”/“without prejudice”

**Consequence:**
- Violation of professional duty
- Inadmissible evidence
I.4 Client attorney privilege – Trusts

Trustee’s privilege?

Legal advice taken by trustees for guidance as to discharge of their functions and paid for from the trust fund = privilege is held for the benefit of the beneficiaries, not the trustee

Legal advice taken by trustees in relation to contentious trust proceedings = trustee is entitled to assert privilege against beneficiary

Communication between trustees and lawyer = usually disclosed, unless they concern:

• Reasons for the exercise of a power or discretion
• Breach of trust claim brought against trustees
• Dispute with a beneficiary otherwise than in his character as beneficiary

Fiduciary exception: trustees’ communication with counsel regarding the administration of the trust is not always protected

Governed by state law and there is a split between different states:

• In some states, the beneficiary may deemed to be the client, not the fiduciary or the trust itself.
• In other states, the fiduciary may be considered the client
• Fact-based analysis

No privilege applicable – Considered as third parties
II.1 Discovery domestically - UK

Disclosure is controlled by judges but parties are obliged to disclose all documents in possession, power or control which are relevant

Relevance:
- Documents which adversely affect and/or support a party’s case
- Documents which adversely affect and/or support the other party’s case

Confidentiality is not a ground for resisting disclosure but privileged documents are exempt from inspection

Parties can apply for order for disclosure against 3rd parties

Disclosure pre-action if:
- Respondent is likely to be a party to subsequent proceedings
- Applicant is likely to be a party to those proceedings
- Respondent’s duty to give standard disclosure would extent to the documents
- Disclosure before commencement is desirable to dispose of them fairly, to assist resolution of the dispute or to save costs
II.2 Discovery domestically - USA (NY)

**Discovery devices issued by counsel for parties generally without requiring prior court approval or review.**

**Extremely Broad Scope of Disclosure from Parties and Non-Parties**

NY -- CPLR 3101: “... full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof.”

Federal -- FRCP 26: “... relevant to any party’s claim or defense and proportional to the needs of the case...”

Broad discovery extends to non-parties as well as parties, both of which may be limited by court order, which is generally obtained through motion practice or other request for judicial intervention. Most jurisdictions require attorneys to attempt to resolve discovery disputes prior to judicial intervention.

Discovery devices (e.g. subpoenas, document requests, written interrogatories, sworn deposition testimony of parties and non-parties, etc.). Various standing disclosure obligations may apply depending on the jurisdiction, and also exist in Federal Courts, see, e.g., FRCP 26.

Pre-action discovery available in extremely limited circumstances.

NY -- SCPA 201(3): Provides jurisdiction to Surrogate’s Court over probate and estate administration and related matters. SCPA 102 - Provides that “CPLR and other laws applicable to practice and procedure apply in the surrogate’s court except where other procedure is provided by this act.” Unique devices and procedures exist under the SCPA regarding disclosure of information relating to estate property. See e.g., SCPA 2103, 2104, 2105
II. Discovery domestically
Role of the judge and parties in obtaining proof in estate litigation

Taking of evidence is left to the court

- Court
- Witness examination
- Order production of documents

Heirs have no general right to information

Legal basis to request information:

- Inheritance law: Art. 607§3 and 610§2 CC: co-heirs and third parties connected to the inheritance are obliged to provide all information which could be necessary for the distribution of the estate (extent unclear).
- Right to information based on contract: Art. 400§1CO: obligation to surrender all documents acquired and created in the context of a mandate

ONLY
- When it has to ascertain the facts of the case of its own based on statutory provision
- When serious doubts about an undisputed fact

When requested from one party

Limits:
- Bank secrecy applicable to 3rd party but not heirs
- Attorney secrecy - client's heirs have no special privilege
II. Discovery domestically
Role of the judge and parties in obtaining proof in estate litigation

Art. 145 Civil procedural code: If legitimate reason for keeping or establishing before any trial evidence that might be relied upon in the solution of a dispute, the legally admissible measures of inquiry may be ordered at the request of any interested party.

- Can be used to establish evidence that will be used before a foreign court but needs to be made before any foreign court is seized
- Can be used against a person who will not be the defendant in the future trial

No disclosure obligation unless ordered by the court

Incentive through penalties: Article 778 of the Civil Code “Recel Successoral” – possibility of losing all heritance rights when not forthcoming of assets received.

Judge
- Cannot introduce a fact upon his own initiative
- But has the power to order ex officio all legally admissible investigative measures
- Cannot order forcible production of evidence exception when requested by a party

Parties
- Definition of the scope of proceedings
- Introduction of motions
II. Discovery domestically
Obligation of trustee to disclose

Mandatory disclosure applies equally to trustees if they are a party to proceedings

Outside contentious proceedings
Application for Beddoe relief: obligation on the trustee to make “full and frank” disclosure to the court

Application by beneficiaries against trustees for disclosure under Schmidt v. Rosewood. Not entitled as of right – depends on circumstances of the case.

Art 8 Hague Convention on the Law Applicable to Trusts: right of beneficiaries to seek disclosure governed by proper law of trust.

France is a signatory, but has not ratified on the Law Applicable to Trusts and on their Recognition of 1985

If the beneficiary is part of the proceeding, he can be forced to communicate the information relating to his/her rights within the trust.

If the beneficiary claims the documents are covered by confidentiality, the trustee can be asked by the Court to produce the documents - Enforceability not guaranteed when local laws of the Trust protect it.
II. Discovery domestically
Obligation of trustee to disclose

**Broad duty** to disclose information to the beneficiaries under the law of various states. This takes the form of a duty to file “accountings” in various circumstances.

In litigation, broad information is available through depositions, document productions, etc. as to trustees, parties to the action, and 3rd parties with relevant information.

Available in pre-trial discovery phase and during trial.

Ratification of the **Hague Convention** on the Law Applicable to Trusts and on their Recognition of 1985: Switzerland recognizes foreign trusts

Swiss attorney secrecy does not apply to a trustee as it is not a typical attorney activity

The law applicable to the trust will always be foreign law.
III. Cross-border discovery

Blocking Statutes

**French Blocking Statute (Law No. 80-538 of 16 July 1980)**

Parties to a litigation outside of France, but who need information held on French territory or by persons located in France

Incriminations concerning the exportation of information out of France:

- Art. 1.bis: prohibits requesting, seeking, or communicating to obtain proof in the context of ongoing or future foreign judicial or administrative proceedings "documents or information of an economic, commercial, industrial, financial or technical nature".

- Art. 3 penalizes such infractions by a maximum prison sentence of 6 months and a fine of up to 18,000 euros

**Swiss Blocking Statute**

Art. 271 CrimC: *any person who carries out activities on behalf of foreign state on Swiss territory without lawful authority, where such activities are the responsibility of a public authority or public official (...) is liable to a custodial sentence not exceeding 3 years or to a monetary penalty (...)*

Obtaining of evidence on Swiss soil = official act

Does not apply to voluntary disclosure by a party to foreign legal proceeding if its own documents and information are concerned. Not if failure to cooperate would entail sanctions by a foreign governmental body (in practice: often a grey zone / unclear)

If evidence is in possession of 3rd parties: Art. 271 CrimC may be affected even if disclosure is voluntary

Art. 273 CrimC protects industrial and business secrets of Swiss individuals and legal persons when they have a connection to Switzerland or concerns the interest of Switzerland

+ Swiss Federal Data Protection Act
III. Cross-border discovery

Specific Channels that must be used

  
  This channel must be used when seeking documents for litigation that has commenced abroad.

  Importance of seeking information before the trial has commenced abroad - Article 145 of the Civil Procedure Code (supra.).

- **1970 Hague Convention Procedure set out in the Civil Procedure Rules, Part 34**

  *Dawson-Damer v. Taylor Wessing* (2017) : English firm working for offshore trustee was ordered to give disclosure of information relating to a foreign trust to beneficiaries pursuant to Data Protection Act 1998

- **1970 Hague Convention**

  NY CPLR 328: assistance to tribunal and litigants outside the state

  NY CPLR 3102(e): testimony within the state based upon mandate, writ or commission issued out of any court of record in any foreign jurisdiction


- **1970 Hague Convention Hague Service Convention – 1965**: procedure for the service of legal documents (judgments, summons) from one state to another without the use of diplomatic or consular channels


  Other bilateral or multi-national treaties Switzerland is a party to
VI. Challenging proof adduced by the other party – ethics obligations when alleging fraud

Ethical obligations of Barristers and attorneys

Core duty is to the court which overrides duty to the lay client (Bar Standards Board Handbook, Core Duty 1)

Ethical obligation not to make fraud allegations without reasonably credible material

Bar Standards Board Handbook, Rule 9: a barrister “must not draft any statement of case, witness statement, affidavit or other document containing (...) any allegation of fraud unless you have a clear instructions to allege fraud and you have reasonable credible material which establishes an arguable case of fraud”

Civil Procedure Rules, Practice Direction 16 §8.2(1): Allegations of fraud must be specifically pleaded in a party’s statement of case

A party is not entitled to obtain a finding of fraud at trial if it has not been directly pleaded - Three Rivers v. Bank of England – 2003

• Allegations needs to be raised fairly and squarely in advance of trial

The lawyer has an obligation to undertake every action to defend the client’s interests

Main objective of the proceedings is the manifestation of the truth (Art. 10 Civil Code) = ensured mostly through the principle of the contradiction

In practice, Ø general duty of loyalty due to the Court

The lawyer’s primary obligation is to his client

Art. 21.4.3 RIN: “while showing respect and loyalty to the judge’s office, the lawyer defends his client conscientiously and without fear, without considering his own interests or any consequences for himself or any other person”
VI. Challenging proof adduced by the other party – ethics obligations when alleging fraud

Ethical obligations of Barristers and attorneys

**No specific regulation** in the CPC that requires attorney’s submission to be true and complete. CPC stipulates: “**All those who participate in proceedings must act in good faith**”

Attorneys must exercise the profession **conscientiously and with diligence**

Duty relevant in respect to: (i) The client; (ii) The public administration; (iii) and the opposing party

**BUT** is first of all and advocate of the client’s interest. As such he has the duty to **raise allegations that support such position**

An attorney statement must be factual and restricted to what is necessary to explain the position

**Allegations made against better knowledge and assumptions not labeled as such are not allowed**

Limit: Cannot hurt unnecessarily the other party = statement factually meaningless which solely humiliates or harasses the other party

New York does not have any rules requiring an attorney to disfavor fraud allegations or to subject them to higher scrutiny before advancing them on behalf of a client.

Federal and State Pleading rules: Particularity Standard
Forthcoming Meetings

IAFL Family Law Symposium:
Waseda University, Tokyo, Japan
Tuesday, May 29, 2018

IAFL Annual Meeting and Asia Pacific Chapter Meeting:
Tokyo
Wednesday, May 30 to Sunday, June 3, 2018

IAFL European Chapter Meeting:
Stuttgart, Germany
Wednesday, September 26 to Sunday, September 30, 2018

IAFL Family Law Conference:
Dubai
Monday, November 12 to Wednesday, November 14, 2018

European Young Lawyers Conference:
Milan
Thursday, March 21 to Friday, March 22, 2019

IAFL USA & Canadian Chapter Meeting 2019:
San Francisco, California
Wednesday, May 15 to Sunday, May 19, 2019

IAFL European Chapter Meeting:
Palma de Mallorca, Spain
Wednesday, September 11 to Sunday, September 15, 2019