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INSIDE:

Chair's Message –

By: Duane A. Daiker

D. DAIKER

I am writing my first "Chair's Message" from my balcony overlooking Mallory Square in Key West. We just finished our first retreat and long range planning session in over a decade. Appellate lawyers from all over the state descended upon the Conch Republic to have a voice in the future of our section.

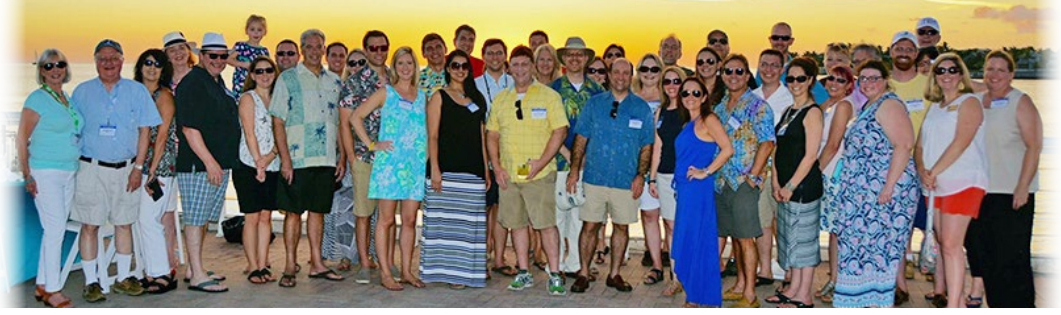
All of us have busy professional lives, and we rarely have the time to stop and reflect on long term goals when we get together for our regular meetings. How can the Appellate Practice Section better serve our members, our appellate courts, our profession, and our legal community? What are we doing well, and what could we be doing better? We discussed these types of weighty topics for the better part of a day, including talks over a fabulous Key West sunset dinner that I will never forget.

I won't attempt to describe all the progress that we made—there will be much discussion about these issues in the coming months. However, I am very proud of what we accomplished as a group. I think we all finished the weekend with new ideas, new action items, and a renewed resolve to accomplish even more in the 2016-17 bar year, and beyond.

My heartfelt thanks go out to everyone who participated in our retreat, and especially to the core group of retreat planners: Hala Sandridge, Tom Hall, and Nick Shannin. I know we will have these types of planning sessions more often in the future, and this retreat has set a very high standard.

I hope all of you who have taken the time to read this missive will be inspired to be active members of the section this year, and to take full advantage of all we have to offer. Our success depends on the involvement of skilled and dedicated appellate lawyers like you!

Hopefully I will see you at our next meeting at the Gaylord Palms in Orlando, on January 26th, where we will talk more about the section's plans going forward, and you will see some of the progress that is already being made. We have a great year ahead of us.



The Honorable Susan L. Kelsey

By: Diane G. DeWolf

JUDGE KELSEY

Judge Susan Kelsey did not always plan to be a judge. She did not always plan to be a lawyer. She did not come from a family of lawyers, didn't know any lawyers, and never even dreamed of college while she was growing up outside a small town in central Ohio. While she was growing up, her father worked for the state highway department, and her mother was a homemaker. No one in her entire family had attended college.

But everything changed one day when her father answered his calling and decided to become a preacher. The whole family packed up and relocated to Knoxville, Tennessee, where Mr. Kelsey completed his studies and became a preacher for the church of Christ. At the church the family attended in Knoxville, many of Kelsey's peers planned to attend Freed-Hardeman University, a small private Christian college in Henderson, Tennessee. She decided to join them, graduating magna cum laude with a Bachelor's degree in communications—as she says, "one of those degrees that makes parents wonder what their children plan to do with it."

What Kelsey did with her degree was work as a secretary in an automotive holding company in Birmingham, then as a legal secretary in a private law firm. While working as a legal secretary, she began to read law school text books. Although many law students may find this a tedious exercise, Kelsey found it fascinating. It was that experience that drove her to attend law school. She completed her first year at Cumberland School of Law, where she graded on to law review. She then transferred to the University of Florida in Gainesville, where she student-taught legal research and writing and was elected editor-in-chief of the Florida Law Review.

After law school, Kelsey joined the Tallahassee office of Holland & Knight, where she worked with the appellate practice group. Kelsey quickly became an accomplished legal writer and appellate lawyer upon whom other lawyers throughout the firm relied. Martha Barnett, former ABA President and Kelsey's former law partner, commented she is "not a bit surprised that [Judge] Kelsey has been appointed to the First District Court of Appeal. She was destined to be a judge." Barnett also recounted the remarks of Bob Feagin, another H&K law partner and former chair of the firm's litigation department:

> I remember [Judge Kelsey] as a beautiful young lady by whom I was often intimidated, not just by her physical presence, but by the strong arguments that she would make in opposition to some point of law, or strategy on appeal, or otherwise on which we disagreed. I cannot remember a single time that I prevailed in any of these disagreements. Soon, I quit arguing and just listened and quickly adopted her position.

Another former law partner, Susan Stephens, recalls Kelsey was her "self-appointed mentor." Not only was she a brilliant lawyer, she was also willing to devote her time to helping younger lawyers advance as women in the law. Kelsey was one of the first women to utilize a part-time schedule at the firm after her daughter was born, and she was instrumental in drafting the firm's first parental leave policy. After returning to full-time work, Kelsey mentored other young parents, supporting their decisions to cut back work hours and offering advice on juggling children and balancing family life with work.

After 17 years with Holland & Knight, Kelsey handled appeals for two years in the panhandle-based firm now known as Keefe Anchors & Gordon. She opened her own firm in 2007, the Kelsey Appellate Law Firm, P.A. During her nine years as a solo practitioner, large clients such as Shands Hospital and the University of Florida Board of Trustees

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entrusted Kelsey with many of their appellate needs.

Stephens recalls that after Kelsey started her own law practice, other law firms would frequently call on her for appellate advice. In fact, after Stephens moved to a different firm, she could think of no one else to call but Kelsey when one of her largest clients insisted on presenting oral argument in his case when he had never presented argument before. Kelsey selflessly agreed to conduct an oral argument "boot camp" for the client. And while his argument did not ultimately carry the day, Stephens recalls it was far from the disaster it could have been had Kelsey not stepped in.

Barnett recalls how successful Kelsey was at transitioning from a large firm with unlimited resources to a one-woman firm with no administrative assistance. Barnett commented on her own abilities—she joined a large firm because she knew she could practice law successfully but could never keep herself stocked with pencils and pens, pay bills, file briefs, and handle client trust accounts. Yet Kelsey did it. With ease.

In 2008, Kelsey received a call from Judge Kahn asking her to serve as the President-elect of the newly-created First District Appellate American Inn of Court. She accepted the invitation, served as President of the Inn the following year, and continued to serve on the Inn's executive committee, becoming a team leader after taking the bench.

Having spent her entire legal career practicing appellate law, it is no surprise she made the transition to appellate judge. But that move was not as easy for her as the rest of her career moves seem to have been. Judge Kelsey applied five times for the position, sometimes never emerging from the judicial nominating commission process, before Governor Scott finally appointed her in April 2015.

Judge Kelsey notes her work now is similar to what she experienced in private practice. As an appellate lawyer, she spent her entire career reading briefs, analyzing cases, and writing up the results of her analysis. The difference now is she is no longer an advocate but an umpire. After spending almost a year on the other side of the bench, Judge Kelsey's biggest surprise has been how hard appellate judges work. Describing her typical day, she notes the process differs little from private appellate practice. There are still voluminous records to digest and cases to analyze. But for someone like Judge Kelsey who describes her work ethic as "accomplishment-driven," it has been challenging to learn that an appellate judge's work is never done.

While current and former appellate law clerks may remember briefing eight or ten cases per month, it is nothing compared to the case load of a district court judge. In an average full month, Judge Kelsey has primary responsibility for 16 new merits cases and secondary responsibility for 32 additional merits panel cases. She also decides 20 to 30 writs and motions cases, 10 to 25 cases summarized by the court's staff attorneys, and dozens of motions filed in pending cases—not to mention sitting on oral argument panels and resolving cases still under review from prior months. "The work is infinite," she says. But she loves the intellectual challenge.

Having practiced solely in civil appeals, the criminal procedural issues are new to Judge Kelsey. But she is not one to shy away from any challenge. Perhaps that is why she works even more hours now than she did in private practice. Judge Kelsey generally spends eight or nine hours a day working at the courthouse, five days a week. She also works at home most nights and weekends, and takes work with her when she travels.

Any lawyer who thinks appellate judges only read law clerks' bench briefs is wrong when it comes to Judge Kelsey. That is usually the last thing she reads. To her, the bench brief is a good check on her own analysis, and is helpful to keep track of complicated issues. Judge Kelsey reads the entire record in every case on which she is primary or in which she intends to write an opinion, and all pertinent portions of the record in each of her panel cases. She then reads the briefs and relevant legal authorities, arriving at her preliminary conclusion before ever consulting the summary prepared by her clerks.

Regarding oral argument, Judge Kelsey takes it very seriously. Advocates can feel confident that if Judge Kelsey is on their panel, she will know the record and the law. She generally takes at least three days to prepare for oral arguments—reading the record, the briefs, and the relevant legal authorities. While as the junior judge she sometimes finds it hard to squeeze in questions, that does not mean she is not prepared. Her diligent preparation has, on occasion, left her more familiar with the case than the presenting attorney. She reports that she was always very nervous before delivering oral arguments and sympathizes for anxious advocates. "It is okay to be nervous," she says. And she has frequently helped advocates along by tossing them softball questions in an effort to help them effectively present their cases.

When looking at Judge Kelsey's accomplishments, one may mistakenly think she has been completely focused on her career. They would be wrong. While working long hours at a large private law firm, and eventually branching out on her own, Judge Kelsey also dedicated a large amount of her time to raising a family including her daughter and two step-sons, who are nearing or finished with college and excelling in their academic and employment endeavors. Her husband is a partner and state and local tax attorney. Judge Kelsey also actively supports her church activities, even including obtaining her commercial driver's license to drive the church bus for youth group events and local

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outreach activities. She enjoys reading and antiquing when she can. For the past two years, in her spare time, Judge Kelsey and her husband have been renovating a 1950's ranch-style home and then furnishing it with a retro-1950's flair (think Mad Men chic). It appears Judge Kelsey enjoys seeking out period furniture and accessories almost as much as she enjoys seeking out the truth in the law.

When asked whether she had any advice for practicing attorneys, she had two emphatic words to say: "DO BETTER." Appellate judges really do care how you write. They care how you spell. They care about grammar and sentence structure. Most of all, they are disappointed when attorneys have not done their research, have not completed an in-depth analysis, or have tried to hide the ball. Appellate judges have high expectations for appellate lawyers. They dedicate an enormous amount of time to analyzing and deciding your case, and they expect you to do the same. Appreciated attorneys conduct diligent research; write clear, concise briefs; and deliver relevant, fair oral arguments. *Really* appreciated attorneys use helpful organizational tactics such as headings and subheadings in their briefs, and even include hyperlinks to the table of contents, appendices, or other materials they want the judges to review.

Nearing completion of one full year on the bench, Judge Kelsey seems perfectly settled in her new suite at the First District. Her desk is not free of papers, but it is arranged in perfectly organized stacks. Her chamber reflects her tastes in that it is efficient but still comfortable, including a few select pieces of antique furnishings and artwork. Perhaps most importantly, she has almost learned her way around the courthouse's unmarked and unadorned corridors despite the lack of landmarks. She confesses, however, that if she has to set off into unfamiliar courthouse territory, she still carries a floor map with her, just in case.

While she did not imagine this career path as a young girl growing up in rural Ohio, the people she has touched during her legal career are extremely appreciative she chose this route. Shrewd, sage, selfless, scholarly, and steadfast. Judge Kelsey sets high standards for herself and she lives up to them. The First District Court of Appeal and the lawyers who practice there are very fortunate to have Judge Kelsey on the bench.

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The Honorable Thomas D. Winokur

By: Jennifer Shoaf Richardson[1]

JUDGE WINOKUR

Judge Thomas D. "Bo" Winokur was appointed to the First District Court of Appeal by Governor Rick Scott on June 11, 2015. He joined the court after serving as Assistant General Counsel for the Executive Office of the Governor since 2011. He is in the unique position of having participated in the appointment of several of his colleagues on the court and can offer great insight on the appointment process. Judge Winokur brings to the court a depth of criminal appellate experience, which is of great value given the court's large criminal caseload. He gained this experience through twelve years of service to the criminal appeals and capital litigation units of the Florida Office of Attorney General. Prior to his work for the State, Judge Winokur served in the Army JAG Corps in Fort Mead for three years and for one year working in private practice for a firm out of Live Oak, where his practice was broad. Judge Winokur is a double-Gator, having attended the University of Florida for both his undergraduate and law degrees.

Judge Winokur has enjoyed his time on the court so far and getting to know his colleagues and court staff, who he describes as gracious even in moments of disagreement. He appreciates the invaluable experience of serving as a law clerk in terms of gaining knowledge of court operations and professionalism and would like to provide that opportunity to recent law graduates in the future. His current clerks graduated from Stetson University College of Law and St. Thomas University School of Law

When asked to provide some advice on how practitioners can prepare the best possible briefs for the court, Judge Winokur offered the advice that an argument must be comprehensible upon a first reading. While he had heard that advice before, it is particularly pertinent now given the heavy caseload shouldered by the judges of the First District. Judge Winokur emphasizes that legal briefs submitted to the court are meant to be neither literature, nor pieces of scholarly work. Rather, they should be written so that someone unfamiliar with the particular area of the law addressed can easily grasp the issues at hand. Judge Winokur frequently reads briefs on a paper copy, though he does appreciate when hyperlinks and bookmarks are provided in electronic submissions.

On the subject of oral argument, Judge Winokur hopes to never be the kind of judge who would brow beat the parties. He grants oral argument on a case by case basis and is more likely to grant it in areas of law with which he is less familiar. With a background of handling appeals for the Attorney General's Office, he did not request oral argument often in practice and frequently opposed it. So far, oral argument has not changed his decision in a case, but it has reassured him of the position he felt inclined to take.

Judge Winokur describes his work as "a dream come true" and exactly the kind of work he was meant to do. He looks forward to many years of service from the bench.

Endnotes

1 Jennifer Shoaf Richardson is an associate in the Jacksonville office of Jackson Lewis. Her practice is devoted to representing management in workplace law related litigation from trial through appeal.

Appellate CPR:
Resuscitating Your Family Law Case on Appeal Without a Transcript

By Michael M. Giel

You're holding a final judgment peppered with errors. Maybe the court awarded certain relief without making statutorily required findings. Or some of the findings aren't supported by the evidence and trial testimony. Perhaps the order adopted a magistrate's report that misconceived the legal effect of the evidence. The case is ripe for appeal.

Or it should be. If only someone had paid a court reporter to attend the final hearing! But there's no transcript; so much for your array of promising arguments.

Except you still may have an arsenal of challenges. Before you start drafting a motion for rehearing or try to construct a Rule 9.200(b)(4) statement of the proceedings,[1] consider the kinds of issues that an appellate court may address despite the lack of a transcript.

This article outlines various circumstances in which courts have reversed judgments at least in part despite failures to supply transcripts. It's not deep or exhaustive, and it's not an endorsement for leaving your favorite court reporter at home for your final hearing. But it highlights some of the factors and patterns to look for when considering an appeal with an incomplete record.

The Big *Applegate*: The Case Citation an Appellant Doesn't Want to See

The bane of litigants who fail to have their hearings transcribed is *Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150 (Fla. 1979). There, the Florida Supreme Court held that, without a transcript, an appellant could not prove that the trial court incorrectly resolved questions of fact in reaching its decision. The holding rested on four bedrock principles:

- The appellate court presumes the trial court's decision was correct.
- The appellant bears the burden of proving the trial court erred.
- Even if the trial court's reasoning is wrong, its decision will usually be affirmed if the evidence or another theory supports it.
- Without a transcript, an appellate court can't tell if (1) the trial court's resolution of the facts was incorrect, (2) its decision is supported by the evidence or an alternative theory, or (3) the trial court so misconceived a principle of law that reversal is required.

Applegate analysis turns primarily on whether the untranscribed hearing was an evidentiary one in which the court resolved contested facts. If a hearing is non-evidentiary and turns only on legal argument, then the lack of a transcript won't necessarily hamstring appellate review.[2]

Of course, virtually every significant hearing in a family law case is at least partly evidentiary. But you're not necessarily out of luck. When you peruse the final judgment, look for errors on the face of the judgment or misconceptions of controlling principles of law like those below.

Challenging Equitable Distribution is Difficult, But Possible

It is hard to challenge the equitable distribution in a final judgment without a transcript. The incomplete record frustrates an appellate court's ability to determine whether there was a sufficient factual basis for the distribution. What's more, no transcript means that the appellant often can't establish that any error that occurred was harmful or caused a miscarriage of justice.

That said, case law reveals several avenues of attack that have convinced appellate courts that error occurred on the face of the judgment.

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Here are some questions to ask.

• Did the judgment fail to identify or distribute certain assets?

The failure to make specific findings of fact identifying the parties' marital and nonmarital assets pursuant to Section 61.075(3) may constitute error on the face of the judgment.[3] So may an order that identifies the assets, but fails to direct the disposition of some of them.[4] Finally, a judgment declining to value or distribute certain assets until several years after dissolution may justify reversal.[5]

• Did the judgment fail to value all, or certain, assets?

Such an argument faces worse odds on appeal. Where an asset is distributed equally but not valued, the court may conclude that the lack of a transcript precludes review.[6] It may affirm even where the judgment fails to value indisputably significant assets, because the incomplete record could make it impossible for the appellant to establish that any error was harmful.[7]

But some cases support reversal even without a transcript for failure to make findings regarding the values of marital assets. For instance, if none of the marital assets are valued at all, the appellate court may remand for findings regarding their values.[8] So too if there are no specific findings regarding marital assets or liabilities,[9] though a court remanding for necessary findings may affirm, based on the lack of a transcript, findings that certain assets were marital.[10] Your odds of a successful challenge improve if the record shows that, despite the failure to make findings on value, there was considerable evidence regarding value presented.[11]

• Did the judgment order an unequal distribution?

This is a more promising basis for appeal. Notwithstanding the difficulties in attacking an equitable distribution award without a transcript, appellate courts often reverse where there has been a substantially unequal distribution unsupported by findings to justify it, especially where the obligations resulting from the judgment leave one spouse with practically no resources to support himself.[12] Additionally, if the final judgment shows the court intended an equal distribution, but contains an error causing an unequal distribution, then the appellate court may remand for correction.[13]

• Is exclusive use and possession of an asset an issue?

The treatment of exclusive use where there is no transcript is somewhat inconsistent. Courts reversing such awards have held, for example, that an award of exclusive use and possession of the marital home—which does not contain within the judgment the reasons or time period for the award—can require remand.[14] Similarly, the court may reverse an award of exclusive possession until the spouse's death or remarriage if the record does not reflect a special purpose justifying the award – even if the trial court made such an award as permanent alimony.[15]

But another court held that, where the final judgment awards exclusive possession, the court would not hold that the award is precluded because, among other reasons, "without having a transcript of the trial proceedings, it cannot be determined whether the issue was in fact tried with the express or implied consent of the parties."[16] The lack of a transcript similarly required affirming where an order required the former wife and parties' child to move out of the marital home, even though the appellate court expressed confusion about why the trial court reached that conclusion.[17] Conversely, another court later considered a similar provision—one that would require the wife and child to vacate the home on the child's 17th birthday—and wrote at length why such a provision required remand and further testimony despite the lack of a transcript.[18]

In short, it's challenging to successfully appeal an award of exclusive use and possession without a transcript, but it has been and can be done.

• Are there any unanswered questions arising from the equitable distribution?

There are several other reasons why a court may remand an equitable distribution award.

Are there arithmetical errors in the judgment? Double-counting assets may justify reversal.[19]

Does the judgment purport to reallocate property rights settled in a previous final judgment or mediated agreement? In a modification proceeding, the trial court may not redetermine and restructure property rights previously settled through equitable distribution in the underlying final judgment.[20] An order impermissibly modifying a mediated settlement agreement may justify reversal.[21] So too if the parties agreed to a temporary property/asset settlement agreement in which they agreed a property would be sold and the proceeds split, but the trial court for unknown reasons awarded one party exclusive use and possession.[22]

Does the judgment grant relief neither party pled for? A court may reverse a judgment ordering the partition and sale of the marital home if neither party requested that relief.[23] Some courts conclude, even absent a transcript, that an appellant is denied due process where no pleading raised the issue that the court adjudicated.[24] On the other hand, a court may decline to reject a challenge on that basis because, among other reasons, "without having a transcript of the trial proceedings, it cannot be determined whether the issue was in fact tried with the express or implied consent

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of the parties."[25] A similar argument can be made that the lack of a transcript should preclude reversal if the court cannot determine whether an issue was preserved.[26]

Are there critical unanswered questions in the final judgment? A judgment providing that the parties will cooperate to sell the marital home and split the proceeds may remand for clarification if there are unanswered questions such as (a) who will pay for homeowners' association fees, the mortgage, insurance, and taxes, or (b) what happens if the home doesn't sell.[27]

Does the equitable distribution create the possibility for post-judgment confusion? For example, where a judgment divvies up one spouse's retirement pay—which is subject to an annual cost-of-living adjustment—the court may reverse where the judgment uses specific dollar amounts that could cause confusion about how annual increases will be calculated in the future.[28]

Challenging the failure to make requisite findings as to equitable distribution is grueling without a transcript.[29] But it's worth the effort if you have colorable grounds: reversal on equitable distribution may justify reexamination of all other financial aspects of a financial judgment.[30]

Child Support: The Crux of Your Appeal

The majority of recent opinions describing successful appeals without transcripts deal with child support and, to a much lesser extent, alimony awards. Child support is a right belonging to the child, cannot be waived, and is governed by fairly clear statutory guidelines. For these reasons, courts appear less reluctant to find error on the face of the judgment concerning child support.

• Does the combined award leave the obligor with virtually nothing?

Awards that take most of the obligor's net income can require reversal even without a transcript.[31] The central question in such cases is whether the alimony and child support awards leave the obligor without the means to support himself.[32] But even if you think the answer is yes, you don't necessarily have a win. If the judgment reflects that the court believed a party was earning more than the income imputed to him "and based the financial award on that belief," then the appellate court may hold that the lack of a transcript bars review.[33]

• Are there problems with the child support income calculations?

A final judgment that doesn't make findings as to the parties' net incomes as a starting point to calculate child support, or explain how the calculation was performed, can justify reversal without a transcript.[34] If you're challenging a judgment for this reason, remember to explain why the failure to make necessary findings harmed your client.[35]

Similarly, if the trial court fails to account for its alimony award or its allocation of retirement benefits when computing the parties' incomes for child support, then you have another promising argument.[36] Scrutinize any unusual method of determining income. For instance, if a court simply takes the value of the parties' assets and divides them by the years of marriage to arrive at an annual "income" for the breadwinning spouse, then—no surprise—the appellate court will reverse without a transcript.[37]

Look for impermissible deductions from a party's income. For example, though court-ordered child support for other children that is actually paid is an allowable deduction from gross income when calculating child support, the court may reverse if the worksheets show that the magistrate or court deducted support paid for children who weren't subject to a prior support action.[38]

Nevertheless, the lack of a transcript can still hurt your appeal of the income determination. If the judgment and record reflect that the trial court relied on appellee's representation of appellant's income, then the lack of transcript can be cited as a basis to affirm.[39] A missing transcript may present the same problem in an imputed income case. The failure to make specific findings of fact regarding the amount and source of imputed income won't necessarily justify reversal if the judgment indicates that imputation was based on record evidence and trial testimony.[40]

Even so, income calculations demand a close look. This article already mentioned that, even if the incomplete record initially hamstrings review, a reversal on equitable distribution can lead to reconsideration of the alimony and child support awards.[41] So too for reversals of income findings or calculations: the trial court may often revisit its alimony and child support awards after correctly recalculating income.[42]

• Are other child support expenses miscalculated or ignored?

Child support awards meriting reversal without a transcript often involve improperly allocating, or ignoring altogether, other child support expenses. Does the judgment:

(1) Fail to address health care coverage, child care costs, or noncovered medical, dental, and prescription medication costs?[43]

(2) Ignore travel expenses associated with visitation?[44]

(3) Provide for child care costs to be split evenly rather than being reduced and added to the basic obligation under Section 61.30(7)?[45]

(4) Split evenly noncovered medical, dental, and prescription medication costs when appropriate factual findings would've resulted in an unequal percentage share

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of child support?[46]

(5) Misallocate health insurance expenses or credit for uncovered medical expenses?[47]

Recent opinions have reversed child support awards despite incomplete records where such errors appeared on the face of the judgment.

• Does the child support award reflect other miscalculations or discrepancies?

In similar fashion, courts have reversed where other inconsistencies or miscalculations appear in the judgment. One example is where there are conflicting amounts of child support due in different paragraphs of the final judgment.[48] Another is where an order specifically finds that overpayment of support has occurred, but fails to appropriately credit against arrearages the correct amount of overpayment.[49] Likewise if the parenting plan and child support guidelines attached to the final judgment contain conflicting numbers for the parties' overnights, but the discrepancy is not explained in the final judgment.[50] And if a trial court orders makeup visitation, reversal may be necessary where the judgment fails to adjust the child support obligation for the months in which the makeup visitation is to occur.[51]

Similar errors can creep into a judgment after rehearing. For instance, where a court grants rehearing for the purpose of recalculating child support payments based on an apparent miscalculation of a party's gross income, but the record does not show that the child support was recalculated to comport with an amended schedule that the court directed to be submitted, then the appellate court may remand for the court to address that issue.[52]

• Does the child support award deviate from the presumptive guideline amount?

A judgment that inexplicably requires a spouse to pay substantially more than the presumptive guidelines child support amount may justify reversal without a transcript.[53] And an upward deviation may be reversed even if the judgment purports to justify the deviation by referencing the "added expenses of the minor child."[54]

On the other hand, the incomplete record may cripple the odds of overturning the trial court's decision not to deviate upward from a guidelines support award.[55]

• Are you challenging the ruling on retroactivity?

The lack of a transcript can be similarly fatal to challenges of retroactivity rulings. If a party doesn't request support retroactive to the date of filing in his petition or motion for rehearing, and there's no transcript of the final hearing, the appellate court may hold there's insufficient record support to conclude the parent established need and ability to pay retroactive support.[56]

• Does the order require the provision of insurance without necessary findings?

Some cases have held that, despite the lack of transcripts, it is error to (1) order a spouse to provide for the other spouse's and children's health insurance absent a finding that such health insurance is reasonably available,[57] or (2) require life insurance where there are no findings of availability and reasonable cost.[58] Note that there is some tension between such rulings and the principle that, given the lack of a transcript, it's possible that the court heard evidence and made the required findings during the final hearing. Appellee in such a case should argue that, given the incomplete record, appellant can't establish harmful error or a miscarriage of justice.

• Does the support award contain any particularly unusual requirements?

Look for particularly onerous or uncommon requirements that are ordered as part of the support award. One example: a judgment ordering the designation of a child as a beneficiary in a parent's will and providing that child support shall be an obligation of the estate—and therefore won't cease with the obligor's death—will justify reversal.[59]

• Is there a plausible explanation for how the trial court reached its decision?

You likely can't prove error on the face of the judgment if there's a plausible explanation for the trial court's conclusion at the hearing. For instance, the Fourth District affirmed a recalculation of child support where the magistrate had calculated a certain figure after disregarding the former husband's claim he would no longer enjoy overtime, but the trial court used a lower income calculation that assumed no overtime. Because the trial court could have found that the magistrate misconceived the effect of former husband's testimony—that overtime would rarely occur in the future—it could have relied properly on a lower amount assuming no overtime.[60]

Note the tension, however, between that result and a different one from the Second District in a paternity case. There, the DCA concluded that—given the statement of the evidence and the mother's failure to argue that evidence presented at the hearing supported the court's conclusion—there was no competent, substantial evidence for the finding of the father's income.[61] This focus on the mother's failure to argue about evidence at the hearing is noteworthy. That, and similar language in other cases highlighting appellees' failures to argue that evidence at hearing supported the judgments, implies an appellee may need to address evidence at the hearing – despite the admonition against referring to matters outside the record.

Alimony: The Tougher Challenge

Attacking a decision on alimony

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is much more difficult without a transcript. Here, trial courts enjoy considerable discretion, and appellate courts are understandably reluctant to conclude that discretion was abused without a transcript.

Unlike the child support discussion above, an argument that the court failed to make required findings to support an alimony award is more likely to end with the appellate court concluding that your failure to provide a transcript makes it impossible to show harmful error.[62] And forget challenging the award if the judgment reflects consideration of most Section 61.08 factors.[63]

Since the First District's 2001 decision in *Klette* and Second District's 2007 decision in *Esaw*, courts are increasingly inclined to affirm alimony awards on the basis that no transcript means it's impossible to examine whether an alimony error was harmless.[64] This is so even where the final judgment fails to address alimony at all. Even where alimony was requested, the court may hold the lack of transcript bars review because it can't tell if the party presented evidence regarding alimony at the final hearing.[65]

• Does the order's alimony discussion show the court applied the wrong legal standard?

Nevertheless, language within the judgment that shows the trial court used the wrong standard to decide alimony may permit reversal. For instance, the Second District reversed an order denying permanent alimony after a long-term marriage because the wife had not proved entitlement by clear and convincing evidence – the burden of proof for a moderate-duration marriage.[66] The same DCA found error on the face of another judgment where the order denied rehabilitative alimony because "[t]he Wife [was] not entitled to an award of alimony for a 10 year marriage."[67]

Several pre-*Klette* cases reversed alimony rulings despite the lack of transcripts on the basis of technical errors. One concluded it was error to order rehabilitative alimony where there was no rehabilitative plan presented and the judgment on its face ordered rehabilitative alimony for non-rehabilitative purposes.[68] It also held it was erroneous to award permanent alimony without providing that such alimony terminates on the obligee's death or remarriage.[69] Another opinion reversed a lump sum alimony award where there were no findings of fact that showed unusual circumstances that would make the award reasonable.[70] And a third overturned a provision establishing an automatic alimony increase after child support ended where the judgment lacked findings

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to show extenuating circumstances justifying an automatic increase.[71]

A trial court's decision to put off a decision on permanent periodic alimony may also invite reversal. If the court finds that a spouse is entitled to permanent alimony that the other spouse cannot pay at the time, but it reserves jurisdiction for only two years to set alimony rather than awarding nominal alimony, the appellate court may reverse.[72]

Of course, the court won't necessarily agree with you that the trial court applied the incorrect legal standard. In one case, a court held that the former wife failed to provide enough evidence that she could not work and imputed $1000 monthly income for purposes of calculating need for alimony. She argued on appeal that the judgment improperly shifted the burden because the former husband bore the burden to prove that she was voluntarily underemployed. The Second District disagreed: the judgment reflected the conclusion that the former wife hadn't adequately presented evidence of need. Without a transcript, it wouldn't conclude that error occurred.[73]

• Do the judgment's factual findings or the record otherwise support your challenge?

For the best chance to prevail without a transcript on an alimony issue, scrutinize the judgment's factual findings and the facts within the record. They may offer the best grounds to convince the appellate court that a judgment is erroneous on its face.

Take the Fourth District's *Wofford* opinion. There, despite (1) the lack of a transcript, (2) the fact that the marriage was of moderate duration, and (3) the wide discretion afforded a trial court on alimony determinations, the appellate court held that it was error on the face of the judgment to award only bridge-the-gap alimony and deny permanent periodic alimony. On remand, the trial court was instructed to award either permanent or rehabilitative alimony.[74]

Or consider the Second District's decision in *Boone*. There, the court reversed an order denying modification of alimony to a nominal amount where (1) the judgment failed to contain specific findings regarding one spouse's ability to pay and the other spouse's need, and (2) the financial affidavits showed the obligor lacked ability to pay and the obligee didn't need alimony.[75]

It's more difficult to challenge an alimony determination without a transcript than it is to attack a child support award, but it remains possible. (It's too early to say, but if Florida eventually passes some version of the of the alimony bill that the legislature passed but the governor vetoed, it's possible that attacking an alimony determination without a transcript could become somewhat easier.)

Parental Responsibility, Timesharing, and Visitation: More Mixed Results

Florida's public policy emphasizing the importance of frequent, continuing contact between a parent and her children makes it somewhat more likely that an appeal challenging a provision contrary to that policy can succeed without a transcript.

Provisions that strike you as extraordinary may offer grounds for reversal. Absent extreme circumstances, a court will likely overturn a provision that (1) holds a parent waives visitation if he's 20 minutes late to pick up his child, (2) denies overnight visitation unless there's a spare bedroom for the child, or (3) denies special visitation on the holidays.[76] Similarly, an order suspending visitation, absent a substantial change of circumstances and a finding that the child's welfare would be promoted by suspension, invites reversal.[77]

The court may not delegate to a third party its responsibility to determine and establish custody and visitation in accordance with the children's best interests.[78] Nor may it essentially grant to a party the right to seek modification in the future without a judicial finding of a substantial change. Accordingly, an appellate court may reverse a provision holding that a parent need not establish a substantial change to seek modification of visitation in the future,[79] or a provision purporting to grant one party the right to seek modification of child support at her discretion.[80]

An order changing primary residential custody, though neither parent requested a change, may justify reversal despite a lack of transcript.[81] Courts have also reversed orders modifying timesharing where the trial court did not found, and factual findings did not support, a substantial change of circumstances,[82] especially where the other parent did not allege a change.[83]

Again, what you and the appellate court believe to be legal error may differ. One common example? Best interest findings concerning majority timesharing. If the court finds that the children's best interests are served by one parent's majority timesharing, specific written findings are unnecessary, and the missing transcript can derail a challenge to the ruling's evidentiary basis.[84] In another modification case, the lack of transcript was similarly fatal; the court couldn't determine if the trial court made any best interest findings during the trial.[85]

Even so, depending on the judgment's findings, a court may conclude that a modification of timesharing may be reversed even without a transcript if "it is clear from the record that no findings regarding the child's best interests were made at the hearing."[86] But it must be clear. Even where the appellate court strongly suggests a par-

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enting plan was incorrectly decided and lacked evidentiary support, it may conclude it can't "conduct a meaningful review in the absence of a transcript [and is] unable to determine from the face of the judgment that the trial court abused its discretion when it decided on the parties' parenting plan and time-sharing schedule."[87]

The failure to provide a transcript may not prevent the appellate court from remanding, however, to address conflicting provisions in a judgment or an overlooked key issue regarding parental responsibility. For example, if a final judgment and statement of evidence conflict about the amount of a parent's makeup visitation, the court may reverse for the trial court to correct the final judgment to conform with its statement of evidence.[88] Additionally, where one parent sought sole parental responsibility, and the final judgment does not address the issue of sole or shared parental responsibility, the court may remand for clarification.[89]

Don't Forget Attorneys' Fees

If the final judgment fails to include findings to justify a fee award, then the appellate court may remand for the necessary findings.[90] It could go even further if the factual findings undermine the ruling on attorneys' fees; thus, if the findings clearly show one party's need and the other party's ability to pay, the court may reverse the denial of fees to the party in need.[91]

Oddly enough, an appellant can be worse off if the judgment does not address attorneys' fees at all. Then the appellate court may hold that the lack of transcript bars review because it can't determine if the party requested and presented evidence on attorneys' fees at the final hearing.[92] That changes, though, if the court can determine from the record that no attorney was called at the hearing and the fees affidavit was not submitted until the date of the final judgment – which means appellant had no opportunity to challenge the hours and rate.[93]

If you're claiming on appeal that the court erred with respect to a party's income, then you should also seek reversal of any fee award that was based at least in part on the finding of your client's ability to pay.[94] And reversal on other grounds may justify reconsideration of any rulings on attorneys' fees once the trial court addresses the issues that merited remand.[95]

Conclusion

If you don't have a transcript, spend extra time examining your judgment, its factual findings, and the record as it stands to best craft a compelling argument on appeal. Ensure you argue why the error harmed your client. Sure, you're at a disadvantage. But cases like those above show that appellants can secure reversals notwithstanding an incomplete record.

If you're the appellee, don't just cite *Applegate* and call it a day. Hammer any failure to establish harmful error and a miscarriage of justice. Highlight any preservation issues, which are often exacerbated by the lack of a transcript. And consider offering a plausible explanation for the trial court's action that, in the absence of the transcript, precludes appellate relief.

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Endnotes

1 Problems that can arise when attempting to construct a statement of the proceedings abound. The other party will likely object. By the time a final judgment issues, the trial court may not be able to settle and approve a statement. An appellate court may conclude the statement consists largely of conclusory assertions, statements of law, or recitations from the judgment, and therefore sheds little light on the evidence presented below. Have your hearing transcribed; if it's not, assume the appellate court might disregard any statement of the proceedings you supply.

2 *Rollet v. de Bizemont*, 159 So. 3d 351, 357-58 (Fla. 3d DCA 2015).

3 *Chestnutt v. Chestnutt*, 752 So. 2d 1287, 1288 (Fla. 2d DCA 2000).

4 *Aguirre v. Aguirre*, 985 So. 2d 1203, 1207 (Fla. 4th DCA 2008).

5 *Silverman v. Silverman*, 940 So. 2d 615, 616-17 (Fla. 2d DCA 2006).

6 *Aguirre*, 985 at 1207 (concluding there was no way to tell without a transcript whether parties introduced evidence about valuation of life insurance proceeds); *cf. Whelan v. Whelan*, 736 So. 2d 732, 733 (Fla. 4th DCA 1999) (reversing apparent unequal division of assets where none of the assets were valued).

7 *Esaw v. Esaw*, 965 So. 2d 1261, 1264-65 (Fla. 2d DCA 2007).

8 *Calderon v. Calderon*, 730 So. 2d 400, 403 (Fla. 5th DCA 1999); *Whelan*, 736 So. 2d at 733.

9 *Green v. Green*, 788 So. 2d 1083, 1085 (Fla. 1st DCA 2001); *Burke v. Burke*, 864 So. 2d 1284, 1284-85 (Fla. 1st DCA 2004); *Dorsett v. Dorsett*, 902 So. 2d 947, 954-55 (Fla. 4th DCA 2005).

10 *Burke*, 864 So. 2d at 1284-85.

11 *Silverman*, 940 So. 2d at 617-18 (noting that record showed that evidence of value included loan closing statements, business bank statements, business profit and loss statements, documents prepared by a business expert, and a CPA's testimony).

12 *Marshall v. Marshall*, 953 So. 2d 23, 26-27 & n.3 (Fla. 5th DCA 2007); *see also Bright v. Bright*, 721 So. 2d 1215, 1215-16 (Fla. 1st DCA 1998) ("[W]e cannot discern from the final judgment why the trial court apparently unequally distributed the parties' two principal marital assets—the home and the former wife's pension—in a way that seems to favor the former husband. Accordingly, we vacate the portion of the final judgment which distributes those assets and remand ...."); *Porzio v. Porzio*, 760 So. 2d 1075, 1077-78 (Fla. 5th DCA 2000); *Holmes v. Holmes*, 709 So. 2d 166, 167-68 (Fla. 5th DCA 1998); *Mobley v. Mobley*, 18 So. 3d 724, 727 (Fla. 2d DCA 2009).

13 *Smith v. Smith*, 39 So. 3d 458, 459-60 (Fla. 2d DCA 2010).

14 *Sugrim v. Sugrim*, 649 So. 2d 936, 937 (Fla. 5th DCA 1995).

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15 *Marshall*, 953 So. 2d at 26.

16 *Sugrim*, 649 So. 2d at 938.

17 *Chirino v. Chirino*, 710 So. 2d 696, 697 (Fla. 2d DCA 1998).

18 *Dorsett*, 902 So. 2d at 950-52.

19 *Soto v. Soto*, 974 So. 2d 403, 404-05 (Fla. 2d DCA 2007).

20 *Encarnacion v. Encarnacion*, 877 So. 2d 960, 963-64 (Fla. 5th DCA 2004); *Klinka v. Klinka*, 959 So. 2d 383, 385-86 (Fla. 5th DCA 2007).

21 *Ferguson v. Ferguson*, 54 So. 3d 553, 556 (Fla. 3d DCA 2011) (holding court erred by voiding a paragraph of mediated settlement agreement because it was obligated to enforce the MSA as voluntarily agreed on); *Encarnacion*, 877 So. 2d at 963-64 (concluding the court "lacked jurisdiction to redetermine and restructure the settlement agreement with regard to the marital properties").

22 *Marshall v. Marshall*, 953 So. 2d 23, 26 (Fla. 5th DCA 2007).

23 *Worthen v. Worthen*, 991 So. 2d 400, 401 (Fla. 2d DCA 2008).

24 *Klinka v. Klinka*, 959 So. 2d 383, 385 (Fla. 5th DCA 2007); *see also Worthen v. Worthen*, 991 So. 2d 400, 401 (Fla. 2d DCA 2008) (reversing partition that neither party sought).

25 *Sugrim*, 649 So. 2d at 938.

26 *Banks v. Banks*, 168 So. 3d 273, 276-77 (Fla. 2d DCA 2015) (affirming where court couldn't determine if former wife preserved argument regarding whether the husband must secure her release as an obligor on the note for the marital home).

27 *Matteis v. Matteis*, 82 So. 3d 1048, 1048-49 (Fla. 4th DCA 2011).

28 *Banks*, 168 So. 3d at 276.

29 *Arias v. Arias*, 28 So. 3d 157, 157 (Fla. 2d DCA 2010).

30 *Mead v. Mead*, 726 So. 2d 865, 865-66 (Fla. 1st DCA 1999).

31 *Casella v. Casella*, 569 So. 2d 848, 849 (Fla. 4th DCA 1990) (reversing on the face of the judgment where the alimony and child support award constituted about 70% of the former husband's net income); *Dennison v. Dennison*, 852 So. 2d 422, 423-24 (Fla. 5th DCA 2003) (reversing where alimony and child support consumed 83% of former husband's monthly income); *Ballesteros v. Ballesteros*, 819 So. 2d 902, 902-04 (Fla. 4th DCA 2002) (reversing alimony award where alimony and child support constituted about 60% of income and left former husband without the means to support himself); *Calderon*, 730 So. 2d at 401-02 (reversing where monthly alimony, child support, mortgage payment, and attorneys' fees exceeded what the court found to be his net income).

32 *Ballesteros*, 819 So. 2d at 902-04.

33 *Guirgis v. Guirgis*, 46 So. 3d 156, 157 (Fla. 2d DCA 2010); *see also Todd v. Guillaume-Todd*, 972 So. 2d 1003, 1007 (Fla. 4th DCA 2008) (holding lack of transcript barred argument appellant would have less than $400 monthly to live on after support, especially where judgment suggested his income exceeded that on his financial affidavit).

34 *Todd*, 972 So. 2d at 1007; *Whittingham v. Whittingham*, 67 So. 3d 239, 239-40 (Fla. 2d DCA 2010); *Wilcox v. Munoz*, 35 So. 3d 136, 139 (Fla. 2d DCA 2010); *Aguirre*, 985 So. 2d at 1207; *Hindle v. Fuith*, 33 So. 3d 782, 785-86 (Fla. 5th DCA 2010).

35 *Wilcox*, 35 So. 3d at 140 & n.1.

36 *Calderon*, 730 So. 2d at 402; *Swanston v. Swanston*, 746 So. 2d 566, 569 (Fla. 1st DCA 1999); *Green*, 788 So. 2d at 1085.

37 *Soto*, 974 So. 2d at 404-05.

38 *Henderson v. Henderson*, 905 So. 2d 901, 903-04 (Fla. 2d DCA 2005).

39 *Green*, 788 So. 2d at 1085.

40 *Porzio*, 760 So. 2d at 1077.

41 *Silverman*, 940 So. 2d at 619.

42 *Soto*, 974 So. 2d at 405.

43 *Whittingham*, 67 So. 3d at 240; *C.J.E. v. S.D.A.*, 79 So. 3d 229, 229-30 (Fla. 2d DCA 2012).

44 *Hindle*, 33 So. 3d at 786-87.

45 *Wilcox*, 35 So. 3d at 140.

46 *Id.* at 140-41.

47 *Rushetsky v. Rushetsky*, 74 So. 3d 592, 592 (Fla. 4th DCA 2011); *Todd*, 972 So. 2d at 1006.

48 *Chetram v. Singh*, 984 So. 2d 614, 616 (Fla. 5th DCA 2008).

49 *Id.*

50 *Quinn v. Quinn*, 169 So. 3d 268, 270-71 (Fla. 2d DCA 2015).

51 *Galasso v. Gargione*, 40 So. 3d 14, 16-17 (Fla. 2d DCA 2010).

52 *Smith*, 39 So. 3d at 460.

53 *Mead*, 726 So. 2d at 865.

54 *Swanston*, 746 So. 2d at 568-70.

55 *Silverman*, 940 So. 2d at 618-19.

56 *Wilcox*, 35 So. 3d at 141 (holding, however, that in light of remand on other child support issues, the trial court could address retroactive modification if the former husband had requested a retroactive award).

57 *Calderon*, 730 So. 2d at 402; *Porzio*, 760 So. 2d at 1077.

58 *Ross v. Botha*, 867 So. 2d 567, 570-71 (Fla. 4th DCA 2004); *Burnham v. Burnham*, 884 So. 2d 390, 392 (Fla. 2d DCA 2004).

59 *Burnham*, 884 So. 2d at 393.

60 *Randazzo v. Randazzo*, 89 So. 3d 984, 985-86 (Fla. 4th DCA 2012).

61 *Galasso*, 40 So. 3d at 16-17.

62 *Esaw*, 965 So. 2d at 1265; *Wilcox*, 35 So. 3d at 139-40; *Worthen v. Worthen*, 991 So. 2d 400, 401 (Fla. 2d DCA 2008); *Lewis v. Lewis*, 807 So. 2d 777, 777-78 (Fla. 1st DCA 2002); *Arias*, 28 So. 3d at 157; *Green*, 788 So. 2d at 1085.

63 *Dennison*, 852 So. 2d at 424.

64 *Klette v. Klette*, 785 So. 2d 562, 563-64 (Fla. 1st DCA 2001); *Esaw*, 965 So. 2d at 1265. Indeed, one pre-*Klette* case held that the failure to make findings of fact related to alimony justified reversal even without a transcript, but has since been distinguished on the basis that other inconsistencies in that judgment showed alimony wasn't appropriate. *Compare Swanston*, 746 So. 2d at 567-68, *with Lewis v. Lewis*, 807 So. 2d 777, 778 (Fla. 1st DCA 2002); nevertheless, *Swanston* continues to be cited. *See Gray v. Gray*, 103 So. 3d 962, 966 (Fla. 1st DCA 2012).

65 *Aguirre*, 985 So. 2d at 1206.

66 *Banks*, 168 So. 3d at 275-76.

67 *Mobley*, 18 So. 3d at 727-28.

68 *Calderon*, 730 So. 2d at 402-03.

69 *Id.* at 403.

70 *Porzio*, 760 So. 2d at 1077.

71 *Swanston*, 746 So. 2d at 568.

72 *Schmidt v. Schmidt*, 997 So. 2d 451, 453-54 (Fla. 2d DCA 2008).

73 *Esaw*, 965 So. 2d at 1266-67.

74 *Wofford v. Wofford*, 20 So. 3d 470, 474-76 (Fla. 4th DCA 2009).

75 *Boone v. Boone*, 3 So. 3d 403, 404-05 (Fla. 2d DCA 2009).

76 *Larocka v. Larocka*, 43 So. 3d 911, 912-13 (Fla. 5th DCA 2010).

77 *Ross*, 867 So. 2d at 571.

78 *Larocka*, 43 So. 3d at 912-13.

79 *Henderson*, 905 So. 2d at 904-05.

80 *Chetram*, 984 So. 2d at 616.

81 *Hunter v. Hunter*, 65 So. 3d 1213, 1215 (Fla. 2d DCA 2011).

82 *Kilgore v. Kilgore*, 729 So. 2d 402, 406-07 (Fla. 1st DCA 1998).

83 *Bartolotta v. Bartolotta*, 687 So. 2d 1385, 1387-88 (Fla. 4th DCA 1997).

84 *Aguirre*, 985 So. 2d at 1206; *Hindle*, 33 So. 3d at 785; *Alday v. Gleason*, 853 So. 2d 1105, 1106 (Fla. 5th DCA 2003); *Burnham*, 884 So. 2d at 391-92.

85 *Alday*, 853 So. 2d at 1106.

86 *Clark v. Clark*, 825 So. 2d 1016, 1017-18 (Fla. 1st DCA 2002).

87 *Smith*, 39 So. 3d at 460-61.

88 *Galasso*, 40 So. 3d at 16.

89 *Aguirre*, 985 So. 2d at 1206.

90 *Van Epps v. Hartzell*, 934 So. 2d 590, 592 (Fla. 5th DCA 2006); *R.M.F. v. D.C.*, 55 So. 3d 684, 684 (Fla. 2d DCA 2011); *Chestnutt*, 752 So. 2d at 1288; *Porzio*, 760 So. 2d at 1077; *Burnham*, 884 So. 2d at 392 (remanding as to amount); *Macarty v. Macarty*, 29 So. 3d 434, 435 (Fla. 2d DCA 2010).

91 *Wofford*, 20 So. 3d at 476 (Fla. 4th DCA 2009).

92 *Aguirre*, 985 So. 2d at 1206.

93 *Calderon*, 730 So. 2d at 403.

94 *Galasso*, 40 So. 3d at 17; *Ballesteros*, 819 So. 2d at 903-04.

95 *Silverman*, 940 So. 2d at 619.

The Effect of Bankruptcy Stay on a Subsequently Filed Appeal

By: Heather M. Kolinsky

The Second District Court of Appeal recently reiterated that an automatic stay in bankruptcy, 11 U.S.C. § 362(a)(1) (2012), renders a subsequently filed notice of appeal in a related state proceeding void and acknowledged that there currently is no state procedural rule that addresses the jurisdictional defect that arises with respect to preserving the right to appeal beyond termination or relief from the automatic stay. *Hewett v. Wells Fargo Bank, N.A.*, 41 Fla. L. Weekly D 1280, 2016 Fla. App. LEXIS 8267 (Fla. 2d DCA June 1, 2016).

The Court found that the provisions in 11 U.S.C. § 108(c) for extended, substitute deadlines in civil actions, once an automatic stay expired or was terminated, were likely inapplicable to state judicial procedures within state court appellate proceedings based on traditional conflicts of law principles. The result, the Court noted, was "an appellate rule that does not speak about bankruptcy and a bankruptcy statute that may not be able to speak to our appellate rules." The Court commended the issue to the Appellate Court Rules Committee for consideration after acknowledging the Court did not possess the power to resolve the issue presented by its holding.

In *Hewett*, Philip Hewett, the debtor, timely sought appellate review of a Final Judgment of Foreclosure in favor of Wells Fargo Bank. However, five days prior to filing his Notice of Appeal, Hewett had filed a petition in bankruptcy. Hewett did not seek relief from the stay prior to filing his Notice of Appeal. Wells Fargo filed a Motion to Dismiss Hewett's appeal based on the automatic stay.

The Court found that because a notice of appeal is a continuation of a judicial proceeding, and because the Bankruptcy Code prohibited the continuation of a judicial proceeding during an automatic stay, Hewett's Notice of Appeal was void.[1] While acknowledging the practical problem this created for appellants, the Court was hard-pressed to find a way to resolve the problem based on existing law and procedure.

The Bankruptcy Code provides for extended, substituted deadlines after an automatic stay has expired or been terminated pursuant to 11 U.S.C. § 108(c) that could arguably provide appellants guidance in such circumstances.[2] But, the Court found that it was unlikely that the statute would reach state judicial procedures within state court proceedings when considered under traditional conflicts of law principles.

Further recognizing that it did not have authority to simply adopt the provisions of section 108(c) to resolve the issue, the Court commended the matter to the Appellate Rules Committee for consideration of the addition of a new or amended rule of appellate procedure incorporating 11 U.S.C. § 108(c) or another tolling period that explicitly addresses the effect of an automatic stay in bankruptcy on the filing of a notice of appeal. As it stands now, where a bankruptcy petition has been filed and no appeal is pending, a potential appellant would be unable to seek appellate review unless the party first obtained relief from the automatic stay under the Bankruptcy Code.[3]

Endnotes

1 The Court observed that the notice was not voidable because voidability would "in essence, give some effect to a filing that cannot have effect."

2 11 U.S.C. §108(c) provides, in pertinent part, that if a "period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor" . . . has not expired prior to the filing of the bankruptcy petition, "then such period does not expire until the later of – (1) the end of such period, including any suspension of such period occurring on or after commencement of the case; or (2) 30 days after notice of the termination or expiration of the stay under section 362 . . . with respect to such claim."

3 For a broader discussion of the potential impact of bankruptcy filings on pending appellate proceedings, see Judge Douglas A. Wallace's article, *The Impact of a Bankruptcy Filing on a Pending Appellate Proceeding*, The Florida Bar Journal, Vol. 87, No. 3 (Mar. 2013).