INTRODUCTION

Family law is the law of human sexual behavior and reproduction, and the complicated relationships that grow around these activities. More than any other field, family is the law of the people, second only to traffic as the most likely reason a person would visit the local courthouse. There were 342,784 initial trial-level filings[1] in Florida family courts in fiscal year 2007-08. About one Florida citizen out of every 22 becomes involved in a family law case each year. Like traffic court, almost everyone is involved in activity that could potentially land them in family court, but unlike traffic court, there is more at stake than paying a ticket.

Marriage is the traditional way to structure the mutual interdependence that child rearing usually requires, so family law defines what makes a valid marriage, and what the legal consequences of an intact marriage are. It also defines the rights and liabilities of the parties in the event of divorce. The most important among these are the custody arrangements for children, whose interests are often overlooked by warring parents.

When married or unmarried persons live apart after reproducing, they are prone to disagree about how to share their child, and some are so childish that they use the children as weapons in the conflict. Protecting children from this form of abuse is a principle aim of family law, reflected in the progressive efforts by courts and legislature to defuse the conflict, evolving from the traditional "custody" model to the shared custody law of 1982, and then to the modern era of shared parenting under a parenting plan.

Under current law, child custody disputes are determined the same way whether the parents are married, divorced, or never married. The word "custody," which historically was much like ownership, is no longer used. A parenting plan allocates responsibilities and the the time with the child. Child support is determined according to an intricate, but dependable, statutory formula.

Family law also provides a process by which persons can become parents of a child not born to them (adoption), or can become temporary guardians of such a child. It even provides a process for protecting children when the parents are unable or unwilling. Doing all of this, while preserving the flexibility to

[1] An additional 351,381 filings reopening existing cases occurred during 2008. Florida State Courts Summary Reporting System, http://trialstats.flcourts.org/TrialCourtStats.aspx .

tailor the result of each case to its particular circumstances, has required the construction and maintenance of a large, intricate system with many moving parts.

No field of law is more worthy of a coherent, consistent body of law that can be delivered at a reasonable price within a reasonable time. And in no field is it harder to accomplish that. Florida is far ahead of most other states in developing sensible family law for modern realities. But there is still considerable room for improvement.

For the most part, family law is about two things: protecting children from adult problems, and allocating financial responsibilities. As described at length in the preface, family law does not try to regulate primary human behavior. It does not try to stop people form marrying, divorcing or procreating. Instead, it reckons the consequences of those choices, accepting that the choices will be made for reasons exogenous to the legal system. As a result, the family law structure must cope with a much more diverse range of situations than any other field of law. This has led the legislature to choose flexibility over determinacy. In practice, this means the statutory provisions are almost all procedural, leaving the establishment of substantive rules to the appellate courts.

This treatise is focused on the substantive family law of Florida, which makes its central observation somewhat ironic: most of the statutory family law is procedural, not substantive. Even when there are relatively deterministic rules set up in the legislation, they are couched in terms of "rebuttable presumptions."

The manuscript was constructed according to the model of the ancient substantive treatises, attempting first to restate existing law, providing synthesis where necessary, and in some instances to question it. Accordingly, this book is fundamentally different from the other available secondary materials in Florida Family law. It is designed to describe what the law is—and in some places what it could be—rather than directly instruct how it should be practiced. It teaches how to analyze a set of facts under the law, and provides enough citations to get research well started on each subtopic.

There are several existing compilations that could be described as practice manuals, with forms, practice pointers, and extensive discussion of procedure. The Continuing Legal Education publications of the Florida Bar, in particular, are excellent collections of essays on various topics by leading practitioners and judges. The same is true of the certification review course materials published by the Bar. The looseleaf set by respected family law Attorney Brenda Abrams is also in part a collection of treatments written by various distinguished contributors. Judge Goldenberg's two-volume set receives high marks from practitioners. It does not

suffer from the gaps and overlaps that are inevitable when each chapter is written by a different author, and it contains extensive practical instruction based on experience from both sides of the bench.

All of the practice manuals are, however, multi-volume hardbound sets that are not easily portable. Moreover, they are less concerned with the historical evolution and depth of analysis that are the hallmarks of a true substantive law treatise. This book is designed to be accessible to all legally literate readers, fit into a briefcase, and serve as a useful reference work in the office, chambers, or courtroom. It tries to be succinct and direct, to offer synthesis where necessary, and to reconcile conflicting cases where possible. It also contains considerably more commentary than other works about what the law should be, from the perspective of a lifelong student of the law, cross-trained as an economist and business school professor, looking at family law from the outside. In addition to serving as a useful introduction to family law and a general reference, this treatise identifies some of the more interesting open questions in the field, in some cases with ideas for resolving them. Of course, full professional competence in the subject will be obtained only by reading the cases themselves, but each of the substantive detail sections is intended to offer an analysis of the points on which the cases agree and disagree.

Each substantive chapter of this treatise is organized in the same way. The first section is a summary, and it provides an overview of the subject which states the general rules. It tries to be comprehensive but does not flag every exception that has been recognized in case law, and as in all aspects of the law, reliance on general principles alone is risky. The second section or series of sections is titled historical perspective, designed for the reader in search of a deeper understanding of how the law has attained its current state, essential for predicting how the law may develop in the future, perhaps even in the case at hand. It is also useful to consult the historical sections in analyzing old cases, in which the operative events occurred some time ago, since the law may have changed.

Users who need a quick answer to a particular question may skip the historical sections and refer directly to the series of sections that follow, which contain short essays on specific topics. Each of these encyclopedic sections is designed to be useful standing alone for persons already familiar with the general principles. To the extent reference to other sections is necessary for a full understanding, an effort has been made to cross-reference the sections, but is some cases the material is simply repeated in both places.

The truly difficult issue in family law, one which this volume concededly falls well short of resolving, is reconciliation of

potential conflicts in doctrines created for different purposes. For example, the law of determining parentage for purposes of child support enforcement is perpetually at odds with the law determining fatherhood for the exercise of parental rights. The two bodies were developed for different purposes without conscious coordination of their inevitable intersection. In the academic business literature, the "silo" paradigm became the prevalent description of a group of related functions that share the same goal and should be working together, but develop in isolation from one another.

There are ample cases and commentary illuminating any particular aspect of the family law, but for the most part these proceed in isolation—each in its own "silo." The result is the appearance of family law as a chaotic collection of unrelated snippets of law. The primary source of explication of family law, the appellate cases, are in their nature driven by the underlying facts, which seem infinite in their variation. As noted above, The Florida Bar produces excellent continuing education materials in family law. Each volume in that series is a series of essays by different esteemed authors, which are well done individually but result in compartmentalization of the subject matter. This treatise does employ some guest authors in areas where I have little exposure, but overall one of its main intended contributions is to begin the process of tackling the "stovepipe" or "silo" nature of the structure of family law.

The foregoing goals for this volume are aspirational, and the author makes no claim to having achieved them, especially not in this first edition. I will not claim that room for improvement has been left here deliberately, but rather would characterize it as inevitable in an undertaking of this nature. It is hoped that by the second or third edition, this treatise will be reasonably close to fulfilling the role for which it is intended. To that end, the author will be grateful for any comments, correction of errors, or suggestions for more complete treatment that any reader may be willing to share.

PREFACE

Trying to understand family law in Florida is like trying to assemble a jigsaw puzzle, with only a quarter of the pieces and no clear picture of what it is supposed to look like when complete. The statutes are lengthy and detailed but contain very little actual law, choosing instead to spell out procedure, leaving the policy decisions and hard choices to the courts. Because of the Florida appellate courts' tradition of writing explanatory opinions only when reversing, the case law is largely negative, in that it gives examples of what not to do. We may not know how the law applies to a case until it is over.

Despite the indeterminacy, it seems that the family law system functions rather well. Its core functions are accomplished, with examples of true injustice rare. Areas needing improvement are cost, complexity, and timeliness. This book was motivated by the perception that Florida Family law in general could be improved by drawing a picture of how the complete system looks when all the interlocking pieces are in place. I am quite sure the picture has not been drawn completely or with perfect accuracy in this first edition, but it is a start. Maybe it should instead be called a sketch. I hope it will encourage others to improve the picture by contributing their observations and critiques. As any academician will tell you, building models that capture the essential elements of a system or process is useful in conducting a systematic analysis.[1]

Exposition of the existing statutes and cases is necessary to determine where the law has been, and where is today. But taking snippets from cases and statutes is not sufficient: comprehending the law's underlying theory provides an advocate, judge, or other analyst a significant advantage in determining where the law will go. The legal process is at its best when the lawyers and judges evaluate each proposition in light of the policy goals that are implicated by the decision. Some laws can be arbitrary, because the only goal is to make sure everyone follows the same convention, such as driving on the right instead of the left. But in family law, every doctrine has a specific underlying reason for existing. If constructed properly, every rule in the system is intended to advance the same set of objectives. Every proposition of law urged upon a trial court or appellate court should thus have some articulable relation to the systemic context—to how it

[1] Readers familiar with the acclaimed Constitutional Law treatise of Professor Laurence Tribe will recognize the centrality of model building to making systematic analysis of bodies of law.

constitutes a valid part of the larger machine.

Sadly, this is often too much to ask. Part of the reason lies in the process of advocacy, in which the lawyer quite properly wants the court to see the law as being on his or her client's side. The reasoning process is, "I need the law to be X. Can I find a case that supports that?" The answer is most often yes, and that is the problem. Arguments that proceed by snippet—that quote isolated passages from an opinion irrespective of context—lead to conflict and confusion as surely as if that were their goal. If the courts do not reject argument by snippet—and they do not always do so—the result will be at least the appearance of confusion in the case law.

The hazard of argument (or judicial reasoning) by snippet is that the quotation is usually accurate, but it may just be wrong in the context where it is used. Consider for example, the blanket statement that trial court alimony orders are reviewed for abuse of discretion. Even though the Florida Supreme Court emphatically held thirty years ago[2] that alimony orders are reviewable for abuse of discretion only when there were no legal rules governing the point, dozens of opinions have since recited the snippet "Alimony decisions are reviewed for abuse of discretion" in cases reversing trial courts for inconsistency with announced rules of law (sometimes rules they are announcing for the first time in that case).

Interestingly, if all of the districts have recited the same contextually incorrect snippet, it becomes the new reality even though it is contrary to the Supreme court's ruling. One theme that recurs throughout this book is the author's contention that the statement of the standard of review being applied in many cases is inaccurate, that true abuses of discretion are rare, though simple error of law is all too common. One goal of this treatise is therefore to combat argument by snippet, by arming the participants with ready access to context.

Another misuse-of-language theme that will appear in several places is the prevalence of mysticism, defined the use of a word or phrase that sounds like it must have a portentous legal meaning when really its meaning is only pretentious. A phrase like res judicata actually does convey, in abbreviated form, a bundle of related concepts that encapsulate the crucial need for affording finality to judgments. But some other words used to convey crucial concepts are lacking in definition.

Mysticism is the literary equivalent of wrapping the Emperor's New Clothes around routine legal principles, dressing them up to elevate their importance and make them look like they are something greater than what they are. The author's own, perhaps

[2] Canakaris v. Canakaris, 382 So.2d 1197, 1202-03 (Fla. 1980).

also unhealthy, preoccupation with stripping the false facade of "jurisdiction" from places where it does not really belong is one example.[3] Another is our exaggeration of "due process" to numerous procedural rules that are not required by the federal constitution. Legal language should communicate its content, not the mystery and rarity of its writer's erudition.

An entirely separate set of issues in family law arises from it status as an insular specialty, growing up in its own silo, chimney, or stovepipe to use the metaphor that became prevalent in the management science literature in the 1990s. High degrees of specialization result in little cross-pollination between different specialties, so, for example, family law and criminal law might develop entirely separate approaches to similar problems that both face. Instead of continually reinventing the wheel (note the illustration by cliché, an abbreviated version of argument by snippet) family law would do well to be open to adopting practices used in other fields. In cases where they intersect—such as indirect criminal contempt—this is essential.

These are just some of the problems that make family law more difficult than outsiders would expect. It is important, however, not to let the problems obscure the bigger picture. The task facing Florida's family law system is gigantic, and viewed as a whole, Florida's family law system works remarkably well, and is far ahead of other states in many ways.

Family law is different than other law. Criminal law and general civil law are intended to regulate the conduct of the population at large—to prevent a person from stealing someone's property or driving carelessly by imposing defined undesirable consequences for that behavior. Family law is mostly about the consequences of sexual behavior, but not for the purpose of preventing it. Fortunately, it is not so naïve as to believe that is possible. Instead, family law takes it as given that things such as divorces, and out-of-wedlock births will occur, and focuses on matching the appropriate responsibilities to the participants.

There was a time when family law tried to have some broader effect on primary social behavior, making it a crime (bastardy) to father an illegitimate child and requiring specified fault-based grounds for divorce. In the modern era, however, the focus has shifted. Family law does not seek to prevent or punish divorce or birth out of wedlock; it just makes the people involved face the responsibilities they created for themselves. Family law takes a

[3] See, Stephens, Florida's Third Species of Jurisdiction, 82 Fla. Bar J. 11 (March 2008) cited in Klem v. Espejo-Norton, 983 So. 2d 1235 (Fla. 3d DCA 2008); Mannino v. Mannino, 980 So. 2d 575 (Fla. 2d DCA 2008); Johnson v. Johnson, 979 So. 2d 350 (Fla. 5th DCA 2008). See also, J.C.W. ex rel. Webb v. Wyciskalla, 275 S.W.3d 249 (Mo. 2009) ("To call a concept "jurisdictional" is to elevate its importance. The problem with a word with such magic is, sadly, that it will be over used....").

more realistic view of what it can hope to accomplish, recognizing that sexual intercourse will occur, and often between persons who have not provided for its natural consequences. Of course, civil and criminal proceedings are also intended to fix responsibility for actions, but they have other goals as well, including reparation for damages done to another person and retribution for bad behavior. They have a greater focus on providing incentives that affect the primary behavior of the populace.

All types of legal systems face the tradeoff between determinacy and flexibility. Legal systems built around the idea that there is a victim and a perpetrator need more determinacy, because the certainty of punishment is what provides the incentive to conform conduct to the law. A number of legal philosophers take the position that determinism—a close correlation between law-in-books and law-in-action—is essential to the validity of any legal system.

The absence of retribution or reparation principles in family law cases makes the legal structure different. The law's incentive effect has not constrained peoples' behavior into narrow channels, so there is a high degree of variation in the combinations of circumstances that must be addressed. Family law's effect on behavioral choices is usually of the secondary (i.e. litigation-induced) nature. Determinacy is not as crucial.

The legislative approach to family law in Florida has thus placed much more emphasis on flexibility than predictability. For many of the most important determinations—child custody, distribution of marital property, and alimony—the statutes are almost entirely procedural, leaving the policy decisions to the courts. In theory, this is accomplished by making most significant decisions matters of trial court discretion. But the appellate authorities, not comfortable with the variability that unbridled trial court discretion brings, have been pushing the law in the direction of determinacy by announcing rules of law while deciding specific cases. In a strange inversion of the democratic process, once case law becomes well settled, the legislation typically comes along later to codify it.

The author will be the first to acknowledge that policy formulation is not generally the proper role of the courts, but when the legislature has essentially delegated that function to the courts, what else could the courts do? Deciding cases for which the legislature as provided no substantive guidance inevitably reflects policy choices, whether made one case at a time by the trial court or on a broader basis by the appellate courts. Thus, if substantive rules of law are to be found, they will be found in the case law. And because family law is a large, complex system with many moving parts, case-by-case policy making incurs substantial risk of unintended consequences.

A principal conclusion of this work is that there is a remarkable degree of coherence in many family law areas that seem chaotic. It is not always obvious, but for the most part the apparent conflicts can be reconciled. The recurring codification of case law is evidence that the case law attains a degree of coherence over time that makes it possible and, according to the legislature, desirable, to memorialize and standardize it in the statute books.

The good news is that the family law system in Florida, despite its flaws and conflicts, functions reasonably well, at least for those who can afford its enormous expense. The fundamental policies expressed in the legislation, such as shared parenting and the abolition of "custody" as ownership, are laudable and even enlightened. The historic notion of family law as somehow less worthy of legal expertise than other fields has been rejected at the highest levels, and the Florida Supreme Court has paid a commendable degree of attention to family law as a system in recent decades.

There are some people so skilled at jigsaw puzzles that they do not need to look at the picture in the box. The rest of use need some idea of what the finished product is going to look like in order to make sense of how any two or three individual pieces fit together. In Florida family law, the legislation presents only the haziest picture of what the actual result will be, and the cases are the pieces we already have. What the next set of cases will be, when fact patterns not covered by existing cases arise, those are the pieces we do not have yet. Assembling the pieces we do have, and identifying some of the spurious ones that do not fit in anywhere, will improve our conception of the overall picture, and better enable us to predict the shapes and patterns of the pieces that are yet to be discovered. This treatise is not going to complete the picture, but hopefully will improve its resolution. Most importantly, it is hoped that over time criticism and other feedback from readers will permit significant advances with each new edition.