Keeping it All in the Family: Taking Financial Discovery from the New Spouse in Post-Judgment Support Cases

By Ronald H. Kauffman, Esq., Miami, FL

Bob and Sandy Simpson's marriage ended in divorce court. Did that finish the matter? No way. Bob remembered you as a good listener, and he is back in your office after getting hit with a contempt motion. Bob looks like the walking dead as he nervously hands you a hard copy of the motion. Bob tells you he's not bothered by contempt, or even getting sent to the big house, but if the subpoena is not "squashed" – he'll be six feet under. The subpoena was not served on Bob though; his new wife Nueva is the human target. The subpoena seeks information on Nueva's income and business.

These are not good times for the Simpsons. Bob earns 30-something a year from the Biz, way down from the happy days when he earned mad money flipping hot properties.[1] Bob has no assets in his name besides an American chopper, a souvenir from his married with children days.

Sandy, the bachelorette, lives with friends near Smallville – it's a full house. Sandy feeds her son Dexter the leftovers she sneaks while moonlighting for a top chef. Sandy is a law and order gal, but her boyfriend Chuck is an outcast who drives Sandy crazy like a fox.

Bob is not the biggest loser though; Bob married the good wife, and is 'livin' large' in Nueva's house. Nueva took Bob to Hawaii when he turned Five-O, and bought him a top gear car. Bob sponges off Nueva's largesse, and has no problem keeping up with the Kardashians.

Ever the gossip girl, Sandy tells her attorney there is easy money to be had if Nueva is brought in the game. Sandy also confesses with glee that she would like to ruin Bob's charmed life, and turn him into one of those mad men. Bob tells you he and Sandy are bitter rivals, and wants a 'no holds barred' trial to burn the notice of deposition.

Just as the world turns, parties remarry after divorce; and their new spouses can sometimes get caught in the post-divorce dragnet. Courts generally will not consider the income and assets of the new spouse for purposes of modifying or enforcing child support and alimony. Moreover, courts cannot impose liability for marital obligations on the new spouse. Accordingly, discovery of the income and financial resources of a new spouse is usually out of bounds. The big picture this article paints is that there are two different standards authorizing discovery of a new spouse's finances in post-judgment alimony and child support cases.[2]

Alimony: The Shield

Assume Sandy's contempt action against Bob is limited to alimony. When Bob shuffles into your office holding Nueva's notice of deposition, what is the answer to that *$64,000 Question*: is the subpoena served on Nueva justified?[3]

Curb your enthusiasm, the answer is the right of privacy. Compared to Florida's privacy laws, Federal laws seem to come from another world. For example, the U.S. Constitution does not specifically mention a right of privacy. Instead, federal privacy law developed over time on specific issues, in a variety of cases – such as *Roe v. Wade* – which periodically face the jeopardy of being overturned.[4] Vice versa, the Florida Constitution contains an express right of privacy written into it:

> Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.[5]

Given that Florida's right to privacy is not a fringe doctrine, but is an express provision in the state Constitution, the Florida Supreme Court has concluded that the privacy right in Florida's Constitution is much broader in scope than that of the Federal Constitution.[6]

The unintended disclosure of personal financial information is extremely dangerous, and keeping it hidden from criminal minds is an out of control problem. In order to keep financial information secure, it is usually withheld from people with family ties, let alone the real world. Despite these privacy concerns, the state – through the Family Law Rules of Procedure for example – can require the disclosure of sensitive records. Even then, disclosure can be made in a 'nip/tuck' fashion, which scrubs away sensitive information from public view.[7]

Demonstrating 20/20 foresight, the Florida Supreme Court has tried to do the right thing, and extend an individual's legitimate expectation of privacy to cover their financial and bank records.[8] In cases propounding discovery on the young and the restless new spouse, the right to privacy has served as a sanctuary to revealing the family fortune.

In addition to the strong privacy rights in Florida, there is the issue of relevance. Generally, a new spouse is not required to pay the child or spousal support owed by his or her current spouse.[9] The financial status of a new spouse is therefore not relevant to a determination of the amount of alimony a divorced spouse is capable of paying.[10] A trial court is limited to considering the financial resources of the parties, not the chips of assistance thrown to them by family or friends.[11]

Schneider v. Schneider, 348 So.2d 612 (Fla. 4th DCA 1977) is the guiding light for discovery of a new spouse's financials in alimony cases.

All in the Family
from preceding page

In *Schneider,* the former wife served interrogatories requesting information about the new wife's bank accounts and real estate holdings. Mr. Schneider's objections to discovery did not receive cheers from the judge, and when the gun smoke cleared, he filed an interlocutory appeal with the court's clerks. The Fourth District reversed the trial order, and denied access to the new wife's financials.

In order to overcome the relevancy and right to privacy objections, *Schneider* placed the burden of proof on the party seeking discovery.[12] *Schneider* required a showing that a former spouse was deliberately terminating or reducing employment to keep from paying alimony, and relying on the new spouse for living expenses in completion of the scheme.[13] Put simply, in order to overcome objections to financial discovery of Nueva, Sandy must prove that Bob is a pretty little liar about his income.

The challenge in demonstrating Bob had a scheme to avoid paying alimony can be as hard as winning *American Idol*.[14] When the new spouse is a high income earner, it is not enough to show that Bob is living the good life. In every case in which the new spouse is a high income earner, the former spouses are going to receive big love from their new spouses.[15] Evidence that Nueva paid for Bob's attorneys' fees, for example, is not enough to overcome Sandy's burden.[16] Additionally, alleging Bob overstated his expenses – in order to mislead the trial court as to his ability to pay alimony – is insufficient.[17] The challenge is showing what a scheme to avoid paying alimony looks like.

One of these amazing stories can be found in *Hayden v. Hayden*, 662 So.2d 713 (Fla. 4th DCA 1995). A true blood businessman, Mr. Hayden had an MBA degree, yet worked part-time at less than $1,000 per month – far less than other men of a certain age.[18] Testimony about Mr. Hayden's extensive job search was found to be shameless, and the court concluded he was faking it. Most shocking, forensic investigators deduced from tax returns that the new wife had between $40,000 and $125,000 in income producing assets, and did not work outside the home. Mr. Hayden may have been bewitched by his new wife, but evidence that he transferred assets into her name looked more like a cover up than the work of an angel.[19] Perhaps Mr. Hayden was just being human, but to the court he appeared to be transferring assets to avoid alimony payments.

In addition to portraying a typical family feud, the *Hayden* case added something extra to the *Schneider* test: "if there is a showing that the husband has transferred significant assets to the [new] wife's name, and as a result has no assets of his own with which to satisfy his support obligations, then the present wife's finances are relevant to the question of the ability of the husband to pay alimony and child support to the former spouse."[20]

The twin peaks of *Schneider* and *Hayden*, which established the criteria for permitting discovery of the new spouse, may have also taught spouses how to get smart about their schemes. In *Pratt v. Pratt,* 645 So.2d 510 (Fla. 3d DCA 1994) for instance, Mr. Pratt had a change of heart about paying alimony after leaving his nine to five job.

Demonstrating greed, and a bit of masterpiece theatre, Mr. Pratt testified his new wife owned her own business alone, and he held no interest in it. However, the new wife's business had one major customer, who happened to be the same major customer at Mr. Pratt's old business. Moreover, Mr. Pratt and his new wife shared joint checking accounts – which contained deposits from the business – from which Mr. Pratt could unilaterally make withdrawals.[21] The trial court did not have to hire Sherlock to determine who's the boss of the Pratt family biz. The Third District affirmed that an undercover boss of a closely held business was suspect, and permitted discovery of the new wife's financials.

The rationale of *Schneider* and *Hayden* is not the big bang theory. What's happening is the court is balancing the relevancy and privacy rights of the new spouse, against specific concerns of men behaving badly: e.g. the voluntary and deliberate divestments of assets and reductions of income to forward schemes. Sandy must establish that Bob has done an extreme makeover to his employment to avoid paying alimony, and relied on Nueva for living expenses – or transferred significant

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assets to her – and cannot satisfy his alimony obligations."[22] After exposing Bob's masquerade, Nueva's finances become relevant to the question of Bob's ability to pay alimony; and may cause Bob to be rushed to the ER, or at least the general hospital.

Child Support: Burden of Proof

Back at the office, assume Sandy's contempt action concerns child support. Are the issues in the battle over Nueva's subpoena the same as the alimony case, or is there something new?

You bet your life there is something new. The standard for permitting discovery of a new spouse in post-judgment child support cases is less than perfect. The burden of proof, in plain lingo, requires clear and convincing evidence that the remarried parent cannot fulfill his or her duty out of his or her own funds. If so, the finances of the new spouse are discoverable.[23] For some, it can take more than 48-hours to see through the weeds covering the two standards, and even courts have made bloopers.[24]

The justification for the different strokes is that in child support cases, both parents may be ordered to support the children.[25] You don't have to be *The Mentalist* to know that in alimony cases, the obligation to pay support can only be on one spouse.[26] The dual obligation to support the child, which now meets the parents, was not always the law of child support – in fact it went through growing pains.

The parent game has changed, and the 1970s would prove to be the wonder years for developing the standard for discovery of a new spouse's financials in child support cases. Prior to 1971, the burden to support a child fell only on the family guy. In language invoking fire, brimstone, and other mysteries of The Bible, the Florida Supreme Court held:

> The law imposes on civilized man the duty to provide . . . raiment for his own. It was one of the conditions upon which Adam was bounced out of the garden, and it has been the law ever since . . . [W]hen the Chancellor is concerned with their breach and butter, he does not take his cue from Elijah and the ravens, he draws it from the earnings of the father.[27]]

For better or for worse, the duties imposed on "civilized man" have made a quantum leap. Civilized man no longer bears Adam's raiment duties at home alone, but shares them with desperate housewives. In 1971, the Legislature amended Florida Statute §61.13, and authorized courts to order:

> "[E]ither or both parents who owe a duty of support to a child to pay support to the other parent or, in the case of both parents, to a third party who has custody in accordance with the child support guidelines schedule."[28]]

This public policy more closely represents the modern family, and was recently strengthened by new Florida Statutes. The new statutes became effective on January 1, 2011, making them modern marvels. The new laws were enacted because the previous statutory laws had a huge shortcoming: they did not provide principles a court should follow when establishing or modifying child support obligations.[29] The new statutes establish that in our community: "[e]ach parent has a fundamental obligation to support his or her minor or legally dependent child."[30] Florida Statutes make no bones that: the guidelines encourage fair and efficient settlement of support issues between parents.[31] In what could only be described as wishful thinking, one new statute declares that the child support guidelines schedule: "minimizes the need for litigation."[32]

In *Birge v. Simpson*, 280 So.2d 482 (Fla. 1st DCA 1973) the father filed a petition for downward modification of his child support due to his separation from the Air Force, and his former wife's remarriage.[33] At trial, the court sustained an objection to the questioning about the new husband's earnings.

In reversing the trial court, the First District relied on that 70s show of legislative changes – which put an equal duty on both parents to support the children of a marriage – and permitted discovery of the financial information of the new spouse. The *Birge* court acknowledged the naked truth: that there is no legal duty on a stepparent to support stepchildren.[34] However, in a smack down to the objections to discovery, the First District reasoned that the new spouse's financial circumstances are necessarily material and relevant to the former wife's ability to contribute to the support of children.[35]

However, *Birge* is now a cold case.

continued, next page

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All in the Family
from preceding page

Sensing that *Birge's* lack of a clear standard might create disorder in the court, the First District soon modified it in *Condon v. Condon*, 295 So.2d 681 (Fla. 1st DCA 1974). Alice Condon filed a petition for an upwards modification of child support. After learning her former husband remarried, Alice went in search of the new spouse's financials by subpoenaing that girl for deposition. Although Alice's subpoena was quashed, all was not lost.

Thinking she had leverage, could rehire the nanny, and would soon be flashing a "V" for victory, Alice appealed the order to the same court which decided *Birge*.[36] Proving that interlocutory appeals can be one of those dirty jobs, the First District played hardball, and launched Alice's appeal into deep space – nine light years away.

The *Condon* court distinguished the fact that in *Birge*, the father's ability to pay support was substantially reduced, justifying the inquiry into the mother's ability to pay support – and her new husband's income thereby became relevant. Missing from Alice's case though, was a record showing that the remarried parent could not provide for the child out of his or her own funds; and Alice's appeal was left pushing daisies.

The *Condon* court modified the *Birge* ruling by requiring that the party seeking discovery from a new spouse bear the burden of proving through "clear and convincing evidence" that the "*remarried* parent is unable to discharge the duty to provide for the needs of the child out of her or his own funds."[Italics added].[37]

The *Condon* court reasoned that without a trace of evidence that the remarried parent cannot provide for the child's needs out of his own funds, discovery of the new spouse's finances would "foster undue harassment to the current family unit," and constitute an "unseemly invasion of the new spouse's privacy."[38]

Any family attorney in private practice will get satisfaction in knowing there are two different standards authorizing discovery of a new spouse in alimony and child support cases. However, not every Tom and Jerry knows that satisfying the burden in child support cases may be as easy as finding a date in *Cougar Town*.[39]

Step by step, the *Condon* requirements appear to be weakening into deadwood. For example, in *Young v. Young*, 465 So.2d 652 (Fla. 1st DCA 1985) the fairly odd parents both remarried. The trial court prevented the former husband from questioning his former wife about her new husband's income, and he appealed. The appellate court, before ruling, noted that the trial court had already relied on the husband's new wife's income in making the modified child support calculation. The First District, which established itself as the court of transformers in this area – and in breaking away from *Condon* – took the high road, and reasoned that: "in order to do equity between the parties," the trial court should consider the income of the new husband too.[40] However, in authorizing discovery based on an equitable, even-stevens rationale, the *Young* court pushed to the outer limits of *Condon*.[41]

Finally, there is *Escanesy v. Burnard*, 867 So.2d 629 (Fla. 3d DCA 2004), a *per curiam* decision, which leaves the reader wondering: what's the story? The facts of life are set forth in the dissent. The mother served her first request for production on the father, and also requested his new wife's financial documents. The 'Commish' in the trial court denied the father's objection to discovery, and the Third District denied the father's petition for writ of certiorari. The lone dissenter in *Escanesy* complained that the evidence before the trial court was not exactly packed to the rafters. In fact, the only evidence in plain sight that a parent could not fulfill a duty of support consisted of a mere magazine article, and the arguments of counsel, which taken alone were not evidence.[42]

The balancing act *Condon* represents is the court's weighing the relevancy and privacy rights of the new spouse against the dual support role both parents have with the remarried spouse's ability to meet a child's needs. In the frontline of a courtroom, Sandy must establish that Bob is not a rich man but a poor man, and cannot fulfill a duty of support himself. However, the *Young* case, and the others following *Condon,* suggest that *Condon* may be a house of cards, and the weakest link in the two standards.

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Conclusion: The Closer

In these days of our lives, many areas in the practice of family law are so obscure, they seem off the map. As the daily show of post-judgment cases gets larger, the chances of having a stand off in this underreported area increases. The good news is that it doesn't take *CSI: Miami's* Lt. Horatio and his entourage to know that the right of privacy is strong medicine in Florida.[43] New spouses have successfully relied on the right to privacy to keep their financial information from the ex-wives club.

The right to privacy is not unlimited.[44] Courts have carved exceptions to the right of privacy with almost surgical precision. The standards for allowing discovery of a new spouse in alimony and child support cases vary considerably, and one practically needs *Gray's Anatomy* to distinguish the two.[45]

Fortunately, it is not man vs. wild in the Southern Reporter. In alimony cases, Sandy and her attorney must become mythbusters. Sandy must show Bob is 'breaking bad': creating a scheme of transferring assets, or terminating or reducing employment, to avoid his alimony obligations. In child support cases, showing Bob cannot provide for Dexter's needs out of his own funds, may be enough to make Sandy feel like she's on *Dancing with the Stars*.[46] Attorneys wanting to be the defenders of their client's privacy would be wise to spend 60 minutes learning the different standards today, before taking a taxi to court tomorrow.

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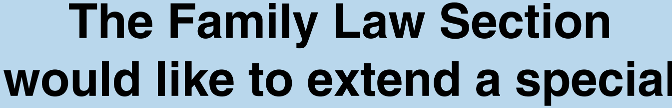
Proofreaders of this article have reported spotting references to television shows in the text. I have no comment, but let's make a deal: a $20 gift certificate at iTunes will be awarded to the first alert reader who sends me a list containing the most television show titles mentioned in the text.

<u>OFFICIAL RULES</u>:
1. Pretty much everything counts, except the footnotes (which are only included to avoid offending members of the Entertainment, Arts and Sports Law Section of the Florida Bar).

continued, next page



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All in the Family
from preceding page

2. The first reader who responds with a list of the most number of shows wins.
3. Contest ends 30 days after publication.

Endnotes

1 *See Underwater Treasure: Equitable Distribution of the Save Our Homes Limitation*, 85 Fla.B.J. 34 (February 2011) (contains a concise account of the then current status of the real estate market.).

2 It is beyond the scope of this article whether and how income and assets of a new spouse can satisfy the statutory basis for modification or termination of alimony or child support obligations.

3 *$64,000 Question*, (CBS television broadcast, 1955-1958).

4 *See Roe v. Wade*, 410 U.S. 113 (1973).

5 *See* Art. 1, §23, Fla.Const.

6 *See Winfield v. Div. of Pari-Mutuel Wagering, Dept. of Business Regulation,* 477 So.2d 544 (Fla. 1985).

7 *See Woodward v. Berkery,* 714 So.2d 1027, 1035 (Fla. 4th DCA 1998). *See also,* Fla. Fam.L.R.P. 12.280(d) ("Records found to be confidential . . . shall be sealed on request of a party.") *Accord,* Fla.R.Jud.Admin. 2.420(e) (providing a procedure to determine the confidentiality of court records.)

8 *See Winfield,* at 548.

9 *See Lau v. Lau,* 407 So.2d 927, 928 (Fla. 3d DCA 1982).

10 *See Montgomery v. Montgomery,* 426 So.2d 1255, 1256 (Fla. 1st DCA 1983). *Accord Harman v. Harman*, 523 So.2d 187 (Fla. 2d DCA 1988).

11 *See Rogers v. Rogers,* 821 So.2d 902, 903 (Fla. 3d DCA 2002).

12 *See Schneider,* at 612.

13 *See Id.*

14 *American Idol* (Fox television broadcast, 2002-current).

15 *See Sullivan v. Sullivan,* 593 So.2d 1153 (Fla. 4th DCA 1992) (finding: "even though appellant may be the beneficiary of her largesse, since there is no legal obligation, we believe attribution to him is not allowable in this context."). *See also Vega v. Swait*, 961 So.2d 1102, 1104 (Fla. 4th DCA 2007) (determining that while the Former Wife did present evidence suggesting that her former husband was relying on his new wife for some of his living expenses, the former wife never attempted to show that he reduced employment to evade alimony.).

16 *See Id.*

17 *See Montgomery* at 1256.

18 *See Hayden* at 715.

19 *See Id.*

20 *See Id.* at 716.

21 See *Pratt* at 512

22 *See Hayden* at 716.

23 *See Condon v. Condon*, 295 So.2d 681, 683 (Fla. 1st DCA 1974).

24 *See Rosales v. Rosales,* 599 So.2d 799 (Fla. 3d DCA 1992) (relying on *Lau v. Lau* and *Schneider v. Schneider,* two alimony cases, the court held: "income of custodial parent's new spouse not properly considered in determining non-custodial parent's *child support obligation.")*[Italics added]. *But see Schneider* at 613 (in reversing an order overruling objections to questioning the new wife in an alimony case, the court noted: "[c]ited to us are *Birge* and *Condon* which are rather on point but have to do with child support.")[Internal citations omitted].

25 *See Young v. Young,* 465 So.2d 652, 653 (Fla. 1st DCA 1985) (holding that the natural parents of a minor child have an equal responsibility within the bounds of equity to provide support for their child.).

26 *The Mentalist* (CBS television broadcast, 2008-current).

27 *See Pollack v. Pollack,* 31 So.2d 253, 254 (Fla. 1947).

28 *See* §61.13(1)(a), Fla.Stat. (2010).

29 *See House of Representatives Staff Analysis on CS/HB 907* (April 12, 2010) (determining current statutory law did not provide principles a court should follow when establishing or modifying child support obligations, and creating the new: "s. 61.29, F.S., to establish the . . . principles that a court must follow when establishing or modifying child support.")

30 *See* §61.29(1), Fla.Stat. (2010).

31 *See* §61.29(3), Fla.Stat. (2010).

32 *See Id.*

33 *See Birge* at 483.

34 *Id.*

35 *Id.*

36 *See Condon* at 682.

37 *See Id.* at 683.

38 *Id.*

39 *Cougar Town*, (ABC television broadcast, 2009-current).

40 *See Young* at 653.

41 *See Young* at 654 (Booth, J., dissenting) (In his dissent, Judge Booth complained that the father failed to present evidence satisfying the *Condon* rule [e.g. that the mother's funds were insufficient to provide her share of child support]. "The natural father seeks to avoid his obligation to contribute an equitable share by establishing that the *stepfather* is able to support the child. This is plainly erroneous.").

42 *See Escanesy* at 630.

43 *CSI: Miami* (CBS television broadcast, 2002-current).

44 *See Winfield,* at 548.

45 Henry Gray, *Gray's Anatomy: The Anatomical Basis of Clinical Practice* (40th ed. 2008). Not the citation you were expecting?

46 *Dancing with the Stars* (ABC television broadcast, 2005-current).

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