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Family Law

The newsletter of the Illinois State Bar Association's Section on Family Law

Chair's Column: Exploring NFTs and Divorce

BY STEPHANIE L. TANG

Hello Family Law Section! My name is Stephanie Tang, and I'm a Chicago family law practitioner turned assistant professor at Baylor Law School and your 2022-2023 chair for the ISBA's Family Law Section Council. This year for my chair's columns, I want to focus on less often explored areas of family law and intersections between family law and other areas of law.

Before I launch into that, I want to take the time to thank our outgoing chair, Susan Rogaliner, for her exceptional mentorship and service to the Family Law Section Council. She taught me how to manage Zoom meetings like a pro and spearheaded many new initiatives and legislation. I also wanted to take time to

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Tips for Fostering Healthy Attorney-Clerk Relationships: A Law Student's Perspective

BY FIONNA EK

I chose to work as a family law clerk at Land of Lincoln Legal Aid this summer because of the unique opportunity this organization presented to me: the chance to work exclusively under one attorney for the entirety of my ten-week position while enjoying a mid-size office environment.

Because I work directly with my supervising attorney for 40 hours each week, I've spent this summer reflecting on how to foster and maintain healthy attorney-clerk relationships. The following is a collection of best practices that we utilized as we navigated this summer, as well as some tips I wish we would have incorporated:

1. Create a list of all possible kinds of tasks that a clerk may complete over

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recognize our wonderful subcommittee chairs for their hard work this past year as always. One project the section council is particularly proud of from this past year is the new Family Law Toolkit, available now. This toolkit is designed to be a handy practitioner's guide to all things family law, with sections including language to include in pleadings, questions to ask in court, and practice tips. I am looking forward to working with Wes Gozia, our incoming vice chair, and Jessica Patchik, our incoming secretary, on making this another great year for the section council!

For this month's column, I wanted to kick things off by writing about the emerging virtual currency, non-fungible tokens ("NFTs" or "nifties"), and some considerations with divorce. NFTs are effectively snippets of code embedded with metadata, similar to a photo or a Word document, that defines its characteristics. For example, one popular NFT, Cryptokitties, allows investors to pick kitties based on their color, mouth and eye shape, and pattern.

NFTs have gained increasing popularity over the past few years, now even getting picked up by the long-established auction houses, Sotheby's and Christie's in their auctions. In March 2021, Christie's sold the highest selling NFT for 69 million dollars. Sotheby's also reaped the benefits of NFTs by hosting its highest sales year in its 277-year history in 2021 thanks to NFTs. On the other hand, NFT fraud also rose with the popularity of NFTs, with many companies engaging in "rug pull" fraud schemes where a NFT creator raises capital for an alleged NFT and then "ghosts" the investors. NFTs are commonly thought of as digital art, but can be extended to website domains or even real estate. So, what do divorce attorneys and judges need to know about this new class of assets?

NFTs are traded on the Ethereum blockchain (ETH for short). This means that in order to purchase an NFT, an investor needs to acquire a certain amount of ETH in their virtual wallet. Think of ETH just like any other type of currency, but instead, it is virtual. You likely have heard of Bitcoin (BTC), which is another cryptocurrency. Similarly, think of your virtual wallet just like your physical wallet, but it exists online. Investors may either purchase an existing NFT (that already has defined, visible characteristics) or if they're trying to invest early, they can purchase what is known as a "mintpass."

Here's a very rough overview of how mintpasses work: For a digital art NFT, the NFT creator first designs what the artwork will look like and advertises this on social media, giving investors the chance to get on what's known as a "whitelist." Think of a whitelist like a VIP list, that grants you access to a private sale where you can purchase a mintpass that will guarantee you an NFT once the creator eventually releases it. The mintpass goes into the investor's virtual wallet. Once the creator is ready to release it (which could be months in the future), they will announce the NFT's release again usually via social media, and the investor can go into their wallet and refresh it to see the final NFT.

So how does an attorney get information about an NFT? Like all other assets, you will primarily rely on your formal discovery methods, particularly Notices to Produce and Matrimonial Interrogatories. You should add a specific request to produce and interrogatory regarding virtual currency holdings, particularly where your client has identified their spouse as a virtual currency investor. Formal discovery will allow you to obtain what's called a "wallet address" for the investor spouse that you can use to trace the history of the NFT on an NFT marketplace like OpenSea, Known Origin, or Rarible. This includes any dates of transaction with the NFT to determine whether it is nonmarital or marital property. If the investor has hundreds or thousands of holdings, it is likely worthwhile to explore hiring an expert to help with this

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tracing analysis if funds allow. You can also use the marketplaces to view how much the NFT is currently valued at. Note that these valuations are very volatile so it is important to keep an eye on values during the pendency of your case.

A spouse can either sell an NFT or transfer it to their spouse (if their spouse has a virtual wallet to receive it). When drafting language for a marital settlement agreement/final judgment regarding the sale of an NFT, think about all of the considerations you go through when drafting a provision regarding sale of real estate. You need to include: (1) when the NFT must be listed for sale on an NFT marketplace and if the spouse should provide proof of same; (2) the price of the sale), and (3) how/when the proceeds received will be distributed. Attorneys can look at other similar NFTs on the open marketplaces or Rarity.Tools, which will let you know what NFTs with similar attributes will sell for. That being said, like is often the case with real estate, NFTs can sell well below their floor price, or maybe not at all. To protect the parties from repeatedly coming back to court in these circumstances, it is advisable to provide deadlines for re-listing an NFT for sale and mandate the seller to list the NFT at increasingly discounted rates until sold to reduce the parties' entanglement with each other. Because of lack of liquidity and uncertain ability to sell, it is also advisable to separate NFTs on your balance sheet and divide the remainder of the estate separate and apart from the NFT rather than trying to ascertain a value to offset with another asset in the estate.

Finally, for spouses who have created NFTs, you will want to do some additional discovery on whether they are receiving royalty income from the NFT. Under *In re Marriage of Heinze*, 257 Ill. App. 3d 782 (3d Dist. 1994), you can make an argument that the non-creator spouse should be entitled to a percentage of the NFT royalties received.

For more information about cryptocurrency, NFTs, and divorce, check out my upcoming article in the Penn State Law Review, the webcast recording of my CLE with Wes Cowell on the topic from June 23, 2022, and my prior article on cryptocurrency and divorce with Janice Boback published in the Illinois Bar Journal.■

Tips for Fostering Healthy Attorney-Clerk Relationships: A Law Student's Perspective

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the summer and go over this list with your clerk to identify individual and shared goals and experiences.

Although this may seem intuitive, many attorneys forget what it's like to be freshly done with 1L year, simply trying to stay afloat at a summer internship. Attorneys may also lose sight of the fact that there are more first-generation law students now than ever before—many of whom have never actually seen a lawyer in action. Further, each law student may have a different idea of what success at a summer clerkship actually means and looks like to them.

I sought out a summer that would expose me to as wide of a cross-section of legal aid and family law as I could find, and I communicated this to my attorney early on. She has since designed a summer for me that includes a wide variety of drafting, court appearances, client contact, legal research, and even writing for this newsletter. We also made time to check back in throughout the summer and shift my responsibilities to include more of the work which I feel most drawn to and excited about. At every step, our professional relationship has been driven by mutual interests.

The law students of today are smart and motivated enough—relationships and experiences are what make or break their time at summer positions. Clerks who feel heard, valued, and supported are simply more likely to succeed in their roles. Making time for clear communication of possibilities and expectations in the beginning tees up a clerk to be in this position from the start. This also helps to set the expectation early on that ongoing communication between both the attorney and the clerk is encouraged and prioritized.

2. Schedule regular check-ins to discuss progress and lingering questions.

In a similar vein to the tip above, many law students have either briefly or never worked in a professional office setting before. Although many learn quickly and perform well, they may not have an understanding of what issues or concerns are appropriate to communicate with their attorney or be able to identify an appropriate time to communicate them.

Scheduling a specific time to discuss issues, concerns, and progress allows attorneys and clerks to recalibrate the clerk's experience on the fly. It also creates space for the fact that many law students feel scared, unsure, and incompetent in their roles—regardless of the quality of the work they are completing. I feel that I have been successful in my clerkship both because I am performing tasks that interest me and because my attorney recognizes that this is an entirely new landscape for me and stresses learning above all else.

3. Debrief after client communication.

Sitting in on or facilitating client communication can bring up any number of questions about any number of topics for law students. Debriefing quickly and immediately after allows the clerk to ask questions as they have them. If a clerk has to wait days or weeks to ask, the question will likely never be brought up again, and they will have missed an opportunity to learn.

Intentionally making time for questions and debriefing also creates an environment where clerks feel welcome to be curious and prioritize their learning. If educational experiences are not emphasized, they can and do quickly fall by the wayside in a high-stress and high-volume family law environment.

4. Have a conversation with your clerk about exactly how they should deliver assignments to you, what

kind of feedback they will receive, and how quickly they should expect that feedback.

This is a simple but very important tip to foster a sense of security for new law clerks. Clearly delineating the logistics for how clerks should perform and deliver engenders a smoother relationship. It also provides an opportunity to course-correct if expectations are not met. If a clerk doesn't receive feedback in a productive manner for both the attorney and the clerk, they may be unable to track their progress or continue to turn in work with avoidable mistakes. Those outcomes are frustrating for both parties and easily avoidable.

Clerk-attorney relationships have the potential to be nurturing and fruitful for years after a clerk leaves a job. These relationships alone sometimes even compel a clerk to come back to a particular office as an attorney! Laying the groundwork for and prioritizing clear communication, expectations, and respect is paramount to building the relationships we would all like to see and be a part of. I hope these tips are helpful in that process to the family law attorneys of Illinois, a group that I am proud to have been among the ranks of this summer.■

Fionna Ek is a Public Interest Law Initiative Intern and Equal Justice America fellow at Land of Lincoln Legal Aid's Eastern Regional Office this summer, working under Sally Kolb. She is a rising 2L at the University of Minnesota Law School with a strong commitment to public interest lawyering.

Voluntary Dismissal in Domestic Relations Cases

BY L. STEVEN RAKOWSKI

At some point in a career, it is going to be necessary to ask a judge to give you permission to withdraw a complaint or petition you filed. Whether you get an unfavorable pre-trial recommendation or you determine the evidence you need is just not attainable, you may find yourself between the proverbial rock and a hard place. What can you do?

One option is to withdraw your pleading. The authority to withdraw your client's pleading can be found at 735 ILCS 5/2-1009735 ILCS 5/2-1009(a) permits voluntary dismissal prior to trial commencement conditioned only on proper notice and payment of costs. Sec. 2-1009. Voluntary dismissal says:

The plaintiff may, at any time before trial or hearing begins, upon notice to each party who has appeared or each such party's attorney, and upon payment of costs, dismiss his or her action or any part thereof as to any defendant, without prejudice, by order filed in the cause.

Much misinformation and misunderstanding surround this statute as case law and recent experiences with some fine judges would demonstrate. Hopefully, this article will provide you with the perspective to navigate a voluntary dismissal process successfully.

A litigant has a right to withdraw a pleading at any time before trial starts, subject to notice and payment of costs as the court may deem appropriate. 735 ILCS 5/2-1009(a)(West 2021). So says our Civil Practice Act. And there are many cases that say the right to a voluntary dismissal is unassailable. *Morrison v. Wagner*, 305 Ill. App.3d 885, 714 N.E.2d 542 (Dist. 4, 1999), citing *Crawford v. Schaeffer*, 226 Ill.App.3d 129, 135-6, 590 N.E.2d 497, 501 (1992). Yet, the assault continues which prompted the Court in *Crawford v. Schaeffer* to pronounce that, "…a court cannot impose restrictions on a right of voluntary dismissal no matter how warranted by circumstances and policy absent guidance from the legislature or the supreme court." *Schaeffer*, at 501. Further, the movant enjoys the absolute right to dismiss unless there exists an unequivocal conflict between §1009 and a specific Supreme Court Rule. Id. See also *O'Connell v. St. Francis Hospital*, 112 Ill.2d 273, 97 Ill.Dec. 449 (1986).

Don't let an opponent make the argument conflating a court's right to impose conditions after a trial starts with conditions prior to trial starts. A rebuke of such reasoning can be found in *City of Palos Heights v. Village of Worth.* "The trial court is clearly vested with discretion to fix such terms after trial or hearing has begun, but it does not follow that the court has the same discretion prior thereto." *City of Palos Heights v. Village of Worth*, 29 Ill.App.3d 746, 331 N.E.2d 193 (1975).

Notwithstanding a litigant's right to withdraw a pleading, the case may continue if your opponent or a third party had a counter-complaint or third-party complaint on file prior to when you filed your voluntary dismissal motion, their claims will still need to be adjudicated. 735 ILCS 5/2-1009(d).

The bulk of the confusion as to a court's ability to impose dismissal conditions seems to stem from the content of §1009 and the interpretation of those conditions. One condition is that a motion for voluntary dismissal must be argued and adjudicated prior to any other pleading filed by your

opponent unless the opponent's motion was filed prior to your motion for voluntary dismissal and only if that motion will dispose of the entire case. 735 ILCS 5/2-1009(b). Motions for dismissal, summary judgment and others that could result in a complete resolution of the underlying claim are required to be adjudicated before a later-filed motion for voluntary dismissal. This makes sense because if a case can be adjudicated on motion and resolved, it should be. A voluntary dismissal is without prejudice. 735 ILCS 5/2-1009(e). Judicial economy is served best by a final adjudication where statutorily prescribed circumstances exist.

This discussion does not take up the issue of what can or should happen if a motion for voluntary dismissal is filed after trial starts. Suffice it to say, the court has authority to fashion additional conditions in such a circumstance. A court can allow it but will usually assess not only costs but may also award fees. 735 ILCS 5/2-1009(c).

At this point it is important to understand what a hearing or trial is intended to mean under §1009. A good explanation is supplied in *In re Marriage of Fine*, 452 N.E.2d 691, 116 Ill.App.3d 875, 72 Ill.Dec. 438 (Ill. App. 1983). In Fine, the court equated the term "hearing" with "trial" and found that a trial does not begin until the parties present arguments and evidence in order to achieve an ultimate determination of their rights. Fine, at 693. Temporary maintenance or support hearings do not constitute trials for purposes of §1009.

So, what happens if there is a pending compliance order or discovery non-compliance rule that requires the party seeking dismissal to do (or not do) something that could be avoided by a voluntary dismissal. This issue was addressed in *Morrison v. Wagner*, 305 Ill.App.3d 885, 714 N.E.2d 542 (Dist. 4, 1999). A denial of a voluntary dismissal was reversed even though the movant failed to disclose witnesses and a motion to compel discovery compliance was pending. Backlash from this ruling in part contributed to the amendment of SCR 219.

To address the avoidance of discovery obligations, a new condition further chipping away at the movant's "unassailable" right of voluntary dismissal can be found at SCR 219. Illinois Supreme Court Rule 219(e) allows for recovery of costs on voluntary dismissals under limited circumstances.

SCR 219(e) states: (e)Voluntary Dismissals and Prior Litigation. A party shall not be permitted to avoid compliance with discovery deadlines, orders or applicable rules by voluntarily dismissing a lawsuit. In establishing discovery deadlines and ruling on permissible discovery and testimony, the court shall consider discovery undertaken (or the absence of same), any mis-conduct, and orders entered in prior litigation involving a party. The court may, in addition to the assessment of costs, require the party voluntarily dismissing a claim to pay an opposing party or parties reasonable expenses incurred in defending the action including but not limited to discovery expenses, expert witness fees, reproduction costs, travel expenses, postage, and phone charges.

The "including but not limited to" language was not intended by the drafters of 219(e) to include attorney's fees. This proposition can be found at the Committee Comments, "Paragraph (e) does not provide for the payment of attorney fees when an action is voluntarily dismissed." See *Committee Comments* (Revised June 1, 1995) Paragraph (e).

Despite the plain language of §§1009 and 219 you may still be confronted by an ambitious, but obviously misguided, opposing counsel who still insists they have a right to pursue attorney's fees following a voluntary dismissal. This exact issue came up in *In Re: Marriage of Manns*, 583 N.E.2d 707, 202 Ill.App.3d 338 (Dist. 5, 1991). In Manns, there was no opposition to the dismissal but the non-moving party sought the imposition of other conditions that included an award of attorney's fees. The trial court imposed conditions on the dismissal that included attorney's fees. Movant appealed. In reversing the trial court, the Fourth District Appellate Court ruled that the only permissible condition (assuming proper notice of the dismissal motion) was the imposition of costs. Id, at 711. The Second District Appellate Court weighed in on this issue as well. In *In re: Keller* it said, "Although a dismissal under section 2-1009 of the Civil Practice Law may be made conditional upon the payment of costs, attorney fees do not generally fall within the ambit of "costs." *In Re: Keller*, 2020 IL APP (2d) 1809060, 156 N.E.3d 1078, 441 Ill.Dec. 329 (2nd Dist, 2020), citing *Bergman v. Schlundt*, 163 Ill. App. 3d 1070 1073, 115 Ill.Dec. 239, 517 N.E.2d 650 (1987).

Don't forget voluntary dismissal as a weapon in your arsenal to avoid a contrary decision on the merits. It may help you keep your client alive to fight another day.■