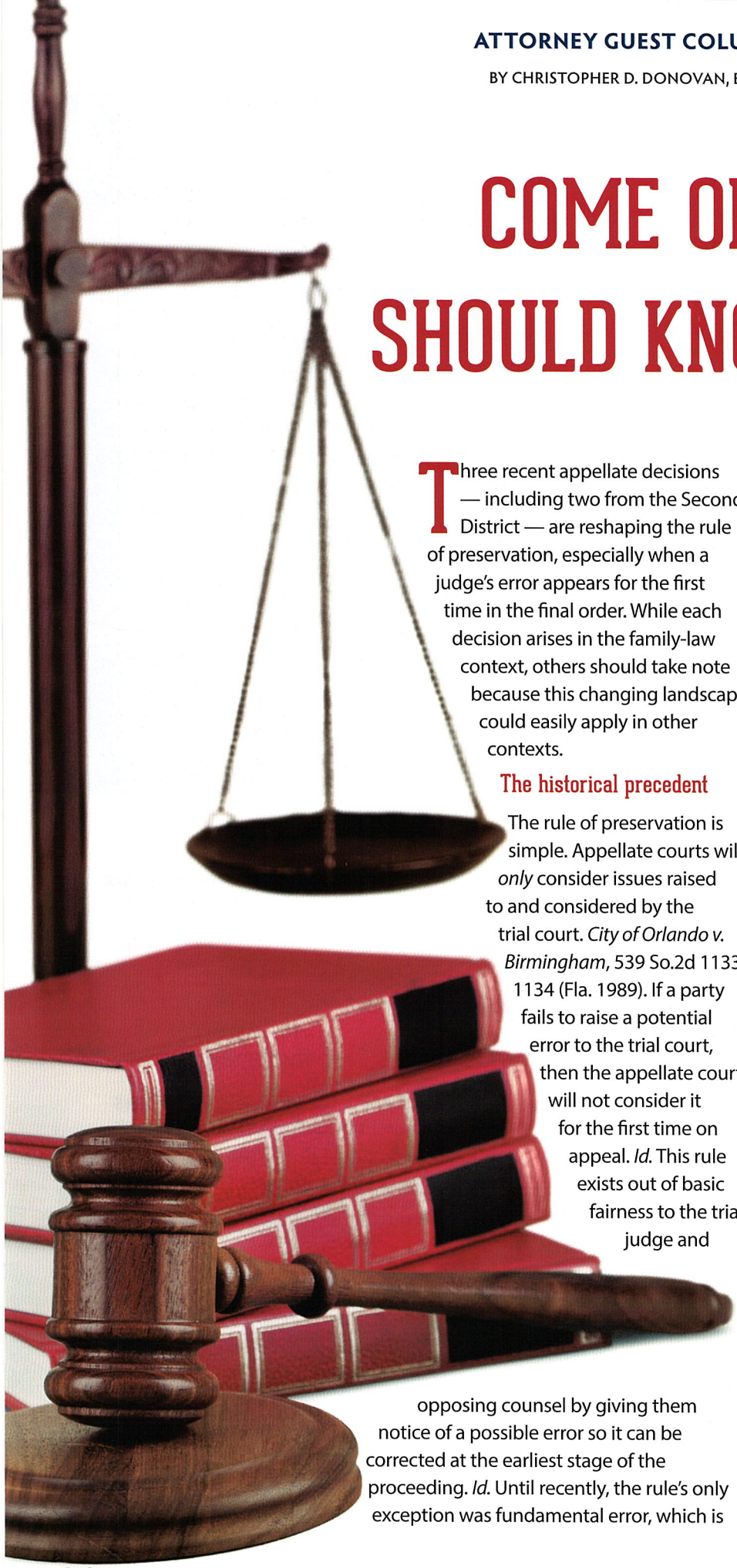
BY CHRISTOPHER D. DONOVAN, ESQ.

COME ON JUDGE, YOU SHOULD KNOW THE LAW



Three recent appellate decisions — including two from the Second District — are reshaping the rule of preservation, especially when a judge's error appears for the first time in the final order. While each decision arises in the family-law context, others should take note because this changing landscape could easily apply in other contexts.

The historical precedent

The rule of preservation is simple. Appellate courts will *only* consider issues raised to and considered by the trial court. *City of Orlando v. Birmingham*, 539 So.2d 1133, 1134 (Fla. 1989). If a party fails to raise a potential error to the trial court, then the appellate court will not consider it for the first time on appeal. *Id.* This rule exists out of basic fairness to the trial judge and opposing counsel by giving them notice of a possible error so it can be corrected at the earliest stage of the proceeding. *Id.* Until recently, the rule's only exception was fundamental error, which is "exceedingly rare" in civil cases. *Coba v. Tricam Indus., Inc.*, 164 So. 3d 637, 646 (Fla. 2015).

Courts typically applied this rule to all potential errors, including those first appearing in the judge's written decision. *See, e.g., Pensacola Beach Pier, Inc. v. King*, 66 So. 3d 321, 324 (Fla. 1st DCA 2011). If a statute required trial judges to support a decision with written factual findings and they failed to do so, then historically the losing party had to file a motion for rehearing to preserve this issue. *See, e.g., D.T. v. Fla. Dep't of Children and Families*, 54 So. 3d 632, 633 (Fla. 1st DCA 2011); *R.B. v. Dep't of Children and Families*, 997 So. 2d 1216, 1218 (Fla. 5th DCA 2008).

A precedential sea change

This clear precedent was changed recently by *Fox v. Fox*, 262 So. 3d 789, 791 (Fla. 4th DCA 2018) (en banc). The trial court had failed to include the required factual findings for permanent alimony, but the error was not preserved by a motion for rehearing. Receding from its own precedent and certifying conflict with its sister courts, the Fourth District held in a 7-5 decision that the error was reversible. *Id.*

Despite agreeing the error was not fundamental, the Fourth District still reversed because "the rules do not require the filing of a motion [for rehearing], many dissolution appeals are pro se, and a family court judge should be aware of the statutory requirements in rendering a decision on alimony, equitable distribution, and child support." *Id.* at 793. According to the court, the rule of preservation was never intended "to allow a trial court to ignore statutory requirements of which it should be aware" and then allow error to

"evade review" simply because "someone forgot or failed to move for rehearing . . . ." *Id.* at 794. After all, "[c]ertainly, a judge sitting in family court should be cognizant of what findings are statutorily required in a final judgment . . . [and] [t]here should be no need to bring those requirements to the trial court's attention." *Id.*

The Second District agrees

Seven months later, a Second District panel reached the same conclusion in *Engle v. Engle*, 277 So. 3d 697, 699 (Fla. 2d DCA 2019). The Court repeated *Fox*'s rationale: " '[A] judge sitting in family court should be cognizant of what findings are statutorily required . . . .' " *Id.* at 703.

The *Engle* Court also questioned the need for seeking rehearing in family-law cases when courts in other contexts routinely reverse errors appearing on an order's face without indicating whether the error was preserved through a motion for rehearing. *Id.* at 701.

Finally, *Engle* rejected the rationale from other district courts, which have said that requiring a rehearing makes it easier for trial courts to correct errors at the earliest stage, rather than waiting until the appellate processes' completion. *Id.* at 702. Although *Engle* agreed that this may constitute a "best practice," it concluded that failing to do so should not foreclose litigants from having the error corrected. *Id.* Imposing such a procedural constraint in the family-law context "elevates judicial convenience over equity." *Id.* at 703.

The *Engle* Court then certified conflict with the First, Third, and Fifth Districts.

A month later, a different Second District panel applied *Engle* in *Allen v. Juul*, 278 So. 3d 783, 785 (Fla. 2d DCA 2019). The *Allen* Court re-certified conflict and repeated the quote that "a judge sitting in family court should be cognizant of what findings are statutorily required . . . ." *Id.* at 785.

Analysis

Although the Second and Fourth District had laudable goals in carving out this new exception to preservation, several concerns exist about their rationale, including:

- The decisions seem unduly harsh on what trial judges should or shouldn't know. A new judge with no family-law background assigned to family-law cases may be unaware of the statutory requirements unless raised by a litigant.
- The conclusion that "a judge sitting in family court should be cognizant of what findings are statutorily required" could apply equally to judges in criminal court and the statutory sentencing guidelines or judges in civil court and the common law requiring written findings to support injunctions or, well, any judge sitting in any court and the rules of evidence and procedure. Yet, district courts routinely decline to consider unpreserved errors in these contexts.
- *Fox*'s reasoning that no procedural rule requires a rehearing to preserve the failure to make written findings could apply to every preservation issue in every civil matter because the rule of preservation is an unwritten common-law rule.
- *Engle*'s statement that courts routinely reverse errors on an order's face without indicating if it was preserved by rehearing is not surprising because courts do not need to discuss preservation if no one raises it. Even when raised, district courts routinely consider and reject appellate points without discussion — which is the cornerstone of the per curiam affirmance.
- And *Engle*'s conclusion that mandating rehearing to preserve this issue "elevates judicial convenience over equity" is undoubtedly the conclusion of every litigant who has ever fallen victim to the rule of preservation.

A tension also exists between *Fox* and *Engle*'s exception and at least four well-established, common-law rules.

- The Supreme Court has clearly established that district courts cannot consider unpreserved errors absent fundamental error. *Castor v. State*, 365 So. 2d 701, 703 (Fla. 1978).
- Courts are confined to matters raised by the parties and must avoid deciding matters not advanced by them. *See, e.g., Miami-Dade Cty. v. Omnipoint Holdings, Inc.*, 863 So. 2d 195, 200 (Fla. 2003); *Marocco v. Brabec*, No. 1D17-894, 2019 WL 1498321, at *3 (Fla. 1st DCA Apr. 5, 2019).
- Courts must also avoid even the appearance of favoring one party by suggesting how to proceed strategically. *Shore Mariner Condo. Ass'n, Inc. v. Antonious*, 722 So. 2d 247, 248 (Fla. 2d DCA 1998).
- *Pro se* litigants are bound by the same rules applicable to attorneys — including the rule of preservation.

To date, no one has petitioned the Florida Supreme Court to review *Fox*, *Engle* and *Allen*. It will be interesting to see how the Supreme Court resolves their express and direct conflict with other district courts and with its own strict adherence to the rule of preservation. It will also be interesting to see whether the Second and Fourth District will apply their new exception outside the family-law context, especially when their rationale could apply to undo virtually any preservation problem.

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