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# Florida Family Law Practice Manual

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Publication 80643    Release 88    April 2022

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## HIGHLIGHTS

### *Statutory Amendments*

- Incarceration of Child Support Obligor Does Not Qualify As Voluntary Unemployment Except in Limited Circumstances
- “Parents’ Bill of Rights” Reiterates Established Rights and Creates New Ones

### *Case Law*

- Florida Supreme Court: In premarital or marital agreement, provision for award of attorneys’ fees to party who establishes that other party violated agreement is reciprocal and therefore does not provide basis for application of Florida Statutes Section 57.105(7), which operates on unilateral contracts (*Levy v. Levy*).
- Third District Court of Appeal: After ERISA plan ben-

efits have been paid to named beneficiary, any preemption by ERISA is no longer an issue and beneficiary may be sued to enforce contractual waiver of plan proceeds (*Martinez-Olson v. Estate of Olson*)

- Fifth District Court of Appeal: If durational alimony is nonmodifiable under MSA, statute does not apply [*Dills v. Perez*].
- First District Court of Appeal: Contract between cohabiting persons must be in writing to be enforceable [*Taylor v. Davis*].

### *New Discussion*

- Parenting Courses—Requirements and sanctions for failure to attend.
- Pets—Determining equitable distribution of pets.

### *Statutory Amendments*

The following legislation, which

was enacted in 2021, is covered in this release:

**1. Parental Responsibility and Timesharing**

**a. Parenting Courses.**

Amended Florida Statutes Section 61.21 requires parents who are parties to dissolution of marriage or paternity actions and who have children with special needs or emotional problems to take parenting courses that incorporate information relevant to their children’s conditions [*see* 2021 Fla. Laws, ch. 2021-103, amending Fla. Stat. § 61.21; *see also* ch.8, *Parental Responsibility and Timesharing*].

**b. Presumption of Detriment.**

In actions concerning shared parental responsibility and timesharing, there is now a rebuttable presumption of detriment that arises from a parent’s conviction of one of the sexual crimes enumerated in Florida Statutes Section 943.0435(1)(h)1.a., if the victim was a minor child or the parent believed the victim was a minor child [*see* 2021 Fla. Laws, ch.

2021-139, § 1, amending Fla. Stat. § 61.13(2)(c); *see also* ch. 8, *Parental Responsibility and Timesharing*].

**c. Parents’ Bill of Rights.**

An act entitled the “Parents’ Bill of Rights” became law during the Covid epidemic [*see* 2021 Fla. Laws, ch. 2021-199, creating Fla. Stat. §§ 1014.01–1014.06]. The act enumerates rights held by parents with regard to their children’s upbringing and moral training, education, and health. Many of the rights previously existed in statutes or case law, but the new law establishes new, particularized rights in parents, such as rights to consent in writing to (1) biometric scans of their children, (2) records concerning their children’s blood or DNA, and (3) video or voice recordings of their children. One significant provision of the new law expressly and broadly requires written parental consent to “health care services”

that are provided, solicited, or arranged to be provided by a health care practitioner or individual employed by a health care practitioner. Previously, Florida law did not expressly require parental consent to medical treatment, but instead allowed persons and health care providers in certain circumstances to consent to, or provide, medical care without parental consent. Under the Parents' Bill of Rights, any health care practitioner or health care facility who violates the written parental-consent requirement is subject to disciplinary action by state regulatory agencies and conviction of a first-degree misdemeanor, with a fine up to \$1,000 and imprisonment for up to one year. Another provision entitles a parent to be notified promptly if an employee of the state, any of its political subdivisions, any other governmental entity, or any other institution suspects that a criminal offense has

been committed against his or her minor child, unless the incident has been reported to law enforcement officials or the Department of Children and Families and notifying the parent would impede the investigation. The new Parents' Bill of Rights provides that a parent of a minor child has inalienable rights that exceed those set forth in it [*see* Final Bill Analysis, House of Representatives Staff, HB 241; *see also* ch. 8, *Parental Responsibility and Timesharing*].

## 2. Child Support.

- a. **Incarceration of Obligor.** Amendments to the child support guidelines statute supersede a conflict among the district courts of appeal as to whether incarceration of a child support obligor may be considered voluntary unemployment that will justify imputation of income to him or her. The statute now provides that incarceration may not be treated as voluntary unemployment in es-

tablishing or modifying a support order, unless the incarceration is for (1) willful nonpayment of child support, or (2) an offense against a child or person who is owed child support [see 2021 Florida Laws, ch. 2021-103, § 4, creating Fla. Stat. § 61.30(2)(c); see also chs. 9, *Child Support*, 15, *Modification*].

- b. Social Security Benefits.** Amendments to the guidelines statute codify the principle that Social Security benefits received by a minor child due to the retirement or disability of the child’s parent must be included in the parent’s gross income [see 2021 Florida Laws, ch. 2021-103, § 4, creating Fla. Stat. § 61.30(2)(d)]. The amendments also establish a procedure for crediting an obligor-parent with payment of such Social Security benefits [see 2021 Florida Laws, ch. 2021-103, § 4, creating Fla. Stat. § 61.30(10)(b); see also chs. 9, *Child Support*, 15,

*Modification*].

### ***Revised Forms***

**Change from “Florida Rules of Judicial Administration” to “Florida Rules of General Practice and Judicial Administration.”** In 2021, the Florida Supreme Court adopted an amendment to Florida Rule of Judicial Administration 2.110, under which the name of the Florida Rules of Judicial Administration was changed to “Florida Rules of General Practice and Judicial Administration” [see In re Amendments to the Fla. Rules of Judicial Admin.-2020 Regular-Cycle Rep., 310 So. 3d 374 (Fla. 2021)]. To reflect the name change, citations in Volumes 1 and 2 of this set were revised in the last release to read “Fla. R. Gen. Prac. & Jud. Admin.” instead of “Fla. R. Jud. Admin.” In this release, revised forms adopted by the Supreme Court in late 2021 to reflect the name change have been incorporated into Volume 4.

### ***Cases***

**Attorneys’ Fees—Prevailing Party Provisions.** If a premarital or marital agreement provides for an award of fees to either party who shows that the other party violated the agreement, a party who successfully defends against allegations that he or she violated the agreement may not properly be awarded fees under the prevailing-party provision of the agreement itself, or pursuant to Florida Statutes Section 57.105(7), which by operation of law transforms a one-sided, unilateral provision to a reciprocal provision. In contrast to a

unilateral contract, an agreement that provides for fees to either party who demonstrates that the other party violated the agreement does not give one party a greater right to fees than the other. Rather, it grants both parties the same contractual right to attorneys' fees. Therefore, such a provision is reciprocal and is not a basis for an award of fees under Section 57.105(7) [*see Levy v. Levy*, 326 So. 3d 678, 681 (Fla. 2021)]; *see also* ch. 17, *Attorney's Fees*].

**Marital Settlement Agreements—Waivers of Payable-on-Death Benefits.** After the death of a divorced spouse who owns a policy or plan with payable-on-death benefits and who did not change the documents to eliminate his or her former spouse as beneficiary, payment of the policy or plan proceeds to the named beneficiary may be challenged by the owner-spouse's estate based on a specific waiver of the proceeds in a marital settlement agreement between the former spouses. To establish a specific waiver, the owner-spouse's estate must show that the agreement specifically stated who was to receive the proceeds if the owner-spouse died [*see Crawford v. Barker*, 64 So. 3d 1246 (Fla. 2011)]. In such a case, Florida's statute providing for automatic revocation of former-spouse beneficiary designations at the time of divorce does not apply, because receipt of the proceeds is governed by the agreement [*see Martinez-Olson v. Estate of Olson*, 328 So. 3d 14 (Fla. 3d DCA 2021) (discussing Fla. Stat. § 732.703)]; *see also* chs.

10B, *Equitable Distribution of Marital Assets*, 11, *Marital Settlement Agreements Negotiated by the Parties*].

**ERISA and Florida's Revocation-on-Divorce Statute.** It is an open question whether ERISA preempts Florida's statute that revokes spousal beneficiary designations by operation of law at the time the beneficiary- and owner-spouses are divorced [*see* 29 U.S.C. § 1001 *et seq*; Fla. Stat. § 732.703]. However, after ERISA plan benefits have been paid to a beneficiary designated in the plan documents, preemption by ERISA is no longer an issue and a party may sue the plan beneficiary to recover the ERISA benefits [*Martinez-Olson v. Estate of Olson*, 328 So. 3d 14 (Fla. 3d DCA 2021) (following *MetLife Life and Annuity Company of Connecticut v. Akpele* [886 F.3d 998 (11th Cir. 2018)]; *see* ch. 10B, *Equitable Distribution of Marital Assets*].

**Termination of Durational Alimony—Marital Settlement Agreement.** As a matter of first impression, the Fifth District Court of Appeal has ruled that if a marital settlement agreement expressly provides that durational alimony is "non-modifiable," the provision precludes terminating durational alimony on remarriage as would otherwise result under Florida Statutes Section 61.08(7). Clear and unambiguous language of an MSA controls over the statute [*see Dills v. Perez*, — So. 3d —, 2021 Fla. App. LEXIS 14569, 46 Fla. L. Weekly D2385 (Fla. 5th

DCA November 5, 2021); *see also* ch. 10, *Alimony*].

**Cohabitation Agreements.** The First District Court of Appeal has expressly ruled that a contract between cohabiting persons must be in writing to be enforceable. The court rejected a party's argument that her same-sex spouse could properly be ordered to pay her permanent alimony because the parties had an oral support agreement prior to their marriage that allowed consideration of their 24 years of cohabitation in determining what type of alimony to award. Accordingly, because the court refused to recognize an enforceable support agreement between the parties, and because they were married for only three years, the trial court was restricted to awarding alimony based on the criteria governing an alimony award to the spouse of a short-term marriage [*see* Taylor v. Davis, 324 So. 3d 570 (Fla. 1st DCA 2021); *see also* ch. 1, *Marriage*].

#### ***New Discussion***

***Parenting Courses.*** A detailed discussion about parents' required completion of parenting courses in dissolution of marriage actions in which the parties have children, and

in paternity actions involving issues of parental responsibility and time-sharing, has been added to Chapter 8, *Parental Responsibility and Time-sharing*. The new discussion includes the time within which a parent must complete a course, required course content, and sanctions a court may order if a parent fails to attend a parenting course as ordered.

***Pets.*** New discussion about competing claims to pets in dissolution of marriage cases has been added in this release. The discussion covers the existing rule in Florida that in dissolution proceedings, pets must be distributed as personal property under the equitable distribution statute. Factors a trial court may consider in determining distribution of a pet as part of an equitable distribution scheme are examined, along with principles a court should employ in determining a spouse's claim that a pet is his or her emotional support animal [*see* Harby v. Harby, 46 Fla. L. Weekly D2453 (Fla. 2d DCA November 17, 2021); Springer v. Springer, 322 So. 3d 172 (Fla. 2d DCA 2021); *see also* ch. 10B, *Equitable Distribution of Marital Assets*].

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# Florida Family Law Practice Manual

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Publication 80643 Release 88

April 2022

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