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FILING INSTRUCTIONS AND PUBLICATION UPDATE

Route to: _____ _____ _____ _____
 _____ _____ _____ _____

Florida Family Law Practice Manual

Publication 80643 Release 57

December 2006

HIGHLIGHTS

Highlights in this release include:

2006 Legislation

- Relocation by Child's Primary Residential Custodian [see 2006 Fla. Laws, ch. 2006-245, § 2]
- Paternity: This release discusses 2006 legislation that provides relief from a paternity or child support judgment based on newly discovered evidence and post judgment scientific test results [see 2006 Fla. Laws, ch. 2006-265, § 1].
- Adoption: Several provisions of Florida's Adoption Act have been amended by the 2006 legislature.
- Temporary Custody: Pursuant to Florida Statutes Chapter 751
- Guardianship: The 2006 legislature amended various statutes governing natural guardianships of minor children by their parents.
- Psychotherapist-Patient Privilege: A 2006 amendment to the statutory definition of "psychotherapist[s]"

Relocation: This release contains a complete discussion of new Florida Statutes

§ 61.13001, which replaces former Florida Statutes Section 61.13(2)(d) as the legislative authority governing relocation by custodial parents [see 2006 Fla. Laws, ch. 2006-245, § 2, creating § 61.13001, Fla. Stat. and repealing § 61.13(2)(d), Fla. Stat.]. Section 61.13001, which applies in general to relocations more than 50 miles from a custodial parent's principal place of residence, retains Section 61.13(2)(d)'s prohibition against a presumption favoring or disfavoring relocation [cf. § 61.13001(7), Fla. Stat. with former § 61.13(2)(d), Fla. Stat.]. In addition, Section 61.13001 largely retains the previous statutory list of factors a court must consider [cf. § 61.13001(7), Fla. Stat. with former § 61.13(2)(d), Fla. Stat.]. However, unlike its predecessor, Section 61.13001 establishes a procedure for notifying the non-custodial parent and any persons with visitation rights about the proposed relocation [see § 61.13001(3)(a)-(c), Fla. Stat.]. If any recipients of the notice object in accordance with the requirements for objecting under Section 61.13001 [see § 61.13001(5), Fla. Stat.], the

statute requires the custodial parent to initiate a court proceeding to obtain court permission to relocate. At the hearing, the burden is on the custodian to prove by a preponderance of the evidence that relocation is in the best interests of the child [see § 61.13001(8), Fla. Stat.]. This burden of proof provision appears to resolve a question that existed under former Section 61.13(2)(d) as to whether a custodial parent seeking a court's permission to relocate had to show a substantial change in circumstances as well as the child's best interests [see *Gerov v. Holter*, 731 So. 2d 152, 153-154 (Fla. 4th DCA 1999) (declining to decide issue)]. New Section 61.13001 sets forth sanctions for failure to comply with its statutory notice procedures [see § 61.13001(3)(f), Fla. Stat.].

Section 61.13001 expressly encourages parties to reach agreement concerning relocation issues. First, the statute requires that a notice of intent to relocate (1) be served before it is filed with the court, and (2) not be filed with the court until after expiration of the time for objecting to the proposed relocation [see § 61.13001(3)(a), Fla. Stat.]. Section 61.13001 states that the purpose of requiring delayed filing is to encourage amicable resolution of relocation issues [see § 61.13001(3)(a), Fla. Stat.]. Section 61.13001 also sets forth requirements for the contents and form of an agreement and provides that a court may approve agreed-to relocation without a hearing [see § 61.13001(2), Fla. Stat.].

Detailed discussion of the new relocation statute may be found in Chapter 8, Custody of Minor Children. Additionally, pertinent questions to ask on client intake forms are set forth in Chapter 2, Initial Interview. Finally, relevant points to consider in drafting marital settlement agreement, as well as a form provision, are set forth in Chapter 11, Property Settlement Agreements Negotiated by the Parties.

Paternity: Significantly, the 2006 legislation does not impose a time limit on post-judgment challenges brought on the basis of newly discovered evidence as does Florida Rule of Civil Procedure 1.540(b) [see 2006 Fla. Laws, ch. 2006-265, § 1]. Previously, the Florida Supreme Court's decision in *D.F. v. Department of Revenue ex rel. L.F.* [823 So. 2d 97 (Fla. 2002)] governed postjudgment scientific tests as a basis for challenges to paternity. In *D.F.*, the Court specifically held that such challenges could not be brought by former husbands unless they could establish (1) grounds such as extrinsic fraud, on which independent actions challenging the judgments could be based; or (2) entitlement to challenge paternity under Florida Rule of Civil Procedure 1.540(b) [see *D.F. v. Department of Revenue ex rel. L.F.*, 823 So. 2d 97 (Fla. 2002)]. In *Department of Revenue v. M.L.S.* [756 So. 2d 125, 126-127 (Fla. 2d DCA 2000)], the Second District indicated that finality-of-judgment restrictions applied to paternity challenges involving children born out of wedlock. Now, any man who has been adjudicated to be the natural father of a child or who has been ordered to pay child support and who satisfies the requirements of the 2006 legislation may obtain the setting aside of the judgment or order [see 2006 Fla. Laws, ch. 2006-265, § 1]. For a detailed discussion of the substantive and procedural requirements of the 2006 legislation, see Chapter 9, Child Support.

Adoption: The Adoption Act now provides that if a person is not otherwise entitled to notice of adoption proceedings under the Act, he or she has no right to notice and no standing to obtain the setting aside of a judgment of adoption unless he or she has a direct, financial, and immediate interest in the adoption [see 2006 Fla. Laws, ch. 2006-265, § 4]. Second, the Act now expressly prohibits the Office of Vital Statistics from recording paternity claims to a child after the

filing of a petition for termination of parental rights [*see* 2006 Fla. Laws, ch. 2006-265, § 2, amending § 63.054(1), Fla. Stat.]. In addition, the 2006 legislation provides that execution of an affidavit of non-paternity is not relegated to a father whose consent is required. Now, any man may execute such an affidavit [*see* 2006 Fla. Laws, ch. 2006-265, § 3, amending and correcting § 63.062(4), Fla. Stat.]. *see* Chapter 18 for coverage of the 2006 amendments to the adoption statutes.

Temporary Custody: Temporary custody obtained under the auspices of Chapter 751 does not require a finding that the child is dependent [*see* §§ 751.01-751.05, Fla. Stat.]. In this release, Chapter 8, Custody of Minor Children, has been expanded to fully cover Chapter 751 temporary custody, including coverage of 2006 amendments to Chapter 751. The amendments (1) delete references to putative fathers as persons who may be granted temporary custody of children, (2) define the term "extended family member," (3) expand the information required in a petition for temporary custody, and (4) allow an order granting temporary custody to redirect payment of an existing child support obligation to an extended family member who is granted such custody [*see* 2006 Fla. Laws, ch. 2006-167, §§ 1-6]; *see* also ch. 8, Custody of Minor Children].

Guardianship: This release broadens the set's discussion of natural guardianships to cover the statutory authority of natural guardians over their children's property, and incorporates the following 2006 amendments [*see* ch. 8, Custody of Minor Children]: (1) if a parent dies, the surviving parent of a child is clarified by the 2006 legislation to be the sole natural guardian of the child [*see* 2006 Fla. Laws, ch. 2006-178, § 3, amending § 744.301(1), Fla. Stat.]; (2) natural

guardians are expressly prohibited from using the property of their children-wards without court orders allowing them to do so [*see* 2006 Fla. Laws, ch. 2006-178, § 3, amending § 744.301(3), Fla. Stat.]; (3) with regard to settlements of minor children's monetary claims, the settlement amount at which trial courts are required to appoint guardians ad litem has been raised from \$25,000 to \$50,000 [*see* 2006 Fla. Laws, ch. 2006-178, § 4, creating § 744.3025(1)(a), Fla. Stat.; *see* also ch. 8, Custody of Minor Children]. Finally, this release updates the set with a 2006 statutory amendment regarding guardianships of incapacitated adults under which the right of an incapacitated person to marry is subject to court approval if his or her right to contract has been removed [*see* 2006 Fla. Laws, ch. 2006-178, § 10, amending § 744.3215(2)(a), Fla. Stat.; *see* also ch. 1, Marriage].

Psychotherapist-Patient Privilege: A 2006 amendment to the statutory definition of "psychotherapist[s]" adds advanced registered nurse practitioners who specialize in mental health to the list of practitioners whose communications with their patients are entitled to the psychotherapist-patient privilege. The newest text of the statute is set forth in Chapter 8, Custody of Minor Children.

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VOLUME 1

Revision

Title page Title page

Chapter 1

3 thru 4.1 3 thru 4.1

Chapter 2

3 thru 5 3 thru 6.1

15 15

Chapter 8

1 thru 133 1 thru 177

Chapter 9

1 thru 9 1 thru 10.3

27 thru 30.1 27 thru 30.1

47 thru 49 47 thru 50.51

VOLUME 2

Revision

Title page Title page

Chapter 11

7 7 thru 8.1

13 thru 14.1 13 thru 14.1

23 23

Chapter 12

17 thru 23 17 thru 24.1

Chapter 15

3 thru 20.3 3 thru 20.1

Chapter 18

25 thru 27 25 thru 28.1

41 41

57 57

87 thru 89 87 thru 90.1

**Check
As
Done** *Remove Old
Pages Numbered*

*Insert New
Pages Numbered*

VOLUME 3

Revision

Title page Title page

Florida Statutes

1 thru 3 1 thru 4.15

57 thru 61 57 thru 61

205 205 thru 206.1

Index

I-1 thru I-19 I-1 thru I-19

VOLUME 4

Revision

Title page Title page

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