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# Florida Family Law Practice Manual

Publication 80643 Release 58 May 2007

## HIGHLIGHTS

**Highlights in this release include:**

- **Revised Family Law Forms**
- Affidavit of Corroborating Witness
- Financial Affidavits
- **Supreme Court Case**
- Joinder of Legal Father in Paternity Action [*Fla. Dep't of Revenue v. Cummings*]
- **District Court of Appeal Cases**
- Post-Separation Mortgage Payments and Equitable Distribution of Marital Home [*Norwood v. Anapol-Norwood*]
- Modification of Alimony on Occurrence of Event Known to Be Possible When Judgment Was Entered [*Mendes v. Mendes*]
- Effect on Alimony of Falsified Joint Income Tax Returns Filed During Marriage [*Cunningham v. Cunningham*]
- Waiver of Psychotherapist-Patient Privilege in Joint Counseling [*Segarra v. Segarra*]
- Identity of Capital Loss Carryovers That Arise During Marriage [*Haley v. Haley*]
- Priority of Guardian Ad Litem's Fees [*Franklin & Criscuolo/Lienor v. Etter*]
- Setting Aside Paternity Judgment in Equity under Rule 1.540 [*Dep't of Revenue ex rel. Stephens v. Boswell*]

**Revised Family Law Forms**

**Affidavit of Corroborating Witness:** This release contains the most recent version of Florida Supreme Court Approved Family Law Form 12.902(i), which was revised pursuant to a Florida Supreme Court opinion dated September 28, 2006. First, the amended affidavit deletes a statement that the affiant has known the spouse who is the subject of the affidavit for a period longer than six months prior to the date the petition for dissolution was filed. Instead, the amended affidavit states that "to the best of [the affiant's] understanding" the filing date of the petition is as stated in the affidavit. Second, the revised affidavit recites that the

affiant has personal knowledge the spouse resided in Florida for at least six months immediately prior to a date stated by the affiant. Previously, the affidavit stated that the affiant had personal knowledge the spouse resided in Florida for at least six months before the date of the affidavit. Finally, the amended affidavit deletes (1) a statement that the affiant is a resident of Florida, and (2) a statement by the affiant that he or she has attached a copy of his or her Florida driver's license or identification card to the affidavit [see In re Amendments to the Fla. Family Law Rules of Procedure, 940 So. 2d 409 (Fla. 2006); *see also* vol. 1, ch. 4, *Initiating the Dissolution*; vol. 4, *Family Law Forms*].

**Financial Affidavits:** Also included in this release are the newest versions of the two family law financial affidavits [*see* Fla. Fam. L. R. P. Form 12.902(b), (c)]. Both were revised in minor, nonsubstantive respects pursuant to the Florida Supreme Court's opinion dated September 28, 2006 [*see* In re Amendments to the Fla. Family Law Rules of Procedure, 940 So. 2d 409 (Fla. 2006); *see also* vol. 4, *Family Law Forms*].

**Supreme Court Case**

**Joinder of Legal Father in Paternity Action:** This release covers a recent Florida Supreme Court decision in which the Court held that a legal father is an indispensable party in an action that has been brought to determine the paternity and child support obligations of another man [*see* Fla. Dep't of Revenue v. Cummings, 930 So. 2d 604 (Fla. 2006); *see also* ch. 9, *Child Support*].

**District Court of Appeal Cases**

**Post-Separation Mortgage Payments and Equitable Distribution of Marital Home:** This release discusses *Norwood v. Anapol-Norwood* [931 So. 2d 951 (Fla. 3d DCA 2006)], a Third District case in which the court held that a wife's mortgage payments on the marital home after the parties separated resulted in active appreciation of the home that was her nonmarital asset on dissolution of the marriage. Because appreciation in the home's value after the parties separated was the wife's nonmarital property, the district court held, the trial court properly valued the marital portion of the home as of the date of the parties' separation. *Norwood* is covered in Chapter 10B, *Equitable Distribution of Marital Assets*.

**Modification of Alimony on Occurrence of Event Known to Be Possible When Judgment Was Entered:** For purposes of modifying alimony, even if the parties knew at the time final judgment was entered that changes in market conditions could cause fluctuations in the obligor's income, he or she may obtain downward modification of his or her alimony obligation following an actual reduction in income. The parties' general knowledge of a possibility that the obligor's income will decrease does not constitute knowledge that it will do so, and therefore does not preclude later modification based on a reduction that in fact occurs [*see* Mendes v. Mendes, 2006 Fla. App. LEXIS 8147, 31 Fla. L. Weekly D1440, 947 So. 2d 450 (Fla. 4th DCA May 24, 2006); *see also* ch. 15, *Modification*].

**Effect on Alimony of Falsified Joint Income Tax Returns Filed During Marriage:** A court may impute income to a spouse that the parties failed to report on their joint tax returns during marriage. However, the court may not deny alimony entirely to such a spouse if, after income is imputed to him or her, the spouse still has a need for alimony and the other spouse has the ability to pay. It is not the trial court's task to enforce federal tax laws by denying permanent alimony in such circumstances [*see* Cunningham v. Cunningham, 918 So. 2d 412 (Fla. 2d DCA 2006); *see also* ch. 10, *Spousal Support*].

**Waiver of Psychotherapist-Patient Privilege in Joint Counseling:** This release discusses a case in which the Third District Court of Appeal held, as a matter of first impression in Florida, that a patient in a joint counseling session does not waive his or her psychotherapist-patient privilege unless the counseling was court-ordered. The district court applied the new rule in the context of an action for dissolution of marriage and one spouse's attempt to discover records of the parties' joint marriage counseling sessions [*see* Segarra v. Segarra, 932 So. 2d 1159 (Fla. 3d DCA 2006); *see also* ch. 7, *Discovery*].

**Identity of Capital Loss Carryovers That Arise During Marriage:** As a matter of first impression in Florida, the Fifth District Court of Appeal has held that capital loss carry forwards ("CLCFs"), which are tax benefits resulting from capital losses in assets such as S corporations, partnerships, and trusts, may be nonmarital even if they arise during marriage. The district court also noted that valuation of CLCFs can be complicated, and may require determination of present value [*see* Haley v. Haley, 936 So. 2d 1136 (Fla. 5th DCA 2006); *see also* ch. 10B, *Equitable Distribution of Marital Assets*].

**Priority of Guardian Ad Litem's Fees:** In determining a proper disbursement of marital property proceeds, a trial court has inherent authority to give a guardian ad litem's claim for fees priority over counsel's charging lien [*see* Franklin & Criscuolo/ Lienor v. Etter, 924 So. 2d 947 (Fla. 3d DCA 2006); *see also* ch. 37, *Attorneys' Fees and Costs*].

**Setting Aside Paternity Judgment in Equity under Rule 1.540:** This release incorporates a Fifth District case that discusses the requirements for relief under Florida Rule of Civil Procedure 1.540(b)(5), which allows a judgment to be set aside if it is no longer equitable to enforce the judgment. Rule 1.540(b)(5) has not been addressed by many appeals courts. The Fifth District held that a putative father who seeks to have a judgment set aside under Rule 1.540(b)(5) must establish that (1) paternity was not expressly adjudicated in the original action; and (2) significant new evidence or a substantial changes in circumstances has arisen since entry of the judgment, and the new evidence or substantial change makes it no longer equitable for the trial court to enforce its earlier judgment [*see* Dep't of Revenue ex rel. Stephens v. Boswell, 915 So. 2d 717 (Fla. 5th DCA 2005); *see also* ch. 13, *Dissolution Trial/Final Judgment*].

**Effect of Spouse's Spendthrift Habits During Marriage on Equitable Distribution:** A spouse's spendthrift habits, failure to save, significant periods of unemployment during the marriage, and expenditure of time on hobbies in lieu of searching for a job can justify an unequal distribution of marital assets based on his or her lack of positive financial contribution to the marital estate [*see* Boutwell v. Adams, 920 So. 2d 151 (Fla. 1st DCA 2006); *see also* õ 61.075(1)(g), Fla. Stat.; ch. 10B, *Equitable Distribution of Marital Assets*].

**Statutory Transfer of Custody as Remedy for Interference With Visitation:** Another district court has weighed in regarding the interplay between (1) Florida Statutes Section 61.13(4)(c)5., which allows a transfer of custody as a remedy for a custodial parent's interference with visitation, and (2) the Florida Supreme Court's decision in *Wade v. Hirschman*, which established that a substantial change in circumstances must be found in all cases in which a modification of custody is granted [*see* Wade v. Hirschman, 903 So. 2d 928, 932 (Fla. 2005)]. In the most recent case to address *Wade*'s effect on Section 61.13(4)(c)5., the Second District Court of Appeal agreed with the Fifth District that *Wade* requires a substantial change

in circumstances to modify custody under Section 61.13(4)(c)5. [*see* Cecena v. Chambers, 938 So. 2d 646 (Fla. 2d DCA 2006); Morales v. Morales, 915 So. 2d 247 (Fla. 5th DCA 2005)]. However, unlike the Fifth District, the Second District did not hold that interference with visitation by itself could not satisfy *Wade* and allow a change of custody under the statute. Instead, the Second District held that six weeks of interference—which is what the noncustodial parent showed in the case before the court—is unlikely to constitute a substantial change in circumstances that will justify a change in custody under Section 61.13(4)(c)5.c)5. [*see* Cecena v. Chambers, 938 So. 2d 646 (Fla. 2d DCA 2006); Morales v. Morales, 915 So. 2d 247 (Fla. 5th DCA 2005); *see also* ch. 15, *Modification*].

**Enforceability of Cohabitants' Contract to Coparent Child:** An agreement between homosexual cohabitants concerning custody of or visitation with a child as to whom one of the partners is a natural parent is unenforceable [*see* Wakeman v. Dixon, 921 So. 2d 669 (Fla. 1st DCA 2006); *see also* ch. 1, *Marriage*].

**Appointment of One Parent to Make Decisions Concerning Specific Aspects of Child's Welfare:** This release covers two Fourth District opinions that have addressed the requirements for designating one parent to make decisions concerning his or her child's welfare pursuant to Florida Statutes Section 61.13(2)(b)2.a. In one of the opinions, the Fourth District further held that the parent to whom the decisionmaking authority is awarded need not have specifically requested it in his or her pleadings. Rather, a grant of decisionmaking authority to a parent may properly be based on his or her petition for primary custody, coupled with evidence supporting the grant of authority [*see* Kasdorf v. Kasdorf, 931 So. 2d 257 (Fla. 4th DCA 2006)]. In the other, earlier decision, the Fourth District indicated that a father's and mother's disagreement regarding whether their child should be homeschooled was a sufficient basis on which to designate one of them as the sole decisionmaker regarding the child's education [*see* Hancock v. Hancock, 915 So. 2d 1277 (Fla. 4th DCA 2005); *see also* ch. 8, *Custody of Minor Children*].

**Nonparticipant-Spouse's Entitlement to Share of DROP Benefits:** The First District Court of Appeal has joined the Fourth District in holding that a spouse who is awarded a share of the other spouse's retirement benefits at the time the parties' marriage is dissolved is also entitled to a *pro rata* share of interest and cost-of-living increases that accrue in a Deferred Retirement Option Program (DROP) account created by the participant-spouse after the dissolution [*see* Pullo v. Pullo, 926 So. 2d 448 (Fla. 1st DCA 2006) (certifying question); *see also* Russell v. Russell, 922 So. 2d 1097 (Fla. 4th DCA 2006); ch. 10B, *Equitable Distribution of Marital Assets*].

**Other Cases:**

*Bode v. Bode* [920 So. 2d 841 (Fla. 4th DCA 2006)] (trial court's award of rehabilitative alimony was improper because obligee-wife failed to show that her capacity for self-support had been interrupted by parties' short-term marriage).

*Joachim v. Joachim*, 942 So. 2d 3 (Fla. 5th DCA 2006) (rejecting principle that spouse should be reimbursed for portion of costs of other spouse's educational degree) [*see* ch. 10B, *Equitable Distribution of Marital Assets*].

*Hamilton v. Hamilton* [922 So. 2d 263 (Fla. 2d DCA 2006)] (mother's chronic alcoholism and bipolar disorder, along with her attempted suicide while child was in her care, rendered award of custody to her an abuse of discretion).

*Williams v. Williams* [939 So. 2d 1154

(Fla. 2d DCA 2006)] (mediated marital settlement agreement, like other marital settlement agreements, may only be set aside or deemed unenforceable pursuant to grounds set forth in Florida Rule of Civil Procedure 1.540 if it was entered into during litigation and after discovery; duress will allow avoidance of mediated, post-litigation agreement, but mere misgivings about divorce or apprehension about financial impact of agreement does not constitute duress [*see* vol. 2, ch. 11, *Property Settlement Agreements Negotiated by the Parties*].

*Engelke v. Estate of Engelke* [921 So. 2d 693 (Fla. 4th DCA 2006)] (party's waiver in prenuptial agreement of all spousal homestead rights will insulate other spouse's separate property homestead from surviving spouse's claims as personal representative of deceased spouse's estate, unless testamentary instrument exists that directs sale of homestead to pay estate expenses).

*Daniel v. Daniel* [921 So. 2d 1041 (Fla. 4th DCA 2006)] (in family law proceeding in which party requests permanent financial relief, requiring litigant to file financial affidavit does not contravene litigant's privacy rights under Florida's constitution).

*Bongiorno* v. Yule [920 So. 2d 1209 (Fla. 1st DCA 2006)] (lump-sum alimony award was intended by trial court to function as support and not as distribution of marital property, and was therefore enforceable as contempt).

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