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Florida Family Law Practice Manual

Publication 80643 Release 62

August 2009

HIGHLIGHTS

New Standard Form

- Agreement Limiting Representation

Recent Cases of Special Note

- **Exclusive Occupancy — Special Purpose Justifying Award** [*Ascherman v. Ascherman* (Fla. 2d DCA)].
- **Modification — Permanency of Reduction Income** [*Perez v. Perez* (Fla. 4th DCA)].
- **Temporary Appellate Attorneys' Fees — Trial Court's Jurisdiction** [*Kasm v. Lynnel* (Fla. 2d DCA)].

New Standard Form

A new standard form of contract for limited representation was approved by the Florida Supreme Court in 2008 [*see* In re: Amendments to Fla. Family Law Rules, 995 So. 2d 407 (Fla. 2008)]; *see also* Ch. 2, Initial Interview]. The form is set forth in its entirety in Volume 4 of this set [*see* Fla.

Fam. L.R.P. Form 12.900(g); *see also* Vol. 4, Family Law Forms].

Revised Standard Forms

The following revised standard forms were approved by the Florida Supreme Court in 2008 [*see* In re: Amendments to Fla. Family Law Rules, 995 So. 2d 407 (Fla. 2008) (approving amendments to standard forms 12.930(c), 12.982(c), (f)); In re: Amendments to the Fla. Family Law Rules, 995 So. 2d 445 (Fla. 2008) (approving amendments to standard forms 12.900(b)–(c), 12.902(e), 12.930(b)–(c); In re Amendments to the Fla. Family Law Rules of Procedure, 987 So. 2d 65 (Fla. 2008) (approving amendments to standard forms 12.930(b), 12.932)].

All of the amended forms are set forth in their entirety in Volume 4 of this set [*see* Fla. Fam. L. R. P. Forms 12.900(b)–(c), 12.902(e), 12.930(b)–(c), 12.932; Fla. Sup. Ct. Approved Fam. L. Forms 12.982(c), (f); *see also* Vol. 4, Family Law Forms].

- **Notice of Limited Appearance.**
See Fla. Fam. L. R. P. Form

12.900(b); *see also* Ch. 2, *Initial Interview*.

- **Consent to Limited Appearance by Attorney.** *See* Fla. Fam. L. R. P. Form 12.900(c); *see also* Ch. 2, *Initial Interview*.
- **Child Support Guidelines Worksheet.** *See* Fla. Fam. L. R. P. Form 12.902(e); *see also* ch. 7, *Discovery*.
- **Standard Family Law Interrogatories for Original or Enforcement Proceedings.** *See* Fla. Fam. L. R. P. Form 12.930(b); *see also* Ch. 7, *Discovery*.
- **Standard Family Law Interrogatories for Modification Proceedings.** *See* Fla. Fam. L. R. P. Form 12.930(c); *see also* Ch. 7, *Discovery*.
- **Certificate of Compliance With Mandatory Disclosure.** *See* Fla. Fam. L. R. P. Form 12.932; *see also* Ch. 7, *Discovery*.
- **Petition for Change of Name (Minor Children).** *See* Fla. Sup. Ct. Approved Fam. L. Form 12.982(c).
- **Petition for Change of Name (Family).** *See* Fla. Sup. Ct. Approved Fam. L. Form 12.982(f).

Recent Cases of Special Note

Alimony

Although an obligor's payment of the obligee's expenses while their divorce is pending can be considered in determining the obligor's ability to pay alimony after the marriage is dissolved, it is not a proper consideration if the obligor subsidized the payments by cost-cutting means that are unlikely to continue, such as renting a room in the marital home from the obligee-spouse [*see* Salazar v. Salazar, 976 So.2d

1155, 1157 (Fla. 4th DCA 2009); *see also* Ch. 10, *Spousal Support*].

If a court finds that an obligor's current ability to pay is greater than the obligee's current needs, the court may not reserve jurisdiction to award a great amount of alimony if the obligee's needs increase. Rather, either spouse who desires a change in alimony in the future must petition for modification based on a substantial change in circumstances [*see* Stewart v. Stewart, 976 So. 2d 1224, 1224 (Fla. 4th DCA 2008); *see also* Ch. 10, *Spousal Support*].

Attorney's Fees

If a party asks a trial court for temporary appellate fees pursuant to Florida Rule of Appellate Procedure 9.600(c)(1), but does not obtain a ruling from the court before the appeal terminates, the trial court does not have jurisdiction to award fees unless the appeals court authorizes an award of final fees. To be entitled to an award of final fees from the appellate court, the party must have filed a timely motion for fees with that court pursuant to Florida rule of Appellate Procedure 9.400(b). Thus, especially in interlocutory appeals, it is good practice to file a motion for appellate fees with both the trial and district courts [*see* Kasm v. Lynnel, 975 So. 2d 560 (Fla. 2d DCA 2008); *see also* Ch. 17, *Attorney's Fees*].

Equitable Distribution

A discussion concerning the need for findings regarding the value of marital assets has been added to Chapter 10B, *Equitable Distribution of Marital Assets*. The discussion, which incorporates the most recent case law concerning this topic, covers a conflict among the district courts of appeal regarding the necessity of findings if substantial, competent evidence supports the trial court's division of property [*compare* Simmons v. Simmons, 979 So. 2d 1063, 1064 (Fla. 1st DCA 2008); Wolf

v. Wolf, 979 So. 2d 1123 (Fla. 2d DCA 2008) (finding no reversible error based on lack of evidence regarding value) *with* Brock v. Brock, 690 So. 2d 737, 740 (Fla. 5th DCA 1997) (reversing for taking of evidence concerning value)]. The discussion also addresses appeals court opinions that have affirmed divisions of marital assets despite the fact that no evidence was presented as to their value [*see, e.g.*, Simmons v. Simmons, 979 So. 2d 1063 (Fla. 1st DCA 2008)].

Imputed Income

An obligor's prior income from illegal activities may not be imputed to him or her in calculating support. However, the trial court may presume that the obligor has the capacity to earn income from legal pursuits and impute income accordingly [*see* Crossin v. Crossin, 979 So. 2d 298 (Fla. 4th DCA 2008); *see also* Chs. 9, *Child Support*, 10, *Spousal Support*, 15, *Modification*].

Modification

The Fourth District Court of Appeals held that a modest, \$1,000 increase in an obligor's income during the two months before a hearing on his petition for modification did not justify a conclusion that the prior downturn in the obligor's income was temporary and his request for modification should be denied. The husband had experienced a very large decrease in his income from direct-mail marketing due to the impact of the Internet, a saturated direct-mail market, increased costs of materials and mailing, and the demise of large direct-mail customers due to government regulation. It was undisputed that the husband had been in the direct-mail business for 23 years, and it was his only skill, and that he had only a high school education. The District Court held that the severe, nearly yearlong decrease in the husband's income, coupled with a lack of evidence that he would

experience any relief in the future, established a permanent change of income that warranted modifying his alimony obligation [*see* Perez v. Perez, 973 So. 2d 1227, 1232 (Fla. 4th DCA 2008); *see also* Ch. 15, *Modification*].

Premarital Agreements

Although a prevailing-party provision in a premarital agreement is enforceable with regard to litigation concerning the validity of the agreement, the trial court may award temporary fees under Section 61.16 in such litigation. That is, to enable a spouse to participate in litigation concerning the validity of an agreement, a trial court may award him or her attorneys' fees in accordance with need and ability to pay, notwithstanding the existence of a prevailing-party provision under which the spouse may ultimately owe the other spouse fees if he or she is not the prevailing party [*see* Lord v. Lord, 993 So. 2d 562 (Fla. 4th DCA 2008); *see also* Ch. 17, *Attorneys' Fees*].

Whether a spouse's premarital threat of no marriage unless the other spouse signs a premarital agreement is sufficiently coercive to render the agreement invalid depends on the other circumstances surrounding execution of the agreement [*compare* Bakos v. Bakos, 950 So. 2d 1257, 1259 (Fla. 2d DCA 2007) (husband's presentation of premarital agreement to wife for first time less than 24 hours before their wedding and his insistence that she sign or parties would not wed was coercive and rendered agreement voidable) *with* Francavilla v. Francavilla, 969 So. 2d 522, 525 (Fla. 4th DCA 2007) (husband's ultimatum that he would not marry wife without premarital agreement did not constitute duress by itself, and although wife was pregnant and unemployed when she signed agreement one hour before their wedding, finding of duress was precluded due to length and depth of parties' prior negotia-

tions and relative ease with which parties' courthouse wedding could have been canceled); *see* Ch. 1, *Marriage*].

Other Cases

Imputed Income

A trial court may not impute income to a party that the party could earn only if he or she obtained further education or retraining. Rather, income may only be imputed based on present job qualifications [*see* *Castaldi v. Castaldi*, 968 So. 2d 713 (Fla. 2d DCA 2007)]; *see also* Chs. 9, *Child Support*, 10, *Spousal Support*, 15, *Modification*].

If a trial court does not find that an obligor has concealed information about his or her income, and the obligor has presented evidence of his or her income, then any additional income the court attributes to him or her is imputed income and must be supported by findings [*see* *Burnstein v. Townley*, 976 So. 2d 624, 627 (Fla. 5th DCA 2008)] (distinguishing the imputed income case before it from concealment cases and noting that evidence of child support obligor's income included

professionally prepared financial statements and income tax returns); *see also* Ch. 9, *Child Support*.

In a case involving a 61-year old obligor who had worked for one utility company for decades, had lost his job due to funding cutbacks and had tried consulting in his field without success, the appeals court questioned whether the trial court should have imputed any income to him and thereby effectively required him to reenter the job market; although the trial court reduced the obligor's support obligation, the appeals court implied that support should have been reduced more or terminated entirely [*see* *Leonard v. Leonard*, 971 So. 2d 263 (Fla. 1st DCA 2008)]; *see also* Ch. 15, *Modification*.

Premarital Agreements

Unlike legislatures of some other states, Florida's legislature has not enacted a statute that changes the general rule under which attorneys' fees incurred prior to dissolution of marriage may not be waived in a premarital agreement [*see also* Ch. 17, *Attorneys' Fees*].

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