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Florida Family Law Practice Manual

Publication 80643 Release 66 August 2011

HIGHLIGHTS

Chapter 10, *Alimony*

- Substantial revision of discussions concerning lump-sum alimony and security for alimony.

Chapter 10B, *Equitable Distribution of Marital Assets*

- Florida Supreme Court resolves conflict concerning passive appreciation of nonmarital property. *See* Kaaa v. Kaaa, 35 Fla. L. Weekly S 521, 2010 Fla. LEXIS 1628, — So. 3d — (Fla. Sept. 30, 2010).

Chapter 17, *Attorneys' Fees*

- Fourth District certifies question regarding bad-faith standard for awarding fees as sanction. *See* Rivero v. Meister, 46 So. 3d 1161 (Fla. 4th DCA Nov. 3, 2010).

Volume 4, Family Law Forms

- Additional, new family law forms have been added to Volume 4, including forms addressing relocation, income deduction, and newest child support guidelines worksheet.

Chapter 7, Discovery

Revised Discussion

Chapter 7 contains detailed coverage of a new Florida Rule of Civil Procedure adopted by the Florida Supreme Court in late 2010. The new rule, Florida Rule of Civil Procedure 1.285, sets forth procedures for parties and nonparties to notify litigants that the parties or nonparties inadvertently disclosed privileged material to the litigants. Rule 1.285 also addresses procedures for resisting such claims of inadvertent disclosure [see In re Amendments to the Fla. Rules of Civ. Procedure, 52 So. 3d 579 (Fla. 2010)]. In addition, Chapter 7 covers other recent amendments to the Florida Rules of Civil Procedure that are relevant to family law practitioners. Those amendments address (1) notice to persons who are to be orally deposed, of the method by which their testimony will be recorded [see Fla. R. Civ. P. 1.310(b)(4)(A)], (2) requirements for obtaining production of documents or things by nonparties at oral depositions [see Fla. R. Civ. P. 1.310(b)(5)], and (3) notice by

persons to be examined that the examinations will be recorded or observed by third parties [see Fla. R. Civ. P. 1.360(a)(1)(A); see also In re Amendments to the Fla. Rules of Civ. Procedure, 52 So. 3d 579 (Fla. 2010)].

Chapter 8, Parental Responsibilty and Timesharing

Cases

Grigsby v. Grigsby, 39 So. 3d 453 (Fla. 2d DCA 2010) (if parent's actions in alienating child from other parent are sufficiently egregious, trial court may completely suspend parent's timesharing, but must also set forth specific steps that parent must to reestablish timesharing, reserve jurisdiction to consider parent's progress, and must not delegate determination of whether parent is ready to resume timesharing to child's other parent or to professionals).

Hahn v. Hahn, 42 So. 3d 945 (Fla. 4th DCA 2010) (2008 legislation that established "timesharing" in lieu of visitation and primary residential custody did not create presumption in favor of equal timesharing).

Chapter 9, Child Support

Cases

Posner v. Posner, 39 So. 3d 411(Fla. 4th DCA 2010) (although in-kind payments to parent are generally employment-related, they may also be in-kind payments made by family members or friends).

MacRae-Billewicz v. Billewicz, 2010 Fla. App. LEXIS 12200, 35 Fla. L. Weekly D 1898, — So. 3d — (Fla. 2d DCA August 20, 1010) (trial court erred in failing to consider extraordinary medical expenses of child who had been diagnosed with autism and obsessive-compulsive disorder, and who needed behavioral therapy).

Zinovoy v. Zinovoy, 50 So. 3d 763 (Fla. 2d DCA 2010); Wilcox v. Munoz, 35 So. 3d 136 (Fla. 2d DCA 2010) (if trial court orders child's noncovered medical expenses to be paid separately from basic child support obligation, then expenses must be apportioned between parties based on their respective percentage shares of child support).

Needham v. Needham, 39 So. 3d 1289 (Fla. 2d DCA 2010) (trial court erred in failing to consider mother's support of teenage daughter from earlier marriage in determining mother's child support obligation with regard to parties' child).

T.J.D. v. A.G., 39 So. 3d 360 (Fla. 2d DCA 2010) (obligor's current arrearage is not basis for deviation from guidelines amount).

New Discussion

This release adds discussion of a conflict among the district courts of appeal as to whether housing and home maintenance expenses provided to a spouse in an award of exclusive occupancy can constitute in-kind income for purposes of calculating child support [see Hanley v. Hanley, 734 So. 2d 529 (Fla. 4th DCA 1999) (certifying conflict with Second District and holding that spouse's obligation to pay half the mortgage and expenses of marital home while other spouse has exclusive occupancy of home are not in-kind payments to spouse who occupies home); Thomas v. Thomas, 712 So. 2d 822 (Fla. 2d DCA 1998) (husband's payment of one-half the marital home expenses while custodial wife had exclusive occupancy of home was in-kind income to her); see also Bryan v. Bryan, 765 So. 2d 829 (Fla. 1st DCA 2000) (wife's exclusive occupancy of former marital home was in-kind payment to her).

Chapter 10, Alimony

Cases

Hill v. Hill, 2011 Fla. App. LEXIS 2659, 36 Fla. L. Weekly D475, — So. 3d — (Fla. 3d DCA Mar. 2, 2011). The Third District indicated that a time limit must be imposed on all reservations of jurisdiction to award alimony.

Janssens v. Janssens, 51 So. 3d 1183, 1185 (Fla. 5th DCA 2010). The Fifth District held that an obligor's heavy debt will not necessarily preclude ordering him or her to pay alimony even if the debt is former marital debt that has been apportioned to him or her in equitable distribution.

Suit v. Suit, 48 So. 3d 195, 197 (Fla. 2d DCA 2010), which involved parties who maintained a high standard of living during their marriage and whose marital home was valued at $850,000, and in which the Second District held that the requesting spouse's need did not include acquiring a home similar in value to the marital home because she did not present evidence of her actual housing needs and the cost of satisfying those needs.

McQuaig v. McQuaig, 36 So. 3d 801, 803 (Fla. 1st DCA 2010), in which the First District held that neither the definition of "business income" that applies to determining child support under Florida Statutes Section 61.30, nor the fact that business expenses are deductible for income tax purposes, determines income for alimony purposes under Florida Statutes Section 61.08.

Boggess v. Boggess, 34 So. 3d 115, 116-117 (Fla. 3d DCA 2010), holding that neither payments from annuity principal nor reverse mortgage payments constitute income for alimony purposes.

Betemariam v. Said, 48 So. 3d 121, 126 (Fla. 4th DCA 2010), which held that in a case involving an invalid marriage and a request by a putative spouse for equitable alimony, if he or she is equally responsible with the other party for the invalidity of their marriage, then he or she is not entitled to an award of equitable alimony.

Revised Discussion

The discussion of **lump-sum alimony** in Chapter 10 has been revised to clearly set forth the characteristics of such an award under Florida law, and how those characteristics result in an award that differs materially from an award of periodic alimony. The discussion has also been updated with the most recent significant cases concerning lump-sum alimony for support. It also covers judicial criticism of using the term "lump-sum alimony" not only to describe an award of spousal support paid in a lump sum, but also to describe cash payments ordered to equalize equitable distribution.

Expanded discussion of **security for an alimony award** now includes more detailed coverage of the grounds for ordering security, and the various district-court standards for such an award.

Chapter 10B, Equitable Distribution of Marital Assets

Cases

Kaaa v. Kaaa, 35 Fla. L. Weekly S 521, 2010 Fla. LEXIS 1628, — So. 3d — (Fla. Sept. 30, 2010). Chapter 10B has been updated to reflect the Florida Supreme Court's resolution of a conflict among the district courts of appeal concerning whether passive appreciation in the value of nonmarital property during marriage is subject to equitable distribution if the property is encumbered and marital funds were used to reduce the debt. The Supreme Court held that passive appreciation in the value of nonmarital property is subject to equitable distribution if marital funds or labor increase the property's worth, and that principle applies if marital funds pay down

debt on nonmarital property. In the case before the Supreme Court, the wife was entitled to a share of the entire increased value of the husband's nonmarital residence, because marital funds had been used to pay down a mortgage on, and fund improvements to, the property.

Jones v. Jones, 51 So. 3d 547 (Fla. 1st DCA 2010) (if valuation of marital liability is not proper subject of expert testimony, for example if promissory note held by spouse's parent must be valued, trial court may reach equitable result by splitting difference between valuations offered by each party); but see Mondello v. Torres, 47 So. 3d 389 (4th DCA 2010) (in case in which husband argued that 100 percent of liability was marital debt, and wife argued that none of liability was marital debt, court could not split difference and find that 50 percent of liability was marital debt).

Leonardis v. Leonardis, 30 So. 3d 568 (Fla. 4th DCA 2010) (court's use of date of filing as valuation date was abuse of discretion, given real estate downturn and decline in property values during pendency of dissolution proceedings).

Van Den Berg v. Van Den Berg, 49 So. 3d 283 (Fla. 5th DCA 2010) (using pension payments for marital purposes does not convert the pension itself to marital property).

New Discussion

Discussion addressing equalizing cash payments ordered as part of equitable distribution is added to Chapter 10B in this release. Included in the discussion is the recent case of Posner v. Posner [39 So. 3d 411 (Fla. 4th DCA 2010)], in which the Fourth District held that if a spouse who is ordered to make an equalizing cash payment has assets that can be used to make the payment, then it may be an abuse of discretion to order a repayment scheme that deprives the payee of payment for a prolonged period of time. In the Fourth District case, the trial court abused its discretion in ordering a wife to pay the husband $85,000 in installments of $100 per month for a 70-year period, because the wife had nearly $500,000 in assets, including some cash.

Chapter 15, Modification

New Discussion

Discussion concerning **modification of alimony** based on a "supportive relationship" under Florida Statutes Section 61.14(1)(b) has been updated with recent court decisions that result in a near equal split among the district courts of appeal regarding whether proof of a supportive relationship under the statute, by itself, allows modification of alimony, or whether following such proof, the burden shifts to the obligee to show continued need for alimony [compare Morris v. Morris, 42 So. 3d 341 (Fla. 5th DCA 2010) (if supportive relationship is found, obligor's request for modification should then be determined based on consideration of general alimony factors set forth by statute) with Overton v. Overton, 34 So. 3d 759 (Fla. 1st DCA 2010) (trial court erred in finding supportive relationship and reducing alimony on basis of relationship that was not de facto marriage with regard to its economic aspects); see French v. French, 4 So. 3d 5 (Fla. 4th Dist. Ct. App. 2009) (finding of supportive relationship allows modification); Buxton v. Buxton, 963 So. 2d 950 (Fla. 2d Dist. Ct. App. 2007) (finding of supportive relationship shifts burden of proof to obligee)].

With regard to **modification of child support**, this release covers Smith v. Smith [45 So. 3d 928 (Fla. 2d DCA 2010)], in which the Second District interpreted a provision of the guidelines statute that allows a court to deviate from the guidelines

support amount based on "the likelihood that either parent will actually exercise the time-sharing schedule set forth in the parenting plan granted by the court" [see Fla. Stat. § 61.30(11)(c)]. According to the Second District, the provision allows a court to deny a reduction in child support based on substantial timesharing if (1) here are preconditions to the requesting parent's right to exercise substantial timesharing, and (2) there is evidence that the parent has failed to meet those requirements in the past and is unlikely to meet those requirements in the future [Smith v. Smith, 45 So. 3d 928 (Fla. 2d DCA 2010)].

Chapter 17, Attorney's Fees

Cases

In *Rivero v. Meister*, 46 So. 3d 1161 (Fla. 4th DCA Nov. 3, 2010), the Fourth District criticized the "bad-faith" standard for awarding attorneys' fees as a sanction, contending that the standard is not broad enough and should at a minimum cover reckless conduct in addition to intentional conduct; the Fourth District certified to the Florida Supreme Court the question of whether reckless conduct that results in unnecessary attorneys' fees qualifies as bad faith, and the Supreme Court granted review in Meister v. Rivero [49 So. 3d 1266 (Fla. 2010)].

In *Robin Roshkind, P.A. v. Machiela*, 45 So. 3d 480 (Fla. 4th DCA 2010), the Fourth District Court of Appeal questioned whether expert testimony should be required to establish the reasonableness of attorneys' fees, and asked the Florida Supreme Court in a certified question whether expert witness testimony is necessary to establish attorneys' fees that are due under a charging lien against a client, who has not objected to the fees and who entered into a retainer agreement that required any dispute regarding fees to be submitted in writing within 30 days of the bill's receipt; the Supreme Court has granted review in Roshkind v. Machiela [49 So. 3d 747 (Fla. 2010)].

Revised Discussion

This release incorporates coverage of Florida Statutes Section 57.105 amendments under which (1) only an attorney, not his or her client, may be found liable for sanctions based on lack of legal support for a claim or defense; and (2) a trial court may not impose sanctions on its own initiative after a voluntary dismissal or settlement of the claims made by or against the party to be sanctioned [see Fla. Stat. § 57.105(3); see also 2010 Fla. Laws, ch. 2010-129, § 1].

This release also incorporates new Florida Rules of Appellate Procedure that implement the "safe harbor" provision of Florida Statutes Section 57.105, which prohibits a party from filing a motion for attorneys' fees under its auspices until 21 days after service of the motion on the party against whom fees are sought, thus providing the respondent-party a chance to withdraw or correct the claim or defense that is alleged to constitute a basis on which fees may be awarded [see Fla. Rules App. P. 9.410; see also Fla. Stat. § 57.105(1), (3)-(4)].

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Publication 80643, Release 66, August 2011

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Publication 80643 Release 66 August 2011

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