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Florida Family Law Practice Manual

Publication 80643 Release 71 November 2013

HIGHLIGHTS

- 2013 legislation adopts flexible *Daubert* standard for admission of expert testimony [*see* 2013 Fla. Laws, ch. 2013-107, § 1, amending Fla. Stat. § 90.702].
- Florida Supreme Court adopts amendments to Florida Rule of Judicial Administration 2.420, which establishes the confidentiality of certain court records and procedures to protect the confidentiality of such records; 2013 amendments significantly affect filers of documents.
- Case decisions address the propriety of awarding durational alimony instead of permanent alimony.

Legislation

Florida legislation that took effect on July 1, 2013 changes the standard for admission of expert testimony from the *Frye* general-acceptance-by-the-scientific-community standard to the *Daubert* reliability standard. As amended in 2013, the Florida Evidence Code requires that a trial court determine whether proffered expert testimony is admissible by applying a multi-part reliability test targeting the methods and facts on which the expert's testimony is based and how they apply to the case before the court [*see* 2013 Fla. Laws, ch. 2013-107, § 1, amending Fla. Stat. § 90.702]. This test reflects the United States Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals* [509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)]. In *Daubert*, the Court interpreted Federal Rule of Evidence 702 as permitting a flexible inquiry into the reliability of proposed scientific testimony that superseded a prior, more restrictive case-law test requiring general acceptance by the scientific community [*see* Daubert v. Merrell Dow Pharms., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)]. The prior general-acceptance test was established in *Frye v. United States* [293 F. 1013 (D.C. Cir. 1923)], and until *Daubert* was decided, was used in federal and many state courts for judging the admissibility of expert testimony. Even after *Daubert*, courts

in Florida continued to apply the Frye test to expert testimony [*see, e.g.*, Ibar v. State, 938 So. 2d 451, 467 (Fla. 2006) ("Florida courts do not follow *Daubert*, but instead follow the test set out in *Frye* . . .")]. In its 2013 regular session, the Florida legislature reversed the longtime rejection of Daubert [*see* 2013 Fla. Laws, ch. 2013-107, Preamble; HB 7015 (2013) House of Representatives Final Bill Analysis (June 15, 2013)]. The 2013 Florida legislature also rejected admission of "pure opinion" testimony by experts based solely on their experience and training, in favor of subjecting all expert testimony to the Daubert test [see 2013 Fla. Laws, ch. 2013-107, Preamble; see also 2013 Fla. Laws, ch. 2013-107, § 1, amending Fla. Stat. § 90.702].

This release covers the 2013 Daubert legislation in Chapters 8, *Parental Responsibility and Timesharing*, and 10B, *Equitable Distribution of Marital Assets*.

Rules

The discussion in Chapter 4 about confidentiality rules applicable to persons who file documents with courts has been substantially revised to reflect 2013 amendments to Florida Rule of Judicial Administration 2.420, which governs filings and public access. The amendments to Rule 2.420 have been adopted by the Florida Supreme Court in response to public comment and committee proposals addressing problems with the rule [see In re Amendments to Florida Rule of Judicial Administration 2.420, 2013 Fla. LEXIS 543 (Mar. 28, 2013)]. Among the most significant amendments are changes to notice-of-confidentiality requirements imposed on persons who file documents with courts. In addition, Rule 2.420 is amended to permit persons who file documents, as well as parties and nonparties, to file notices of confidentiality after documents have been filed. Procedures governing motions for judicial determination of confidentiality are amended to expressly allow oral motions, which must be followed within five days by written motions. The amendments also establish a new procedure by which persons who possess legal bases for obtaining access to confidential information in court records may gain access to the information by court order, without altering the confidential status of the records [*see* Fla. R. Jud. Admin. 2.420].

A standard form of notice to court clerk that appears in an appendix to Rule 2.420 has been amended to reflect all pertinent amendments to the text of the rule, and is set forth within the Chapter 4 discussion [*see* Ch. 4, *Initiating the Dissolution*].

All of the amendments to Rule 2.420 took effect on May 1, 2013.

Cases

Ch. 8, *Parental Responsibility and Timesharing*

Applying the statutory best-interest factors in deciding parental responsibility and timesharing is the proper approach to deciding those issues in a case involving unwed parents [*see* Neuman v. Harper, 106 So. 3d 974, 976 (Fla. 5th DCA 2013)].

A new section has been added to address the parental rights of sperm donors. The section discusses the general statutory preclusion of parental rights in men who donate sperm solely for artificial insemination and not for the purpose of parenting the resulting children. Also discussed are the statutory exceptions that permit men who plan to parent the children to donate sperm and retain their parental rights [see Fla. Stat. §§ 742.13–742.14]. Cases interpreting the statute are also discussed [*see, e.g.*, A.A.B. v. B.O.C., 112 So. 3d 761 (Fla. 2d DCA 2013)].

Other cases: Milton v. Milton, 113 So. 3d 1040 (Fla. 1st DCA 2013) (temporary relocation may not properly be allowed unless party desiring to relocate has filed and served petition in accordance with statutory requirements); Rivero v. Rivero, 111 So. 3d 233, 234 (Fla. 4th DCA 2013) (trial court must conduct evidentiary hearing before allowing temporary relocation).

Carrillo-Jimenez v. Carrillo, 110 So. 3d 490 (Fla. 4th DCA 2013) (parent has no standing to assert child's patient-psychotherapist privilege with regard to communications between child and therapist that are set forth in social investigation report). *See* Ch.8.

Ch. 9, ***Child Support***

A trial court's authority to terminate prospective child support payments in an order disestablishing paternity does not include authority to relieve the petitioner of his obligation to pay previously established child support arrearage [Hickman v. Milsap, 106 So. 3d 513 (Fla. 5th DCA 2013); *see* Fla. Stat. § 742.18].

Other cases: Dep't of Revenue v. Ingram, 112 So. 3d 169, 170 (Fla. 1st DCA 2013) (child support obligor may not be awarded credit against his or her retroactive child support obligation for "in-kind contribution[s]" of child care while timesharing). *See* Ch. 9.

Ch. 10, ***Alimony***

Durational Alimony

In this release, appellate court opinions addressing durational alimony—in particular, its relationship to permanent alimony—are covered. In one of the opinions, the Second District discusses when durational versus permanent alimony is proper. In *Doganeiro v. Doganeiro*, the DCA reversed an award of durational alimony for reconsideration by the trial court, based on (1) the facts of the case, including the length of the parties' marriage and their respective income-earning capacities; and (2) the lack of a statutorily required finding that an award of permanent alimony was inappropriate. The DCA also held that the durational alimony award was insufficient in amount [see Doganiero v. Doganiero, 106 So. 3d 75 (Fla. 2d DCA 2013)]. In another, similar opinion, the First District Court of Appeal reversed a trial court's award of durational alimony to a wife and remanded for specific factual findings or other appropriate relief in a case in which the parties had been married for 27 years and the trial court had awarded the wife $2,000 per month for two years as bridge-the-gap alimony, and $700 per month thereafter as durational alimony for a time not to exceed the length of the parties' marriage. The First District held that the lower court erred in failing to make factual findings as to why it chose to award durational alimony rather than permanent alimony, and why it ordered the amount of alimony to decrease from $2,000 per month to $700 per month. Additionally, the First District held, the trial court erred in failing to specifically address the rebuttable presumption favoring permanent alimony, and remanded for the lower court to provide (1) an explanation as to why the presumption had been overcome; or (2) an explanation as to why the presumption had not been overcome [*see* Broemer v. Broemer, 109 So. 3d 284, 290 (Fla. 1st DCA 2013)].

Amount of Alimony

The *Doganiero* case discussed above is also covered within Ch. 10's discussion about the amount of alimony awarded and the trial court's consideration of "all relevant factors" in determining how much to award [*see* Fla. Stat. § 61.08(2)]. *Doganeiro* is presented as an example of a case in which the DCA reversed and remanded

an alimony award for redetermination of the amount, but did not also remand the equitable distribution scheme to assist the trial court in considering all relevant economic factors [*see* Doganiero v. Doganiero, 106 So. 3d 75 (Fla. 2d DCA 2013)].

Applying a relatively new statutory provision, the First District Court of Appeal reversed an award of permanent alimony that resulted in a significant discrepancy between the parties' net monthly incomes and shortchanged the obligor-husband, without findings to support the result [see Payton v. Payton, 109 So. 3d 280 (Fla. 1st DCA 2013); *see also* Fla. Stat. § 61.08(9) (award of alimony may not leave payor with significantly less net income than net income of recipient, unless there are written findings of exceptional circumstances); 2011 Fla. Laws, ch. 2011-92, § 79].

Standard for Ordering Security

In *Sweeny v. Sweeny* [113 So. 3d 987 (Fla. 5th DCA 2013)], the court indicated that demonstrated need and special circumstances must be shown to justify award of security for alimony, thus apparently departing from the Fifth District's past rejection of the "special-circumstances" standard [*see* Layeni v. Layeni, 843 So. 2d 295, 300 n.2 (Fla. 5th DCA 2003); Richardson v. Richardson, 722 So. 2d 280, 281 (Fla. 5th DCA 1998)].

Extending or Converting Rehabilitative Alimony

The discussion about extending or converting rehabilitative alimony has been revised. The coverage now emphasizes the most recent statutory provisions and how case law—both old and new—applies under those provisions. A very recent case addressing the standard for extending or converting rehabilitative alimony, *Lilly v. Lilly* [113 So. 3d 155 (Fla. 5th DCA May 24, 2013)], is discussed. *See* Ch. 10.

Ch. 10B, *Equitable Distribution of Marital Assets*

A new subsection has been added to the discussion regarding grounds for unequal distribution. The subsection addresses the parties' economic circumstances, which is one of the factors the equitable distribution statute expressly permits to be considered as a ground for unequal distribution [*see* Fla. Stat. § 61.075(1)(b)]. *Doganiero v. Doganiero* is discussed. In that case, the district court affirmed the trial court's unequal division of the parties' only significant marital asset, the marital home, based on other economic circumstances of the parties. The specific circumstances cited by the trial court and approved by the appeals court were that the husband had sold marital investment assets and paid off marital debt with the proceeds, and although the husband's actions were proper, they had caused a loss of investment income to the homemaker-wife. Coupled with her lack of a credit history that would be positively impacted by the payoff of marital debt, the trial court found (and the appeals court agreed) that the husband's elimination of marital debt had created a financial imbalance between the parties that warranted an award to the wife of 2/3 of the equity in the marital home. The parties owned the home "free and clear" and at the time of the dissolution in 2011, it was valued around $1.5 million.

Other economic circumstances that appeared to support the unequal division in the *Doganiero* appeals court's view included the husband's successful business and real estate pursuits prior to the economic downturn that began in 2008, and his inconsistent reports concerning the amount of his income during the subsequent dissolution proceedings. He was unemployed during most of the proceedings, but had briefly held a job during that time that paid

$52,000 annually. The trial court had imputed $52,000 in annual income to him based on that job, and the district court concluded that an alimony award to the wife must be reversed because it was too low in amount, "where this payor is recognized to have imputed income and future prospects." Finally, the parties had agreed that $24,000 in annual income would be imputed to the homemaker-wife (about half the amount imputed to the husband) based on her age, health, and abilities.

Other cases: First District confirms that 10 U.S.C. § 1408 permits state court to distribute up to 50% of military service-member's total disposable retirement pay to his or her spouse or former spouse [see 10 U.S.C. § 1408(e)(1); Toussaint v. Toussaint, 107 So. 3d 474, 479–480 (Fla. 1st DCA 2013)]. *See* Ch. 10B.

Ch. 15, ***Modification***

If a marital settlement agreement provides that alimony may not be modified, then the obligor may not invoke Florida's supportive relationship statute to modify or terminate his or her alimony obligation [Smith v. Smith, 110 So. 3d 108, 110 (Fla. 4th DCA 2013)]. *See* Ch. 15.

Ch. 16, ***Tax Considerations***

A new section containing discussion of the federal "child tax credit" has been added to Chapter 16 [*see* I.R.C. § 24, *Child tax credit*]. Distinctions between the credit and dependency exemptions are discussed [I.R.C. §§ 24, 151–152 (dependency exemptions); Gentry v. Comm'r, T.C. Memo 2013-16 (2013)]. See Ch.16.

Ch. 17, ***Attorney's Fees***

An "upside down" marital home on which more is owed than what the home is worth has a negative value, and therefore acquisition of an interest in the home in dissolution of marriage proceedings does not constitute a positive result of an attorney's services on which a charging lien may attach. If the record supports a finding that no positive results or "tangible fruits" of the attorney's services otherwise exist, then the trial court may properly deny a motion by the attorney to adjudicate his or her charging lien [*see* Weissman v. Abou-Sayed, 107 So. 3d 1163, 1164, 1164 n.1 (Fla. 4th DCA 2013)].

Even if income is properly imputed to a spouse, his or her reasonable and necessary monthly expenses must be considered in determining whether he or she has the ability to pay an award of attorneys' fees or a need for such an award. If a spouse has a negligible surplus of available funds each month after considering his or her income and monthly expenses, the surplus is clearly insufficient to pay his or her own trial counsel's fees. In contrast, if a spouse is left with a "healthy" surplus of funds each month, then he or she may have the ability to pay an award of fees to the other spouse [*see* Quintero v. Rodriguez, 113 So. 3d 956 (Fla. 5th DCA 2013)]. *See* Ch. 17.

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