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Florida Family Law Practice Manual

Publication 80643 Release 72 June 2014

HIGHLIGHTS

- **Electronic Signing and Filing of Documents:** Rule Amendments
- **Supportive Relationships as Grounds for Modification of Alimony:** Recent Case Law
- **Mandatory Adjustment of Child Support to Reflect Substantial Timesharing:** Child Support Obligor May Waive Otherwise Mandatory Adjustment, According to Second District.
- **Awards of Appellate Attorneys' Fees in Paternity Proceedings:** Conflict Arises Among District Courts
- **Amendments to Family Law Forms:** Recent Amendments Reflect 2012 Legislation That on Dissolution of Marriage, Automatically Terminates Designation of Former Spouse as Beneficiary of Payable-on-Death Asset
- **Expanded and Enhanced Discussion:** Chapter 15's Discussion Concerning Modification of Child Support

Rules

Ch. 4, *Initiating the Dissolution*

Electronic Signing and Filing of Documents. Amendments to Florida Rules of Judicial Administration 2.515 regarding attorneys' signatures and certifications in court-filed documents are covered in this release. The updated coverage includes the following: (1) the signature of an attorney on a court-filed document constitutes a certification that the document is submitted in compliance with confidentiality rules; and (2) electronic filing of a document through the Florida Courts e-Filing Portal, using an attorney's user I.D. and password, binds the attorney to the contents of the document and to the certifications set forth in Rule 2.515, including a certification that the attorney has complied with all applicable procedural rules. Finally, amended Rule 2.515 mandates that every attorney who signs a document that is filed or served through the Portal using another attorney's login I.D. and password is bound by the contents and certifications of the document,

as if the document had been filed or served by that attorney using his or her Portal login I.D. and password. *See* Ch. 4.

Ch. 5, *Service of Process and Defaults*

Electronic Service of Documents. Rules governing service of documents after initial pleadings are discussed briefly in this chapter, and in this release, that coverage is updated to reflect recent amendments to Florida Rule of Judicial Administration 2.516. Rule 2.516 governs service by electronic means, and the recent amendments concern electronic service through the Florida Courts e-Filing Portal. Amended Rule 2.516 permits service through the Portal to satisfy the rule's requirement that service be made by e-mail. However, the filer must verify that the Portal will serve the document using the names and e-mail addresses provided by the parties and their attorneys. Amended Rule 2.516 also provides that service of a document through the Portal is complete on the date the document is electronically filed with the Portal, and that such service is considered service by mail for computation of time purposes. Finally, the rule sets forth requirements for proof of service by electronic means. *See* Ch.5.

Cases

Ch. 1, *Marriage*

Premarital Agreements. Delay in challenging a voidable premarital agreement until dissolution of marriage proceedings are commenced does not by itself constitute ratification or laches. To hold otherwise would be contrary to the public policy to avoid disrupting marriages by requiring spouses to litigate while they remain married [Flaherty v. Flaherty, 128 So. 3d 920 (Fla. 2d DCA 2013)]. *See* Ch. 1.

Ch. 7, *Discovery*

Examinations of Persons. Third District Court of Appeal held that a trial court's *sua sponte* order requiring a mother to undergo a psychological examination departed from the essential requirements of law because the pleadings and evidence had not shown that the mother's mental condition was in controversy, which is required by Florida Rule of Civil Procedure 1.360 before a mental examination may be ordered. The trial court had issued its order after denying an emergency request by the father, who was an NBA player, for a psychological examination of the mother and suspension or supervision of her timesharing pending the results of the examination. The father had based his request partly on conduct by the mother one day outside a Chicago courthouse, where she had sat under a sign that read "NBA MIAMI HEAT STAR MOTHER OF HIS CHILDREN ON THE STREETS" while complaining to reporters about alleged interference by the father with her timesharing and other matters involving him. *See* Ch. 7, *Discovery*.

Ch. 9, *Child Support*

Mandatory Adjustment in Guidelines Amount to Reflect Substantial Timesharing. A child-support obligor can waive the otherwise-mandatory statutory reduction in support that would reflect substantial timesharing by him or her [*see* Emmenegger v. Emmenegger, ___ So. 3d ___, 2013 Fla. App. LEXIS 14825 (Fla. 2d DCA Sept. 18, 2013); *see also* Ch. 15, *Modification, below*]. *See* Ch. 9.

Ch. 10, *Alimony*

Permanent Alimony

Presumption Favoring Award of Permanent Alimony to Spouse of Long-Term Marriage. In a case in which the trial court found the parties' marriage had lasted barely 17 years, the Second District Court of Appeal held that such a finding gives rise to a presumption that some

amount of alimony should be awarded to the requesting spouse if a need is demonstrated [*see* Grill v. Grill, 123 So. 3d 683 (Fla. 2d DCA 2013)]. This holding, together with the First District's decision in *Broemer v. Broemer* [109 So. 3d 284 (Fla. 1st DCA 2013)], indicate that the presumption favoring an award of permanent alimony to the spouse of a long-term marriage remains viable, notwithstanding amendments to the alimony statute that were enacted in 2011 and could be construed to weaken the presumption [*see* 2011 Fla. Laws, ch. 2011-92, § 79, amending Fla. Stat. § 61.08]. *See* Ch. 10.

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

Division of Spouse's Military Retirement Pay. The First District Court of Appeal addressed a provision in a marital settlement agreement under which the wife was to receive a portion of the husband's army retirement benefits. The First District (1) observed that federal law permits a military servicemember's "disposable retired pay" to be divided in marital dissolution proceedings; (2) reviewed the federal statute defining "disposable retired pay," which mandates certain deductions from a servicemember's gross retired pay to calculate disposable retired pay; and (3) interpreted the statutory definition of disposable retired pay as not permitting the trial court to deduct amounts the husband was voluntarily paying towards a survivor benefit plan (SBP) for his current spouse [*see* Graham v. Graham, 123 So. 3d 625, 628 (Fla. 1st DCA 2013)]. *See* Ch. 10B.

Ch. 11, *Marital Settlement Agreements*

Interpreting Provision Concerning Division of Spouse's 401(k) Retirement Account. The First District Court of Appeal held that a provision in a marital settlement agreement granting the wife one-half of the husband's 401(k) account "as of July 24, 1993" was not a grant of the fixed dollar value of her half-interest in the account as of July 24, 1993. Rather, it was a grant to the wife of a one-half ownership interest in the 401K funds existing in the account on that date, which entitled her to any subsequent gains or losses on her share [*see* Graham v. Graham, 123 So. 3d 625, 628 (Fla. 1st DCA 2013)].

Unfairness Challenges. The Third District Court of Appeal holds that the fairness ground for invalidating agreements between spouses, established by the Florida Supreme Court in *Casto v. Casto* [508 So. 2d 330 (Fla. 1987)], is not relevant to determining the validity of an agreement entered into by spouses during litigation to dissolve their marriage. More specifically, if a husband and wife are parties to dissolution of marriage proceedings, then they are necessarily dealing at arm's length and so long as each party has ample opportunity to avail himself or herself of Florida's liberal discovery procedures, there can be no question about the adequacy of either party's knowledge [*see* de Rey v. Rey, 114 So. 3d 371 (Fla. 3d DCA 2013)]. *See* Ch. 11.

Ch. 14, *Enforcement*

Enforcement of Judgments Rendered in Another State

Florida Enforcement of Foreign Judgments Act (FEFJA). Service of process is not required under the Florida Enforcement of Foreign Judgments Act (FEFJA) [*see* Pratt v. Equity Bank, N.A., 124 So. 3d 313, 316 (Fla. 5th DCA 2013); *see also* Fla. Stat. §§ 55.501–55.509]. *See* Ch. 14.

Ch. 15, *Modification*

Modification of Alimony

Supportive Relationships. The Third District Court of Appeal, on rehearing,

withdrew an opinion concerning supportive relationships that it issued a little over one year ago. In the original decision, the Third District held that a supportive relationship does not exist unless the alimony-obligee is receiving economic support from his or her cohabitant [*see* Murphy v. Murphy, ___ So. 3d ___, 2012 Fla. App. LEXIS 16541 (Fla. 3d DCA Oct. 3, 2012)]. In the substituted opinion, the Third District held that an alimony-obligee's economic and noneconomic support of his or her cohabitant, as well as the cohabitant's economic and noneconomic support of the obligee, must be considered in determining whether a supportive relationship exists that will allow a reduction in alimony. Based on this test, the appeals court held that an obligee-wife's economic support of her cohabitant, and his contribution of valuable services such as pool maintenance, yardwork, and car washing to her, was sufficient evidence on which to find a supportive relationship. The author of the substituted opinion was Judge Rothenberg, who dissented from the original opinion and was the only member of the original three-judge panel to consider the case on rehearing [*see* Murphy v. Murphy, ___ So. 3d ___, 2013 Fla. App. LEXIS 17661 (Fla. 3d DCA Nov. 6, 2013)].

In a case involving a supportive relationship, the Fifth District Court of Appeal reversed a trial court's denial of an obligor-husband's request to terminate alimony under the supportive-relationship statute. The Fifth District held that evidence of valuable, noneconomic contributions by the wife's cohabitant, together with evidence of an inheritance received by the wife, and the wife's support of her cohabitant and other expenditures, constituted record evidence that she no longer needed alimony [*see* Gregory v. Gregory, 128 So. 3d 926 (Fla. 5th DCA 2013)]. The Fifth District's decision is notable in that it appears to be the first appeals court opinion that expressly considers the valuable noneconomic contributions of a cohabitant with whom the obligee-spouse has a supportive relationship, to be relevant to the issue of the obligee's continued need for alimony. The Fifth District's decision is in accord with prior decisions by the First, Second, and Fifth Districts concerning modification of alimony under the supportive-relationship statute. Those courts, in contrast to the Fourth District, view an obligee's continued need for alimony as a determination that must be made under the supportive relationship statute after a threshold inquiry into whether a supportive relationship exists [*compare* Overton v. Overton, 92 So. 3d 253 (Fla. 1st DCA 2012); Morris v. Morris, 42 So. 3d 341, 341 (Fla. 5th DCA 2010) (if trial court finds that supportive relationship exists based on factors set forth in supportive-relationship statute, then court must apply general factors set forth in Florida Statutes Section 61.08 and decide whether termination or reduction of permanent alimony is warranted); Baumann v. Baumann, 22 So. 3d 719, 720–721 (Fla. 2d DCA 2009) *with* French v. French, 4 So. 3d 5, 6–7 (Fla. 4th DCA 2009) (proof of supportive relationship is proof of reduced need; therefore, if obligor proves that obligee is in supportive relationship, trial court must reduce or terminate alimony because both substantial change and reduced need have necessarily been shown)].

Modification of Child Support

No Preemption of UIFSA by FFCCSOA. As a matter of first impression in Florida, the First District Court of Appeal has held that the Federal Full Faith and Credit for Child Support Orders Act (FFCCSOA) does not conflict with and therefore preempt the Uniform Interstate Family Support Act (UIFSA) with regard

to jurisdiction to modify a child support order originally issued in another state. Under UIFSA, a state that would otherwise have jurisdiction to modify the child support order of another state lacks subject matter jurisdiction to modify the order if the petitioner is a resident of the forum state. The pertinent provisions of FFCCSOA do not conflict with the nonresident-petitioner requirement of UIFSA, the First District held. FFCCSOA provides that a state has jurisdiction to modify the child support order issued in another state if the forum state possesses "jurisdiction over the nonmovant for the purpose of modification." In the First District's view, this reference to jurisdiction in FFCCSOA is a reference to both subject matter jurisdiction and personal jurisdiction over the respondent, and because FFCCSOA does not define subject matter jurisdiction, the nonresident-petitioner requirement of UIFSA may be applied without violating FFCCSOA and federal preemption principles [*see* Pulkkinen v. Pulkkinen, 127 So. 3d 738 (Fla. 1st DCA 2013)].

Mandatory Adjustment in Guidelines Amount to Reflect Substantial Timesharing. The Second District Court of Appeal has held that if a child-support agreement clearly indicates that the obligor is not to receive the statutory adjustment to his or her child support obligation based on substantial timesharing, then the trial court may not modify support on that ground. In other words, a child support obligor may waive the otherwise-mandatory statutory reduction in support that would reflect substantial timesharing by him or her, and thereafter may obtain a downward modification of support based only on proof of a substantial change in circumstances [*see* Emmenegger v. Emmenegger, ___ So. 3d ___, 2013 Fla. App. LEXIS 14825 (Fla. 2d DCA Sept. 18, 2013); *see also* Fla. Stat. § 61.30(11)(b)]. *See* Ch.15.

Ch. 16, *Tax Considerations*

Deductible Alimony

If lump-sum alimony is paid pursuant to an agreement between the spouses, it will not qualify for alimony tax treatment for federal income tax purposes regardless of whether the payment was approved by the Florida trial court in the dissolution of marriage proceedings, because with or without court approval of the settlement, the obligee's death will not affect the obligor's duty to pay the lump sum; the obligee's estate will remain entitled to receive the payment if he or she dies, and therefore the right to receive payment is a vested right that is not deductible under federal tax law [Nye v. Comm'r, T.C. Memo 2013-166 (July 15, 2013)]. *See* Ch. 16.

Ch. 17, *Attorney's Fees*

Awards of Appellate Attorneys' Fees in Paternity Proceedings

Conflict Arises Among District Courts. The district courts of appeal are in conflict regarding whether a party in a paternity proceeding may be awarded appellate attorneys' fees. The Second District has held that such fees may be awarded under the paternity fees statute [*see* Fla. Stat. § 742.045]. In contrast, the Fourth and Fifth Districts have held to the contrary, and the Second District has certified conflict with them [*see* B.K. v. S.D.C., 122 So. 3d 980, 983 (Fla. 2d DCA 2013) (certifying conflict with Starkey v. Linn, 727 So. 2d 386, 388 n.3 (Fla. 5th DCA 1999)] and Gilbertson v. Boggs, 743 So. 2d 123, 128 (Fla. 4th DCA 1999))].

Awards of Attorneys' Fees Under Section 61.16(1) in Postjudgment Proceedings. In a case in which a mother who had brought a postjudgment action to establish

child support was denied an award of attorneys' fees under Florida Statutes Section 61.16, the Fifth District disagreed with the trial court that the action was essentially an equitable declaratory proceeding to enforce the parties' marital settlement agreement and therefore, an award of fees was precluded by Flanders v. Flanders, 516 So. 2d 1090 (Fla. 5th DCA 1987). In dicta, the Fifth District questioned the continued viability of its previous decision in *Flanders*, in which it held that an award of fees may not be made pursuant to Section 61.16 in a postjudgment declaratory relief action to construe and enforce a property settlement agreement, because Section 61.16(1) is not applicable to such actions. The Fifth District in the instant case did not decide whether *Flanders* remains good law, but implied that the Florida Supreme Court's decision in Bane v. Bane, 775 So. 2d 938 (Fla. 2000) may have rendered *Flanders* obsolete. In the instant case, the Fifth District reversed and remanded the trial court's denial of the wife's request for an award of fees, holding that a postjudgment action to establish child support is not a declaratory relief action to which *Flanders* would apply, if *Flanders* remains viable. *See* Ch. 17.

Forms

The Florida Supreme Court adopted revisions to several Florida Supreme Court Approved Family Law Forms to reflect legislation regarding designations of former spouses as beneficiaries of payable-on-death assets. The legislation, which was enacted and took effect in 2012, automatically terminates the designation of a former spouse as beneficiary on dissolution of his or her marriage to the owner-spouse, unless a statutory exception applies.

The amended forms are Florida Supreme Court Approved Forms 12.902(f)(1)–(2), the marital settlement agreement forms, and 12.990(c)(1)–(2), the final judgment of dissolution of marriage forms.

In this release, the previous versions of the four forms set forth in Volume 4 have been replaced with their amended versions.

Expanded and Enhanced Coverage

Chapter 14, Section 14.03[2]: Enforcement of Foreign Support Orders. Discussion of the Florida Enforcement of Foreign Judgments Act (FEFJA) has been added to the set in Chapter 14 [*see* Fla. Stat. §§ 55.501–55.509].

Chapter 15, Section 15.03: Modification of Child Support Orders. The discussion in Section 15.03 is now divided into subsections for easier research. Also, the discussion has been expanded with coverage of a Florida court's jurisdiction to modify a child support order issued by the court of another state. Specifically, discussion of the Federal Full Faith and Credit for Child Support Orders Act (FFCCSOA) has been added to Section 15.03, to complement existing discussion of the Uniform Interstate Family Support Act (UIFSA) in Section 15.05. The recent *Pulkkinen* case, which interprets FFCCSOA and UIFSA as not conflicting with regard to jurisdiction to modify another state's child support order, is discussed in Section 15.03. Chapter 15 coverage has also been expanded to include discussion about (1) the requirement that a change be "unanticipated" to obtain modification in the child support context, (2) modification based on differences between the guidelines and support amounts, (3) modification based on the child's postjudgment receipt of social security dependent benefits as a result of the obligor-parent's eligibility for social security retirement or disability benefits, (4) modification based on the recipient-spouse's dissatisfaction with current health care coverage for the child, and (5) modification based on a

child's emancipation. In addition, discussion concerning evidence of an increase in ability to pay has been expanded, as well as the required and discretionary contents of an order modifying child support.

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VOLUME 1

Revision

☐	Title page.	Title page
☐	1-41 thru 1-42.1.	1-41 thru 1-42.1
☐	4-5 thru 4-6.1	4-5 thru 4-6.2(1)
☐	4-6.13 thru 4-6.15.	4-6.13 thru 4-6.15
☐	4-35 thru 4-37	4-35 thru 4-39
☐	5-2.1 thru 5-4.1	5-3 thru 5-4.1
☐	7-31 thru 7-35	7-31 thru 7-36.3

Special Alert

☐	Blue Special Alert pages 8SA-1 thru 8SA-11 (preceding page 8-1).	Material not replaced

Revision

☐	9-21 thru 9-23	9-21 thru 9-24.1
☐	10-3 thru 10-4.3.	10-3 thru 10-4.3
☐	10-41.	10-41 thru 10-42.1
☐	10-57 thru 10-63	10-57 thru 10-64.1

VOLUME 2

Revision

☐	Title page.	Title page
☐	10B-21 thru 10B-22.1	10B-21 thru 10B-22.1
☐	10B-44.1 thru 10B-46.1	10B-45 thru 10B-46.1
☐	11-1 thru 11-3.	11-1 thru 11-4.1
☐	11-17 thru 11-18.3.	11-17 thru 11-18.3
☐	14-1 thru 14-41	14-1 thru 14-42.3
☐	15-1	15-1 thru 15-2.1
☐	15-17 thru 15-45	15-17 thru 15-46.11
☐	15-59.	15-59 thru 15-61
☐	16-7 thru 16-16.1	16-7 thru 16-16.3
☐	17-21 thru 17-24.1	17-21 thru 17-24.1
☐	17-39 thru 17-43	17-39 thru 17-44.3

VOLUME 3

Revision

☐	Title page thru vii	Title page thru vii

Check As Done	*Remove Old Pages Numbered*	*Insert New Pages Numbered*
☐	TC-1 thru TC-85	TC-1 thru TC-85
☐	TS-1 thru TS-23	TS-1 thru TS-21
☐	I-1 thru I-25	I-1 thru I-25

VOLUME 4

Revision

☐	Title page thru ix	Title page thru ix
☐	113 thru 130.5	113 thru 130.7
☐	231 thru 234.1	231 thru 234.3
☐	587 thru 609	587 thru 610.1

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