PUBLICATION UPDATE

Route to: ☐ _____ ☐ _____ ☐ _____ ☐ _____
☐ _____ ☐ _____ ☐ _____ ☐ _____

Florida Family Law Practice Manual

Publication 80643 Release 73 October 2014

HIGHLIGHTS

2014 Legislation

- Codification of Case Law Concerning Enforcement of Foreign Nations' Judgments and Enforcement of Contractual Choice-of-Law and Forum-Selection Clauses
- Authorization to Take Judicial Notice without Opportunity for Parties to Be Heard If Imminent Threat of Harm to Persons or Property Exists

New Family Law Rules

- Notice Regarding and Coordination of Related Family Cases

2014 Case Law

- Bridge the Gap Alimony Paid Pursuant to Agreement Does Not Terminate on Obligee's Remarriage If Agreement Does Not Address Termination (*Taylor v. Lutz*)
- Obligor's Knowledge, at Time of Settlement, That His or Her Health Might Deteriorate Due to Diagnosed Health Condition Does Not Preclude Him or Her from Later Establishing Substantial Change in Circumstances Based on Actual Health Decline and Consequent Reduction in Income (*Garvey v. Garvey*)
- Fourth District: Premarital Waiver of Interest in Any Property That Is Titled Solely in Other Spouse's Name Constitutes Waiver of Interest in Any Enhanced Value of Such Property

2014 Legislation

Codification of Case Law Concerning Enforcement of Foreign Nations' Judgments and Enforcement of Contractual Choice-of-Law and Forum-Selection Clauses

A new statute addresses requirements for application of the laws of foreign countries in family law proceedings and is covered in this release in Chapter 14, *Enforcement*. The new statute, Florida Statutes Section 61.040, states that a foreign country's judgment or order is not entitled to comity if (1) the parties were not given adequate notice and the opportunity to be heard, (2) the foreign court did not have jurisdiction, or (3) the judgment or order of the foreign

court offends the public policy of this state. Additionally, the new statute provides that contractual clauses designating the laws of other countries or selecting other countries as forums must not be enforced if they contravene strong public policy or are unreasonable or unjust. Finally, Section 61.040 states broadly that any attempt to apply the law of a foreign country is void if it contravenes the strong public policy of this state or if the law is unjust or unreasonable. By its express terms, new Section 61.040 codifies existing case law [*see* 2014 Fla. Laws, ch. 2014-10, § 1, creating Fla. Stat. § 61.040]. Specific case law codified by the new statute is set forth in a legislative preamble and is discussed in Chapter 14 [*see* 2014 Fla. Laws, ch. 2014-10, § 1, preamble].

Note: Section 61.040 represents a legislative compromise of controversial earlier proposals that would have required a foreign nation's law to extend the same fundamental rights and privileges as those afforded by the United States and Florida Constitutions before the foreign law could be applied by a Florida court [*see* Sen. Staff Analysis, S.B. 386 (Apr. 8, 2014) (analyzing prior version of bill); *see also* Tonya Alanez, *State Senators Advance Controversial "Anti-Sharia" Bill*, http://www.sun-sentinel.com/news/local/florida/politics-blog/sfl-state-senators-advance-controversial-antisharia-bill-20140428,0,54216.post, Apr. 28, 2014].

Authorization to Take Judicial Notice without Opportunity for Parties to Be Heard If Imminent Threat of Harm to Persons or Property Exists

A new provision has been added to the Evidence Code to permit trial courts in family law proceedings to take judicial notice of court records without providing a prior opportunity to the parties to be heard, if an imminent threat of harm to persons or property has been alleged and it is impractical to give prior notice. The amendment, which is covered in Chapter 13, *Dissolution Trial/Final Judgment*, also requires trial courts that take judicial notice of court records without prior notice to file information regarding matters judicially noticed within two business days [*see* 2014 Fla. Laws, ch. 2014-35, § 2, amending Fla. Stat. § 90.204(4)].

New Family Law Rules

Coordination of Related Cases

The Florida Supreme Court has adopted five new family law rules to (1) help ensure that parties, attorneys, and judges in a family case receive proper notice of other related family cases; (2) outline new procedures for assigning related family cases to a single judge unless it is impractical to do so; and (3) coordinate related family cases assigned to different judges.

2014 Case Law

Alimony

Bridge the Gap Alimony Paid Pursuant to Agreement Does Not Terminate on Obligee's Remarriage If Agreement Does Not Address Termination. In a case involving a Marital Settlement Agreement (MSA) that required the husband to pay the wife $500 per month for three years as nonmodifiable bridge-the-gap alimony, the First District Court of Appeal held that the trial court erred in granting the husband's motion to end his alimony obligation on the wife's remarriage. The First District held that the MSA's lack of any provision regarding termination resulted in the MSA being clear and unambiguous with regard to termination. Therefore, according to the district court, the MSA controlled instead of Florida Statutes Section 61.08(5), which provides that unless the parties agree otherwise, a court may award bridge-the-gap

alimony that terminates on the remarriage of the recipient-spouse. Pursuant to the MSA, the First District held, the husband's obligation did *not* terminate on the wife's remarriage [*see* Taylor v. Lutz, 134 So. 3d 1146 (Fla. 1st DCA 2014); *see also* Chs. 10, *Alimony*, 11, *Marital Settlement Agreements Negotiated by Parties*].

Obligor's Knowledge, at Time of Settlement, That His or Her Health Might Deteriorate Due to Diagnosed Health Condition Does Not Preclude Him or Her from Later Establishing Substantial Change in Circumstances Based on Actual Health Decline and Consequent Reduction in Income. The Fourth District Court of Appeal held that a trial court erred in denying a husband's petition to modify alimony, based on the trial court's finding that at the time of the parties' marital settlement agreement, the husband knew he had Multiple Sclerosis ("MS") and that his condition could worsen in time. The Fourth District observed that the husband had no symptoms of MS at the time of the agreement, and had no way of knowing with certainty that the MS would cause him to involuntarily retire many years later. Therefore, the Fourth District reversed and remanded to the trial court for a determination of whether there was a substantial change in circumstances that was not contemplated, and that was sufficient, material, involuntary, and permanent in nature. The Fourth District also held that the trial court had erroneously imposed a heavier burden of proof on the husband with regard to his petition to modify the parties' agreement. Parties petitioning for modification of marital settlement agreements and court orders have the same burden of proof, the district court held [*see* Garvey v. Garvey, 138 So. 3d 1115 (Fla. 4th DCA 2014) (on motion for clarification); *see also* Chs. 10, *Alimony*, 15, *Modification*].

Other alimony cases covered in this release include the following decisions regarding the presumption that permanent alimony should be awarded to the spouse of a long-term marriage:

• Fichtel v. Fichtel, ___ So. 3d ___, 2014 Fla. App. LEXIS 7637, 39 Fla. L. Weekly D1043 (Fla. 4th DCA May 21, 2014), in which the district court acknowledged the continued existence of the presumption, but held that in the case before it, the presumption was rebutted by evidence and the trial court's finding that the requesting spouse was voluntarily unemployed and possessed the ability to work fulltime.

• Motie v. Motie, 132 So. 3d 1210 (Fla. 5th DCA 2014), a case in which the parties had been married for 17 years, the wife demonstrated an ongoing need for support, and the husband possessed the means to pay, the Fifth District Court of Appeal held that the presumption applied and the trial court erred in awarding durational alimony instead of permanent alimony to the wife.

In another opinion added to the alimony chapter in this release, the district court heavily emphasized the requesting spouse's current employability in deciding whether permanent alimony should be awarded, and held that because the evidence showed the spouse did not have a permanent inability to become self-sustaining, the trial court's award of permanent alimony was erroneous [Evans v. Evans, 128 So. 3d 972, 973 (Fla. 1st DCA 2013)].

Attorneys' Fees

The following cases regarding attorneys' fees are added as updates to Chapter 17 in this release:

• Hahamovitch v. Hahamovitch, 133 So.

3d 1020 (Fla. 4th DCA 2014), regarding the following issues:

- ☐ Although provision in premarital agreement that requires each party to pay his or her own fees is ineffective as to fees incurred for services rendered prior to entry of final judgment dissolving marriage, it is effective as to fees incurred after final judgment is entered; therefore, wife's request for award of fees incurred by her in post-dissolution litigation concerning a mount of temporary fees she had been awarded during dissolution proceedings ("fees for fees") was properly denied by trial court.
- ☐ Award of attorneys' fees to spouse whose financial means are greater than those of other spouse must be based on trial court's inherent authority to sanction bad-faith conduct; such award may not be made under auspices of *Rosen v. Rosen* [696 So. 2d 697 (Fla. 1997)], because *Rosen* does not authorize awards of attorneys' fees to spouses who have greater financial abilities to pay.
- ☐ Trial court properly assessed attorneys' fees against wife for bad faith conduct consisting of allegations that premarital agreement between parties had been presented to her on short notice, that she was "emotional wreck" when she entered into agreement, and that she had not reviewed agreement with her lawyer before signing it; because trial court (1) supported its award of fees with detailed factual findings that described specific acts of bad-faith conduct by wife that resulted in husband's incurring unnecessary attorneys' fees, and (2) limited award to fees incurred by bad-faith conduct, award was proper.
- ☐ Procedural rules that provide authority for awards of attorneys' fees in family law proceedings include Florida Rule of Civil Procedure 1.380(c), which allows fees to be awarded to party if (1) he or she sought admission of matter from other party, (2) other party did not admit the matter, and (3) party who sought admission proves to court the truth of the matter; however, award of fees may not be made if good reason exists for opposing party's failure to admit [*see* Fla. R. Civ. P. 1.380(c)]; good reason exists for party's denial of other party's requests for admission if requests concerned contested matters that were central issues in case.
- ☐ In family law proceedings, statutory authority to award "suit money" expands types of expenses that may properly be taxed as costs beyond those that are ordinarily taxable in civil case.

• Fichtel v. Fichtel, ___ So. 3d ___, 2014 Fla. App. LEXIS 7637, 39 Fla. L. Weekly D1043 (Fla. 4th DCA May 21, 2014) (award of only 50% of wife's attorneys' fees was not supported by vague findings that (1) award was based on husband's income and his support payments to wife, and (2) fees charged by wife's attorney were reasonable; on remand, trial court was required to address substantial disparity between parties' incomes and provide specific factual findings justifying amount of award).

• Fox v. Widjaya, ___ So. 3d ___, 2013

Fla. App. LEXIS 17670, 38 Fla. L. Weekly D2287 (Fla. 3d DCA Nov. 6, 2013) (retaining-lien case arising from counsel's representation of husband in dissolution of marriage proceedings; district court held that if attorney who possesses valid retaining lien has not sued his or her former client for unpaid fees, then retaining lien may not be impaired by court order compelling production of client's records; instead, attorney is entitled to retain client's file until client pays legal fees or posts adequate security for fees; exceptions to this rule arise only in rare circumstances).

Equitable Distribution

A number of equitable distribution cases are covered in this release. They are as follows:

• Jordan v. Jordan, 127 So. 3d 794 (Fla. 4th DCA 2013) (wife's integral involvement in making extensive improvements to husband's nonmarital professional building was more than mere maintenance and gave rise to marital enhancement of building's value).

• Valentine v. Valentine, 137 So. 3d 566 (Fla. 2d DCA 2014) (appeals court affirmed trial court's open-ended reservation of jurisdiction to decide whether any portion of royalties received by wife from sales of book were marital, because although she had not yet written book, it was possible that she would write one based on journal that she had fully written during marriage).

• Wagner v. Wagner, 136 So. 3d 718 (Fla. 2d DCA 2014) (husband's credit card charges totaling $13,515.50 to pay for adult daughter's college expenses just a few days before wife filed petition for dissolution of marriage constituted marital debt).

• Evans v. Evans, 128 So. 3d 972 (Fla. 1st DCA 2013) (reversing trial court's equitable distribution scheme regarding marital home, pursuant to which wife was ordered to buy out husband's $37,500, one-half interest in home's equity, at rate of $150 per month plus interest over 20 years; although equitable distribution statute permits equitable distribution of marital assets in form of installment payments over fixed period of time [*see* Fla. Stat. § 61.075(10)], scheme in instant case effectively deprived husband of his present one-half interest in marital home).

• Ehman v. Ehman, ___ So. 3d ___, 2014 Fla. App. LEXIS 4380, 39 Fla. L. Weekly D619 (Fla. 2d DCA Mar. 26, 2014) (trial court erred in awarding three properties to wife as part of its equitable distribution scheme, because title owner of properties was the company that was not joined as party to litigation; in addition, even though trial court did not err in granting default judgment against husband and wife's entitlement to equitable distribution and alimony was therefore conceded by husband, trial court must readdress amount of alimony and its equitable distribution scheme on remand, because three properties were essential to calculating equitable distribution).

Modification

Chapter 15, *Modification*, has been updated with recent appeals court decisions, including the following:

• Garvey v. Garvey, 138 So. 3d 1115 (Fla. 4th DCA 2014) (on motion for clarification) (changes in health that were merely possible at time of alimony agreement or order to pay alimony can warrant later modification if, following establishment of alimony obligation, deterioration in health does happen; district court also holds that same burden of proof applies to obtaining modification of agreed alimony as applies to securing modification of alimony that is court-ordered).

• Wilks v. Cronin, 138 So. 3d 1141, 2014

Fla. App. LEXIS 7294, 39 Fla. L. Weekly D1014 (Fla. 5th DCA May 16, 2014) (modification of timesharing based on change in father's work schedule from night shift to day shift was proper if trial court found it to be material and in child's best interests on remand; according to district court, father's schedule change "permitted him to be available to the [parties'] child in a more significant way," and, contrary to trial court's ruling, it constituted substantial change in circumstances).

Premarital Agreements

Fourth District: Premarital Waiver of Interest in Any Property That Is Titled Solely in Other Spouse's Name Constitutes Waiver of Interest in Any Enhanced Value of Such Property. The Fourth District Court of Appeal has held that if a premarital agreement provides that any property titled solely in one spouse's name is that spouse's sole property, regardless of whether the property was acquired prior to or during the parties' marriage, then the agreement is broad enough to reserve any enhancement in the value of such property—including any enhancement that results from the expenditure of marital funds or labor—as the owner-spouse's sole property. In so holding, the Fourth District certified conflict with the Second District in *Irwin v. Irwin* [857 So. 2d 247 (Fla. 2d DCA 2003)] and the Third District in *Valdes v. Valdes* [894 So. 2d 264 (Fla. 3d DCA 2004)]. In each of those cases, the district court held that a premarital agreement in which a spouse waived any interest in property titled solely in the other spouse's name was insufficient to also waive the nonowner-spouse's interest in enhanced value of the property that resulted from marital earnings [*see* Hahamovitch v. Hahamovitch, 133 So. 3d 1008 (Fla. 4th DCA 2014), *rev. granted*, 2014 Fla. LEXIS 1531 (Fla. Apr. 22, 2014); *see also* ch. 1, *Marriage*].

New Family Law Forms

The Florida Supreme Court has adopted corrections to four family law forms that were previously amended to reflect 2012 legislation regarding status of beneficiary-spouses following dissolution of their marriages to owner-spouses [*see* Fla. Stat. § 732.703; 2012 Fla. Laws, ch. 2012-148, § 1]. Pursuant to the most recent amendments, which were adopted by the Court in response to public comment, the forms' references to "deceased's party former spouse" have been corrected to read "deceased party's former spouse" [*see* Fla. Sup. Ct. Approved Fam. L. Forms 12.902(f)(1)-(2) (marital settlement agreement forms), 12.990(c)(1)–2) (final judgment of dissolution of marriage forms)]. In addition, designated references in one form to tax "deductions" have been changed to tax "exemptions" [*see* Fla. Sup. Ct. Approved Fam. L. Form 12.902(f)(1)]).

All four forms are set forth in Volume 4 of this set.

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VOLUME 1

Revision

☐	Title page.	Title page
☐	1-39	1-39 thru 1-40.1

Special Alert

☐	Blue Special Alert page 9SA-1 (preceding page 9-1)	Material not replaced

Revision

☐	10-3 thru 10-5	10-3 thru 10-6.3
☐	10-57 thru 10-69	10-57 thru 10-70.5
☐	10-87 thru 10-93	10-87 thru 10-93

VOLUME 2

Revision

☐	Title page thru vii	Title page thru vii
☐	10B-11 thru 10B-29	10B-11 thru 10B-30.3
☐	10B-79 thru 10B-83	10B-79 thru 10B-83
☐	11-4.1 thru 11-18.3	11-5 thru 11-18.5
☐	13-11.	13-11 thru 13-12.1
☐	14-1	14-1 thru 14-2.1
☐	14-41 thru 14-43	14-41 thru 14-44.9
☐	15-1 thru 15-2.1.	15-1 thru 15-2.1
☐	15-13 thru 15-15	15-13 thru 15-16.1
☐	15-46.1 thru 15-46.3.	15-46.1 thru 15-46.4(1)
☐	15-47 thru 15-61	15-47 thru 15-63
☐	17-11 thru 17-25	17-11 thru 17-26.3
☐	17-44.1 thru 17-57	17-45 thru 17-59

VOLUME 3

Revision

☐	Title page.	Title page
☐	I-1 thru I-25	I-1 thru I-25

Check As Done	*Remove Old Pages Numbered*	*Insert New Pages Numbered*

VOLUME 4

Revision

☐	Title page.	Title page
☐	113 thru 130.7	113 thru 130.7
☐	587 thru 610.1	587 thru 610.1

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