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Florida Family Law Practice Manual

Publication 80643 Release 77 September 2016

HIGHLIGHTS

2016 Legislation:

- ***Collaborative Law***
- ***Cohabitation***
- ***Service of Process***
- ***Enforcement***

2016 Legislation

Collaborative Law

***Initial Interview*, Chapter 2**

A collaborative law process is an alternative dispute resolution (ADR) process by which parties voluntarily and actively attempt to resolve their disputes together, while represented by counsel. This release incorporates discussion of Florida's new Collaborative Law Process Act, which is based on the national Uniform Collaborative Law Rules/Act (UCLR/A). The most significant provisions of Florida's Collaborative Law Process Act address (1) the commencement of a collaborative law process when parties enter into a collaborative law participation agreement, (2) the confidentiality of communications made during collaborative law proceedings, and (3) termination of a collaborative law process [*see* 2016 Fla. Laws, ch. 2016-93, §§ 6–7, creating Fla. Stat. §§ 61.57–61.58; *see also* HB 967 (2016) House of Representatives Final Bill Analysis]. An important difference between Florida's Act and the UCLR/A on which it is based is that the Florida Act is silent with regard to representation of the parties if the collaborative process does not yield a settlement and litigation is to be pursued. The UCLR/A mandates disqualification of collaborative counsel from representing their clients in litigation, thereby providing an incentive for settlement. The Florida Collaborative Law Process Act does not address the issue [*see* HB 967 (2016) House of Representatives Final Bill Analysis]. However, rules of procedure and professional responsibility are to be adopted by the Florida Supreme Court consistent with the Act [see 2016 Fla. Laws, ch. 2016-93, § 8], and they may address whether collaborative counsel

may represent their clients in litigation following conclusion of the collaborative process.

Florida's Collaborative Law Process Act will not take effect until 30 days after the Florida Supreme Court adopts rules of procedure and professional responsibility consistent with the Act [*see* 2016 Fla. Laws, ch. 2016-93, §§ 8–9].

Cohabitation

***Marriage*, Chapter 1**

A 2016 amendment deleted the statutory prohibition against cohabitation by unmarried persons, and this release reflects that change in the law. Although the prohibition against cohabitation was not often enforced, it was in effect and rendered the conduct of "any man and woman, not being married to each other, lewdly and lasciviously associat[ing] and cohabit[ing] together" a misdemeanor. The 2016 Legislature deleted the prohibition and the amendment took effect on April 6, 2016 when it was approved by the Governor [*see* 2016 Fla. Laws, ch. 2016-188, §§ 1–2, amending Fla. Stat. § 798.02].

Service of Process

***Service of Process and Defaults*, Chapter 5**

Amendments to the general statute concerning service of process allow substituted service to be made at a "virtual office" or an "executive office or mini suite," as those terms are defined by the amendments [*see* 2016 Fla. Laws, ch. 2016-207, § 1, amending Fla. Stat. § 48.031(6)]. The amendments took effect on July 1, 2016 [*see* 2016 Fla. Laws, ch. 2016-207, § 4].

Enforcement

***Enforcement*, Chapter 14**

Two new statutes and various statutory amendments concerning execution on judgments against judgment debtors were enacted in 2016 and have been incorporated into Chapter 14. In addition, this release contains expanded versions of the existing discussions about (1) initiating and maintaining actions to obtain judgments for support arrearage; (2) issuance of writs of execution and levying on property subject to the terms of such writs; and (3) discovering assets on which to levy and satisfy writs of execution. With regard to the discussion concerning discovery, a description of proceedings supplementary has been added to Chapter 14, and proceedings supplementary are distinguished from discovery that is pursued under general procedural rules.

One of the new statutes concerning execution on judgments against judgment debtors sets forth definitions of terms used throughout the statutes governing execution on judgments. The other new statute focuses on discovery in proceedings supplementary by consolidating and supplementing current discovery provisions. The most significant amendments to existing statutes concern third parties and proceedings supplementary. The amendments (1) establish a procedure for bringing a nonparty to the original action into proceedings supplementary; (2) require a third party who has been brought into proceedings supplementary to answer with any defenses; (3) confirm the due process rights of a third party who has been brought into proceedings supplementary; and (4) require that claims brought in proceedings supplementary under the Uniform Fraudulent Transfer Act (UFTA) be initiated by a supplemental complaint governed by UFTA and the rules of civil procedure.

The new enforcement statutes and amendments to existing enforcement statutes took effect on July 1, 2016 [*see* 2016 Fla. Laws, ch. 2016-33, § 20].

Case Law

Florida District Courts

Parental Responsibility and Timesharing, Chapter 8

The discussion of a parent's caregiver role as a factor to consider in determining timesharing has been expanded in this release. The revised discussion incorporates the concept that a court must consider not only a parent's past role as caregiver to the parties' child, but also the parent's current and anticipated future caregiver roles and the degree to which third parties have provided or will provide caregiving [*see* Fla. Stat. § 61.13(3)(b), (o)]. A recent Fifth District Court of Appeal decision in which the court affirmed a parenting plan set forth in a final judgment of dissolution that designated the husband to be the primary caregiver to the parties' children, notwithstanding the fact the mother had been their primary caregiver during the marriage, is covered. In the Fifth District case, the district court held that the trial court had properly designated the husband as primary caregiver in the final judgment, based on (1) the wife's repeated rejections of the court's temporary timesharing orders; and (2) her repeated allegations that the husband had sexually abused the children, which the Department of Children and Family Services, the Sheriff's Office, various psychologists and therapists, and three judges had all found to be unsubstantiated. The district court noted that in contrast to the wife, the husband had "not only complied with the letter of" the court's timesharing orders, "but with the spirit of those orders as well," granting the wife additional timesharing at her request. The Fifth District also held there was competent, substantial evidence to support the trial court's finding that the husband's conduct constituted a change in the children's best interests, resulting in their "[becoming] healthy, happy, and doing well at school, both socially and educationally" [*see* Paulick v. Paulick, 180 So. 3d 1109 (Fla. 5th DCA 2015)].

In this release, recent case law that refines the rules for alleviating or removing timesharing restrictions is discussed. Specifically, recent case law addressing what purge-like conditions a trial court must include in its order imposing the restrictions is covered. Pursuant to the new decisional law, a trial court is not required to set forth every minute detail of the preconditions a parent must satisfy to reestablish unrestricted timesharing. However, the court must set forth relatively specific tasks the parent will know must be accomplished and if they are accomplished, the restrictions will be terminated. An example of a relatively specific task that a trial court must set forth is identification of a specific type of counseling, if the court has determined that is preferable to general counseling. For instance, if a trial court determines that anger management therapy or a substance abuse program would be more appropriate than mere general counseling, then the court must specify that the affected parent must obtain the specific type of therapy determined by the court to be desirable. The court must also set forth a timeframe for the therapy [*see* Witt-Bahls v. Bahls, — So. 3d —, 2016 Fla. App. LEXIS 6000, 41 Fla. L. Weekly D989Fla. 4th DCA Apr. 20, 2016)]. If a trial court's order fails to set forth the steps the parent must take to be relieved of the restrictions, the order must be reversed [*see* Forssell v. Forssell, 188 So. 3d 880 (Fla. 4th DCA 2016) (reversing and instructing that on remand, trial court could consider psychological evaluation, parenting course, or anger management course as conditions to resuming father's timesharing); Tzynder v.

Edelsburg, 184 So. 3d 583 (Fla. 3d 2016)]. A trial court must not delegate its authority over timesharing to a therapist with respect to determining how and when a parent may reestablish timesharing with his or her child [*see* Niekamp v. Niekamp, 173 So. 3d 1106, 1108 (Fla. 2d DCA 2015)].

Child Support, Chapter 9

A new section discussing declaratory relief actions to determine maternity has been added in this release. The new section specifically discusses a recent Fourth District case involving a birth mother's falsification of her name on her children's birth certificates because she was in the United States illegally. Her children petitioned for declaratory relief, requesting (1) a determination of her maternity, (2) child support, and (3) a parenting plan. The Fourth District held that the trial court erred in dismissing the action, because Florida Statutes Section 86.011 extends broad jurisdiction to circuit courts to provide declaratory relief if the party requesting such relief establishes that an adjudication is necessary to accomplish determination of rights or duties between parties to an actual controversy or dispute. In the case before the Fourth District, the children's request for child support and a parenting plan together with a determination of maternity established that there was a dispute for which a determination of maternity was dependent, and therefore the dispute could properly be adjudicated under the declaratory relief statute. The Fourth District declined to address whether the trial court had erred in previously dismissing the mother's petition for a determination of maternity under Florida Statutes Chapter 742, which governs paternity [*see* B.B.S. v. Rodriguez-Murguia, 191 So. 3d 528, 2016 Fla. App. LEXIS 7198, 41 Fla. L. Weekly D1137(Fla. 4th DCA May 11, 2016)].

Alimony, Chapter 10

- A trial court may impute income to a party at a lower level than he or she previously earned, even if the party desires to earn at the higher, previous level, if (1) the party voluntarily terminated his or her prior employment and thereafter rejected an offer of a job that was similar to his or her prior job, but paid less than the prior job; and (2) the party's rejection of the job offer was based solely on the fact that he or she would be earning less at the new job than he or she was earning at the prior job. In such a case, the party may properly be found to have not made a diligent attempt to find a job comparable to his or her prior employment and the court may properly impute income at the level of that offered and rejected [Manfre v. Manfre, 189 So. 3d 197, 201 (Fla. 4th DCA 2016)].
- A trial court's finding that a husband should not be required to work seven days per week reflected (1) a realization by the court that requiring such a workload is not reasonable, and (2) an implicit finding that the overtime he had earned during the marriage by working seven days per week was no longer available to him [*see* Fla. Stat. § 61.08(2)(i) (trial court determining alimony must consider "[a]ll sources of income available to either party")]. Therefore, the trial court erred in calculating an alimony award to the wife based on the husband's former seven-day workweek [*see* Nolan v. Nolan, 188 So. 3d 977, 979 (Fla. 1st DCA 2016)].

- A trial court abuses its discretion if it awards alimony in an amount that does not provide for the obligee's needs and necessities as those were established during the parties' marriage, and the amount awarded also does not comply with the court's duty to consider other statutory factors [Rhoads v. Rhoads, — So. 3d —, 2015 Fla. App. LEXIS 19100, 40 Fla. L. Weekly D2825(Fla. 1st DCA Dec. 22, 2015)].

Equitable Distribution of Marital Assets, Chapter 10B

An increase in the value of nonmarital stock held by a spouse in his or her employer during the parties' marriage remains nonmarital unless the spouse holds a significant management position with the employer. The increased value of the stock is considered to be nonmarital because the appreciation in value is not deemed to be the result of the employee's active effort [*see* Witt-Bahls v. Bahls, — So. 3d —, 2016 Fla. App. LEXIS 6000, 41 Fla. L. Weekly D989(Fla. 4th DCA April 20, 2016), *on reh.* (declining to decide whether Florida Supreme Court's decision in *Kaaa v. Kaaa* [58 So. 3d 867 (Fla. 2010)] is distinguishable)].

Marital Settlement Agreements Negotiated by the Parties, Chapter 11

The Fifth District Court of Appeal held that a trial court erred in failing to conduct an evidentiary hearing to address how a wife should be paid her share of her husband's retirement pension. The parties' marital settlement agreement (MSA) had provided for distribution to the wife pursuant to a Qualified Domestic Relations Order (QDRO). However, the husband's employer prohibited transfer of pension payments by QDRO, giving rise to a latent ambiguity with regard to how benefits were to be transferred to the wife. According to the Fifth District, the ambiguity was required to be resolved through the taking of parol evidence [*see* Taylor v. Taylor, 183 So. 3d 1121 (Fla. 5th DCA 2015)].

Attorneys' Fees, Chapter 17

The discussion of charging liens is updated to include discussion of *Jaeger v. Jaeger*, in which the Fourth District Court of Appeal ruled that charging liens are not enforceable against awards of overdue support, including awards of overdue support to be paid in the form of undifferentiated family support. This is particularly true to the extent a fund includes only temporary child support and alimony arrearage amounts, and therefore does not include any amounts other than what was established as the needs and necessities of the spouse and children [*see* Jaeger v. Jaeger, 182 So. 3d 697 (Fla. 4th DCA 2015)].

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