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Florida Family Law Practice Manual

Publication 80643 Release 79 September 2017

HIGHLIGHTS

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- ***Collaborative Law Rules***
- ***"Stand-Alone" Family Law Rules of Procedure***

New Family Law Forms:

- ***Subpoenas and Subpoenas Duces Tecum for Hearing or Trial***
- ***Subpoena for Deposition***

Case Law:

Florida Supreme Court:

- ***Daubert* evidence statute is rejected, to extent it is procedural.**
- **Florida court must enforce final judgment of another state that awards grandparent visitation.**
- **Proper standard of review in case concerning whether spouse made interspousal gift is whether competent, substantial evidence exists in record to support finding donative intent.**

Florida District Courts:

- **In first of its kind ruling in Florida, Fourth District rules that oral cohabitation agreements are enforceable.**
- **Fourth District holds *en banc* that courts may award appellate attorneys' fees in paternity proceedings.**

Rules

Collaborative Law Rules

***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 discusses a new family law procedural rule, Florida Family Law Rule of Procedure 12.745, and a new rule of professional responsibility, Rule Regulating the Florida Bar 4-1.19, both of which were adopted by the Florida Supreme Court to address Florida's Collaborative Law Process Act [*see* Fla. Fam. L. R. P. 12.745; Rules Reg. Fla. Bar 4-1.19; *see also* 2016 Fla. Laws, ch. 2016-93].

The Collaborative Law Process Act was enacted in 2016, but by its terms, it did not take effect until 30 days after the Supreme Court adopted the new rules [*see* 2016 Fla. Laws, ch. 2016-93, § 8]. The Supreme Court's opinion was issued on May 18, 2017, and therefore the Act took effect on June 18, 2017. The new rules took effect on July 1, 2017 [*see* In re Amendments to Rule Regulating the Fla. Bar 4-1.19 & Fla. Family Law Rule of Procedure 12.745, 2017 Fla. LEXIS 1080, 42 Fla. L. Weekly S—(Fla. May 18, 2017)].

The most important aspect of the new rules is that under Rule 12.745, a collaborative lawyer or a member of the lawyer's firm who has represented a party in a collaborative law process is thereafter disqualified from representing the party in litigation that is related to the collaborative law matter, unless one of the exceptions set forth in the rule applies [*see* Fla. Fam. L. R. P. 12.745(f)]. This provision addresses a major gap in Florida's Act. Unlike the national Uniform Collaborative Law Rules/Act (UCLR/A) on which it is based, Florida's Act does not address disqualification of collaborative counsel to represent their clients in any subsequent litigation related to the collaborative process. That feature of the UCLR/A is considered one of the hallmarks of collaborative law practice, because it provides an incentive for settlement and differentiates collaborative law practice from other alternative dispute resolution methods such as mediation [*see* In re Amendments to Rule Regulating the Fla. Bar 4-1.19 & Fla. Family Law Rule of Procedure 12.745, 2017 Fla. LEXIS 1080, 42 Fla. L. Weekly S—(Fla. May 18, 2017)].

Significant aspects of new Rule Regulating the Florida Bar 4-1.19 include a requirement that collaborative law counsel obtain informed consent of his or her prospective client before agreeing to represent the client in a collaborative law process. The rule sets forth a nonexclusive list of informational items about which the attorney should apprise the client to obtain informed consent [*see* Rules Reg. Fla. Bar 4-1.19(a)]. In addition, Rule 4-1.19 sets forth requirements that must be satisfied before an attorney may initiate or continue representation of a client in a collaborative law process [*see* Rules Reg. Fla. Bar 4-1.19(c)]. A Comment to Rule 4-1.19 states that representation of a client in a collaborative law process is a form of limited representation that must comply with all requirements of limited scope representations [Rules Reg. Fla. Bar 4-1.19, Comment].

Rule 4-1.19 also sets forth required format and provisions of the agreement, requires filing of the agreement with the court, and establishes the filing as an application for stay of the court proceeding [Rules Reg. Fla. Bar 4-1.19(b)]. On conclusion of the collaborative law process, the parties must promptly file notice with the court and any stay of the proceeding is lifted when the notice is filed. The notice may not specify any reason for termination of the process [Fla. Fam. L. R. P. 12.745(2)].

"Stand-Alone" Family Law Rules of Procedure

Volumes 1–3

The Florida Supreme Court has approved amendments to the Florida Family Law Rules of Procedure that eliminate all cross-references to the Florida Rules of Civil Procedure and incorporate applicable civil procedure rule provisions into the family law rules, resulting in what the Supreme Court calls a "stand-alone" set of family law rules. The newly incorporated civil procedure rule provisions contain some

modifications in language to make them more directly relate to family law proceedings, but the modifications do not change the substance of the provisions. Also worth noting is that the incorporation of the civil procedure rules provisions has changed the numbering of family law rule provisions in a number of instances.

The family law rules of procedure set forth in Volume 3 of this set, along with the accompanying official commentary, have been replaced with the new stand-alone rules and official commentary. In addition, an entirely updated table of contents listing the number and name of each rule, along with an easy-to-reference list of Florida Supreme Court opinions in which the Court adopted new or amended rules, is set forth in Volume 3. Finally, in chapter discussions throughout the set, outdated references to the Florida Rules of Civil Procedure have been replaced with references to the stand-alone rules.

The amended rules became effective immediately on release of the Supreme Court's opinion on March 16, 2017 [see In Re: Amendments to Florida Family Law Rules of Procedure, 214 So. 3d 400, 2017 Fla. LEXIS 598, 42 Fla. L. Weekly S319 (Fla. LEXIS 2017)].

Forms

New Family Law Forms

Volume 4

The following five forms of subpoena were adopted by the Florida Supreme Court in its opinion adopting "stand-alone" family law rules of procedure [*see* In re Amendments to Fla. Family Law Rules of Procedure, 2017 Fla. LEXIS 598, 42 Fla. L. Weekly S 319 (Fla. Mar. 16, 2017)]:

1. Florida Fam. L. R. Form 12.911(a), *Subpoena for Hearing or Trial (Issued by Clerk).*
2. Florida Fam. L. R. Form 12.911(b), *Subpoena for Hearing or Trial (Issued by Attorney).*
3. Florida Fam. L. R. Form 12.911(c), *Subpoena Duces Tecum for Hearing or Trial (Issued by Clerk).*
4. Florida Fam. L. R. Form 12.911(d), *Subpoena Duces Tecum for Hearing or Trial (Issued by Attorney).*
5. Florida Fam. L. R. Form 12.911(e), *Subpoena for Deposition (Issued by Clerk).*

The five subpoena forms above replace, for use in family law actions, the subpoena forms that accompany the Florida Rules of Civil Procedure [*see* Fla. R. Civ. P. Forms 1.910]. They became effective immediately on release of the Court's opinion [*see* In re Amendments to Fla. Family Law Rules of Procedure, 2017 Fla. LEXIS 598, 42 Fla. L. Weekly S 319 (Fla. Mar. 16, 2017)].

Amended Family Law Forms

Volume 4

The following amended forms were adopted by the Florida Supreme Court in its opinion adopting "stand-alone" family law rules of procedure [*see* In re Amendments to Fla. Family Law Rules of Procedure, 2017 Fla. LEXIS 598, 42 Fla. L. Weekly S 319 (Fla. Mar. 16, 2017)]:

1. Florida Fam. L. R. Form 12.910(a), *Summons: Personal Service on an Individual.*
2. Florida Fam. L. R. Form 12.930(a), *Notice of Service of Standard Family Law Interrogatories.*
3. Florida Fam. L. R. Form 12.930(b), *Standard Family Law Interrogatories for Original or Enforcement Proceedings.*

4. Florida Fam. L. R. Form 12.930(c), *Standard Family Law Interrogatories for Modification Proceedings.*
5. Florida Fam. L. R. Form 12.930(d), *Notice of Service of Answers to Standard Family Law Interrogatories.*
6. Florida Fam. L. R. Form 12.975, *Notice of Compliance When Constitutional Challenge Is Brought*.
7. Florida Fam. L. R. Form 12.999, *Final Disposition Form*.

According to the Supreme Court, the amendments to the above forms were "minor and editorial." They became effective immediately on release of the Court's opinion [*see* In re Amendments to Fla. Family Law Rules of Procedure, 2017 Fla. LEXIS 598, 42 Fla. L. Weekly S 319 (Fla. Mar. 16, 2017)].

Case Law

Florida Supreme Court

The Florida Supreme Court has declined to adopt integration of the *Daubert* standard for admission of scientific testimony into the Evidence Code, to the extent the pertinent statutory provisions are procedural [*see* In re Amendments to the Fla. Evidence Code, 210 So. 3d 1231 (Fla. 2017); *see also* Fla. Stat. § 90.702; Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)]. The Supreme Court refused to adopt the provisions based on "grave constitutional concerns," including denial of access to the courts [*see* In re Amendments to the Fla. Evidence Code, 210 So. 3d 1231 (Fla. 2017)]. In *Daubert*, the United States Supreme Court interpreted Federal Rule of Civil Procedure 702 and held that (1) the rule permitted a flexible inquiry into the reliability of proposed scientific testimony; and (2) the reliability test of Rule 702 superseded a prior, more restrictive case-law test requiring general acceptance by the scientific community. The prior test was established in *Frye v. United States* [293 F. 1013 (D.C. Cir. 1923)], and until *Daubert* was decided, *Frye* 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 long-time rejection of *Daubert* in Florida and amended the Florida Evidence Code in a manner that essentially confirmed application of Federal Rule 702 to the Florida Evidence Code. 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.]. The 2013 *Daubert* legislation and the Supreme Court's rejection of it is discussed in Chapters 8, *Parental Responsibility and Timesharing,* and 10B, *Equitable Distribution of Marital Assets*.

The Florida Supreme Court resolved a conflict between the Fourth and Fifth District Courts of Appeal and ruled that pursuant to the Full Faith and Credit Clause of the United States Constitution, a Florida court must recognize and enforce the final judgment of another state's court under which grandparents have been awarded visitation with their minor grandchildren [*see* Ledoux-Nottingham v. Downs, 210 So. 3d 1217 (Fla. 2017); *see also* Ch. 8, *Parental Responsibility and Timesharing*].

The Florida Supreme Court has ruled that

the 20-year statute of limitations found in Florida Statutes Section 95.11(1) is applicable to the enforcement of a foreign judgment after it is recorded under the Florida Enforcement of Foreign Judgments Act (FEFJA) [*see* Patrick v. Hess, 212 So. 3d 1039 (Fla. 2017); *see also* Fla. Stat. § 95.11(1)]. In so ruling, the Court approved a decision of the Second District Court of Appeal and disapproved decisions of the Fourth and Fifth District Courts of Appeal [*see* Patrick v. Hess, 42 Fla. L. Weekly S 174, 2017 Fla. LEXIS 337 (Fla. Feb. 16, 2017) (approving *Hess v. Patrick* [164 So. 3d 19 (Fla. 2d DCA 2015)]; disapproving *New York State Commissioner of Taxation & Finance v. Friona* [902 So. 2d 864 (Fla. 4th DCA 2005)] and *Haigh v. Planning Board* [940 So. 2d 1230 (Fla. 5th DCA 2006)])].

The Florida Supreme Court resolved a conflict between the Fourth District Court Court of Appeal and one of the Supreme Court's own decisions, as well as decisions of the First and Third District Courts of Appeal, ruling that the proper standard of review in a case involving the issue of whether a spouse made an interspousal gift is whether competent, substantial evidence exists in the record to support finding donative intent in the spouse [*see* Hooker v. Hooker, 42 Fla. L. Weekly S 396, — So. 2d —, 2017 Fla. LEXIS 712 (Fla. Mar. 30, 2017); *see also* Shaw v. Shaw, 334 So. 2d 13 (Fla. 1976); Hooker v. Hooker, 174 So. 3d 507, 511 (Fla. 4th DCA 2015); Abreu v. Amaro, 534 So. 2d 771 (Fla. 3d DCA 1988); Merrill v. Merrill, 357 So. 2d 792 (Fla. 1st DCA 1978)]. The Supreme Court also confirmed, in the case before it, the trial court's determination that a husband's nonmarital real property asset became marital because he made an interspousal gift to the wife. The Supreme Court ruled that no one factor independently establishes an interspousal gift for purposes of equitable distribution. In the instant case, neither the wife's signing of a warranty deed, nor her being listed on the mortgage, nor her unfettered access to and autonomy in residing, maintaining, and improving the property established an interspousal gift by the husband. However, viewing the husband's actions comprehensively, including comments he made to the wife concerning the property during their marriage, established an interspousal gift, notwithstanding that there was no transfer of title from the husband alone to the parties. Discussion of the Supreme Court decision may be found in Chapter 10B, *Equitable Distribution of Marital Assets*.

Florida District Courts

For the first time in Florida, an appeals court has ruled that oral cohabitation agreements are recognized and enforceable. The Fourth District Court of Appeal held that in the case before it, "sufficiently specific" testimony regarding the nature of the parties' relationship and their commingling of assets and funds, together with other evidence of the parties' course of conduct regarding their financial affairs, established that an oral cohabitation agreement existed between the parties. The court also held that the statute of frauds does not apply to cohabitation agreements [*see* Armao v. McKenney, 2017 Fla. App. LEXIS 6180, 42 Fla. L. Weekly D 1011 (Fla. 4th DCA May 3, 2017); *see also* ch. 1, *Marriage*].

On *en banc* consideration, the Fourth District Court of Appeal has receded from its prior ruling in *Gilbertson v. Boggs* [743 So. 2d 123 (Fla. 4th DCA 1999)] and ruled that courts may award appellate attorneys' fees to parties in paternity proceedings. In so ruling, the court's six-member majority joined the Second District Court of Appeal in certifying conflict with the Fifth District

Court of Appeal on the issue [*see* Beckford v. Drogan, 2017 Fla. App. LEXIS 935, 42 Fla. L. Weekly D 280 (Fla. 4th DCA Jan. 27, 2017); *see also* B.K. v. S.D.C., 122 So. 3d 980, 982–983 (Fla. 2d DCA 2013); Starkey v. Linn, 727 So. 2d 386 (Fla. 5th DCA 1999)].

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Publication 80643 Release 79 September 2017

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