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Florida Family Law Practice Manual

Publication 80643 Release 85 September 2020

HIGHLIGHTS

Cases

- ***Florida District Courts***
- Fifth District Court of Appeal has joined the First District in ruling that trial courts are not required or even authorized to establish conditions a parent must satisfy to obtain removal of restrictions on his or her timesharing. Rather, Florida Statutes Section 61.13(3) provides the exclusive method—modification—that a parent may use to obtain a change in timesharing conditions [C.N. v. I.G.C.]
- A child's poor performance in school that is "connected" to acrimony between the child's parents may constitute a substantial change in circumstances. However, the poor school performance must, by itself, constitute a sufficient basis on which to find a substantial, unanticipated change in circumstances [Light v. Kirkland]
- Evidence that a respondent-parent has engaged in an "enduring course of behavior" that risks "destabilization" of the parties' child satisfies the requirements of showing a substantial change and the child's best interests for purposes of obtaining modification of shared decisionmaking to sole decisionmaking [Ezra v. Ezra]
- Fourth District, *en banc*: a party who seeks attorneys' fees under the safe-harbor provision of Florida Statutes Section 57.105 is not required to serve the motion requesting fees by email pursuant to Florida Rule of Judicial Administration 2.516 [Law Offices of Fred C. Cohen v. H.E.C. Cleaning,

LLC, receding from prior contrary decision in *Matte v. Caplan*]

- Third District adopts the Fourth District's rule that if litigation requires a trial court to determine what is in the best interests of the parties' child, then the trial court has the discretion to award attorneys' fees and costs pursuant to Florida Statutes Section 61.16, notwithstanding any agreement between the parties to waive their respective rights to seek an award of attorneys' fees and costs [Helinski v. Helinski]

Cases

Florida District Courts

Dissolution of Marriage—Residency Requirement

Although a wife's absence from Florida may very well have been a consequence of her serious health issues and not an intention to make her residence elsewhere, her "complete physical absence" from Florida during the six months prior to the filing of her petition was "dispositive" on the residency issue. Therefore, the lower court's order was void for lack of subject matter jurisdiction [Lauterbach v. Lauterbach, ___ So. 3d ___, 2020 Fla. App. LEXIS 5044, 45 Fla. L. Weekly D 848 (Fla. 2d DCA April 15, 2020); *see* ch. 3, *Initiating the Action*].

Future Events As Bases for Determining Support or Timesharing

Support

Chapter 10, *Alimony*, now includes a discussion focused on whether future, anticipated events may be considered in determining what type of alimony to award or the amount that should be awarded. A recent case, *Rhoden v. Rhoden* [___ So. 3d ___, 2020 Fla. App. LEXIS 5788, 45 Fla. L. Weekly D1035 (Fla. 1st DCA April 29, 2020)], is covered.

Timesharing

A trial court's order may not provide that timesharing will be modified in the future if the parent whose timesharing has been restricted satisfies conditions for removal of the restrictions. Such a provision for future modification constitutes a prospective determination of the child's best interests and is prohibited [Hughes v. Binney, 285 So. 3d 996 (Fla. 1st DCA 2019), citing *Arthur v. Arthur,* 54 So. 3d 454 (Fla. 2010); *see* chs. 8, *Parental Responsibility and Timesharing,* 15, *Modification*].

Because a mother had not identified a date for relocation and her plans were "no more concrete than wanting to look for employment in [another named county]," the trial court erred in addressing the best interests of the parties' child in connection with the relocation issue and establishing a parenting plan based on the mother's possible relocation. The relocation constituted a future event that was not "objectively certain to occur at an identifiable time in the future," as allowed by *Rivera v. Purtell* [252 So. 3d 283 (Fla. 5th DCA 2018)], in which the district court interpreted the Supreme Court's decision in *Arthur v. Arthur* [54 So. 3d 454 (Fla. 2010)]. Addi-

tionally in the instant case, the trial court improperly addressed the relocation issue outside the context of the relocation statute and its requirements [*see* C.G. v. M.M., ___ So. 3d ___, 2020 Fla. App. LEXIS 6861, 45 Fla. L. Weekly D 1183 (Fla. 2d DCA May 20, 2020); *see also* ch. 15, *Modification*].

Enforcement—Contempt

The Chapter 14 discussion about contempt has been revised to more clearly set forth current law and eliminate lengthy discussion about older law. The 2020 case of *Wolf v. Wolf* is covered with respect to the district court's reversal of a trial court's order finding a mother in contempt for alleged willful denial of timesharing. Evidence of the child's not wanting to get out of the mother's car, without more to show that the child's conduct was attributable to the mother, was insufficient to show a clear, willful violation of the parties' parenting plan and the final judgment of dissolution. Also, evidence of the mother's refusal to meet at a location allowed in the parenting plan and her desire to instead meet at an alternative nearby location where the child would not be able to run into the street in reaction to the timesharing handoff was insufficient to establish a clear, willful violation of the final judgment [*see* Wolf v. Wolf, ___ So. 3d ___, 2020 Fla. App. LEXIS 3545, 45 Fla. L. Weekly D 622 (Fla. 2d DCA March 18, 2020) (mother testified that child was autistic and "ha[d] a very hard time transitioning")].

A trial court may not effectively circumvent the rule against enforcing property settlements through contempt by ordering that a property equalization payment be recharacterized as alimony, and then enforcing the obligation through contempt [*see* Vinson v. Vinson, ___ So. 3d ___, 2020 Fla. App. LEXIS 6710, 45 Fla. L. Weekly D 1172 (Fla. 1st DCA May 18, 2020) (*Vinson II*) (remanding contempt order and ordering its vacatur because, as was held in *Vinson I*, order purportedly being enforced was not support order but rather directed husband to make equalization payment as part of equitable distribution); Vinson v. Vinson, 282 So. 3d 122, 140-141 (Fla. 1st DCA 2019) (*Vinson I*) (directing that when trial court reconsidered its equitable distribution scheme on remand, it must not reclassify lump-sum payment award that effected property distribution as alimony, to sanction payor-husband for his failure to make equalization payment through contempt)].

Contempt sanctions must be remedial and if ordered to compensate for loss, they must not exceed the claimant's actual loss [Biss v. Biss, 292 So. 3d 846 (Fla. 5th DCA 2020); *see* ch. 14, *Enforcement*].

Contempt was not available as a sanction for breach of a marital settlement agreement that was neither adopted nor ordered by the trial court. The only remedies available for the breach were contract remedies [Thilloy v. Ciccone-Capri, 289 So. 3d 18 (Fla. 3d DCA 2019) (MSA was executed during initial dissolution

proceeding and was never adopted or ordered by trial court prior to dismissal of action; enforcement by contempt was improperly ordered during second dissolution action); *see* ch. 11, *Marital Settlement Agreements Negotiated By The Parties*].

Modification

Distinguished from Clarification of Judgment

If a postjudgment order confers a new benefit or obligation, it constitutes a modification and not a clarification of the final judgment [*see* Bustamante v. O'Brien, 286 So. 3d 352 (Fla. 1st DCA 2019) (judgment that required parties to "confer regarding airplane tickets" for children's travel to visit their father and "mutually agree prior to booking said tickets" was modified, not clarified, by order that required father to plan transportation details and book flights no less than 60 days before his timesharing was to begin; order conferred new benefit on wife and imposed new and material burden on husband due to his variable location obligations in United States Army); *see also* ch. 15, *Modification*].

Alimony

If the parties agree that a specific amount of durational alimony will be paid each month for a definite time, the alimony is nonmodifiable with regard to duration. Also, if the agreement does not require the payee to obtain employment following dissolution of the parties' marriage, then the trial court may not impute income to the payee in later modification proceedings initiated by the payor to obtain a reduction or termination of the alimony obligation. A trial court's imputation of income in such circumstances fails to give effect to the MSA and the parties' intentions and constitutes reversible error [Judy v. Judy, 291 So. 3d 651 (Fla. 2d DCA 2020); *see* ch. 15, *Modification*].

Although a husband's retirement was anticipated by the parties when they stipulated to an alimony amount in earlier proceedings, there was no evidence they had contemplated the actual change and consequences to his income. I.E. the change in the husband's income resulting from retirement was not contemplated and considered at the time the alimony amount was established, and therefore, the change could properly be considered in later proceedings to reduce alimony [Befanis v. Befanis, 293 So. 3d 1121, 2020 Fla. App. LEXIS 5173, 45 Fla. L. Weekly D 920 (Fla. 5th DCA April 17, 2020); *see* ch. 15, *Modification*].

If a change in a payor's financial circumstances is caused not only by fluctuating market conditions that adversely affect his or her income, but also by permanent changed conditions such as loss of major clients and changed government regulations, then termination of his or her alimony obligation may be proper [*see* Suarez v. Suarez, 284 So. 3d 1083, 1087 (Fla. 4th DCA 2019); *see also* ch. 15, *Modification*].

The First District discusses competing facts and inferences regarding the financial relationship between an

alimony obligee and her cohabitant, and holds that they precluded the trial court from properly finding a supportive relationship and entering summary judgment on that basis in favor of the obligor [Bradner v. Bradner, 286 So. 3d 947 (Fla. 1st DCA 2019); *see* ch. 15, *Modification*].

Parental Responsibility and Timesharing

A child's poor performance in school that is "connected" to acrimony between the child's parents may constitute a substantial change in circumstances. However, the poor school performance must, by itself, constitute a sufficient basis on which to find a substantial, unanticipated change in circumstances [Light v. Kirkland, ___ So. 3d ___, 2020 Fla. App. LEXIS, 45 Fla. L. Weekly D 150 (Fla. 1st DCA Jan. 21, 2020); *see* ch. 15, *Modification*].

A parent engaging in domestic violence in front of his or her children constitutes an unanticipated, material, and substantial change in circumstances supporting modification of a timesharing arrangement [Meyers v. Meyers, ___ So. 3d ___, 2020 Fla. App. LEXIS 2861, 45 Fla. L. Weekly D 525 (Fla. 2d DCA March 6, 2020) (domestic violence incident between father and his new wife in child's presence, coupled with father's attempt to conceal incident by telling child to keep it secret, constituted substantial change in circumstances that justified modification of timesharing)].

A parent may be able to obtain modification of shared decisionmaking to sole decisionmaking if a substantial change in circumstances and the child's best interests is shown. Evidence that the respondent-parent has engaged in an "enduring course of behavior" that risks "destabilization" of the parties' child satisfies those requirements [*see* Ezra v. Ezra, __ So. 3d __, 2020 Fla. App. LEXIS 1319, 45 Fla. L. Weekly D 262 (Fla. 3d DCA Feb. 5, 2020); *see also* ch. 15, *Modification*].

The Fifth District Court of Appeal has joined the First District in ruling that trial courts are not required or even authorized to establish conditions a parent must satisfy to obtain removal of restrictions on his or her timesharing. Rather, Florida Statutes Section 61.13(3) provides the exclusive method—modification--that a parent may use to obtain a change in timesharing conditions [*see* C.N. v. I.G.C., 291 So. 3d 204, 205 (Fla. 5th DCA 2020); Dukes v. Griffin, 230 So. 3d 155, 156–157 (Fla. 1st DCA 2017)]. Like the First District, the Fifth District certified conflict with the Second and Fourth District Courts of Appeal on the issue [*see* C.N. v. I.G.C., 291 So. 3d 204, 207 (Fla. 5th DCA 2020) (certifying conflict with e.g., *Perez v. Fay* [160 So. 3d 459 (Fla. 2d DCA 2015)] and *Ross v. Botha* [867 So. 2d 567 (Fla. 4th DCA 2004)]); *see also* ch. 15, *Modification*].

Domestic Violence

Chapter 12, *Temporary Relief*, has been revised to set forth an overview of what evidence is sufficient to establish a reasonable fear of imminent

domestic violence that will justify entry of an injunction. The discussion is derived from a Fourth District decision in which the court addressed whether evidence before a trial court was sufficient to show an imminent fear of domestic violence in the petitioner-wife, who sought an injunction based on her husband's threat to kill her two months earlier. That evidence, coupled with evidence of prior violent acts by the husband against the wife and a recent act of intimidation by him toward her, was sufficient to justify entry of an injunction against domestic violence, the Fourth District held [*see* Boucher v. Warren, 291 So. 3d 597 (Fla. 4th DCA 2020) (citing *Gill v. Gill* [50 So. 3d 772, 774 (Fla. 2d DCA 2010)] and Florida Statutes Section 741.30(6)(b))].

In determining whether to grant a motion to dissolve an injunction against domestic violence, a trial court must determine whether the injunction continues to serve a valid purpose. In doing so, the court must consider whether the victim reasonably maintains a continuing fear of becoming a victim of domestic violence [Hobbs v. Hobbs, 290 So. 3d 1092, 1095 (Fla. 1st DCA 2020); *see* ch. 12, *Temporary Injunctions*].

Marital Settlement Agreements—Enforcement—Court's Jurisdiction

In a postjudgment enforcement proceeding in which a former spouse seeks enforcement of the parties' marital settlement agreement, the trial court's continuing jurisdiction to enforce the MSA does not encompass authority to award general damages for its breach. However, whether the parties can, within their marital settlement agreement, confer continuing jurisdiction on the court to award general damages in a postjudgment enforcement proceeding is an open question [, ___ So. 3d ___, 2019 Fla. App. LEXIS 17908, 44 Fla. L. Weekly D2865 (Fla. 2d DCA Nov. 27, 2019); *see* ch. 11, *Marital Settlement Agreements Negotiated by the Parties*].

Attorneys' Fees

A party who seeks attorneys' fees under the safe-harbor provision of Florida Statutes Section 57.105 is not required to serve the motion requesting fees by email pursuant to Florida Rule of Judicial Administration 2.516 [Law Offices of Fred C. Cohen v. H.E.C. Cleaning, LLC, 290 So. 3d 76, 81 (Fla. 4th DCA 2020), *en banc* (receding from prior contrary decision in in *Matte v. Caplan* [140 So. 3d 686 (Fla. 4th DCA 2014)]); *see* ch. 17, *Attorney's Fees*].

After an action is voluntarily dismissed, the trial court may not grant a party's motion to award attorneys' fees as a sanction under Florida Statutes Section 57.105(1), unless the motion was filed before the dismissal [Residents for a Better Cmty. v. WCI Cmtys., Inc., 291 So. 3d 632 (Fla. 2d DCA 2020); *see* ch. 17, *Attorney's Fees*].

Florida Statutes Section 742.045, which governs awards of attorneys' fees in paternity cases, permits waivers of attorneys' fees the same as

Florida Statutes Section 61.16. However, like Section 61.16, Section 742.045 does not permit a waiver of temporary fees prior to entry of final judgment [Nishman v. Stein, 292 So. 3d 1277, 2020 Fla. App. LEXIS 5224, 45 Fla. L. Weekly D 907 (Fla. 2d DCA April 17, 2020); *see* ch. 17, *Attorney's Fees*].

The Third District adopts the Fourth District's rule that if litigation requires a trial court to determine what is in the best interests of the parties' child, then the trial court has the discretion to award attorneys' fees and costs pursuant to Florida Statutes Section 61.16, notwithstanding any agreement between the parties to waive their respective rights to seek an award of attorneys' fees and costs [Helinski v. Helinski, ___ So. 3d ___, 2020 Fla. App. LEXIS 6497, 45 Fla. L. Weekly D 1154 (Fla. 3d DCA May 13, 2020); *see* ch. 17, *Attorney's Fees*].

Costs must be awarded to a respondent if an action is voluntarily dismissed [*see* Fla. Fam. L. R. P. 12.420(c); Helinski v. Helinski, ___ So. 3d ___, 2020 Fla. App. LEXIS 6497, 45 Fla. L. Weekly D 1154 (Fla. 3d DCA May 13, 2020); *see also* ch. 17, *Attorney's Fees*].

Other Cases Covered in This Release:

Motions to Set Aside or Vacate—(1) Singer v. Singer, ___ So. 3d ___, 2020 Fla. App. LEXIS 7715, 45 Fla. L. Weekly D 1342 (Fla. 2d DCA June 3, 2020); (2) Sanchez v. Sanchez, 285 So. 3d 969 (Fla. 3d DCA 2019) [*see* ch. 13, *Dissolution Trial/Final Judgment*].

Notice/Due Process—Ramirez v. Ramirez, 293 So. 3d 21 (Fla. 4th DCA 2020) [*see* ch. 12, *Temporary Relief*].

Preserving Issue for Appeal—Eaton v. Eaton, 293 So. 3d 567, 2020 Fla. App. LEXIS 3736, 45 Fla. L. Weekly D674 (Fla. 1st DCA March 23, 2020) [*see* ch. 10, *Alimony*].

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Publication 80643 Release 85 September 2020

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