PUBLICATION UPDATE

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FLORIDA FAMILY LAW

Publication 513 Release 61 June 2018

HIGHLIGHTS

- **New Family Law Rule—**Allows court to take judicial notice of court records without notice to parties if case involves imminent danger, same as Florida Statutes Section 90.204(4).
- **New Family Law Forms—** Petition and final judgment forms accommodate requests for parenting plans in proceedings for support unconnected with dissolution of marriage.
- **Amended Family Law Form—** Notice of Hearing on Motion for Contempt is amended to clearly notify alleged contemnor that present ability to pay is critical issue and he or she will have opportunity to be heard regarding his or her financial status.
- **Florida Supreme Court Case Opinion**—Person whose right to contract has been removed in guardianship proceedings may obtain court approval of marriage after marriage ceremony (*Smith v. Smith*).

Florida District Court Case Opinions

- **Restricted Timesharing—**First District certifies conflict with Second and Fourth District Courts of Appeal regarding whether trial courts must set forth specific conditions that parents may satisfy to obtain removal of restrictions on their timesharing (*Dukes v. Griffin*).
- **Imputed Income—**Fourth District addresses as matter of first impression whether party's decision to postpone receipt of Social Security retirement benefits warrants imputation income to him or her (*Huertas Del Pino v. Huertas Del Pino*).
- **Motions for Rehearing—** First District rules in dissolution of marriage case that if trial court may orders rehearing on its own motion as authorized by Rule 1.530(d), then court may correct judgment without parties' participation, so long as court acts in timely fashion and for purpose contemplated by "this important rule" (*Bucsit v. Bucsit*) [*Editor's Note: Rule 1.530(d) is now fully incorporated into Rule 12.530*].
- **Attorneys' Fees—**Second District certifies conflict with Fourth District regarding whether motion for fees served under Section 57.105 safe-harbor provision must be served by email (*Isla Blue Dev.,*

LLC v. Moore), and Fifth District recedes from its prior decision in *Starkey v. Linn* regarding temporary appellate fees, ruling they may be awarded in paternity proceedings (*McNulty v. Bowser*).

- **Costs—**Second District certifies conflict with First and Third Districts concerning whether costs may be included in award of attorneys' fees under Florida Statutes Section 57.105(1) (*Assimakopoulos v. Assimakopoulos-Panuthos*).

Rules

Family Law Rules of Procedure

New Rule 12.4501, *Judicial Notice*

This release covers a new family law rule concerning judicial notice that was adopted by the Florida Supreme Court to reflect a statutory provision regarding judicial notice in family cases. The new rule, Florida Family Law Rule of Procedure 12.4501, like the statute, Florida Statutes Section 90.204(4), authorizes judges in family cases to take judicial notice of court records without prior notice to the parties if imminent danger to persons or property has been alleged and it is impractical to give prior notice of the court's intent to take judicial notice [*see* Fla. Fam. L. R. P. 12.4501; *see also* Fla. Stat. § 90.204(4)]. The term "family cases" has the same meaning as provided in the Rules of Judicial Administration [*see* Fla. Fam. L. R. P. 12.4501; *see also* Fla. Stat. § 90.204(4); Fla. R. Jud. Admin. 2.545(2) (defining term "family cases")]. The proper subjects of judicial notice by trial courts in family law cases are the records listed in Florida Statutes Section 90.202(6) [*see* Fla. Fam. L. R. P. 12.4501; *see also* Fla. Stat. §§ 90.202(6) (records that are proper subjects of judicial notice), 90.204(4)]. If a trial court takes judicial notice in a family law case, then the court may wait until after judicial action has been taken to provide the parties with an opportunity to present evidence concerning the propriety of taking judicial notice. However, within two business days from the date the court takes judicial notice, it must file a notice of the matters that were judicially noticed [*see* Fla. Fam. L. R. P. 12.4501; *see also* Fla. Stat. § 90.204(1), (4)].

New Rule 12.4501 took effect on January 1, 2018 [*see* In re Amendments to the Fla. Family Law Rules of Procedure-2017 Regular-Cycle Report, 227 So. 3d 115 (Fla. 2017)]. It is covered in Chapters 12, *Domestic Violence Injunctions and Other Injunctions for Personal Protection*, and 54, *Temporary Relief*.

Amended Rules

Family Law Rules

Overview. This release covers amendments to the Florida Family Law Rules of Procedure that took effect on January 1, 2018 [*see* In re Amendments to the Fla. Family Law Rules of Procedure-2017 Regular-Cycle Report, 227 So. 3d 115 (Fla. 2017)]. The release adds discussion of the amended rules to pertinent chapters of this publication. Below is a description of the specific amendments and the chapters in which the amendments are discussed.

Rule 12.130, *Documents Supporting Action or Defense.* Previously, Rule 12.130 stated that a copy of a bond, note, bill of exchange, contract, account, or other document must be incorporated into or attached to the pleadings if doing so was essential to state a cause of action. Amendments to the rule omit the references to specific types of documents (bonds, notes, bills of exchange, contracts, and accounts) and instead state simply that documents essential to state a cause of action must be incorporated into or attached to the pleadings. The amended rule also requires the incorporation into or attachment of docu-

ments to pleadings if doing so is "otherwise required by law." Finally, amended Rule 12.130 permits copies of documents to be utilized "when otherwise required" [*see* In re Amendments to the Fla. Family Law Rules of Procedure-2017 Regular-Cycle Report, 227 So. 3d 115 (Fla. 2017), Appendix (amendments to Florida Family Law Rule of Procedure 12.130(a))].

This release incorporates the amendments to Rule 12.130 in Chapter 53, *Pleadings*.

Rule 12.200, *Case Management and Pretrial Conferences*. An amendment to Florida Family Law Rule of Procedure 12.200 affects adoption proceedings by changing the status of case management conferences from mandatory to optional [*see* In re Amendments to the Fla. Family Law Rules of Procedure-2017 Regular-Cycle Report, 227 So. 3d 115 (Fla. 2017), Appendix (amendments to Florida Family Law Rule of Procedure 12.200(a)(2))].

This release reflects the amendment to Rule 12.200 in Chapter 58, *Trial Preparation and Discovery*, and in Chapter 91, *Adoption*.

Rule 12.400, *Confidentiality of Records and Proceedings*. The Supreme Court adopted an amendment to Florida Family Law Rule of Procedure 12.400 that requires all documents filed in family law proceedings to be filed in conformity with Florida Rule of Judicial Administration 2.425. Rule 2.425 sets forth procedures to minimize the inclusion of sensitive information in documents that are filed with the court.

According to the Supreme Court, it adopted the Rule 12.400 amendment mandating compliance with Rule 2.425 to "raise awareness" of the confidentiality requirements of Rule 2.425 [*see* In re Amendments to the Fla. Family Law Rules of Procedure-2017 Regular-Cycle Report, 227 So. 3d 115 (Fla. 2017)]. Florida Family Law Rule 12.012 and various other family law rules continue to require application of Rule 2.425 to filed documents, as they did prior to the amendment of Rule 12.400 [*see* Fla. Fam. L. R. P. 12.012 (requiring compliance with Rule 2.425 generally); *see, e.g.*, Fla. Fam. L. R. P. 12.410(c)(2) (notice to produce must comply with Rule 2.425)].

The amendment to Rule 12.400 is set forth in new subsection (b) of the rule, and previous subsections (b) and (c) have been renumbered as subsections (c) and (d), respectively [*see* In re Amendments to the Fla. Family Law Rules of Procedure-2017 Regular-Cycle Report, 227 So. 3d 115 (Fla. 2017), Appendix].

This release covers the amendments to Rule 12.400 in Chapter 58, *Trial Preparation and Discovery*, Chapter 61, *Judgments*, and other chapters that discuss or cite to Rule 12.400.

Appellate Rules

This release covers amendments to the rules of appellate procedure that were adopted by the Florida Supreme Court primarily to address (1) the initial transmission and correction of electronic records; and (2) the contents and format of electronic appendices. Also covered are relatively minor amendments adopted by the Court concerning the requirements for paper appendices. All of the amendments took effect on October 1, 2017 [*see* In re Amendments to the Fla. Rules of Appellate Procedure, 225 So. 3d 223 (Fla. 2017)].

The amendments are covered in Chapter 62, *Appeals*. The amendments pertaining to appendices are covered in a new, detailed discussion of appendices that has been added to the chapter.

Rules of Judicial Administration

Electronic Service of Documents

Other rule amendments covered in this release include amendments to Florida Rule of Judicial Administration 2.516, *Service of Pleadings and Documents.* The amendments to Rule 2.516 concern electronic service. The first amendment requires that in the subject lines of email messages accompanying documents served by email, the case style of the proceeding must be set forth. Previously, only the case number and the words "SERVICE OF COURT DOCUMENT" were required to be stated in the email subject line [*see* Fla. R. Jud. Admin. 2.516(b)(1)(E)(i)]. The second amendment to Rule 2.516 changes the action required if service on a *pro se* party who does not designate an email address, or an attorney who is excused from service by email, is not possible because the address of the party or attorney is unknown. Prior to its amendment, Rule 2.516 required that the unserved document be left with court clerk. However, following the effective date of the amendment, a certificate of service must be filed with the court clerk that states a copy of the document desired to be served may be obtained (1) on request from the court clerk, or (2) from the party desiring to serve the document [*see* Fla. R. Jud. Admin. 2.516(b)(2)].

The amendments to Rule 2.516 took effect on January 1, 2018. They are covered in Chapter 57A, *Electronic Lawyering*, and other appropriate places in this publication.

Forms

New Family Law Forms

Two new forms adopted by the Florida Supreme Court are included in this release. They are (1) Florida Supreme Court Approved Form 12.904(a)(2), *Petition for Support and Parenting Plan Unconnected with Dissolution of Marriage with Dependent or Minor Child(ren)*; and (2) Florida Supreme Court Approved Form 12.994(a)(2), *Final Judgment for Support and Parenting Plan Unconnected with Dissolution of Marriage with Dependent or Minor Child(ren).* Both new forms took effect on February 1, 2018. However, the forms are subject to revisions by the Supreme Court in response to comments received by it from interested persons. Those comments were due by April 2, 2018 [*see* In re: Amendments to the Fla. Supreme Court Approved Family Law Forms-Nomenclature, 235 So. 3d 357 (Fla. Feb. 1, 2018)].

The new forms may be found in Chapter 4, *Separate Maintenance*.

Amended Family Law Forms

(1) **Florida Family Law Rule of Procedure Form 12.901**(a), ***Petition for Simplified Dissolution of Marriage*.** The amendments to this form affect (1) the parties' signatures on the petition, and (2) the caption of the petition. In addition, instructions accompanying the form are revised to clarify matters concerning (1) the filing of a cover sheet, and (2) obtaining a court hearing date. Amended Form 12.901(a) and the amended instructions took effect on February 1, 2018 [*see* In re: Amendments to the Fla. Family Law Rules of Procedure – Form 12.901(a), 235 So. 3d 800 (Fla. Feb. 1, 2018)].

Amended Form 12.901(a) may be found in Chapter 53, *Pleadings*.

(2) **Florida Family Law Rules of Procedure Form 12.902**(f)(3), ***Marital Settlement Agreement for Simplified Dissolution of Marriage.*** The amendments to this form consist of the following:

- Deletion of language that required litigants to file family law financial affidavits, because in simplified dissolution of marriage actions, parties are not required to serve or file financial affidavits

[*see* Fla. Fam. L. R. P. 12.285(c)].

- Deletion of language that advised litigants they were not required to provide account numbers; replacement of that language with a directive to litigants to state only the last four digits of account numbers [*see* Fla. R. Jud. Admin. 2.425 (minimization of filing of sensitive information)].

The amended form of marital settlement agreement for use in simplified dissolution proceedings took effect on January 1, 2018 [*see* In re Amendments to the Fla. Family Law Rules of Procedure-2017 Regular-Cycle Report, 227 So. 3d 115 (Fla. 2017)]. The amended form may be found in Chapter 56, *Marital Settlement Agreements*.

(3) **Florida Supreme Court Approved Form 12.904(a)(1),** ***Petition for Support Unconnected with Dissolution of Marriage with Dependent or Minor Child(ren).*** Prior to its amendment, this form was numbered 12.904(a). It has been renumbered as 12.904(a)(1) [*see* In re: Amendments to the Fla. Supreme Court Approved Family Law Forms-Nomenclature, 235 So. 3d 357 (Fla. Feb. 1, 2018)]. Renumbered Form 12.904(a)(1) may be found in Chapter 4, *Separate Maintenance.*

(4) **Florida Supreme Court Approved Form 12.961,** ***Notice of Hearing on Motion for Contempt/Enforcement.*** Amendments to Form 12.961 are intended to help afford due process to alleged contemnors in a manner approved by the United States Supreme Court in *Turner v. Rogers.* In that case, the Court set forth procedural safeguards that may be used in lieu of appointing counsel to represent an alleged contemnor. The safeguards include (1) provision of notice that ability to pay will be a critical issue in the contempt proceeding, and (2) provision of an opportunity for the alleged contemnor to be heard on the ability-to-pay issue [*see* Turner v. Rogers, 564 U.S. 431, 447–448, 131 S. Ct. 2507, 180 L. Ed. 2d 452 (2011)]. In the Florida Supreme Court's opinion adopting amendments to Form 12.961, the Court explained that the amendments were needed to reflect the *Turner* decision. Accordingly, amended Form 12.961 provides clear notification to an alleged contemnor that (1) his or her present ability to pay is a critical issue in the proceeding, and (2) he or she will be provided an opportunity during the contempt hearing to respond to allegations and questions about his or her financial status [*see* In re Amendments to the Fla. Supreme Court Approved Family Law Forms-Form 12.961, 232 So. 3d 285 (Fla. Dec. 14, 2017); *see also* Turner v. Rogers, 564 U.S. 431, 131 S. Ct. 2507, 180 L. Ed. 2d 452 (2011)]

Other, less-significant amendments to Form 12.961 include the addition of a provision that advises the alleged contemnor whether the court will provide electronic recording of the proceedings or a court reporter. This amendment reflects a requirement of Florida Family Law Rule of Procedure 12.615, the Florida Supreme Court noted [*see* In re Amendments to the Fla. Supreme Court Approved Family Law Forms-Form 12.961, 232 So. 3d 285 (Fla. Dec. 14, 2017)].

The amendments to Form 12.961 took effect immediately on issuance of the Court's opinion, subject to comments submitted during a 60-day period that ended on February 12, 2018 [*see* In re Amendments to the Fla. Supreme Court Approved Family Law Forms-Form 12.961, 232 So. 3d 285 (Fla. Dec. 14, 2017)].

Amended Form 12.961 may be found in Chapters 70, *Enforcement of Alimony and*

Child Support, and 71, *Enforcement of Parental Responsibility and Timesharing.*

Case Law

Florida Supreme Court

Validity of Marriage, Chapter 2

This release covers a decision by the Florida Supreme Court in which the Court addressed a statute that provides if a person is determined by a court to be incapacitated in guardianship proceedings and the court orders that his or her right to enter into a contract be removed, then the person's right to marry is subject to court approval [*see* Fla. Stat. § 744.3215(2)(a)]. The Supreme Court answered a certified question regarding whether the marriage of such a ward is void or voidable if the ward fails to obtain prior court approval of the marriage. The Court ruled that such a marriage is neither void nor voidable. If the marriage is subsequently ratified by a court, then the marriage is given legal effect. In other words, the ward possesses a right to marry that he or she may exercise without prior court approval, and the marriage becomes legally valid if court approval is later obtained. Thus, unlike a voidable marriage, which is good for every purpose until it is challenged and good *ab initio* if it is not challenged within the parties' lifetimes, a marriage that is entered into by an incapacitated person whose right to contract has been judicially removed has no legal effect until and unless court approval is obtained [Smith v. Smith, 224 So. 3d 740, 748 (Fla. 2017)].

Florida District Courts

Alimony, Chapter 31

Imputed Income. This release adds a discussion about imputation of government benefits to Chapter 31. The discussion arises from a Fourth District decision in which the court considered, as a matter of first impression, whether a party who is eligible to receive Social Security retirement benefits but has opted to defer application for benefits until he or she is eligible for a higher amount of benefits, may properly be deemed to have voluntarily reduced his or her income and therefore may be subjected to imputation of income in the amount of the benefits for which he or she is currently eligible. The Fourth District ruled that a party's choice to defer application for Social Security retirement benefits to a later date when the benefits will be larger does not constitute a voluntary reduction in income unless there is evidence of a motivation other than the desire to receive the higher amount of benefits. In contrast, the Fourth District explained, a trial court may properly find that a party has voluntarily reduced his or her income based on the party's deferral of Social Security retirement benefits if the evidence shows that the current and future amounts of the Social Security benefits will be the same. However, the trial court must find no compelling reason that will justify a refusal to impute the deferred benefits. As a general matter, the court ruled that government benefits for which a party is eligible may be imputed to him or her under appropriate circumstances [*see* Huertas Del Pino v. Huertas Del Pino, 229 So. 3d 838, 841–842 (Fla. 4th DCA 2017)].

Findings: A trial court must make explicit findings of fact regarding a nonrequesting spouse's ability to pay alimony, even if during the parties' marriage, their income largely consisted of funds gifted to the parties by the nonrequesting spouse's parents. Merely finding that a spouse lacks the ability to pay due to his or her living expenses is insufficient. Particularly in a case involving a long-term marriage and a requesting spouse whose primary contribution to the marriage was as a homemaker,

the trial court must (1) apply the presumption favoring permanent alimony to the spouse of a long-term marriage, and (2) make explicit findings with regard to whether the spouse from whom alimony is sought has the ability to pay permanent alimony [*see* Hua v. Tsung, 222 So. 3d 584 (Fla. 4th DCA 2017)]. In addition, if a court awards alimony conditioned on the occurrence of an event such as the sale of the marital home to provide the payor-spouse with funds to pay alimony, or the requesting spouse's completion of a rehabilitative plan, the court must set forth an alternative alimony award that will take effect if the condition is not met [*see* Hua v. Tsung, 222 So. 3d 584 (Fla. 4th DCA 2017)].

Nonmarital Assets As Financial Resources. A trial court erred in failing to identify shares of stock that were transferred solely to a husband by his father during the parties' marriage as the husband's nonmarital assets that were available to pay support. Although both the husband and his father testified that the shares were transferred to allow the father to avoid tax consequences to his estate on his death, a desire to circumvent tax obligations by placing the shares in the husband's name did not permit circumvention of marital dissolution law by exempting the shares from inclusion among the husband's financial resources. The husband and father were estopped from disavowing the consequences of transferring the shares into the husband's name [*see* Hua v. Tsung, 222 So. 3d 584 (Fla. 4th DCA 2017)].

This case has also been incorporated into Chapter 34, *Equitable Distribution*.

***Parental Responsibility and Timesharing*, Chapter 32**

This release covers a conflict between the Second and Fourth District Courts of Appeal and the First District Court of Appeal regarding whether trial courts that order timesharing restrictions must, in the orders imposing the restrictions, also set forth conditions that, if satisfied, will allow the affected parents to obtain elimination of the restrictions or restoration of reduced timesharing. The Second and Fourth Districts have ruled that if trial courts impose timesharing restrictions, they must set forth specific conditions that the affected parents may satisfy to obtain removal of the restrictions [*see* Witt-Bahls v. Bahls, 193 So. 3d 35 (Fla. 4th DCA 2016); Perez v. Fay, 160 So. 3d 459 (Fla. 2d DCA 2015)]. However, the First District has ruled to the contrary, noting that it could not find a statutory or other legal basis for requiring trial courts to provide such guidance [*see* Dukes v. Griffin, 230 So. 3d 155, 156–157 (Fla. 1st DCA 2017)]. Petitioning for a modification of timesharing is the proper and exclusive means for a parent to obtain a change in timesharing arrangements, the First District ruled [*see* Dukes v. Griffin, 230 So. 3d 155, 157 (Fla. 1st DCA 2017) (citing Fla. Stat. § 61.13(3))]. The First District certified conflict with the Second and Fourth District Courts of Appeal in *Perez v. Fay* [160 So. 3d 459, 466–467 (Fla. 2d DCA 2015)] and *Witt-Bahls v. Bahls* [193 So. 3d 35, 38–39 (Fla. 4th DCA 2016)], and other, similar decisions of the Second and Fourth Districts [*see* Dukes v. Griffin, 230 So. 3d 155, 157 (Fla. 1st DCA 2017)].

The conflict concerning requirements for orders imposing timesharing restrictions is also discussed in Chapter 81, *Modification of Parental Responsibility and Timesharing*.

***Child Support*, Chapter 33**

In this release, the discussion about what constitutes voluntary unemployment or underemployment that will support imputation of income to a parent has been ex-

panded to clarify that Florida courts focus on the actions of a parent after his or her previous employment has terminated, and not whether the termination itself was voluntary or involuntary, in determining whether the parent is voluntarily unemployed or underemployed for child support purposes. Relevant case law is discussed, including a recent Fourth District opinion in which the court was supportive generally of parents who establish small businesses and whose income is decreased as a result. The Fourth District held that although a party's voluntary departure from a remunerative job to start a business that proves to be unprofitable can properly result in a finding of voluntary unemployment or underemployment, the lack of profitability of the business does not by itself establish voluntary unemployment or underemployment [*see* Gillette v. Gillette, 226 So. 3d 958, 962 (Fla. 4th DCA 2017)]. In the case before it, the Fourth District held that the trial court did not abuse its discretion in refusing to find that the entrepreneur-father was underemployed, even though he had voluntarily left a highly remunerative job to start a business that was unprofitable. The Fourth District held that the lower court had properly considered a number of factors in deciding the underemployment issue and was not required to focus on the unprofitable status of the husband's business since its establishment in 2004. If profitability were the focus of underemployment determinations, the appeals court stated, the analysis would "strangle" small businesses that "struggle at their inception" [*see* Gillette v. Gillette, 226 So. 3d 958, 962 (Fla. 4th DCA 2017)].

***Attorneys' Fees and Costs*, Chapter 37**

Award of Fees As Sanction under Florida Statutes Section 57.105. This release covers a conflict that has arisen between the Second and Fourth District Courts of Appeal regarding whether a party who seeks fees under the "safe-harbor" provision of Florida Statutes Section 57.105 must serve the motion requesting fees by email under Florida Rule of Judicial Administration 2.516. According to the Second District, Rule 2.516 requires service by email only as to documents that are filed with the court [*see* Fla. R. Jud. Admin. 2.516(a) (every document "filed in any court proceeding" must be served by email)]. Because a Section 57.105 safe-harbor motion for fees is initially served but not filed, it need not be served by email, but may be mailed via the United States Postal Service [*see* Isla Blue Dev., LLC v. Moore, 223 So. 3d 1097 (Fla. 2d DCA 2017) (construing together Florida Rule of Judicial Administration 2.516(a) and (b)(1)); *see also* Fla. Stat. § 57.105(4)]. In contrast, the Fourth District has ruled that service by email is required because Because Florida Rule of Civil Procedure 1.080(a) requires every pleading after the initial pleading, and every other document filed in an action, to be served pursuant to Florida Rule of Judicial Administration 2.516 [*see* Matte v. Caplan, 140 So. 3d 686, 689–690 (Fla. 4th DCA 2014) (discussing Florida Rule of Civil Procedure 1.080(a) and Florida Rule of Judicial Administration 2.516(b)(1) (all documents required or permitted to be served on another party must be served by email, unless parties stipulate otherwise)]. The Second District has certified conflict with the Fourth District regarding the issue [*see* Isla Blue Dev., LLC v. Moore, 223 So. 3d 1097 (Fla. 2d DCA 2017)].

Temporary Appellate Fees. This release incorporates an *en banc* decision by the Fifth District Court of Appeal, in which the court receded from its prior decision in *Starkey v. Linn* [727 So. 2d 386 (Fla. 5th DCA 1999)] and ruled that temporary ap-

pellate attorneys' fees may be awarded in paternity proceedings under Florida Statutes Section 742.045. Section 742.045 is similar in wording to Florida Statutes Section 61.16(1) [*see* McNulty v. Bowser, 233 So. 3d 1277 (Fla. 5th DCA 2018)].

Costs. The Second District Court of Appeal has ruled that costs may not be included in an award of attorneys' fees under Florida Statutes Section 57.105(1), which permits a trial court to award attorneys' fees and prejudgment interests if the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense (1) was not supported by the material facts necessary to establish the claim or defense, or (2) would not be supported by the application of then-existing law to those material facts. The Second District certified conflict with decisions of the First and Third District Courts of Appeal that affirmed awards of costs under Section 57.105(1) [*see* Assimakopoulos v. Assimakopoulos-Panuthos, 228 So. 3d 709 (Fla. 2d DCA 2017) (certifying conflict with *Martin County Conservation Alliance v. Martin County* [73 So. 3d 856 (Fla. 1st DCA 2011)] and *Smith v. Viragen, Inc*. [902 So. 2d 187, 191 (Fla. 3d DCA 2005)])].

***Marital Settlement Agreements*, Chapter 56**

A mutual release of claims that is incorporated into a final judgment dissolving a husband's and wife's marriage does not preclude a former marital corporation from maintaining a postjudgment suit concerning alleged civil theft from the corporation, if the corporation was not a party to the execution and signing of the release [*see* Doctor Rooter Supply & Serv. v. McVay, 226 So. 3d 1068, 1075 (Fla. 5th DCA 2017) (reversing summary judgment granted in favor of former wife who was defendant in postjudgment civil theft suit brought by husband and corporation that had been awarded to husband in final judgment of dissolution as part of his share of marital assets; corporation had not waived its right to sue because it did not join husband and wife in executing mutual release of claims; district court also rejected argument that husband's execution of release constituted waiver of his right to bring postjudgment suit for theft, holding that because parties' mutual release of claims encompassed only claims that could have been resolved during dissolution proceedings, and issue of fact existed as to when husband discovered alleged theft, no waiver by husband could be found on motion for summary judgment; similarly, issue of when alleged theft was discovered would have prevented summary judgment from properly being entered against corporation even if it had executed release, because there was conflicting evidence as to when corporation learned of theft)].

***Electronic Lawyering*, Chapter 57A**

A new section has been added to Chapter 57A concerning counsel's duty to maintain sufficient e-systems and protocol to ensure that notice of an appealable order will be timely received. The new discussion covers a First District case in which the court ruled that counsel is required (1) to conduct independent monitoring of a trial court's electronic docket, and (2) use an email spam filter with adequate safeguards against permanent deletion of legitimate emails without a record. Both of these are required to discharge counsel's duty to have sufficient protocols to ensure timely notice of appealable orders, the First District ruled [*see* Emerald Coast Util. Auth. v. Bear Marcus Pointe, LLC, 227 So. 3d 752, 758 (Fla. 1st DCA 2017)].

***Judgments*, Chapter 61**

Motions for Rehearing. In this release, discussion about motions for rehearing has been updated to incorporate coverage of a First District opinion in which the court interpreted Florida Rule of Civil Procedure 1.530(d), which has since been incorporated verbatim into family law Rule 12.530. The First District ruled that if a trial court orders a rehearing on its own motion as authorized by Rule 1.530(d), the court may make corrections to the judgment and may do so without the participation of the parties so long as the court acts in a timely fashion and for the purpose of ensuring that the court's rulings reflect the evidence and equities that have been presented in the proceedings. The First District also characterized Rule. 1.530(d) as an "important rule" [*see* Bucsit v. Bucsit, 229 So. 3d 430, 433 (Fla. 1st DCA 2017) (interpreting Fla. R. Civ. P. 1.530(d)); *see also* Fla. Fam. L. R. P. 12.530(d)].

Excusable Neglect. The failure of a party's attorney to actively check the court's electronic docket despite having knowledge that the trial court would be issuing a final order that was subject to appeal within jurisdictional time limits cannot constitute excusable neglect within the purview of Rule 12.540(b) [*see* Emerald Coast Util. Auth. v. Bear Marcus Pointe, LLC, 227 So. 3d 752, 758 (Fla. 1st DCA 2017)].

***Enforcement of Alimony and Child Support*, Chapter 70**

A trial court may order prejudgment interest on support arrearage as a provision of a contempt order if the support is owed pursuant to an agreement between the parties and the trial court finds the obligor to be in arrears by a specific amount [*see* Kuchera v. Kuchera, 230 So. 3d 135 (Fla. 4th DCA 2017) (arrearage judgment was not necessary because parties had agreed to alimony as to which obligor-husband was in arrears and trial court stated specific arrearage amount in contempt order)].

***Enforcement of Foreign Property and Support Judgments*, Chapter 73**

This release adds discussion about the impact of Florida public policy on recognition of foreign support judgments under the Full Faith and Credit Clause of the United States Constitution. The discussion focuses on a recent decision by the First District Court of Appeal, which relied on the Florida Supreme Court's 2017 decision addressing Florida public policy and the Full Faith and Credit Clause in *LeDoux-Nottingham v. Downs* [210 So. 3d 1217, 1219 (Fla. 2017)]. In *LeDoux*, a mother argued that the enforcement of a registered and domesticated Colorado order that granted visitation rights to her children's grandparents violated Florida's constitution and was against Florida's public policy. The Florida Supreme Court rejected her argument, ruling that a parent's right to raise his or her children free from unwarranted governmental interference pursuant to the Florida Constitution is subordinate to the United States Constitution under the Supremacy Clause. The Florida Supreme Court further observed that the United States Supreme Court has continuously rejected the notion that a state may elevate its public policy over the policy in which another state's judgment is grounded. Accordingly, the Florida Supreme Court ruled that even though a Florida court cannot lawfully enter an order that grants grandparents visitation rights, a Florida court cannot refuse to enforce such an order by another state's court [*see* LeDoux-Nottingham v. Downs, 210 So. 3d 1217 (Fla. 2017)]. In the recent First District case, the district court held that a Florida trial court could not refuse to enforce a Michigan divorce judgment that contained a provision entitling the obligor-husband to

interest on any child support that he prepaid. The Full Faith and Credit Clause required enforcement even if the provision violated Florida's public policy concerning a child's right to child support, the court held [*see* Pulkkinen v. Pulkkinen, 226 So. 3d 352, 353 (Fla. 1st DCA 2017) (relying on *LeDoux-Nottingham v. Downs* [210 So. 3d 1217 (Fla. 2017)])].

***Modification of Alimony*, Chapter 80**

This release covers a decision by the Second District in which the court ruled that the date on which a marital settlement agreement (MSA) is entered-into by the parties, not the date of the final judgment, is the date from which a trial court must determine whether a substantial change in circumstances has occurred that will warrant modification of alimony. In the case before it, the Second District held that because the husband had decided to retire after the parties executed their marital settlement agreement, the parties failed to contemplate his retirement when they entered into their agreement and the husband should therefore have been granted modification based on his retirement. Neither the fact that the firefighter-husband had made prior annual inquiries with his employer concerning his possible retirement dates, nor the fact that his retirement was approved by the governing Pension Board several weeks before entry of the final judgment of dissolution, persuaded the Second District that the husband's retirement should be deemed to have been contemplated at the time of the parties' agreement. The court held that equity demanded the timing of the husband's decision to retire not be held against him in his attempts to modify his alimony obligation [*see* Dogoda v. Dogoda, 233 So. 3d 484 (Fla. 2d DCA 2017)].

***Paternity*, Chapter 90**

Evidence of a developed relationship between a putative father and the child, together with evidence the putative father has demonstrated a willingness to assume full parental responsibility for the child, are important factors in deciding whether common sense and reason would be outraged by application of the presumption of legitimacy to bar a paternity suit brought by a putative father [*see* M.L. v. Dep't of Children & Families, 227 So. 3d 142, 145 (Fla. 4th DCA 2017)].

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Publication 513, Release 61, June 2018

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Publication 513 Release 61 June 2018

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VOLUME 1

Revision

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☐	4-1 thru 4-3.	4-1 thru 4-4.1
☐	4-25 thru 4-51	4-25 thru 4-77
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☐	31-3 thru 31-5	31-3 thru 31-5
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VOLUME 2

Special Alert

☐	No Material removed	Special Alert page SA2-1 (file preceding i)

Revision

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Special Alert

☐	No Material removed	Special Alert page SA3-1 (file preceding i)

Revision

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☐	No Material removed	Special Alert page SA4-1 (file preceding i)

Revision

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