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Florida Family Law Practice Manual

Publication 80643 Release 90

April 2023

HIGHLIGHTS

Rule Amendments

- Motion for rehearing must be filed in trial court to preserve sufficiency of trial court's findings as ground for appeal.
- Certain interrogatories concerning expert witnesses need not be counted as supplemental interrogatories.
- Methods of serving notices of intent to subpoena nonparties for production, and corresponding time requirements applicable to issuing the subpoenas or objecting to them, are revised.

Uniform Guidelines for Taxation of Costs—Revisions

- Costs that "should be" taxed now include filing and service of process fees, and fees for any court testimony.

- Costs that may be awarded now include nonbinding arbitration expenses and reasonable fees charged by expert witnesses who testify.

Cases

- In apparent decision of first impression in Florida, First District holds that Federal law preempts Florida court from treating military retirement pay that is waived for disability benefits as property subject to equitable distribution, and preempts court from ordering military spouses who waive retirement pay for disability pay to reimburse or indemnify nonmilitary spouses for lost retirement benefits (*Martin v. Martin*).
- Award of retroactive alimony in final judgment of dissolution is improper because such awards are creation of courts and are prohibited by separation of powers provisions of Florida

Constitution (*Guimbellot v. Guimbellot*).

- Prejudgment contempt order could be appealed as nonfinal order under Florida Rule of Appellate Procedure 9.130; conflict certified (*100 Emerald Beach Way LC v. Thornton*).
- Party who files motion for relief from judgment based on mistake, neglect, newly discovered evidence, or fraud must seek hearing within reasonable time or motion may properly be dismissed (*Brooks v. Brooks*).
- If nonparticipant-spouse is entitled to share of Florida Retirement System participant's ordinary monthly retirement benefit, then nonparticipant-spouse is entitled to COLA increases attributable to that share (*Cardarelli v. Cardarelli*).
- In apparent conflict with Second District, Fifth District holds that man who provided sperm for use in do-it-yourself artificial insemination was not barred by Florida Statutes Section 742.14 from claiming parental rights in paternity action (*Enriquez v. Velazquez*).

Legislation

Grandparent Visitation. A statutory provision enacted in 2022 establishes a rebuttable presumption favoring grandparent visitation of if one parent has been held criminally liable for the death of the other parent or civilly liable for an intentional tort causing the death of the other parent, and the grandparent petitioning for visitation is the parent or stepparent of the deceased. In such a case, the

court may award visitation based on the presumption unless it is overcome by a showing that visitation is not in the child's best interests. The statute does not require a finding of significant harm to the child to award grandparent visitation, and may be vulnerable to constitutional challenge on that ground [*see Fla. Stat. § 752.011(2); 2022 Fla. Laws, ch. 2022-217 (effective July 1, 2022); see also ch. 8, Parental Responsibility and Timesharing*].

Rule Amendments

Preservation of Issue for Appeal.

To preserve a challenge to the sufficiency of a trial court's findings as a ground for appeal, a party must raise the issue in a motion for rehearing filed in the trial court [Fla. Fam. L. R. P. 12.530(a); *see In re Amendments to Fla. Rule of Civil Proc. 1.530, 346 So. 3d 1161 (Fla. 2022)*]. Because of this amendment to Rule 12.530, a conflict among the district courts of appeal concerning whether a motion for rehearing is required to preserve a challenge based on insufficient findings is moot [*see, e.g., Allen v. Juul, 278 So. 3d 783, 785–786 (Fla. 2d DCA 2019) (certifying conflict with First, Third, and Fifth Districts on preservation issue); see also ch. 13, Dissolution Trial/Final Judgment*].

Supplemental Interrogatories. A party to a family law action may serve up to 10 supplemental interrogatories after serving standard initial interrogatories approved by the Florida Supreme Court [*see Fla. Fam. L. R. P. 12.340(b); see also Fla. Fam. L. R. P. Forms 12.930(b)–(c) (stan-*

dard interrogatories)]. Expert interrogatories authorized by Rule 12.280 are not included within the limit on supplemental interrogatories [*see* Fla. Fam. L. R. P. 12.340(b); *In re: Amendments to Fla. Fam. Law Rule of Proc. 12.340, & Forms 12.930(b) & 12.930(c)*, 346 So. 3d 1100 (Fla. 2022) (adopting amendment to rule and declining to amend forms); *see also* ch. 7, *Discovery*].

Production of Documents and Things by Nonparty without Deposition. Before a party may subpoena a nonparty for production of documents and things, the party must serve every other party with a notice of intent to serve the subpoena. Rule 12.351 sets forth time requirements for serving such a notice of intent. Under amended Rule 12.351, the notice must be served at least 10 days before the subpoena is issued if service of the notice is by delivery, facsimile, or email. Alternatively, a notice of intent may be served 15 days before issuance of the subpoena, if the notice is served by mail. Neither the notice nor the subpoena may be served on the nonparty until the time for a party to object to the subpoena has expired. If the notice of intent was served by delivery, facsimile, or email, an objection must be served within 10 days of service of the notice. If the notice was served by mail, a party receiving the notice must object within 15 days of service [*see* Fla. Fam. L. R. P. 12.351(b); *In re Amendments to the Fla. Fam. Law Rule of Proc. 12.351*, 346 So. 3d 1099 (Fla. 2022); *see also* ch. 7, *Discovery*].

Uniform Guidelines for Taxation of Costs

The Uniform Guidelines have been revised for the first time since 2005. Most significantly, litigation costs that the guidelines provide “should be” taxed now include filing and service of process fees. Additionally, reasonable fees for any court testimony, not just trial testimony, are included as costs that should be taxed. Finally, costs that are allowed to be awarded now include nonbinding arbitration expenses and reasonable fees charged by expert witnesses who testify [*see* *In re: Amendments to Fla. Rules of Civil Proc.-Unif. Guidelines for Tax’n of Costs*, 47 Fla. L. Weekly S 277, 351 So. 3d 581, 2022 Fla. LEXIS 1712 (Fla. November 10, 2022); *see also* ch. 17, *Attorney’s Fees*].

Cases

New Rulings:

Alimony—Ch. 10

Guimbellot v. Guimbellot, ___ Fla. L. Weekly ___, 352 So. 3d 950, 2022 Fla. App. LEXIS 9022 (1st DCA Dec. 22, 2022) (reversing award of retroactive alimony in final judgment of dissolution, on ground that such awards are creation of courts and are prohibited by separation of powers provisions of Florida Constitution; in so deciding, district court creates apparent conflict among district courts of appeal with regard to whether retroactive alimony may properly be ordered in final judgment of dissolution).

Enforcement—Ch. 14

100 Emerald Beach Way LC v. Thornton, 341 So. 3d 346 (Fla. 4th DCA 2022) (holding that prejudgment contempt order could be appealed as nonfinal order under Florida Rule of Appellate Procedure 9.130; certifying conflict with First, Second, Third, and Fifth District Courts of Appeal, all of which have held that prejudgment contempt order must be challenged through petition for certiorari).

Tinoco v. Lugo, 342 So. 3d 845 (Fla. 2d DCA 2022) (complete offset of child support arrearage that results in no ongoing support for child who lives with less financially capable parent is improper).

Equitable Distribution of Marital Assets—Ch. 10B

Martin v. Martin, 344 So. 3d 621, 623 (Fla. 1st DCA 2022) (in apparent decision of first impression in Florida, First District holds that Federal law preempts Florida court from treating military retirement pay that is waived for disability benefits as property subject to equitable distribution, and preempts court from ordering military spouses who waive retirement pay for disability pay to reimburse or indemnify nonmilitary spouses for retirement benefits that nonmilitary spouses would have received if waivers had not occurred [*see* Howell v. Howell, 581 U.S. 214, 137 S.Ct. 1400, 1405–1406, 197 L. Ed. 2d 781 (2017)]).

Cardarelli v. Cardarelli, 350 So. 3d 766 (Fla. 4th DCA 2022) (if

nonparticipant-spouse is entitled to share of Florida Retirement System participant's ordinary monthly retirement benefit, then nonparticipant-spouse is entitled to COLA increases attributable to that share).

Initial Interview—Ch. 2; Attorney's Fees—Ch. 17

Your Support Sol., P.A. v. Ovalles, 343 So. 3d 178 (Fla. 3d DCA 2022) (contracts for contingency fees are enforceable in domestic relations actions if fees are connected with recovery of postjudgment balances that are due under child support, alimony, or other financial orders).

Parental Responsibility and Timesharing—Ch. 8

Enriquez v. Velazquez, 350 So. 3d 147, 154 (Fla. 5th DCA 2022) (in apparent conflict with Second District's decision in *A.A.B. v. B.O.C.* [112 So. 3d 761 (Fla. 2d DCA 2013)], Fifth District holds that man who provided sperm to friend to impregnate herself through do-it-yourself artificial insemination was not barred by Florida Statutes Section 742.14 from claiming parental rights in paternity action).

Setting Aside Final Judgments—Ch. 13

Brooks v. Brooks, 340 So. 3d 543 (Fla. 3d DCA 2022) (party who files motion for relief from judgment based on mistake, neglect, newly discovered evidence, or fraud must, in addition to filing motion within reasonable time not to exceed one year, seek hearing within reasonable time

or motion may properly be dismissed).

Clarifications of Existing Law:

Attorney's Fees—Ch. 17

Barrios-Balbin v. Saporta, 344 So. 3d 478, 482 (Fla. 4th DCA 2022) (pursuant to Florida Statutes Section 57.105(8), awards of fees under Section 57.105 may only be awarded in action for personal protection injunction if court finds clear and convincing evidence that petitioner knowingly made false statement or allegation in petition, or that respondent knowingly made false statement or allegation in asserted defense, with regard to material matter).

Parental Responsibility and Timesharing—Ch. 8

White v. Lee-Yuk, ___ So. 3d ___, 2022 Fla. App. LEXIS 6430, 47 Fla. L. Weekly D1928 (Fla. 3d DCA September 21, 2022) (all persons who are served with petition to relocate, including every person entitled to access or timesharing with child, possess standing to object to proposed relocation).

Logreira v. Logreira, ___ So. 3d ___, 2022 Fla. App. LEXIS 6433, 47 Fla. L. Weekly D1936 (Fla. 3d DCA September 21, 2022) (in case involving alleged parental alienation by mother, expert witness testified that children were thriving in her care physically and emotionally and although relationship with both parents was in children's best interests, forced separation from their mother as required by Family Bridges pro-

gram would not promote children's welfare and might even detrimentally harm them).

Beehler v. Beehler, 351 So. 3d 1257, 2022 Fla. App. LEXIS 8528, 47 Fla. L. Weekly D2561 (Fla. 1st DCA December 2, 2022) (if Florida court declines to exercise its jurisdiction under UCCJEA's inconvenient-forum provision, court is declining to adjudicate specific dispute before it in favor of another state's court; however, Florida court retains exclusive, continuing jurisdiction to resolve future disputes between parties; in contrast, if Florida court with exclusive, continuing jurisdiction (or court of another state) determines that Florida court's exclusive, continuing jurisdiction has ended, then entire custody matter is free to be handled by another state's court).

Chatani v. Blaze, 346 So. 3d 670 (Fla. 3d DCA 2022) (mother's failure to inform child's father of her intent to remain in Michigan with child did not support father's contention that her absence with child from Florida was temporary; substantial, competent evidence of actions that mother took to establish Michigan as her state of legal residence and child's connections with Michigan supported both trial court's finding that Michigan was child's home state and court's dismissal of father's petition to establish paternity; additionally, any unjustifiable conduct of mother in informing father that she intended to return to Florida from Michigan when in fact she intended to perma-

nently remain in Michigan did not vest Florida court with home-state jurisdiction).

New Cases Concerning Established Law:

Alimony—Ch. 10

Adams v. Adams, 340 So. 3d 551 (Fla. 2d DCA 2022) (Subchapter-S “pass-through” income and ability to pay).

Attorney’s Fees—Ch. 17

Cletcher v. Cletcher, 348 So. 3d 1223 (Fla. 2d DCA 2022) (court’s grant or denial of fees should not result in inequitable diminution of spouse’s share of marital assets).

Discovery—Ch. 7

Arthur v. Schneider, 342 So. 3d 757 (Fla. 3d DCA 2022) (if there is no method of obtaining information that is less intrusive than production of computer or smartphone, then court may properly order production of device but must state permissible time and scope of requesting party’s search).

Equitable Distribution of Marital Assets—Ch. 10B

McGowan v. McGowan, 344 So. 3d 607 (Fla. 1st DCA 2022) (trial court erred in valuing husband’s Employee Stock Ownership Plan (ESOP) as of date in mid-2020 to account for decline in its value due to COVID-19 pandemic, and then failing to apply same pandemic-based reasoning in valuing wife’s similarly situated accounts).

Income Deduction Orders—Chs. 2, 9, 10, 11, and 14

Johnson v. Johnson, ___ So. 3d ___, 2022 Fla. App. LEXIS 7535, 47 Fla. L. Weekly D2243 (Fla. 5th DCA November 4, 2022) (parties may agree that there will be no income deduction, contrary to statutory provision (otherwise) requiring income deduction).

Marital Settlement Agreements—Ch. 11

Mandelko v. Lopresti, 345 So. 3d 314 (Fla. 4th DCA 2022) (if terms of agreement are ambiguous, then trial court must hold evidentiary hearing to determine parties’ intent before ruling on motion to enforce agreement).

Modification of Alimony—Chs. 10 & 15

Kraus v. Kraus, 344 So. 3d 634, 636 (Fla. 3d DCA 2022) (evidence that obligor-wife had relieved herself of obligation to assume marital debt by filing for bankruptcy and had also experienced considerable increase in her income established substantial change in her ability to pay that supported increase in husband’s alimony).

Nonparents’ Rights—Ch. 1

Stabler v. Spicer, ___ So. 3d ___, 2022 Fla. App. LEXIS 7451, 47 Fla. L. Weekly D2230 (Fla. 1st DCA November 2, 2022) (mediation agreement that provides for parental responsibility and timesharing by nonparent with child is unenforceable, like other agreements that purport to imbue nonparents with such rights).

Parental Responsibility and Timesharing—Ch. 8

Hassenplug v. Hassenplug, 346 So. 3d 149 (Fla. 2d DCA 2022) (court that is addressing statutory requirement that parenting plan contain residence designation for school registration purposes must consider child's best interests in making such designation).

Hiatt v. Mathieu, 350 So. 3d 357 (Fla. 4th DCA 2022) (trial court abuses its discretion if it orders timesharing arrangement that requires travel parents cannot afford).

Personal Jurisdiction—Ch. 5

Fradera v. Fradera, 350 So. 3d 796 (Fla. 5th DCA 2022) (in action for dissolution of marriage and partition brought by wife, husband's statutory motion to appoint special master to sell property was wholly reliant on wife's petition for partition and could not have been maintained without it, and therefore he had not requested

affirmative relief that waived personal jurisdiction).

Temporary Alimony—Ch. 10

Alizzi v. Alizzi, 350 So. 3d 758 (Fla. 4th DCA 2022) (amount of temporary alimony must be based on actual expenses, not anticipated expenses; also, court determining temporary alimony should apply standard-of-living factor in same manner as permanent alimony, and therefore should not treat standard of living as super factor).

Temporary Attorneys' Fees—Ch. 17

Alizzi v. Alizzi, 350 So. 3d 758 (Fla. 4th DCA 2022) and Hasson v. Hasson, 339 So. 3d 1006, 1008 (Fla. 4th DCA 2022) (if majority of spouse's assets are nonliquid, and they cannot be converted to cash to in timely manner, then they may not be considered available to spouse to pay attorneys' fees and costs).

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April 2023

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