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Family Law 2023

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FLORIDA

Law and Practice

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1. Divorce

1.1 Jurisdiction

In order to have subject matter jurisdiction and to commence dissolution of marriage proceedings in the State of Florida, one of the parties must reside in the state for six months prior to filing (Fla. Stat. § 61.021). Subject matter jurisdiction is required for a Florida court to dissolve the marriage. Personal jurisdiction is required for a Florida court to adjudicate support and property rights. Personal jurisdiction can occur by service in the State of Florida, but can also be obtained if served outside the state and the required information is contained in the initial pleading which primarily is that the parties maintained a matrimonial domicile in Florida or resided in Florida prior to the filing, even if not with the spouse. These are the same grounds for same-sex spouses. Florida does not allow civil unions.

Residency is relevant in determining subject matter jurisdiction in Florida. A party must reside in Florida for six months prior to filing a Petition for Dissolution of Marriage. Under Florida law, residency constitutes an actual presence and intent to reside in the State of Florida.

Domicile is not relevant to determining subject matter jurisdiction in divorce matters, but it does matter for personal jurisdiction. Domicile refers to where a person has a fixed and permanent home. However, they may not actually reside there. See Latta v Latta, 645 So. 2d 1043 (Fla. 1st DCA 1995).

Additionally, nationality is not relevant in determining jurisdiction in divorce matters. An individual can establish residency in Florida without being a US citizen so long as they meet the six-month residency requirement. See Markofsky v Markofsky, 384 So. 2d 38 (Fla. 3rd DCA 1980).

A party can contest jurisdiction in divorce matters on the bases of lack of personal jurisdiction or subject matter jurisdiction.

A party can apply to stay proceedings in Florida in order to pursue divorce proceedings in a foreign jurisdiction. A party may file a motion to stay or for an anti-suit injunction. Florida courts consider the following factors when addressing this issue.

- Florida is a first-to-serve state, not a first-to-file state. Mabie v Garden St. Mgmt. Corp., 397 So. 2d 920, 921 (Fla. 1981) (citing Martinez v Martinez, 153 Fla. 753, 15 So. 2d 842 (Fla. 1943)).
- Where courts within one sovereignty have concurrent jurisdiction, the court which first exercises its jurisdiction acquires exclusive jurisdiction to proceed with that case. This is called the "principle of priority". 20 Am. Jur.2d Courts § 128 (1965).
- The "principle of priority" is not applicable between sovereign jurisdictions as a matter of duty. As a matter of comity, however, a court of one state may, in its discretion, stay a proceeding pending before it on the grounds that a case involving the same subject matter and parties is pending in the court of another state. Bedingfield v Bedingfield, 417 So. 2d 1047, 1050 (Fla. 4th DCA 1982).
- This does not mean that a trial court must always stay proceedings when the prior proceedings involving the same issues and parties are pending before a court in another state but only that ordinarily this should be the result. "There may well be circumstances under which the denial of a stay could be justified upon a showing of the prospects for undue delay in the disposition of a prior action". Norris v Norris, 573 So. 2d 1085, 1086 (Fla. 4th DCA 1991) (citing Schwartz v

DeLoach, 453 So. 2d 454, 455 (Fla. 2d DCA 1984)).

In cases regarding children's issues, as described in detail below, if the child(ren) had been a resident of Florida for six months prior to filing the petition for dissolution of marriage and Florida is the home state of the child(ren), as defined by the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), the court may stay all other issues and retain jurisdiction to determine the pending child-related issues. See Norris, at 1086.

1.2 Divorce Process

The grounds for a divorce in Florida are that the marriage is irretrievably broken. Florida is a "no-fault" state, so the party filing for divorce does not have to prove anything to obtain a divorce, other than to state the marriage is irretrievably broken. Florida does not recognise civil unions or common law marriages. These grounds are the same for same-sex marriages.

While there are certainly other ways to accomplish a divorce, as discussed in the ADR section below, for a court to finalise a dissolution of marriage, court proceedings must be commenced by the filing of a Petition for Dissolution of Marriage (§ 61.043, Fla. Stat). The Petition for Dissolution of Marriage must be served within 120 days of the issuance of a summons. Once served, the receiving party has 20 days to file a responsive pleading, known as an Answer, and file a Counterpetition if they choose.

Florida has a simplified dissolution process that only applies to parties who do not have any minor or dependent children together, neither party is pregnant, and they have made a satisfactory division of their property and agreed as to the payment of their joint obligations, and neither party has legal counsel. Further, neither party may seek spousal support. The timeline for a simplified dissolution of marriage is typically less than 90 days.

The length of time a divorce takes largely depends on the complexity of the issues presented. Most cases do settle, but obviously litigated cases generally take longer than cases that settle. Cases with complex and intricate financial issues often take longer, as the process of obtaining and synthesising discovery and information can be time consuming. Less complex cases can be resolved in four to six months, generally, and more complex cases can take a year or more.

Florida law provides for civil divorces "from the bonds of matrimony" only. The court can neither require the parties to participate in a religious marriage ceremony nor to secure a religious divorce. Turner v Turner, 192 So. 2d 787 (Fla. 3d DCA 1966).

A marriage may be annulled for any cause which has prevented the parties from contracting a valid marriage. However, annulments are unusual in Florida. The court must find one of these factors for invalidity: (i) a want of legal capacity to contract, or a statutory prohibition against the type of marriage in question, (ii) a want of mental capacity to contract, (iii) a lack of actual consent to the contract, (iv) a consent wrongfully procured by force, duress, fraud or concealment, and (v) a lack of physical capacity to consummate. Sack v Sack, 184 So. 2d 434, 436 (Fla. 3d DCA 1966) (citing 10 Fla. Jur. Divorce, Separation and Annulment, Section 308).

2. Finances

2.1 Jurisdiction

The grounds for jurisdiction for commencing financial proceedings in Florida are that the marriage is irretrievably broken.

There is also the ability to seek support unconnected with a dissolution of marriage. While it is unusual, in cases where a party does not want to get divorced but has been financially abandoned by their spouse, they can seek both alimony/spousal support and child support.

In order to resolve issues regarding support or property, the court must have both subject matter jurisdiction and jurisdiction over the person. There are three methods to obtaining jurisdiction over the person. They are: in personam, in rem, and quasi in rem.

If a person is a Florida resident the court has in personam jurisdiction. Patten v Mokher, 184 So. 29 (Fla. 1938). A person can also voluntarily appear in Florida, consenting to jurisdiction. See Brown v Brown, 786 So. 2d 611 (Fla. 1st DCA 2001). If a party is personally served while voluntarily in Florida not by fraud or for another court appearance, in personam jurisdiction is established. See Wolfson v Wolfson, 455 So. 2d 577, 578 (Fla. 4th DCA 1984). Lastly, in personam jurisdiction may be acquired through Florida's long-arm statute (§ 48.193 Fla. Stat).

A party may timely contest personal jurisdiction. Fla. Fam. L. R. P. 12.140(b)(2). However, if a party seeks affirmative relief or participates in the case without contesting jurisdiction, the objection is waived. Scott-Lubin v Lubin, 49 So. 3d 838, 840 (Fla. 4th DCA 2010).

A party is able to apply to stay proceedings in order to pursue divorce proceedings in a foreign jurisdiction. A party may file a motion to stay or for an anti-suit injunction. Florida courts consider the following factors when addressing this issue.

- Florida is a first-to-serve state not a first-to-file state. Mabie v Garden St. Mgmt. Corp., 397 So. 2d 920, 921 (Fla. 1981) (citing Martinez v Martinez, 153 Fla. 753, 15 So. 2d 842 (Fla. 1943)).
- Where courts within one sovereignty have concurrent jurisdiction, the court which first exercises its jurisdiction acquires exclusive jurisdiction to proceed with that case. This is called the "principle of priority". 20 Am. Jur.2d Courts § 128 (1965).
- The "principle of priority" is not applicable between sovereign jurisdictions as a matter of duty. As a matter of comity, however, a court of one state may, in its discretion, stay a proceeding pending before it on the grounds that a case involving the same subject matter and parties is pending in the court of another state. Bedingfield v Bedingfield, 417 So. 2d 1047, 1050 (Fla. 4th DCA 1982).
- This does not mean that a trial court must always stay proceedings when the prior proceedings involving the same issues and parties are pending before a court in another state but only that ordinarily this should be the result. "There may well be circumstances under which the denial of a stay could be justified upon a showing of the prospects for undue delay in the disposition of a prior action". Norris v Norris, 573 So. 2d 1085, 1086 (Fla. 4th DCA 1991) (citing Schwartz v DeLoach, 453 So. 2d 454, 455 (Fla. 2d DCA 1984)).

In cases regarding children's issues, as described in detail below, if the child(ren) had been a resident of Florida for six months prior to filing the petition for dissolution of marriage and Florida is the home state of the child(ren), the court may stay all other issues and retain jurisdiction to determine the pending child-related issues. See Norris, at 1086.

Florida courts may hear some financial claims after a foreign divorce for the purpose of enforcement.

- Florida courts may enforce a foreign court's alimony award, however, it may not be modified. The foreign court retains continuing and exclusive jurisdiction over the alimony award. § 88.2051(6) and § 88.2061(3), Fla. Stat.
- Full faith and credit are given to all final and non-modifiable judgments from other states entered in accordance with constitutional due process rights to all parties. Fisher v Fisher, 613 So. 2d 1370 (Fla. 2d DCA 1993).
- Foreign judgments may be domesticated in Florida pursuant to §55.501–§55.509, the Florida Enforcement of Foreign Judgments Act.

2.2 Court Process

Service of process for financial proceedings may be accomplished by personal service, substitute service or constructive service.

Service may be made by an officer authorised by law to serve process or by any competent individual, not interested in the action and appointed by the court.

If service is not effectuated within 120 days after filing the initial pleading, the court must direct that service be initiated within a certain time period or dismiss the action. After service has been completed for financial proceedings, the parties have 45 days to exchange financial documents through mandatory disclosure pursuant to Rule 12.285 of the Florida Family Law Rules of Procedure.

2.3 Division of Assets

Florida approaches the division of assets with the premise that that division should be equitable, which generally results in an equal division of assets, pursuant to § 61.075, Fla. Stat. The court must make specific factual findings in distributing assets.

By a showing of exceptional circumstances, the court can enter an order for partial equitable distribution of assets during the pendency of a case, pursuant to § 61.075(5), Fla. Stat. However, this is statutorily driven and often difficult to accomplish and cannot be for the sole purpose of contributing to fees and costs. Moreover, the moving party must strictly comply with the procedural requirements of § 61.075, Fla. Stat. or they will be prohibited from receiving this form of relief. The court's determination in this order is considered as part of the court's final judgment dissolving the party's marriage.

A final judgment contains the court's order on the equitable distribution of assets. The court can order the unequal distribution of assets. The court considers the following factors to justify an unequal distribution:

- each party's contribution to the marriage, including contributing to caring for and education of the children and services as a homemaker;
- the parties' individual and collective economic circumstances;
- the duration of the marriage;

- any interruptions to their careers or the educational opportunities of either party;
- if there is a desirability to retain a specific asset. For example, if a party has a specific interest in retaining their interest in a business without interference from the other party;
- the parties' contributions to the acquisition or enhancement of a marital or non-marital asset or debt;
- the parties' desire to maintain the marital home as a residence for a dependent or minor child;
- if either party intentionally depleted assets after the petition for dissolution of marriage was filed or within two years of the filing; and
- any other factor necessary to do justice between the parties.

The basic premise of equitable distribution of assets in Florida is a three-step process: (i) identify marital and non-marital assets, (ii) value the marital assets, and (iii) distribute the assets between the parties. The same process is used for marital debts or liabilities.

Marital assets are assets that were (i) acquired during the marriage by either party individually or jointly, (ii) nterspousal gifts during the marriage, (iii) the paydown of principal of a note or mortgage secured by non-marital real property and a portion of the property's passive appreciation, (iv) the enhancement in value of a non-marital asset due to the efforts of either party during the marriage, and (v) all vested and non-vested benefits or rights accrued during the marriage in the parties' pensions, annuities, deferred compensation plans or insurance plans.

Parties identify the subject assets through the discovery process. The discovery process is the exchange of financial and other documents (either formally or informally) so as to be able to properly identify and value the marital assets. In a family law case, the parties are subject to "mandatory disclosure", pursuant to Fla. Fam. L. R. P. 12.285. Mandatory disclosure is the compulsory production of certain financial records by both parties to the other party. As part of a party's mandatory disclosure, the parties are required to execute a complete Florida Family Law Financial Affidavit. This is a sworn affidavit wherein the parties are obligated to list all of their current assets and liabilities. In addition, parties are able to request the production of additional financial records beyond what is required by mandatory disclosure. Fla. Fam. L. R. P. 12.350 governs the production of documents. Further, the parties can be subject to depositions, which is a witness's out-of-court testimony that is reduced to writing (usually by a court reporter) for later use in court or for discovery purposes. Fla. Fam. L. R. P. 12.310 governs the deposition process. There are other discovery mechanisms to ensure the disclosure of assets and liabilities.

The court can compel the production of financial records from third parties. This is done through the court's subpoena power. A subpoena is a writ or order commanding a person to appear before a court or other tribunal, subject to a penalty for failing to comply. (Subpoena, Black's Law Dictionary (11th ed. 2019)). The court's subpoena power is governed by Fla. Fam. L. R. P. 12.351 and 12.410.

There are no property regimes in Florida.

Florida courts do recognise the concept of trusts. Under Florida law, an irrevocable trust is a trust that cannot be revoked by the settlor (the individual who established the trust) and is treated as a separate and distinct entity from the settlor. See Nelson v Nelson, 206 So. 3d 818, 820 (Fla. 2d DCA 2016). Whereas a revo-

cable trust, which is a trust that can be revoked ("undone") by the settlor, is still treated as the property of the settlor. See Collier v Collier, 343 So. 3d 183, 186 (Fla. 1st DCA 2022) (recognising that property held in a revocable trust remains the property of the settlor). Therefore, the nature of the trust will affect the court's approaches and powers over the trust for both property distribution and support. Generally, property held in an irrevocable trust is not subject to equitable distribution under § 61.075, Fla. Stat. because it is viewed as owned separate from the parties. Alternatively, property held by a revocable trust, where one or both of the parties is a settlor, is subject to equitable distribution because it is still considered within the ownership of one or both of the parties.

2.4 Spousal Maintenance

Spousal maintenance in Florida is referred to as alimony. Alimony is codified under Florida law pursuant to §61.08, Fla. Stat. There is no set calculation for alimony. An alimony award is based upon the respective parties' "need" for the support and the other party's "ability to pay". For the purposes of determining an alimony award the courts will look to the length of the marriage; short term marriages are less than seven years, moderate term marriages are more than seven years but less than 17 years, and long-term marriages are longer than 17 years. Temporary alimony can also be awarded during the pendency of a case, based on the same need and ability factors. The length of the marriage is not a bar to this temporary award.

Attitudes towards spousal maintenance, or alimony, in Florida, vary throughout the state. Moreover, it is not uncommon for attitudes to vary between judges presiding within the same circuit court. There has been an annual legislative attempt to essentially eradicate alimony in Florida for the better part of the last ten years. Many people do not believe permanent alimony should exist and also believe that retirement should be a basis to terminate an alimony award, regardless of the financial situation of the parties. That is not, however, the law in Florida.

There are currently four primary types of alimony awarded in Florida.

- Bridge-the-Gap alimony – is ordered to aid one party as they transition from married to single life. There must be evidence of a legitimate and identifiable short-term need. Bridge-the-Gap alimony may not be modified in duration or amount, and it may not exceed a period of two years. This is generally seen in only very short-term marriages.
- Rehabilitative alimony – is ordered to "establish the capacity of self support of the receiving spouse, either through redevelopment of previous skills or provision of the training necessary to develop potential supportive skills", Canakaris v Canakaris, 382 So. 2d 1197, 1202 (Fla. 1980). Though rehabilitative alimony may be modified or terminated, there must be a specific rehabilitative plan. For example, if a spouse has a specific plan to finish required courses to obtain an incomplete degree, they may be eligible for an award of rehabilitative alimony. This is generally awarded when one spouse abandoned a career in lieu of child rearing and/or other aspects of a marital relationship and needs re-education or new education to become employable and capable of self support. It can also be used as a creative defence to an alimony request, providing a plan for the spouse seeking alimony to be able to rehabilitate themselves.
- Durational alimony – was codified in 2010. Durational alimony may not exceed the length

of a marriage and was truly created to limit the need to award permanent alimony in cases that would result in an alimony award that would exceed the time the parties were married. The duration of the alimony may only be modified under exceptional circumstances. The amount of durational alimony may be modifiable based upon a substantial change in circumstances.

- Permanent alimony – is awarded when the courts find there is no other form of alimony that would be fair and reasonable under the circumstances. There is a rebuttable presumption that permanent alimony should be awarded in long-term marriages. Permanent alimony is meant to provide the lifestyle of the former spouse as they had during the marriage. The purpose of permanent alimony is to provide for the needs and necessities of life for a former spouse as they were established during the marriage of the parties. Canakaris, 382 So. 2d 1197, 1201. In essence, permanent alimony is really durational alimony without an actual ending date, so it can exceed the length of the marriage. Permanent alimony is modifiable by the showing of an unanticipated, involuntary change in circumstance. However, case law has established that reaching normal retirement age is considered a substantial change to warrant a modification notwithstanding the fact that it is known and anticipated. Most alimony modifications are sought because the paying spouse has experienced a reduction in income impeding the ability to pay.

In awarding alimony, the court must first determine there is the requisite need and ability to pay. If that burden has been met, the court then applies the factors in 61.08 Fla. Stat. to determine type, length and amount of the alimony award. These factors include an evaluation of the lifestyle of the parties, the ability of the recipient to go back to work, the income available to each party, including that from assets distributed in the dissolution process and from non-marital sources.

Changes to the national tax laws have made it such that alimony is not taxable to the recipient or deductible by the paying spouse. See 26 USCA § 61 (wherein alimony/support payments are no longer included in the definition of gross income); see also Topic No 452 Alimony and Separate Maintenance, IRS.gov (last updated 11 January 2023), www.irs.gov/taxtopics/tc452. However, awards entered prior to 31 December 2018 that are taxable/deductible awards will maintain that status. This also means that modifications of those pre-31 December 2018, spousal support awards remain taxable/deductible unless otherwise agreed to by the parties. See Publication 504 (2021), Divorced or Separated Individuals, IRS.gov (last updated 1 February 2022), www.irs.gov/publications/p504#en_US_2021_publink100031444.

Unless agreed to by the parties, all alimony awards are modifiable in amount, and depending on the type, may be modifiable in duration. See Ispass v Ispass, 243 So. 3d 453, 456 (Fla. 5th DCA 2018) (standing for both propositions). The standard to modify alimony is a substantial and permanent change in circumstances that was unknown at the time of the entry of the final judgment or the last order on support. See Valby v Valby, 317 So. 3d 147, 151 (Fla. 4th DCA 2021). For the most part, modifications are generally downward in nature, the paying spouse seeking to reduce their obligations, as opposed to the recipient seeking more. That does not mean upward modifications do not occur, but the vast majority are downward.

While it is arguably known and anticipated, case law has established that retiring at a reasonable retirement age is a basis to modify. See Pimm v Pimm, 601 So. 2d 534, 536-37 (Fla. 1992); Holder v Lopez, 274 So. 3d 518, 520 (Fla. 1st DCA 2019); and Bauchman v Bauchman, 253 So. 3d 1143, 1148 (Fla. 4th DCA 2018). In addition, there are legislative pushes to codify this well-known case law.

2.5 Prenuptial and Postnuptial Agreements

Both pre and postnuptial agreements are recognised in Florida. Prenuptial agreements are differentiated by their entry date. Prenuptial agreements, now referred to as premarital agreements, entered after 1 October 2007, are governed by the Uniform Premarital Agreement Act (UPAA).

Prenuptial Agreements, Entered Prior to 1 October 2007 and Postnuptial Agreements

The key case law on these agreements is Del Vecchio v Del Vecchio, 143 So. 2d 17 (Fla. 1962) and Casto v Casto, 508 So. 2d 330 (Fla. 1987).

The validity of these agreements is determined by a two-prong analysis. An agreement can be determined invalid by meeting either prong.

- Prong 1 – a spouse may set aside or modify an agreement by establishing that it was reached under fraud, deceit, duress, coercion, misrepresentation or overreaching. Masilotti v Masilotti, 29 So. 2d 872 (Fla. 1947).
- Prong 2 – a spouse looking to set aside the agreement must establish that the agreement makes an unfair or unreasonable provision for that spouse, given the circumstances of the parties.

Once the claiming spouse establishes that the agreement is unreasonable, a presumption arises that there was either concealment by the defending spouse or a presumed lack of knowledge by the challenging spouse of the defending spouse's finances at the time the agreement was reached.

The burden then shifts to the defending spouse, who may rebut these presumptions by showing that there was either:

- a full, frank disclosure to the challenging spouse by the defending spouse before the signing of the agreement relative to the value of all the marital property and the income of the parties; or
- a general and approximate knowledge by the challenging spouse of the character and extent of the marital property sufficient to obtain a value by reasonable means, as well as a general knowledge of the income of the parties. Casto, 508 So. 2d at 333.

Prenuptial Agreements, Entered After 1 October 2007

Agreements entered after 1 October 2007, referred to as premarital agreements, are governed by the UPAA.

Premarital agreements must be in writing and signed by both parties.

Pursuant to Florida Statutes § 61.079, a premarital agreement is not enforceable if the party against whom enforcement is sought proves that:

- the party did not execute the agreement voluntarily;
- the agreement was the product of fraud, duress, coercion or overreaching; or

- the agreement was unconscionable when it was executed and, before execution of the agreement, that party:
  (a) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;
  (b) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and
  (c) did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.

Premarital and postnuptial agreements may contract regarding property rights, disposition for property, spousal support, rights in and disposition of death benefits from a life insurance policy, choice of law governing the agreement and any other personal rights not in violation of public policy or a law imposing a criminal penalty.

Premarital and postnuptial agreements may not contract with respect to children's issues or temporary support.

Pre and Postnuptial Agreements Regardless of Entry Date

All pre and postnuptial agreements are interpreted and construed like any other contract. See Famiglio v Famiglio, 279 So. 3d 736 (Fla. 2d DCA 2019) (asserting same in the context of a prenuptial agreement); Chipman v Chipman, 975 So. 2d 603 (Fla. 4th DCA 2008) (asserting same in the context of a postnuptial agreement).

It is important to understand that, when interpreting any agreement, the court must first look to its plain language to determine the parties' intent. Famiglio, at 739. When interpreting the agreement, the court may only consider extrinsic evidence outside of the agreement's plain language, known as parol evidence, when the agreement contains an ambiguity. Id.

Florida law staunchly supports parties' rights to contract. It is never the role of a trial court to rewrite a contract to make it more reasonable for one of the parties. Id.

Famiglio is a key case explaining, in immense detail, the process trial courts must employ when interpreting and construing marital agreements.

2.6 Cohabitation

In Florida, no legal rights or obligations are established from a non-marital, cohabitation relationship. Posik v Layton, 695 So. 2d 759 (Fla. 5th DCA 1997).

In Castetter v Henderson, 113 So. 3d 153 (Fla. 5th DCA 2013), the court determined that "a court may, however, impose a constructive trust to do equity between unmarried cohabitants". Evans v Wall, 542 So. 2d 1055, 1056 (Fla. 3d DCA 1989). The party seeking to establish a constructive trust "must establish it by proof to the exclusion of all reasonable doubt". Smith v Smith, 108 So. 2d 761, 764 (Fla.1959); see also Harris v Harris, 260 So. 2d 854, 855 (Fla. 1st DCA 1972). "Before a constructive trust in real property will be created, the person claiming such interest must prove beyond a reasonable doubt by clear and convincing evidence those factors which give rise to the trust". The four elements that must be established for a court to impose a constructive trust include: (i) a promise, express or implied; (ii) a transfer of property and reliance thereon; (iii) a confidential relationship; and (iv) unjust enrichment. Provence v Palm Beach

Taverns, Inc., 676 So. 2d 1022, 1024 (Fla. 4th DCA 1996); Heina v LaChucua Paso Fino Horse Farm, Inc., 752 So. 2d 630, 637 n. 4 (Fla. 5th DCA 1999).

Cohabitants do not acquire rights by virtue of length of cohabitation. Cohabitants may acquire rights to child support by virtue of children born of the relationship upon the establishment of a support obligation.

In addition, while not called cohabitation, Florida Statute 61.14 recognises a supportive relationship as a basis to modify alimony. Essentially, the paying spouse must prove the spouse who is receiving alimony is living with another person like married couples, sharing in property ownership, bank accounts, life activities, but not actually marrying to avoid the termination of alimony that comes with remarriage.

2.7 Enforcement

Many different forms of relief exist when a party fails to comply with a financial order. However, the nature of the financial order can dictate the types of relief available to the enforcing party. These remedies can be used to enforce international financial orders, subject to the applicable statutes and rules.

Civil Contempt

A party may move the court to hold a non-complying party in civil contempt. Civil contempt is used to coerce an offending party into complying with a court order rather than to punish the offending party for a failure to comply with a court order. Johnson v Bednar, 573 So. 2d 822 (Fla. 1991). A support award can be enforced by contempt proceedings and incarceration. Braswell v Braswell, 881 So. 2d 1193, 1198 (Fla. 3d DCA 2004). A party's incarceration for violation of a support order is meant purely to coerce compliance, not to punish. Therefore, a party must be released once they have complied with their support obligation(s). However, orders concerning property awards cannot be enforced by contempt and incarceration. Randall v Randall, 948 So. 2d 71 (Fla. 3d DCA 2007).

Income Deduction Orders/Income Withholding Orders

Income deduction orders/income withholding orders ensure compliance by requiring a non-complying party's employer to deduct support obligations directly from the party's pay. § 61.1301(1)(a), Fla. Stat. states that, "Upon the entry of an order establishing, enforcing, or modifying an obligation for alimony, for child support, or for alimony and child support, other than a temporary order, the court shall enter a separate order for income deduction if one has not been entered". The court's ability to enter income deduction orders/income withholding orders is subject to the dictates and limitations of UIFSA (Ch. 88, Florida Statutes).

Writs

As part of an action to enforce a final divorce decree, a party can seek the court to impose certain writs. A writ is a court's written order, in the name of a state or other competent legal authority, commanding the addressee to do or refrain from doing some specified act. (Writ, Black's Law Dictionary (11th ed. 2019)). There are many types of writs recognised by the laws of the State of Florida.

Writ of ne exeat

When either party is about to remove himself or herself or his or her property out of the state, or fraudulently convey or conceal it, the court may award a ne exeat or injunction against the party or the property and make such orders as will secure alimony or support to the party who

should receive it. § 61.11, Fla. Stat. Writs of ne exeat can also be used to enjoin a party from fraudulently conveying or concealing property subject to a final divorce decree. See Sandstrom v Sandstrom, 565 So. 2d 914, 915 (Fla. 4th DCA 1990) (§ 61.11, Fla. Stat. applies to attempts to dissipate marital assets before or after final dissolution judgment).

Writ of garnishment

Separate and apart from income deduction orders/income withholding orders which are used to enforce support obligations, a party can seek compliance through a writ of garnishment to enforce property obligations. "Garnishment" consists of notifying a third party to retain something he has belonging to the defendant, to make disclosure to the court concerning it, and to dispose of it as the court shall direct. Writs of garnishment are governed by Chapter 77 of the Florida Statutes. § 77.01, Fla. Stat. in part states, "Every person or entity who has sued to recover a debt or has recovered judgment in any court against any person or entity has a right to a writ of garnishment, in the manner hereinafter provided". Writs of garnishment are limited in that they cannot be applied to property existing outside of the State of Florida. See Power Rental Op Co, LLC v Virgin Islands Water & Power Authority, M.D.Fla.2021, 2021 WL 268472.

Writ of sequestration

A writ of sequestration is a court order. Writs of sequestration are governed by § 68.03, Fla. Stat. and Fla. Fam. L. R. P. 12.570. They prohibit a party's access to certain property to prohibit the conveying or concealing of the property. Moreover, writs of sequestration can order non-parties with possession of the subject property to act on the court's behalf to ensure the property is disposed of in accordance with the court's order.

Writ of attachment

Writs of attachment are governed by Ch. 76, Fla. Stat. and Fla. Fam. L.R.P. 12.570(c)(1). §76.01, Fla. Stat. states, "Any creditor may have an attachment at law against the goods and chattels, lands, and tenements of his or her debtor under the circumstances and in the manner hereinafter provided". Essentially, this allows a Florida court to direct what happens to property located in the State of Florida that is subject to a domestic or foreign divorce decree.

2.8 Media Access and Transparency

All family law cases in Florida are public record and open for anyone to see or watch. Many of the filings in family law cases in Florida are available online and anyone can go directly to the courthouse and request to review cases and see pleadings and documents filed in the court file. Other than juvenile dependency cases, all family law cases are open to the public.

There are Rules of Judicial Administration and General Practice (RJAAGP) that protect some of the material that may be filed in the court. This includes account information; children's names, addresses and social security numbers; social security numbers of the parties, etc. In addition, allegations that might stem from dependency can be held confidential. All of this is governed by RJAAGP 2.420 and 2.425 and require a proper filing with the clerk's office to ensure redactions occur on the files.

Parties can also agree to Confidentiality Orders protecting items from being filed in the court file and only being shared between parties, but, for example, the Financial Affidavit that is required to be filed in most cases filed in Florida cannot be waived, sealed or kept out of the court file.

RJAAGP 2.420 also provides a mechanism whereby someone can request a file be sealed and/or held confidential or portions of a file be held confidential, however, a very detailed order must be entered upon findings for this step to be taken and, ironically, the order sealing the records and explaining why they are being sealed must be published in a public area, both on the clerk's website and in the clerk's office for a period not less than 30 days. The effect often drawing more attention to the file and the confidential records than having done nothing at all with the filed documents.

2.9 Alternative Dispute Resolution

ADR is highly favoured in Florida, and in most jurisdictions across the state there are local Administrative Orders in place requiring mediation to occur before any matter is brought before a judge for resolution.

The primary ADR method used in financial cases in Florida is mediation. Mediation is a method of non-binding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution. The mediation process is governed by Chapter 44 of the Florida Statutes and Florida Family Law Rules of Procedure 12.740 and 12.741. Most cases in Florida go to mediation, at least once. Mediation is generally done with a Supreme Court Certified mediator agreed upon by the parties, but the courthouse in many areas does offer sliding scale mediations for lower cost. Since COVID, many mediations are done by Zoom, but in-person mediations are beginning to resume.

Parties are expected to appear for mediation and govern themselves accordingly. An agreement resolving financial issues, not related to minor children (ie, child support), reached through the mediation process is binding and enforceable upon the parties' execution.

Voluntary Binding Arbitration

Arbitration is a process whereby a neutral third person or panel, called an arbitrator or arbitration panel, considers the facts and arguments presented by the parties and renders a decision which may be binding or non-binding. § 44.1011(1), Fla. Stat. Binding arbitration means that the decision rendered during arbitration is binding on the parties and the court. Arbitration in family law matters is governed by Chapter 44 of the Florida Statutes and Florida Family Law Rules of Procedure 12.740.

Generally speaking, voluntary binding arbitration does not happen in family law cases in Florida as it cannot be used when there are minor children involved in the case. See § 44.104(14), Fla. Stat. Toiberman v Tisera, 998 So. 2d 4, 6 (Fla. 3d DCA 2008) "The plain language of section 44.104(14) prohibits binding arbitration of child custody, visitation, or child support matters". However, in dealing with only financial issues it is possible.

Voluntary Trial Resolution

Similar to voluntary binding arbitration, voluntary trial resolution is a process by which a trial resolution judge considers the facts and arguments presented by the parties and renders a decision. See § 44.1011(1), Fla. Stat. The private judge must be agreed to by the parties, must be a member of the Florida Bar in good standing and have been practicing for at least five years. See § 44.104(2), Fla. Stat. The private judge is appointed by the presiding judge via court order. The presiding judge cannot require parties to use this alternative method.

This private judge method is often used in cases that are very complex and knowing that the

judge can block off the necessary number of days, etc, for continuity in the process is helpful. Many jurisdictions rotate judges on a bi-annual basis, and for complex cases, this could cause more than one judicial rotation during the life of the case. Private judges can be very beneficial to keep consistency for the case.

Collaborative Law

Florida Statutes established the Collaborative Law Process in Florida, which allows parties to settle their cases via a collaborative contract. Each party has a lawyer, and the lawyer and the parties contract to this confidential process of resolution. Joint experts, in both financial and mental health, can be involved to help the parties to find creative resolution to their divorce without any litigation. However, if the collaborative process is unsuccessful, the parties must hire new lawyers, start the process over from the beginning and hold all things discovered during the collaborative process confidential. The Collaborative Law Process is very successful in certain parts of Florida and less so in others.

3. Children

3.1 Jurisdiction

Florida has adopted the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). Pursuant to § 61.514, Fla. Stat. Florida courts have jurisdiction to make an initial child custody determination if:

- Florida is the child's home state on the date of filing or was the home state of the child within six months before filing if the child is absent from Florida but a parent or person acting as a parent continues to live in Florida;
- a court of another state does not have jurisdiction under the first bullet point, or a court of the home state of the child has declined to exercise jurisdiction on the grounds that Florida is the more appropriate forum and:
  - (a) the child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with Florida beyond their physical presence; and
  - (b) substantial evidence is available in Florida concerning the child's care, protection, training and personal relationships;
- all courts having jurisdiction under the first two bullet points have declined to exercise jurisdiction on the grounds that a court of Florida is the more appropriate forum to determine the custody of the child; or
- no court of any other state would have jurisdiction under the criteria specified in the bullet points above.

The courts look at the child's home state to determine jurisdiction. A child's "home state" is the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding. In the case of a child younger than six months of age, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period. § 61.503(7), Fla. Stat. The court does not consider the child's domicile or nationality, but their residence. The child's physical presence is not necessary to make a custody determination.

3.2 Court Process: Child Arrangements and Child Support

3.2.1 Child Arrangements

Whether parents agree on child arrangements or do not, a parenting plan must be entered in Florida that governs the parties' relationship

and timesharing with the minor child. Florida takes a two-prong approach to parenting, one being decision making, the other timesharing, or where the child lays their head at night. In addition to providing a “regular” timesharing schedule, the parenting plan will also deal with holidays, school breaks, and assist in decision-making parameters for the parties. If the parties do not agree, then the court will decide, based on § 61.13, Fla. Stat. an appropriate timesharing schedule and create the parenting plan.

The decision-making aspect is referred to as shared parental responsibility, and there is a presumption in Florida that it will be awarded in all cases. This means the major decisions for a child’s life must be made together by the parties, and not unilaterally. This would include primarily medical and educational decisions as well as other major decisions that may affect a specific family.

Occasionally, the court may award sole decision making, but that requires a finding by the court that shared parental responsibility would be detrimental to the child and that is a high burden to meet.

Florida does not have any presumptions regarding timesharing and courts are given wide discretion in determining the time a child spends with each parent. That being said, Florida Statutes do indicate that it is the public policy of the state that each parent has substantial time with the child. There are many counties in Florida where an equal timesharing schedule is the “norm” but that is most definitely not the case across the entire state. However, because there is no presumption in favour of either parent in determining a timesharing schedule, often the court will begin with that concept and then deviate by applying the statutory factors.

3.2.2 Child Support

Pursuant to § 61.29, Fla. Stat. each parent has a fundamental obligation to support his or her minor or legally dependent children. Child support is the obligated payment of monetary support for the maintenance of a child. See § 61.046, Fla. Stat.

Child support is calculated by a statutory guideline based upon the parent’s combined net income estimated to have been allocated to the child as if the parents and child(ren) were living together in one household, § 61.29, Fla. Stat. After determining the total support obligation, this is divided between the parents based upon each parent’s percentage of the overnights with the child(ren). The difference between the amounts is used to determine which parent is the payor and the amount of the payment necessary to care for the child(ren). These amounts are adjusted for each parent’s contributions to the child(ren)’s health insurance and day care expenses, producing the final support amount, § 61.30, Fla. Stat.

Parents may enter an agreement concerning their child support obligations so long as the agreement serves the best interest of the child, however, they may not waive or contract away their child’s right to support. Lester v Lester,736 So. 2d 1257 (Fla. 4th DCA 1999) (citations omitted). Contracts between the parents regarding the support of their minor child are subject to the plenary power of the state to control and regulate. Zolonz v Zolonz, 659 So. 2d 451 (Fla. 4th DCA 1995).

The court may make orders in relation to child support. All child support orders and income deduction orders must provide for child support to terminate on a child’s 18th birthday unless the court finds or previously found that a child

is dependent due to a mental or physical incapacity which began prior to the child turning 18 or if a dependent child is between the ages of 18 and 19, and is still in high school performing in good faith with a reasonable expectation of graduating before age 19. § 61.13, Fla. Stat, § 743.07(2), Fla. Stat.

Florida law does not provide an avenue for a child to seek support on their own.

3.3 Other

Courts have broad discretion in entering orders on children's issues. See Miller v Miller, 842 So. 2d (Fla. 1st DCA 2003). When parents have opposing views on specific issues the court may modify parental responsibility to allow one parent ultimate decision-making authority on the specific issue. For example, in Hancock v Hancock, 915 So. 2d 1277 (Fla. 4th DCA 2005), when parents could not agree on a school for their child, the lower court was directed to award ultimate decision making and designate one parent to make educational decisions for the child.

The courts cannot order or provide decision-making authority to a third party. As such, if there are impasses on parenting decisions and that is brought before the court, the court will not likely make the actual decision, but will give one parent ultimate decision-making authority over that specific issue or topic. For example, if the parties do not agree on which school a child shall attend, after a hearing, the court would award one parent with ultimate decision making on that issue.

Unless there is evidence that the order would harm the child, the court may not choose one parent's religious beliefs and practices over another's. This would violate the first amendment. Mesa v Mesa, 652 So. 2d 456, 457 (Fla. 4th DCA 1995).

Parental alienation is a bit of a misnomer but is really about gate-keeping behaviours. Florida courts recognise that parental alienation, if proved by competent, substantial evidence, can justify a post-dissolution request for a modification of a time-sharing designation in a final judgment. See McKinnon v Staats, 899 So. 2d 357, 361 (Fla. 1st DCA 2005). Parental alienation is not a crime in Florida, however if the court finds evidence of parental alienation, it may result in reduced timesharing.

In Florida, children are able to give testimony in family law cases, but it is disfavoured and unusual. If a party wants a child to testify, they must seek permissions pursuant to Rule 12.407 Florida Family Law Rules of Procedure to bring them to court or even just to have them deposed. Generally, courts do not want to put children in the position to testify "against" a parent or in a position to believe they have a say or choice in the result of a court case, and perhaps more importantly, do not want to put a child in a position of "picking" a parent. As such, child testimony is generally very rare and limited to fact-based issues that usually surround behaviours or incidents a child witnessed. The court generally will do an in-camera examination of a child outside of the presence of the parents and their counsel to avoid the child needing to testify in the presence of their parents.

3.4 Alternative Dispute Resolution

In Florida, different from many other jurisdictions, all aspects of the dissolution process: parenting, equitable distribution, alimony, child support and any other matters to resolve for the family come before one judge and are typically all decided at the same time. While sometimes

cases may be bifurcated, it is unusual for the financial issues to be bifurcated from the child related issues as they all work off each other. What is distributed to each party must be known to determine incomes for the need and ability to pay the component of alimony. The alimony amount and timesharing schedule must be known to determine child support.

To encourage resolution of issues without court involvement, mediation is required in most cases before ever appearing in front of a judge. Mediation is a process, generally speaking, where each party has their own attorney and a mediating professional (either a lawyer or someone certified by the Supreme Court) serves as a conduit between the parties to seek amicable resolution of their issues. If that is possible, a marital settlement agreement and parenting plan are usually signed by the parties at the conclusion of mediation and, other than a very brief final hearing for the court to enter a final judgment, the litigation is concluded. Sometimes more than one mediation is necessary to resolve a matter, but mediation and amicable resolution is generally quite successful in Florida.

As mentioned above, arbitration is not permitted in Florida for child-related cases. The parties can agree to use a private judge to resolve child-related issues.

Collaborative Law Process. §§ 61.55-61.58, Fla. Stat. established the Collaborative Law Process in Florida which allows parties to settle their cases via a collaborative contract. Each party has a lawyer, and the lawyer and the parties contract to this confidential process of resolution. Joint experts, in both financial and mental health, can be involved to help the parties find creative resolution to their divorce without any litigation. However, if the collaborative process is unsuccessful, the parties must hire new lawyers, start the process over from the beginning and hold all things discovered during the collaborative process confidential. The Collaborative Law Process is very successful in certain parts of Florida and less so in others.

3.5 Media Access and Transparency

The courts have decided that not all dissolution of marriage cases involving children have an absolute right to privacy. Barron v Florida Freedom Newspapers, Inc., 531 So. 2d 113 (Fla. 1988).

Pursuant to Florida Family Law Rules of Procedure Rule 12.012 pleadings and documents shall comply with court rules to minimise the filing of sensitive information. Rule 2.425 Fla. Rules of Gen. Prac. and Jud. Admin requires minors to be identified by their initials and not full legal names in court filings. However, there is an exception in court orders relating to parental responsibility, timesharing or child support where children's names may be used. Florida allows for the determination of confidentiality and sealing of court files in family law cases. Florida Rule of General Practice and Judicial Administration 2.420.

4. Reform

4.1 Upcoming Reform and Areas of Debate

The Florida legislature has been active with family law issues for several years. It began with changes to the parenting statute that acknowledge that both parents should be active and involved in the child's life and that neither parent is "superior" or "primary". Since then, there have been countless legislative battles on alimony reform, all but seeking to eradicate it in Florida. However, even when that legislation has passed,

it has ultimately been vetoed by the governor, three times. It is expected that 2023 will be no different with legislation expected on alimony reform, equal timesharing presumptions, fathers' rights regarding children born out of wedlock and a myriad of other issues.

Sasser, Cestero & Roy, P.A. provides top-quality legal representation to its clients on sophisticated and complex family law matters both domestically and abroad. Its family law practice includes litigation, appeals and alternative dispute resolution. Committed to excellence, the partners at the firm are Florida board certified specialists in marital and family law. The firm's clients are captains of industry, celebrities, professional athletes, small business owners, homemakers and working individuals. Although its client base varies, its philosophy of service remains the same: providing exceptional, professional legal services, maintaining a high standard of client service while respecting clients' confidentiality. The firm specialises in high-profile cases with clients whose complex legal matters involve the distribution of multimillion-dollar holdings and require sophisticated financial expertise. Its strategic approach generally involves negotiating, when possible, to keep matters out of the public eye, but litigating when necessary to help its clients work towards their goals.

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Trends and Developments

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Parenting

Florida law has a two-prong approach to parenting issues and what other jurisdictions may refer to as custody. In 2008, Florida abolished the concept of custody and now recognises that both parents are expected to be active and involved participants in their child's life. The two-prong approach pertains to decision making, commonly referred to as parental responsibility, and a timesharing schedule, where the child lays their head at night. The decision making and timesharing components are placed into a parenting plan, which is essentially a contract governing the parties' relationship with the minor child.

Florida has seen a significant shift in the modification of parenting plans. The Florida Supreme Court, in Wade v Hirschman, 903 So. 2d 928 (Fla. 2005), established that in order to modify a parenting plan a party needed to show a substantial change in circumstances and that the substantial change was in the minor child's best interest to warrant a modification. However, § 61.13(3), Fla. Stat. which came after Wade v Hirschman, codified the concept that change of circumstances must also be "unanticipated". Much of the resulting case law tends to prevent modification of a parenting plan because it focuses on whether the change was anticipated or unanticipated, creating what has become an almost impossible legal burden to satisfy. This is especially true because Florida courts have equated "anticipated" to mean "voluntary" and "unanticipated" to mean "involuntary".

As an example, a case may involve a parent that has issues with substance abuse at the time the court established a final parenting plan. In such a case, it would be common for the party to have their timesharing restricted and supervised. Subsequently, that party may take steps to obtain and maintain their sobriety for a significant period of time. Logically, it would seem that the parent should now have a sufficient basis to modify the parenting plan, giving the trial court the ability to reassess whether these restrictions should remain in place. However, the trends in our case law are making it clear that even this type of positive change would not warrant a modification if it was a "voluntary", and therefore an "anticipated", change by the parent. Hopefully, legislative change(s) or a shift in the judiciary will alter this trend.

As a sub-topic of the broad topic of parenting, paternity has come to the forefront as well. Over the past few years there have been multiple bills presented before the legislator to better establish the rights of a father. While our timesharing law does not give preference to either parent, a child born outside of a marriage is considered to be the child of the mother, and the mother has 100% parental responsibility and timesharing until the father legally establishes paternity. This means that a father in a paternity case arguably has less rights than a father in an intact marriage. Weighing the needs of single mothers with the rights of involved fathers will likely continue to be something Florida sees in its case law and legislation.

Parentage/Same-Sex Relationships

Same-sex marriages and adoptions are now allowed in Florida as a result of the United States Supreme Court decisions. This is creating a significant need for laws to catch up with society, and we certainly are not there yet. The law currently provides that children born of a marriage are considered children of that marriage and that the parties of an intact marriage are the natural guardians of any children born during that marriage. §744.301, Fla. Stat. As such, if you have a same-sex couple where one of the parties is able to carry a baby to term, and that child is then "born of the marriage", the presumption is that it is a child of that marriage. However, many practitioners, in erring on the side of caution, have the non-birth parent adopt the child so it is abundantly clear it is a child of the marriage. In same-sex marriages where a biological child is not born of the parents, adoption is the only way, and the issues in those cases are far less concerning.

Undoubtedly, societal changes are continuing to develop how and what we define as "parents". Likewise, the concept of how we view a "parental relationship" is drastically changing, especially with same-sex couples. Parental relationships are forming where a child may have two moms or two dads. As things continue to evolve those labels too will begin to change. While Florida law has not caught up yet, it will be necessary for legislative changes to better reflect how we refer to parties as mother, father, husband, and wife. The titles will not always meet the requirements in every case before the court. This trend in development will also require legislative change to ensure that children's relationships with the individuals serving as their parents are maintained even as the relationship between the parents may change.

Alimony and Support

For the better part of ten years, alimony reform has been front and centre in the Florida legislature. The group promoting reform and its leadership has changed over the years, but the purpose and goal has essentially remained the same. There is a large group of Floridians who seek to remove the concept of alimony or support from Florida law, or as close thereto as possible. The goal of this group would be to limit as much as possible the ability of a spouse who does not work, or limits their income, to seek financial support from the other party. Additionally, this same group seeks to have all alimony terminate when a payor spouse retires, arguably regardless of the situation or the actual date of retirement of the payor.

Unfortunately, these groups often fail to realise that in many marriages the parties agree that one spouse will forgo their career or furthering their employment to be a stay-at-home parent and/or full-time caretaker to minor children. This fundamental issue sits at the heart of the concern for alimony reform in Florida as it pertains to initial awards of support and alimony.

While alimony reform has passed out of legislature three times over the last ten years, each time it has been vetoed for a variety of reasons.

From a trends and development perspective for Florida law, alimony reform continues to be a hot topic of legislative discussion. Florida lawyers who are integrally involved in family law understand that there may be a need to change how we view and award support. However, these practitioners also understand that there are many nuanced aspects of support awards, which must be considered, as we are dealing with individuals from multiple generations. For example, single-income households were sig-

nificantly more common with older generations, but younger generations have significantly more dual-income households. A "one size fits all" approach to alimony reform may be desired by lawmakers, but it is most likely impossible to achieve without causing significant hardship to large portions of alimony recipients.

An important and sometimes overlooked aspect of support in Florida is that alimony is to be for the actual current needs and necessities of the recipient spouse. There is no savings component to alimony. This means that an alimony-receiving spouse, who wishes to improve their financial circumstances, may be placed in a precarious position by reducing their expenses or increasing their ability to earn. Perhaps the receiving spouse downsizes their housing, takes less vacations, and/or otherwise reduces their discretionary spending, or takes classes or finds employment to better their financial situation, they risk a potential modification because their present financial needs have lessened. Because earning more or spending less is considered a substantial change in Florida to warrant a modification of alimony, a receiving spouse risks receiving less alimony rendering them unable to improve and/or stabilise their financial circumstances.

From a trends perspective, however, the reduction of expenses is not as hot a topic or issue as the idea of a receiving spouse bettering their financial situation through education and/or employment. If the recipient, for example, is receiving USD5,000 a month that will terminate in 15 years and in 15 years the recipient will only be 60 years old, the recipient may attempt to educate themselves and/or otherwise improve their employability, to make sure that they can take care of themselves after age 60. However, under current Florida law, the recipient spouse may be at risk of losing their alimony if they start generating significant income before the termination date. Accordingly, that recipient spouse may be in a situation of having to financially support themselves for more years of their life, with less employable years available to them. As such, it is virtually impossible for a non-breadwinning spouse to obtain the full ability to financially support themselves absent significant inheritance. If alimony reform really is to happen in Florida, it will be necessary to consider the ability of a recipient spouse to contribute to their overall need without risking the loss of the support they need day-to-day.

Equitable Distribution

The primary developmental trend in Florida's equitable distribution laws is not a new trend and has been unfolding for many years. It is the evisceration of the trial court's ability to find and ascribe a true fair market value to business(es) owned by one or both of the parties during the marriage. Florida law has long held that, "[T]he clearest method to determining a business' value is the fair market value approach, which is best described as what would a willing buyer pay, and what would a willing seller accept, neither acting under duress for a sale of the business. Thompson v Thompson, 576 So. 2d 267 (Fla. 1991). In this hypothetical transaction, the amount a seller is willing to pay over assets represents "goodwill". Id. at 269. Thompson held that "personal goodwill", which is goodwill based on the continued presence and/or reputation of a particular individual, is not a marital asset subject to equitable distribution. Id. Whereas, goodwill that is separate and apart from a particular individual's presence and/or reputation, known as "enterprise goodwill", is a marital asset subject to equitable distribution. Id. In order to determine the fair market value of a business interest and parse out personal and

enterprise goodwill, it was necessary to consider all three broad approaches to business valuation, the asset approach, income approach and market approach.

However, the evolution of case law has all but created a bright line rule that the net book value is the only appropriate way to value a business and entirely eviscerated the concept of "enterprise goodwill". This newer case law has essentially determined that a businesses' value, over its net book value, is largely "personal goodwill", not subject to equitable distribution. Trial courts have furthered this concept by determining that any sale, "real or hypothetical", which is contingent upon the seller executing a non-compete agreement, definitively nullifies any "enterprise goodwill".

Prior to this evolution in the case law, it was understood that personal/professional businesses, such as law firms, medical practices, cosmetic services (ie, hair salons, barber shops, etc), would have significant "personal goodwill". This is because the business' value, over its net book value, is being generated from an individual's presence and/or reputation. Essentially, these businesses rely on customers/clients coming to receive services from a particular individual. Without question, any sale of these types of businesses would require the seller to execute a non-compete agreement, or else the seller could open a competing business right after the sale. Clearly, these businesses exemplify the existence of "personal goodwill".

The quandary becomes that most, close to all, buyers would require the sellers of any business to execute a non-compete agreement, even if the businesses' goodwill was not the result of the seller's presence and/or reputation. An example could be a high volume auto dealership owned by a spouse. Many of the dealership's customers are probably not buying from the dealership because of that spouse's presence and/or reputation. The customers probably do not even know who owns the dealership. Past case law used to recognise/support that such a business would possess significant "enterprise goodwill". However, any buyer looking to purchase the dealership would want the spouse to execute a non-compete agreement, so that the spouse did not open a competing dealership. After all, no buyer would want the potential for instant competition from the seller(s). Due to the recent case law, trial courts are to determine that there is no enterprise goodwill merely because of the non-compete agreement.

This trend has had a major impact on business valuation in the context of equitable distribution. It can create significant inequity to a spouse who does not have an ownership interest in the business, as it can significantly devalue an asset that was created and/or significantly grew during the marriage. Resolution of this trend will likely require legislative fixes to instruct the court on proper business valuation.

Also, there has been a growing trend in Florida's equitable distribution law concerning awards for "dissipation", sometimes referred to as "marital waste". Florida's equitable distribution statute, § 61.075. Fla. Stat. provides the trial court to award an unequal distribution of the parties' marital estate due to a party's, "intentional dissipation, waste, depletion, or destruction of marital assets". Likewise, the trial court is empowered to include in its final equitable distribution scheme marital assets which were dissipated/spent while the parties' marriage was experiencing an irreconcilable breakdown. However, this only applies if that dissipation was the result of a party's intentional "misconduct". Basically, this

allows the court to "recapture" an asset's loss in value against a party who engages in intentional misconduct. This has been Florida law for an extended period of time. However, there is a growing trend limiting parties' abilities to successfully prove dissipation claims and successfully "recapture" assets due to the evolution of how the term "misconduct" has been defined by recent case law.

Certain conduct has always been considered misconduct. Dissipating marital assets on extramarital affairs and the actual intentional physical destruction of marital assets almost always result in a "dissipation" award. However, certain conduct is less clear cut and more often Florida practitioners are seeing opinions overturning "misconduct" findings.

For example, multiple cases have held that imprudent investments made during the marriage and/or during dissolution proceedings do not constitute "misconduct". See Sarazin v Sarazin, 263 So. 3d 273, 274 (Fla. 1st DCA 2019). "As a general rule, expenditures and investment decisions which do not rise to the level of misconduct will not support an unequal distribution of marital assets." Likewise, imprudent tax decisions to the detriment of the other spouse are not considered "misconduct". See Welton v Welton, 267 So. 3d 6, 9 (Fla. 4th DCA 2019) (holding that, "While… the husband 'intentionally dissipated' assets in a manner that was 'detrimental' to the wife, this was not enough to warrant inclusion of the dissipated assets in the equitable distribution scheme"). In one of the most interesting Florida cases on "misconduct", Soria v Soria, 237 So. 3d 454 (Fla. 2d DCA 2018), the court overturned a finding that the former husband committed "misconduct" by paying his paramour a salary with shares of his company. Id. at 459. This trend has caused significant difficulty in being able to recapture lost value in marital assets against the other party. Unfortunately, this conduct is unlikely to change at this time and would need a drastic shift in the mindset of Florida's judiciary, as much of these concepts were created from case law.

Finally, we are seeing a small trend in interim partial equitable distribution awards. Florida allows for interim partial equitable distribution, meaning a distribution of assets during a pending case, but these awards have traditionally become very difficult to receive. § 61.075(5), Fla. Stat. The statutory requirements for such an award are difficult to meet, and the need for the award cannot be for the payment of attorney's fees and costs. See id. However, an inherent issue with this statute is that in many, if not most cases, the marital assets belong to the family but are controlled and/or only in the name of one spouse. As such, one spouse has unfettered access to spend marital money as they choose, whereas the other party has no access. An interim partial distribution could better even the playing field for the parties, however, that is not the current status of law in Florida. The difficulty has risen to such a level that proposed legislative language has been drafted to try and make these awards more commonplace. However, it will take some time before meaningful change is made.

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Sasser, Cestero & Roy, P.A. provides top-quality legal representation to its clients on sophisticated and complex family law matters both domestically and abroad. Its family law practice includes litigation, appeals and alternative dispute resolution. Committed to excellence, the partners at the firm are Florida board certified specialists in marital and family law. The firm's clients are captains of industry, celebrities, professional athletes, small business owners, homemakers and working individuals. Although its client base varies, its philosophy of service remains the same: providing exceptional, professional legal services, maintaining a high standard of client service while respecting clients' confidentiality. The firm specialises in high-profile cases with clients whose complex legal matters involve the distribution of multimillion-dollar holdings and require sophisticated financial expertise. Its strategic approach generally involves negotiating, when possible, to keep matters out of the public eye, but litigating when necessary to help its clients work towards their goals.

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