

William P. Statsky

Florida Supplement to Accompany

# Family Law

Fifth Edition

Prepared by

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**THOMSON**



**DELMAR LEARNING**

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# CONTENTS

<b>1</b>	Introduction to Family Law and Practice	1
<b>2</b>	Ethics and Malpractice in Family Law	3
<b>3</b>	Compiling a Family History	5
<b>4</b>	Premarital and Cohabitation Agreements	6
<b>5</b>	Traditional Marriage and Alternatives	8
<b>6</b>	Annulment	10
<b>7</b>	Divorce Grounds and Procedure	12
<b>8</b>	Spousal Support, Property Division, and the Separation Agreement	17
<b>9</b>	Child Custody	22
<b>10</b>	Child Support	25
<b>11</b>	Tax Consequences of Separation and Divorce	34
<b>12</b>	The Legal Rights of Women	35
<b>13</b>	Illegitimacy and Paternity Proceedings	38
<b>14</b>	The Legal Status of Children	40
<b>15</b>	Adoption	42
<b>16</b>	The New Science of Motherhood	46
<b>17</b>	Torts and Family Law	47

*In this supplement, a page reference follows each head (Statsky-000). This page reference correlates with William Statsky's textbook, Family Law, Fifth Edition.*

This supplement is not a practice guide. It should not be relied on to answer legal questions concerning actual client situations. Statements of statutes are not complete or verbatim; they are excerpts or summaries, and are paraphrased unless an exact quote is indicated by quotation marks. The legal assistant or practitioner must consult primary and secondary sources of Florida law concerning specific client situations.

# 1

## INTRODUCTION TO FAMILY LAW AND PRACTICE

Many of the concepts and issues in this chapter are equally applicable in Florida. The student should become familiar with a Florida law library through completion of the Florida-specific assignments within the chapter.

### FINDING FAMILY LAW IN FLORIDA

#### Primary Authority (*Statsky 16*)

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**Constitution**—The Florida Constitution can be found in *Florida Statutes* and *Florida Statutes Annotated* (West).

**State Code**—*Florida Statutes* is the official code. *Florida Statutes Annotated* (West) is the unofficial publication.

**Court Rules**—Florida Rules of Court can be found in *Florida Statutes Annotated* (West) and West's *Florida Rules of Court*. The Florida Family Law Rules of Procedure (Fla. Fam. L.R.P.) became effective January 1, 1996, and must be followed. The rules are accompanied by extensive forms to be used.

**State Court Opinions**—The opinions of the Florida Supreme Court and the Florida District Courts of Appeal can be found in *Southern Reporter* (First and Second Series) and *Florida Reports*. *Florida Reports* was the official publication of these opinions until 1948 when *Southern Reporter* was named the official publication of Florida court opinions. *Florida Supplement* and *Florida Supplement, Second Series*, contained the opinions of Florida trial courts (circuit and county courts). *Florida Supplement* has ceased publication.

#### Secondary Authority (*Statsky 18*)

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**Digests**—The state digest is West's *Florida Digest, Second Series* (*Southern Digest* has ceased publication).

**Legal Encyclopedias**—*Florida Jurisprudence, Second Series*, is a Florida-specific legal encyclopedia that summarizes every major area of law and provides excellent background information on the topic of family law with footnotes to leading Florida case law and statutes.

Practice Manuals and Legal Treatises—Many practice manuals and treatises on specific topics are available through the Florida Bar’s Continuing Legal Education department as well as other private publishers.

Legal Periodicals—There are numerous legal periodicals available through the Florida Bar. The two flagship publications of the Florida Bar are the *Florida Bar Journal* and the *Florida Bar News*. The *Florida Bar Journal* contains at least one article in each monthly issue that examines a timely family law issue. The *Florida Bar News*, a legal newspaper published every two weeks, includes family law case summaries on recent cases of interest. The Family Law Section of the Florida Bar publishes the *Commentator*, a quarterly issue containing case summaries and comments on important court opinions involving family law issues.

Law Directories—Florida has an integrated bar association; that is, membership in the Florida Bar is mandatory for those who wish to practice before the state courts of Florida. The September/October issue of the *Florida Bar Journal* contains a directory of all members of the Florida Bar. Other sources of information regarding family law attorneys can be found at the website of the American Academy of Matrimonial Lawyers: <http://www.AAML.org> and the American Bar Association at <http://www.ABANET.org>.

## **FAMILY LAW ONLINE (Statsky 24)**

Another useful site is the American Association of Law Libraries at <http://www.AALLNET.org>.

## **FLORIDA’S STATE COURT SYSTEM (Statsky 26)**

The website for the Florida state courts is <http://www.FLCOURTS.org>.

Florida Supreme Court—Located in Tallahassee, Florida, it is the highest level state court.

Florida District Courts of Appeal—Five of these intermediate appellate courts are established in the state, each with specific geographic jurisdiction:

First District Court of Appeal in Tallahassee

Second District Court of Appeal in Tampa

Third District Court of Appeal in Miami

Fourth District Court of Appeal in West Palm Beach

Fifth District Court of Appeal in Daytona Beach

Florida Circuit Courts—There are 20 geographic circuits in Florida, each having trial-level courts with original jurisdiction over felonies and certain civil actions including all family law matters. Most circuits have a Family Law Division hears only family law cases.

Florida County Courts—There are 67 counties in Florida, each of which has trial-level courts with original jurisdiction over misdemeanors and certain civil actions including landlord/tenant and small claims actions.

For more detailed maps showing the state courts of Florida, see the September/October issue of the *Florida Bar Journal*.

The state agency charged with investigating and monitoring child abuse and neglect cases is the Department of Children and Family Services (DCFS). Before the creation of DCFS, the Department of Health and Rehabilitative Services (HRS) was charged with these responsibilities. The Florida Department of Revenue (or a law firm who contracts with it) is now the agency charged with collecting past-due child support.

# 2

## ETHICS AND MALPRACTICE IN FAMILY LAW

The Florida Bar is an integrated bar association; that is, an attorney must be a member of this association to practice law in the state. The Florida Bar handles grievance complaints and pursues enforcement of disciplinary rules adopted by the Florida Supreme Court. Only the Florida Supreme Court has the authority to discipline an attorney.

Chapter 3 of the *Rules Regulating the Florida Bar*, titled “Rules of Discipline,” outlines the procedures and sanctions available. Chapter 4, titled “Rules of Professional Conduct,” describes conduct and behavior that must be followed by all attorneys licensed to practice in Florida.

The *Rules Regulating the Florida Bar* also sets forth strict guidelines concerning advertising by attorneys and the voluntary pro bono reporting requirements. The Florida Bar maintains a toll-free phone number called the Ethics Hotline for members of the Florida Bar who wish an opinion regarding proposed conduct under the Rules of Professional Conduct. The Florida Bar’s website is <http://www.FLABAR.org>.

### Nonattorney Assistants (*Statsky 40*)

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The Rules of Professional Conduct in Florida specifically address nonlawyer employees in a law firm setting. An attorney is under an obligation to supervise his or her legal assistant and may be found liable in grievance procedures if he or she orders, knows of, or ratifies any conduct that would violate the Rules of Professional Conduct if engaged in by a lawyer.

### Unauthorized Practice of Law (*Statsky 41*)

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The unauthorized practice of law (UPL) is a crime in Florida. § 454.23, Fla. Stat. (2001).

One of the most famous cases regarding UPL is *The Florida Bar v. Furman*, 376 So. 2d 378 (Fla. 1979), *appeal dsmd*, 444 U.S. 1061, 100 S. Ct. 1001, 62 L. Ed. 2d 744 (1980); *The Florida Bar v. Furman*, 451 So. 2d 808 (Fla. 1984), *appeal dsmd*, 469 U.S. 925, 105 S. Ct. 316, 83 L. Ed. 2d 254 (1984).

Generally speaking, the performance of legal services by a nonlawyer constitutes the unauthorized practice of law. A legal assistant can only perform certain legal services and all such services must be supervised by a licensed attorney.

A case that arose in Florida may shed more light on the issue of what constitutes the unauthorized practice of law:

It is generally understood that the performance of services in representing another before the courts is the practice of law. But the practice of law also includes the giving of legal advice and counsel to others as to their rights and obligations under the law and the preparation of legal instruments, including contracts, by which legal rights are either obtained, secured or given away, although such matters may not then or ever be the subject of proceeding in a court.

We think that in determining whether the giving of advice and counsel and the performance of services in legal matters for compensation constitute the practice of law it is safe to follow the rule that if the giving of such advice and performance of such services affect important rights of a person under the law, and if the reasonable protection of the rights and property of those advised and served requires that the persons giving such advice possess legal skill and a knowledge of the law greater than that possessed by the average citizen, then the giving of such advice and the performance of such services by one for another as a course of conduct constitute the practice of law.

*The Florida Bar v. Sperry*, 140 So. 2d 587, 591 (Fla. 1962), *rev'd on other grounds*, 373 U.S. 379, 83 S. Ct. 1322, 10 L. Ed. 2d 428 (1963).

To report an occurrence of the unauthorized practice of law, contact the Florida Bar UPL Committee at (850) 561-5840.

A very good article on this topic is, "When Are You Giving Legal Advice?" by Barbara Rosen on pp. 24–29 in the July/August issue of *Legal Assistant Today*.

Other websites with their own model rules of conduct for paralegals are the National Association of Legal Assistants at <http://www.NALA.org> and the National Federation of Paralegal Associations at <http://NFPA-INFO@paralegals.org>.

## SUPPLEMENTAL ASSIGNMENTS

1. Contact the National Association of Legal Assistants or the National Federation of Paralegal Associations (or a local chapter of these organizations) to obtain information on ethical standards that have been promulgated for legal assistants.
2. Ask a lawyer in your community or write to the Florida Bar to obtain information on establishing an IOTA account and showing how IOTA funds were distributed last year.
3. Interview a lawyer, judge, or paralegal in your community to determine the availability of legal services to the poor in your area. Write a two-page report describing these services.
4. Go to the library and read Rule 4-5.3 and 4-5.5 of the Rules of Professional Conduct in the *Rules Regulating the Florida Bar*. Create two examples: one that shows compliance with these rules and one that shows a violation of these rules.
5. Interview a member of the grievance committee in your community about the grievance process followed when someone claims that a lawyer has acted unethically. Write a two-page report describing this process.



# 3

## COMPILING A FAMILY HISTORY

The main text provides a good client interview checklist. Each firm or attorney usually develops a checklist that they prefer to use. Many will use the Florida Family Law Rules of Procedure as a guideline. It is very difficult for any checklist to be all-encompassing because detail is very important and the laws change rapidly in this area.

Because Florida is an equitable distribution state, you will need detailed information about assets and liabilities. This will be discussed more fully in Chapter 8.

# 4

## PREMARITAL AND COHABITATION AGREEMENTS

An enforceable antenuptial agreement must be in writing and signed by both parties. It must meet the general requirements for a valid contract; for example, meeting of the minds, consideration, and legal capacity, and it cannot violate any public policy of the state, such as promoting divorce.

The test to be applied in examining the enforceability of a premarital agreement is found in the case of *Delvecchio v. Delvecchio*, 143 So. 2d 17 (Fla. 1962):

A premarital agreement will be upheld if one of the following is true:

1. The agreement contemplates a fair and reasonable provision for the spouse.
2. Absent such a provision, a full and frank disclosure has been made to the spouse.
3. Absent such a disclosure, the spouse has a general and approximate knowledge of the property of the other spouse.

If an agreement is unreasonable or unfair on its face, then a presumption of concealment arises that shifts the burden of proof from the spouse who is disadvantaged by the agreement to the other spouse to prove the validity of the agreement. The court will consider a number of factors in weighing the fairness and reasonableness of an agreement: the relative situation of the parties; their respective ages, health, and experience; their respective properties; their family ties and connections; the needs of the disadvantaged spouse; and any other factor that tends to show whether the agreement was understandingly made.

### COHABITATION AGREEMENTS (*Statsky 90*)

Florida Statutes 798.02 prohibits lewd and lascivious cohabitation by unmarried persons. However, agreements between unmarried cohabitants will be enforced as long as there is some valid, lawful consideration separate and apart from any express or implied agreement regarding sexual relations. See *Poe v. Estate of Levy*, 411 So. 2d 253 (Fla. 4<sup>th</sup> DCA 1982).

### SUPPLEMENTAL ASSIGNMENTS

Buford and Matilda had dated for nine years before Buford finally agreed to marry Matilda. Matilda was the CEO of a large corporation and had accumulated a large amount of assets. Buford was an aerobics instructor at the local YMCA and had very few assets. Matilda's lawyer drafted a premarital agreement for them to sign that provided for the following upon a dissolution of their marriage:

- a. Matilda would keep all the assets she owned at the time of the execution of the agreement, all assets she acquired during their marriage and all appreciation in the value of any such assets



- b. Matilda would pay Buford the total sum of \$10,000 as a nonmodifiable property settlement
- c. Buford would return to Matilda all gifts he received from Matilda during their marriage within 30 days of the filing of any Petition for Dissolution of Marriage by either of them.

Buford and Matilda read the premarital agreement and signed it in the presence of two witnesses and a notary public. Under *Delvecchio v. Delvecchio*, would this premarital agreement be enforceable? What additional information would you like in order to make your decision?

# 5

## TRADITIONAL MARRIAGE AND ALTERNATIVES

### **Breach of Promise to Marry (*Statsky 104*)**

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Florida's Heart-Balm Statute is found at Chapter 771 of the Florida Statutes. It specifically abolishes actions for alienation of affection, criminal conversation, seduction, and breach of contract to marry.

### **Gifts (*Statsky 111*)**

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Florida follows the general rule that gifts are made upon the implied condition that a marriage will follow. See *Gill v. Shively*, 320 So. 2d 415 (Fla. 4<sup>th</sup> DCA 1975), which cites to *Pavlicic v. Vogtsberger*, 390 Pa. 502, 136 A.2d 127, 130 (Pa. 1957).

### **Contracts Restraining Marriage (*Statsky 114*)**

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A contract that purports to generally prohibit marriage or that promotes divorce is unenforceable in Florida. Premarital and separation agreements do not promote divorce, they simply outline what will happen if the marital relationship is ever terminated by any means.

### **CEREMONIAL MARRIAGE (*Statsky 118*)**

A marriage license can be issued only by a county court judge or clerk of the circuit court. § 741.01, Fla. Stat. The solemnization of the marital contract can be performed by members of the clergy, all judicial officers, clerks of the circuit court, and notaries public of Florida. § 741.07, Fla. Stat.

### **COMMON LAW MARRIAGE (*Statsky 123*)**

Common law marriages entered into after January 1, 1968 are declared void by § 741.211, Fla. Stat. However, Florida will recognize a common law marriage that is validly entered into in a state that permits common law marriages.

## **SAME-SEX RELATIONSHIPS (*Statsky 128*)**

Florida does not allow the issuance of a marriage license unless one party is male and the other party is female. § 741.04, Fla. Stat. Pursuant to the federal Defense of Marriage Act, the Florida legislature passed § 741.212, Fla. Stat. in 1997. This statute establishes Florida's position that it will not give effect to any "marriage" between persons of the same sex, even if validly entered into in another jurisdiction.

## **SUPPLEMENTAL ASSIGNMENTS**

1. Myrtle and Purvis had been engaged to be married for two years. During the two-year period Purvis had bought Myrtle a new car, a diamond ring, and a dog named Sue. When the date for the wedding finally arrived, Myrtle left Purvis standing at the altar. Purvis and Myrtle signed a written agreement that provided that Myrtle would pay Purvis \$17,500 for the car, the ring, and the dog named Sue. After reading Florida Statutes Chapter 771, is this contract between Myrtle and Purvis enforceable? What additional information would you like in order to make your decision? Do either of them face any penalties?
2. Interview the clerk of court in your community who is in charge of marriage licenses. Write a one-page report on how to obtain a marriage license in Florida. Get a copy of the marriage license application form to be attached to your report.
3. Florida Statutes provides for a premarital preparation course in § 741.0305, Fla. Stat. Prepare a two-page report on this provision.
4. Contact the Florida Bar or the clerk of court in your community and obtain a copy of the family law handbook, which is required by § 741.0306, Fla. Stat. Prepare a two-page report on the most important and most surprising parts of this handbook.
5. Prepare a chart outlining § 741.0405, Fla. Stat. regarding the issuance of marriage licenses to persons under the age of 18.

# 6

# ANNULMENT

## ANNULMENT, DIVORCE, AND LEGAL SEPARATION

### (*Statsky 150*)

Florida does not have legislation that directly addresses annulment; however, many cases support the common law right to an annulment. An action for annulment must be brought during the life of the parties.

## THE VOID/VOIDABLE DISTINCTION (*Statsky 151*)

When a marriage contract is entered into between two parties but one or both of the parties contracts under a disability or defect, the marriage is either void or voidable. A void marriage is one that is declared void by statute or that is impossible to be ratified subsequently. A voidable marriage means that neither party knew of the existence of a disability or defect at the time the marriage was contracted, and it is possible for parties to subsequently ratify the marriage contract when the disability or defect has been removed. *Kuehmsted v. Turnwall*, 138 So. 775 (Fla. 1932). Many possible disabilities and defects are recognized at common law and by legislation.

### Prior Existing Marriage (*Statsky 153*)

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Bigamy/polygamy is void. When a party contracts two marriages, there is a rebuttable presumption that the second, most recent, marriage is valid. *Reese v. Reese*, 178 So. 2d 913 (Fla. 3<sup>d</sup> DCA 1965), *rev'd*, 192 So. 2d 1 (Fla. 1966).

### Consanguinity (*Statsky 154*)

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Consanguinity is voidable. § 741.21, Fla. Stat. and *Johnson v. Landefeld*, 138 Fla. 511, 189 So. 666 (1939).

### Nonage (*Statsky 156*)

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Nonage is voidable. § 741.0405, Fla. Stat.

### Physical Disabilities (*Statsky 157*)

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Physical incapacity is voidable (impotency). Note that sterility is not grounds for an annulment in Florida. *Cott v. Cott*, 98 So. 2d 370 (Fla. 2d DCA 1957); *Jarzem v. Bierhaus*, 415 So. 2d 88 (Fla. 4<sup>th</sup> DCA 1982).

## **Mental Disabilities (*Statsky 163*)**

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Intoxication is usually voidable but depends on degree of intoxication. *Mahan v. Mahan*, 88 So. 2d 545 (Fla. 1956).

Mental capacity is voidable (temporary incompetence or joke wedding where requisite intent to fulfill marital contract was lacking). *Jarzem v. Bierhaus*, 415 So. 2d 88 (Fla. 4<sup>th</sup> DCA 1982); *Abbe v. Abbe*, 68 So. 2d 565 (Fla. 1953).

## **Duress or Fraud (*Statsky 165, 166*)**

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Fraud or Duress is voidable. However, a false allegation of pregnancy is not sufficient for annulment. *Brandt v. Brandt*, 123 Fla. 680, 167 So. 524 (1936).

## **SUPPLEMENTAL ASSIGNMENTS**

1. Read Florida Statutes § 741.0405 and prepare a chart showing the age limitations on marriage in Florida.
2. Read Florida Statutes § 741.21. What are the limitations on marriage between relatives in Florida?

# 7

## DIVORCE GROUNDS AND PROCEDURE

### NO-FAULT GROUNDS FOR DIVORCE (*Statsky 181, 185*)

In Florida, there are two grounds for divorce. § 61.052(1), Fla. Stat.

1. The marriage is irretrievably broken.
2. One of the parties is mentally incapacitated.

The Florida Supreme Court has defined “irretrievably broken” to be “simply whether for whatever reason or cause the marriage relationship is for all intents and purposes ended, no longer viable, a hollow sham beyond hope of reconciliation or repair.” *Ryan v. Ryan*, 277 So. 2d 266 (Fla. 1973).

Mental incapacity is found only when a spouse has been adjudicated incapacitated and has remained in that condition for three years since the date of the adjudication. § 61.052(1)(b), Fla. Stat.

### FAULT GROUNDS FOR DIVORCE (*Statsky 187*)

All grounds for divorce have been abolished in Florida except for the two just discussed in the previous section.

### JUDICIAL SEPARATION (*Statsky 190*)

While Florida law recognizes the right to separate maintenance, judicial separations are not recognized in Florida. § 61.09 and § 61.10, Fla. Stat.

### SEPARATE MAINTENANCE (*Statsky 191*)

An action for separate maintenance may be brought by a spouse, who is legally married at the time of the proceeding, against his or her spouse if the spouse fails to provide support. § 61.09 and § 61.10, Fla. Stat.; Fla. Fam. L.R.P. 12.904(a) and (b).

The amount of support awarded in a separate maintenance action is determined by the same standards that are applicable to a dissolution of marriage action: the necessities of the applying spouse and the ability of the other spouse to pay. While the court may decide use of the property, it may not adjudicate the title to property in an action for separate maintenance.

In addition, a spouse who may owe an obligation of support may bring an action for separate maintenance to have such financial obligation adjudicated without seeking a dissolution of marriage. § 61.10, Fla. Stat.

## INTRODUCTION TO DIVORCE PROCEDURE (*Statsky 192*)

The Fla. Fam. L.R.P. 12.105 permits couples without children to petition for a “simplified” dissolution of their marriage. To be eligible for this procedure, the parties must certify under oath that there are no minor or dependent children; that the wife is not pregnant; that the parties have agreed to a division of their property and debts; that their marriage is irretrievably broken; that at least one of the parties has resided in Florida for at least six months prior to filing the petition; and that neither spouse signed the petition under duress.

In the simplified dissolution, the clerk of the Circuit Court will provide the necessary forms and assist in their preparation. These forms are different from those used in regular dissolution procedures. While the parties must personally appear in court, the dissolution may be obtained without counsel. Both parties must file a financial affidavit and a marital settlement agreement. Forms for each of these are provided in the Fla. Fam. L.R.P. See Fla. Fam. L.R.P. Form 12.901(a).

If the parties are unable to use the simplified procedure, regular dissolution procedures must be used. Under regular dissolution procedures, the divorce may be uncontested or contested. If the parties are in agreement regarding all issues, the divorce is considered uncontested. In addition, if the spouse does not respond to the petition or cannot be located, it is considered uncontested. If the parties cannot reach agreement over some matter, the proceeding is considered contested.

A default may be sought against a party who fails to file a response to the petition within the time provided by law pursuant to Fla. R. C. P. 1.500. The Fla. Fam. L.R.P. require that defaulted parties must be served with notice of final hearings, trials, court orders, and final judgments. Fla. Fam. L.R.P. 12.080(c).

Dissolution of marriage in Florida is from bonds of matrimony, not bed and board. § 61.031, Fla. Stat.

## DOMICILE (*Statsky 194*)

Florida Statute 61.021 requires that either one of the parties to a dissolution of marriage proceeding must reside six months in Florida prior to filing the petition. In *Nicolas v. Nicolas*, 444 So. 2d 1118 (Fla. 3<sup>d</sup> DCA 1984), the court held that legal residence under this statute is synonymous with domicile. As a result, two elements must be present:

1. Physical presence in the state
2. Intention to remain for an unlimited period of time

Temporary absence from the state during the six-month period does not invalidate the party’s residency.

The residency requirement must be corroborated by at least one of the following:

- a. A valid Florida driver’s license
- b. A Florida voter’s registration card
- c. The affidavit of a third party
- d. The live testimony of a third party

§ 61.052(2), Fla. Stat.

## **JURISDICTION (*Statsky 197*)**

Every petition for dissolution of marriage must contain an allegation regarding residency. The failure to make this allegation deprives the court of subject matter jurisdiction. Every petition should also contain an allegation of facts necessary to prove that the petitioner has selected the appropriate venue. The Florida Circuit Court has original jurisdiction over dissolution of marriage actions. § 61.043, Fla. Stat.

## **Venue (*Statsky 203*)**

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In Florida, venue in dissolution cases exists in the county where the defendant resides or where the parties last lived together with the intent to remain married.

## **PRETRIAL MATTERS (*Statsky 204*)**

Fla. Fam. L.R.P. 12.200(a)(1) allows the court to order a case management conference. A case management conference may also be requested by either party. Fla. Fam. L.R.P. 12.200(b) allows the court to order or a party to request a pretrial conference after the action is “at issue.”

## **Pleadings (*Statsky 204*)**

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Pleadings and motions are governed by Fla. R. Civ. P. 1.100 by authority of Fla. Fam. L.R.P. 12.100 and 12.110, but note that extensive forms are provided. See Fla. Fam. L.R.P. Forms generally.

## **Guardian Ad Litem (*Statsky 207*)**

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A Guardian Ad Litem may be appointed pursuant to §§ 61.401–61.405, Fla. Stat.

## **Waiting Period (*Statsky 207*)**

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Florida Statute 61.19 specifies that, “No final judgment of dissolution of marriage may be entered until at least 20 days have elapsed from the date of filing the original petition for dissolution of marriage.” However, the court has the discretion to waive this waiting period upon proof that “injustice would result from the delay.”

## **DISCOVERY (*Statsky 207*)**

In Florida, six methods of formal discovery are used commonly in family law cases:

1. Interrogatories
2. Depositions
3. Financial Affidavits



4. Requests for Production of Documents
5. Requests for Admissions
6. Examination of Persons

Discovery in Florida family law cases is addressed in Fla. Fam. L.R.P. 12.280–12.407 and Forms 12.903–12.932. Florida has specific mandatory disclosure requirements in family law cases. Fla. Fam. L.R.P. 12.285.

The Florida Supreme Court has approved standard questions that must be used as the initial interrogatories. Additional interrogatories are limited to 10 questions without leave of court. Fla. Fam. L.R.P. 12.340 and Form 12.930(b).

Fla. Fam. L.R.P. 12.407 provides that a minor child cannot be deposed or brought to a deposition without a prior court order based on good cause shown except in an emergency situation.

## **Preliminary Orders (*Statsky 210*)**

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Florida courts have the authority under Chapter 61, Florida Statutes to enter temporary orders regarding custody, visitation, child support, alimony, conduct of the parties in contact with each other, and preservation of property. If irreparable and immediate harm will result, the court may award temporary relief without notice to one of the parties; that is, *ex parte*. The procedure for obtaining temporary and permanent injunctions against domestic and repeat violence is provided in Fla. Fam. L.R.P. 12.610 and ch. 742, Fla. Stat.

## **TRIAL (*Statsky 212*)**

In Florida, two types of trials occur in a dissolution. In an uncontested case, the opposing side may not be represented or make an appearance. In a contested case, there may be an extensive trial before the trial judge. There is no right to a jury trial in Florida dissolution of marriage cases.

Many dissolution hearings are conducted by general masters. Alimony, child support, and child custody are all proper issues to refer to masters. When a trial judge appoints a master to hear evidence and make findings of fact, the master's findings must be approved by the trial judge unless they are clearly erroneous or the master has misunderstood the effect of the evidence. However, the trial judge has authority to reach a different conclusion of law. An extensive rule addressing general masters is found at Fla. Fam. R. P. 12.490 and one regarding special masters at Rule 12.492.

## **ALTERNATIVE DISPUTE RESOLUTION (*Statsky 213*)**

Mediation is probably the most popular form of ADR in family law matters. "All contested family matters may be referred to mediation" pursuant to Fla. Fam. L.R.P. 12.740 and 12.741, which became effective January 1, 1996. Florida Statutes 61.183 provides authority to refer certain issues to mediation. For more information regarding mediator qualifications, standards of professional conduct, and discipline, see the Florida Rules for Certified and Court-Appointed Mediators.

## **DIVORCE JUDGMENT (*Statsky 216*)**

In Florida, the final judgment is effective immediately when signed by the court. There is no waiting period. *Barnett v. Barnett*, 743 So. 2d 105 (Fla. 4<sup>th</sup> DCA 1999), *app'v'd*, 768 So. 2d 441 (Fla. 2000).

## **ENFORCEMENT OF DIVORCE JUDGMENT**

### **Civil Contempt (*Statsky 219*)**

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The grounds for civil contempt are addressed in § 61.14(5), Fla. Stat.

### **Garnishment and Attachment (*Statsky 219*)**

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The garnishment and attachment of amounts due for alimony and child support is addressed at § 61.12, Fla. Stat.

### **Posting Security (*Statsky 219*)**

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Requiring insurance, bonds, or other security for an award is provided for in § 61.18, Fla. Stat.

### **Health Insurance for the Minor Child (*Statsky 219*)**

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A court can require a party to purchase and maintain health insurance covering a minor child whenever such insurance is “reasonably available,” that is, if either party has access to group insurance “at a reasonable rate.” § 61.13(1)(b), Fla. Stat.

## **SUPPLEMENTAL ASSIGNMENTS**

1. Robert and Katie Smith have been married for 25 years. All of their children are adults and do not live at home. For the past three years, Katie has been spending summers alone at a Long Island summer home. However, during each winter, she has returned to Florida to reside with Robert. If Robert brings an action for dissolution of marriage because his marriage is irretrievably broken, will he obtain the divorce?
2. In Florida, may one spouse seek alimony or child support without seeking a divorce?
3. Review the provisions of Chapter 61, Florida Statutes, regarding temporary relief. What standards should be used by the court in deciding petitions for temporary relief?
4. Can the Florida courts obtain personal jurisdiction over a nonresident spouse in dissolution cases? How?
5. What are the minimum qualifications to become a certified Florida Family Law Mediator?
6. What additional information must be produced by a person whose gross annual income is greater than \$50,000 under Fla. Fam. L.R.P. 12.285?

# 8

## SPOUSAL SUPPORT, PROPERTY DIVISION, AND THE SEPARATION AGREEMENT

### SEPARATION AGREEMENTS AND LITIGATION (*Statsky 227*)

Fla. Fam. L.R.P. Form 12.901(h) provides three different form marital settlement agreements for use in a dissolution of marriage action.

### UNCOVERING FINANCIAL ASSETS (*Statsky 230*)

Fla. Fam. L.R.P. 12.340 specifies that the initial interrogatories must be the form interrogatories approved by the Florida Supreme Court. See Form 12.930(b). Rule 12.285, titled “Mandatory Disclosure Rule,” requires disclosure of specific financial information from all parties. The extent of information required to be disclosed is dependent upon each party’s gross annual income and expenses. Rule 12.285(e) also imposes a continuing duty on each party to supplement documents and financial affidavits “whenever a material change in their financial status occurs.”

### ALIMONY PAYMENTS AND PROPERTY DIVISION: INTRODUCTION (*Statsky 249*)

A true property settlement agreement cannot be modified and its terms are not subject to enforcement through the court’s power of contempt. A “true property settlement agreement” is one involving only issues of property division and not issues of support. *Karch v. Karch*, 445 So. 2d 1077 (Fla. 3<sup>d</sup> DCA 1984).

A trial court is not bound by an agreement between the parties with regard to alimony. *Risteen v. Risteen*, 280 So. 2d 488 (Fla.3<sup>d</sup> DCA 1973), *cert.den.*, 283 So. 2d 563 (Fla. 1973).

### ALIMONY (*Statsky 253*)

Florida Statutes 61.075(8) provides:

The court may provide for equitable distribution of the marital assets and liabilities without regard to alimony for either party. After the determination of an equitable distribution of the marital assets and liabilities, the court shall consider whether a judgment for alimony shall be made.

This allows the court to exercise its discretion in creating the most equitable remedy possible in light of the circumstances of each case. However, it also requires that a determination of whether or not alimony is to be awarded be made *after* the marital assets and liabilities have been distributed. This becomes clearer upon review of the factors that must be considered by the court in making an award of alimony. These factors include the following:

- a. The standard of living established during the marriage
- b. The duration of the marriage
- c. The age and the physical and emotional condition of each party
- d. The financial resources of each party, and the nonmarital and marital assets and liabilities distributed to each.
- e. When applicable, the time necessary for either party to find appropriate employment, education, or training to enable such party to find appropriate employment.
- f. The contribution of each party to the marriage, including, but not limited to, services rendered in homemaking, child care, education, and career building of the other party.
- g. All sources of income available to either party.

The court may also consider any other factor it deems “necessary to do equity and justice between the parties.” § 61.08(2), Fla. Stat. The court is also required to include specific findings of fact in the judgment relative to the factors listed supporting an award or denial of alimony. § 61.08(1), Fla. Stat.

Florida Statute 61.08(3) allows the court to require the payor to purchase or maintain a life insurance policy or a bond to secure an alimony award. However, the court can only order coverage “to the extent necessary to protect an award of alimony.”

Three main types of alimony are recognized in Florida: rehabilitative, permanent periodic, and lump sum.

## 1. Rehabilitative alimony

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Purpose: To establish capacity for self-support (assumes proof of a possibility that the spouse is able to develop a new capacity for self-support or redevelop a capacity that has been underdeveloped or lost during the marriage).

Form: A specific amount per month/year for a specific number of months/years.

Modification: Yes, an extension may be granted upon finding that the spouse is not rehabilitated despite diligent and reasonable efforts (through no fault of his or her own) or the amount may be modified upon proof of a substantial change in circumstances since the entry of the order sought to be modified.

Termination: Yes, upon expiration of the specified term, upon death of either party, or upon finding of early rehabilitation by the court.

## 2. Permanent periodic alimony

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Purpose: To provide the needs and necessities of life to a former spouse as they were established during the marriage (the receiving spouse does not have to try to rehabilitate him or herself).

Form: A specific amount per month/year until the death of either party or the remarriage of the receiving spouse.

Modification: Yes, upon proof of a substantial change in circumstances since the entry of the order awarding the support sought to be modified.

Termination: Yes, upon the death of either party or remarriage of the receiving spouse.

### 3. Lump sum alimony

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Purpose: For support but only if the evidence shows both of the following:

- a. Justification for lump sum payment
- b. Financial ability of the other spouse to pay it without substantially endangering his or her economic status.

Florida law also allows the court to award marital assets in lump sum form to accomplish equitable distribution but the same asset(s) cannot be used by the court for both support and equitable distribution. See § 61.075(9).

Caveat: The court must ensure that neither party automatically passes from prosperity to misfortune or from misfortune to prosperity.

Form: A definite sum payable either all at once or in installments over a period of time. It may be cash, personal property, real property, or payments to a third party.

Modification: The amount of alimony is nonmodifiable but the method of payment is modifiable within the discretion of the court.

Termination: Only when paid in full. It is a vested right, and a fixed amount that survives the death of the receiving spouse and paying spouse.

## PROPERTY DIVISION: GENERAL PRINCIPLES (*Statsky 257*)

Florida follows equitable distribution principles. Florida Statutes 61.075 sets forth the procedure for accomplishing equitable distribution. The court is required to “set apart to each spouse that spouse’s nonmarital assets and liabilities” before distributing marital assets and liabilities. An equal distribution of marital assets and liabilities is presumed “unless there is a justification for an unequal distribution based on all relevant factors, including:

- a. The contribution to the marriage by each spouse, including contributions to the care and education of the children and services as a homemaker.
- b. The economic circumstances of the parties.
- c. The duration of the marriage.
- d. Any interruption of personal careers or educational opportunities of either party.
- e. The contribution of one spouse to the personal career or educational opportunity of the other spouse.
- f. The desirability of retaining any asset, including an interest in a business, corporation, or professional practice, intact and free from any claim or interference by the other party.
- g. The contribution of each spouse to the acquisition, enhancement, and production of income or the improvement of, or the incurring of liabilities to, both the marital and nonmarital assets of the parties.
- h. The desirability of retaining the marital home as a residence for any dependent child of the marriage, or any other party, when it would be equitable to do so, it is in the best interest of the child or that party, and it is financially feasible for the parties to maintain the residence until the child is emancipated or until exclusive possession is otherwise terminated by a court of competent jurisdiction. In making this determination, the court shall first determine if it would be in the best interest of the dependent child to remain in the marital home; and, if not, whether other equities would be served by giving any other party exclusive use and possession of the marital home.

- i. The intentional dissipation, waste, depletion, or destruction of marital assets after the filing of the petition or within 2 years prior to the filing of the petition.
- j. Any other factors necessary to do equity and justice between the parties.

In contested dissolutions where the parties have not filed an agreement or stipulation, the final judgment must contain specific findings of fact regarding each of the listed factors. All final judgments containing a distribution of marital assets and liabilities “whether equal or unequal” must include specific findings of fact based upon competent substantial evidence providing:

- a. Clear identification of nonmarital assets and ownership interests;
- b. Identification of marital assets, including the individual valuation of significant assets, and designation of which spouse shall be entitled to each asset;
- c. Identification of the marital liabilities and designation of which spouse shall be responsible for each liability;
- d. Any other findings necessary to advise the parties or the reviewing court of the trial court’s rationale for the distribution of marital assets and allocation of liabilities. § 61.075(3), Fla. Stat.

The term “marital assets and liabilities” is defined in § 61.075(5)(a), Fla. Stat. to include:

- a. Assets acquired and liabilities incurred during the marriage, individually by either spouse or jointly by them;
- b. The enhancement in value and appreciation of nonmarital assets resulting either from the efforts of either party during the marriage or from the contribution to or expenditure thereon of marital funds or other forms or marital assets, or both;
- c. Interspousal gifts during the marriage;
- d. All vested and nonvested benefits, rights, and funds accrued during the marriage in retirement, pension, profit-sharing, annuity, deferred compensation, and insurance plans and programs; and
- e. All real property held by the parties as tenants by the entireties, whether acquired prior to or during the marriage, shall be presumed to be a marital asset. If, in any case, a party makes a claim to the contrary, the burden of proof shall be on the party asserting the claim for a special equity.

The terms “nonmarital assets and liabilities” are defined in § 61.075(5)(b), Fla. Stat. to include:

1. Assets acquired and liabilities incurred by either party prior to the marriage, and assets acquired and liabilities incurred in exchange for such assets and liabilities;
2. Assets acquired separately by either party by non-interspousal gift, bequest, devise, or descent, and assets acquired in exchange for such assets;
3. All income derived from nonmarital assets during the marriage unless the income was treated, used, or relied upon by the parties as a marital asset; and
4. Assets and liabilities excluded from marital assets and liabilities by valid written agreement of the parties, and assets acquired and liabilities incurred in exchange for such assets and liabilities.

## Goodwill (*Statsky 266*)

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The Florida Supreme Court has held that goodwill may be a marital asset subject to equitable distribution if it has a value over and above the tangible assets of the business, which is “separate and distinct from the presence and reputation of the individual attorney or doctor.” Expert testimony on this matter is necessary. *Thompson v. Thompson*, 546 So. 2d 99 (Fla. 4<sup>th</sup> DCA 1989), *remanded*, 576 So. 2d 267 (Fla. 1991).

## Dividing a Degree (*Statsky 269*)

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Florida courts have consistently ruled that an educational degree is not a marital asset subject to equitable distribution. *Hughes v. Hughes*, 148 So. 2d 236 (Fla. 3<sup>d</sup> DCA 1983).

## WILLS (*Statsky 279*)

Florida Statutes 732.201-732.228 recognize a surviving spouse’s right to an Elective Share equal to 30% of the “elective estate.”

## SUPPLEMENTAL ASSIGNMENTS

1. Read Florida Statutes 61.30(14) and Fla. Fam. L.R.P. 12.285. Prepare a chart showing the time frames within which financial affidavits must be filed with the court.
2. Read Fla. Fam. L.R.P. 12.285. Prepare a request for mandatory disclosure directed to an opponent whose gross annual income exceeds \$50,000. Prepare a request for mandatory disclosure directed to an opponent whose gross annual income is less than \$50,000.
3. Read Florida Statutes 61.08(4). Prepare a chart showing when alimony payments will be required to be made through the Central Governmental Depository.
4. John and Mary Smith were married on January 1, 1974. On January 2, 1974, John enlisted in the Navy and was on active duty until his retirement on January 1, 1994. Mary has never been a member of any branch of the military. John sought a dissolution of marriage. Upon their dissolution of marriage, the court held that John’s Navy retirement pay was a marital asset and that Mary was entitled to receive 50% of John’s disposable retired pay. Read Florida Statutes 61.076 and draft a final judgment provision that equitably distributes the retirement pay.



# 9

## CHILD CUSTODY

### KINDS OF CUSTODY (*Statsky 301*)

Florida Statutes 61.046 provides some useful definitions:

(3) "Custodial parent" or "primary residential parent" means the parent with whom a child maintains his or her primary residence.

(10) "Noncustodial parent" means the parent with whom the child does not maintain his or her primary residence.

(14) "Shared parental responsibility" means a court-ordered relationship in which both parents retain full parental rights and responsibilities with respect to their child and in which both parents confer with each other so that major decisions affecting the welfare of the child will be determined jointly.

(15) "Sole parental responsibility" means a court-ordered relationship in which one parent makes decisions regarding the minor child.

Florida Statutes 61.13(2)(b)1 provides:

It is the public policy of this state to assure that each minor child has frequent and continuing contact with both parents after the parents separate or the marriage of the parties is dissolved and to encourage parents to share the rights and responsibilities of childrearing.

Under Florida law, custody is determined based upon the best interests of the child, however, shared parental responsibility *must* be ordered "unless the court finds that shared parental responsibility would be detrimental to the child." § 61.13(2)(b)2, Fla. Stat.

A determination of what is in the best interests of a child or children for purposes of shared parental responsibility under § 61.13(3), Fla. Stat. is to be made after an evaluation of "all factors affecting the welfare and interests of the child, including, but not limited to" the following:

- a. The parent who is more likely to allow the child frequent and continuing contact with the nonresidential parent
- b. The love, affection, and other emotional ties existing between the parents and the child
- c. The capacity and disposition of the parents to provide the child with food, clothing, medical care, or other remedial care recognized and permitted under the law of this state in lieu of medical care, and other material needs
- d. The length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity
- e. The permanence, as a family unit, of the existing or proposed custodial home
- f. The moral fitness of the parents
- g. The mental and physical health of the parents
- h. The home, school, and community record of the child
- i. The reasonable preference of the child, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference
- j. The willingness and ability of each parent to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent



- k. Evidence that any party has knowingly provided false information to the court regarding a domestic violence proceeding
- l. Evidence of domestic violence or child abuse
- m. Any other fact considered by the court to be relevant

In 1997, the Florida legislature passed § 61.121, which allows the court to order rotating custody if it finds that rotating custody will be in the best interest of the child. See *Hosein v. Hosein*, 785 So. 2d 783 (Fla. 4<sup>th</sup> DCA 2001); *Mandell v. Mandell*, 741 So. 2d 617 (Fla. 2<sup>d</sup> DCA).

## **PARENT VS. PARENT (*Statsky 309*)**

The appointment of Guardians Ad Litem is provided for in § 61.401, Fla. Stat. upon a finding by the court that such appointment would be in the best interests of the child(ren). The qualifications, power, authority, confidentiality and immunity of guardians ad litem are also addressed in § 61.402-61.405, Fla. Stat. In addition, § 61.20, Fla. Stat. allows the court to order a social investigation and study whenever the custody of a minor child is in issue.

## **Legal Preferences (*Statsky 314*)**

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Florida Statute 61.13(2)(b)1 specifically provides that “after considering all relevant facts, the father of the child shall be given the same consideration as the mother in determining the primary residence of a child irrespective of the age or sex of the child.”

Fla. Fam. L.R. P. 12.407 provides that a minor child cannot be deposed or brought to a deposition without a prior court order based on good cause shown unless in an emergency situation.

Grandparents have specific rights under Florida law in conjunction with the original dissolution proceeding. See § 61.13(2)(b)2.c., Fla. Stat. Grandparents also have specific rights regarding visitation under Ch. 752, Fla. Stat.

## **Morality and Lifestyle (*Statsky 315*)**

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Some interesting Florida cases are *Kazmierazak v. Query*, 736 So. 2d 106 (Fla. 4<sup>th</sup> DCA 1999), *rev. den.*, 760 So. 2d 947 (Fla.2000); *Schutz v. Schutz*, 522 So. 2d 874 (Fla. 3<sup>d</sup> DCA 1988), *appv’d*, 581 So. 2d 1290 (Fla. 1991) and *Jacoby v. Jacoby*, 763 So. 2d 410 (Fla. 2<sup>d</sup> DCA 2000).

## **Wishes of the Child (*Statsky 317*)**

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Florida Statute 61.183 allows the trial court to order the parents to mediation on the issues of parental responsibility, primary residence, visitation, and child support if the parties are unable to agree on their own.

## **SUPERVISED VISITATION (*Statsky 323*)**

Florida Statute Ch. 753 establishes the “Family Visitation Network” to provide supervised visitation programs throughout the state.

## **MODIFICATION OF THE CUSTODY ORDER BY THE STATE THAT ISSUED THE ORDER (*Statsky 332*)**

Section 61.13(2)(c) provides that jurisdiction to modify an award of child custody belongs to the circuit court

- a. in the county in which either parent or the child resides, and
- b. in which the original award of custody was entered.

Case law in Florida provides that modification of primary residence may only be had upon proof that:

- a. A substantial change in the circumstances of either party and/or the child has occurred since the entry of the order sought to be modified, and
- b. That the best interest of the child(ren) would be served by granting the modification. *Teta v. Teta*, 297 So. 2d 642 (Fla. 1<sup>st</sup> DCA 1974); *Frye v. Frye*, 205 So. 2d 310 (Fla. 4<sup>th</sup> DCA 1967).

## **Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) (*Statsky 335*)**

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Florida has adopted the UCCJEA at § 61.1302-61.1348, Fla. Stat.

## **SUPPLEMENTAL ASSIGNMENTS**

1. Paul and Veronica were married for five years and had one child, Gregory. The final judgment that dissolved their marriage did not give any visitation rights to Gregory's grandfather. Under Florida law, can Gregory's grandfather file a petition to seek establishment of his visitation rights? What factors will be considered by the court?

# 10

## CHILD SUPPORT

### SEPARATION AGREEMENT (*Statsky 347*)

Another factor to consider in negotiating the child support terms in a separation agreement is the Internal Revenue Service dependency exemption. See § 61.30(11)(a)(8), Fla. Stat.

In Florida, the court may accept all, part, or none of the provisions of a separation agreement regarding child support. Any agreement will be carefully reviewed by the trial judge because of the need to protect the best interest of the children. *Doss v. Doss*, 627 So. 2d 1297 (Fla. 5<sup>th</sup> DCA 1993). But see Fla. Fam. L.R.P. Form 12.901(h)(1)-(3).

An agreement to provide a lump sum amount for child support, which attempts to remove the parent's continuing duty to support is void. *Brock v. Hudson*, 484 So. 2d 285 (Fla. 1<sup>st</sup> DCA 1986); *Warrick v. Hender*, 198 So. 2d 348 (Fla. 4<sup>th</sup> DCA 1967).

When awards of child support are based on an agreement of the parties, the party seeking modification is not held to a heavier burden as is normally imposed when seeking modification of other aspects of an agreement. *Maher v. Maher*, 505 So. 2d 1107 (Fla. 4<sup>th</sup> DCA 1987); *Bernstein v. Bernstein*, 498 So.2d 1270 (Fla. 4<sup>th</sup> DCA 1986); *Wortzel v. Wortzel*, 489 So. 2d 1155 (Fla. 4<sup>th</sup> DCA 1986); *Wanstall v. Wanstall*, 427 So.2d 353 (Fla. 5<sup>th</sup> DCA 1983).

Florida Statute 61.13(1)(d) provides that a trial court shall direct that payments for child support be made into a government depository. While the parties may agree to avoid the depository procedure, any default may require participation in the program. Furthermore, Florida Statute 61.181 created a central depository system that has the power to begin income deduction proceedings when payments are not made when due.

### JURISDICTION AND THE UNIFORM INTERSTATE FAMILY SUPPORT ACT (UIFSA) (*Statsky 351*)

Florida has adopted the UIFSA at Ch. 88, Fla. Stat.

In Florida, personal jurisdiction is necessary to obtain a valid judgment for child support. Personal jurisdiction must be established by personal service or by a response by the respondent. Personal service may be effectuated by personally serving the parent with process while physically in Florida, leaving the process at the respondent's usual place of abode with a person 15 years of age or older who lives there, or through the "long-arm statute." A respondent may be served outside of Florida pursuant to this law if a matrimonial domicile is maintained in Florida at the time of the commencement of the action. *Mouzon v. Mouzon*, 458 So. 2d 381 (Fla. 5<sup>th</sup> DCA 1984), § 48.194 and § 48.031, Fla. Stat.

## WHO PAYS AND HOW MUCH? (*Statsky 355*)

Both parents may be ordered to contribute to support. While Florida historically looked to fathers to support their children, Florida law now recognizes the duty of both parents to support their children. § 61.13(1)(a), Fla. Stat.

Florida courts have consistently held that the most important factor in determining the amount of child support to be paid by the noncustodial parent is the income of that parent. Determination of the amount of child support is the responsibility of the trial judge considering factors such as needs of the children, their age, their station in life, and prior standard of living of the parents relative to the financial status and ability of the noncustodial parent to meet such needs. The ability of the custodial spouse to provide for the needs of the children must also be taken into account.

Florida Statute 61.30 sets forth presumptive child support guidelines to be used by trial judges in the determination of a proper amount of child support. These guidelines are for temporary and permanent awards in initial and modification proceedings. Parents whose combined net income is less than \$650 per month will have their child support obligation determined on a case-by-case basis. Parents whose combined net income is in excess of \$10,000 per month are required to pay at least the minimum support provided in the guidelines plus varying percentages of the amount of income over \$10,000 per month, depending on the number of children. § 61.30(6), Fla. Stat.

These guidelines are reproduced in Exhibit 1. § 61.30, Fla. Stat.

Florida Statute 61.30 describes in great detail how the child support guidelines amount is to be calculated. The Fla. Fam. L.R.P. include a worksheet to be used when calculating the presumptive minimum child support need under the Florida child support guidelines. Fla. Fam. L.R.P. Form 12.901(e).

## Second Family (*Statsky 358*)

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Florida follows the view that a second family is a factor to be considered as it affects the payor's ability to support the first family. Section 61.30(12), Fla. Stat. provides detailed rules regarding the effect of a second family on child support determination.

## MODIFICATION OF CHILD-SUPPORT ORDERS (*Statsky 359*)

The trial court has the authority to modify child-support obligations. Such decisions rest in the sound discretion of the trial judge. For a party to obtain a reduction in child-support payments, he or she must show a decrease in the needs of a child or in the ability of the parent to pay. § 61.14(1), Fla. Stat. and Fla. Fam. L.R.P. Form 12.903(b).

## ENFORCEMENT OF CHILD-SUPPORT ORDERS (*Statsky 363*)

Fla. Fam. L.R.P. 12.491 addresses child-support enforcement in Florida.

## Income Withholding (*Statsky 372*)

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Income deduction orders are provided for in § 61.1301, Fla. Stat.

**61.30 Child support guidelines; retroactive child support.—**

(1)(a) The child support guideline amount as determined by this section presumptively establishes the amount the trier of fact shall order as child support in an initial proceeding for such support or in a proceeding for modification of an existing order for such support, whether the proceeding arises under this or another chapter. The trier of fact may order payment of child support which varies, plus or minus 5 percent, from the guideline amount, after considering all relevant factors, including the needs of the child or children, age, station in life, standard of living, and the financial status and ability of each parent. The trier of fact may order payment of child support in an amount which varies more than 5 percent from such guideline amount only upon a written finding explaining why ordering payment of such guideline amount would be unjust or inappropriate. Notwithstanding the variance limitations of this section, the trier of fact shall order payment of child support which varies from the guideline amount as provided in paragraph (11)(b) whenever any of the children are required by court order or mediation agreement to spend a substantial amount of time with the primary and secondary residential parents. This requirement applies to any living arrangement, whether temporary or permanent.

(b) The guidelines may provide the basis for proving a substantial change in circumstances upon which a modification of an existing order may be granted. However, the difference between the existing monthly obligation and the amount provided for under the guidelines shall be at least 15 percent or \$50, whichever amount is greater, before the court may find that the guidelines provide a substantial change in circumstances.

(c) In Title IV-D cases reviewed pursuant to the 3-year review and adjustment cycle, no change of circumstance need to be proven to warrant a modification.

(2) Income shall be determined on a monthly basis for the obligor and for the obligee as follows:

(a) Gross income shall include, but is not limited to, the following items:

1. Salary or wages.
2. Bonuses, commissions, allowances, overtime, tips, and other similar payments.
3. Business income from sources such as self-employment, partnership, close corporations, and in-

dependent contracts. "Business income" means gross receipts minus ordinary and necessary expenses required to produce income.

4. Disability benefits.
5. All workers' compensation benefits and settlements.
6. Unemployment compensation.
7. Pension, retirement, or annuity payments.
8. Social security benefits.
9. Spousal support received from a previous marriage or court ordered in the marriage before the court.
10. Interest and dividends.
11. Rental income, which is gross receipts minus ordinary and necessary expenses required to produce the income.
12. Income from royalties, trusts, or estates.
13. Reimbursed expenses or in kind payments to the extent that they reduce living expenses.
14. Gains derived from dealings in property, unless the gain is nonrecurring.

(b) Income on a monthly basis shall be imputed to an unemployed or underemployed parent when such employment or underemployment is found to be voluntary on that parent's part, absent physical or mental incapacity or other circumstances over which the parent has no control. In the event of such voluntary unemployment or underemployment, the employment potential and probable earnings level of the parent shall be determined based upon his or her recent work history, occupational qualifications, and prevailing earnings level in the community; however, the court may refuse to impute income to a primary residential parent if the court finds it necessary for the parent to stay home with the child.

(c) Public assistance as defined in s. 409.2554 shall be excluded from gross income.

(3) Allowable deductions from gross income shall include:

(a) Federal, state, and local income tax deductions, adjusted for actual filing status and allowable dependents and income tax liabilities.

(b) Federal insurance contributions or self-employment tax.

(c) Mandatory union dues.

(d) Mandatory retirement payments.

(e) Health insurance payments, excluding payments for coverage of the minor child.

(f) Court-ordered support for other children which is actually paid.

		Child or Children						Combined Monthly Available Income
		One	Two	Three	Four	Five	Six	
(g) Spousal support paid pursuant to a court order from a previous marriage or the marriage before the court.								
(4) Net income for the obligor and net income for the obligee shall be computed by subtracting allowable deductions from gross income.								
(5) Net income for the obligor and net income for the obligee shall be added together for a combined net income.								
(6) The following schedules shall be applied to the combined net income to determine the minimum child support need:								
Combined Monthly Available Income	One	Two	Three	Four	Five	Six		
650.00	74	75	75	76	77	78	2150.00	473
700.00	119	120	121	123	124	125	2200.00	484
750.00	164	166	167	169	171	173	2250.00	494
800.00	190	211	213	216	218	220	2300.00	505
850.00	202	257	259	262	265	268	2350.00	515
900.00	213	302	305	309	312	315	2400.00	526
950.00	224	347	351	355	359	363	2450.00	536
1000.00	235	365	397	402	406	410	2500.00	547
1050.00	246	382	443	448	453	458	2550.00	557
1100.00	258	400	489	495	500	505	2600.00	568
1150.00	269	417	522	541	547	553	2650.00	578
1200.00	280	435	544	588	594	600	2700.00	588
1250.00	290	451	565	634	641	648	2750.00	597
1300.00	300	467	584	659	688	695	2800.00	607
1350.00	310	482	603	681	735	743	2850.00	616
1400.00	320	498	623	702	765	790	2900.00	626
1450.00	330	513	642	724	789	838	2950.00	635
1500.00	340	529	662	746	813	869	3000.00	644
1550.00	350	544	681	768	836	895	3050.00	654
1600.00	360	560	701	790	860	920	3100.00	663
1650.00	370	575	720	812	884	945	3150.00	673
1700.00	380	591	740	833	907	971	3200.00	682
1750.00	390	606	759	855	931	996	3250.00	691
1800.00	400	622	779	877	955	1022	3300.00	701
1850.00	410	638	798	900	979	1048	3350.00	710
1900.00	421	654	818	923	1004	1074	3400.00	720
1950.00	431	670	839	946	1029	1101	3450.00	729
2000.00	442	686	859	968	1054	1128	3500.00	738
2050.00	452	702	879	991	1079	1154	3550.00	748
2100.00	463	718	899	1014	1104	1181	3600.00	757
							3650.00	767
							3700.00	776
							3750.00	784
							3800.00	793
							3850.00	802
							3900.00	811
							3950.00	819
							4000.00	828
							4050.00	837
							4100.00	846
							4150.00	854
							4200.00	863
							4250.00	872
								872
								1355
								1687
								1911
								2085
								2229

**EXHIBIT 1 (continued)**



Combined Monthly Available Income	Child or Children						Combined Monthly Available Income	Child or Children					
	One	Two	Three	Four	Five	Six		One	Two	Three	Four	Five	Six
4300.00	881	1369	1704	1930	2106	2251	6450.00	1165	1811	2268	2551	2785	2981
4350.00	889	1382	1721	1949	2127	2273	6500.00	1170	1819	2278	2562	2798	2994
4400.00	898	1396	1737	1968	2147	2295	6550.00	1175	1827	2288	2573	2810	3008
4450.00	907	1409	1754	1987	2168	2317	6600.00	1179	1835	2299	2584	2822	3021
4500.00	916	1423	1771	2006	2189	2339	6650.00	1184	1843	2309	2595	2834	3034
4550.00	924	1436	1788	2024	2209	2361	6700.00	1189	1850	2317	2604	2845	3045
4600.00	933	1450	1804	2043	2230	2384	6750.00	1193	1856	2325	2613	2854	3055
4650.00	942	1463	1821	2062	2251	2406	6800.00	1196	1862	2332	2621	2863	3064
4700.00	951	1477	1838	2081	2271	2428	6850.00	1200	1868	2340	2630	2872	3074
4750.00	959	1490	1855	2100	2292	2450	6900.00	1204	1873	2347	2639	2882	3084
4800.00	968	1503	1871	2119	2313	2472	6950.00	1208	1879	2355	2647	2891	3094
4850.00	977	1517	1888	2138	2334	2494	7000.00	1212	1885	2362	2656	2900	3103
4900.00	986	1530	1905	2157	2354	2516	7050.00	1216	1891	2370	2664	2909	3113
4950.00	993	1542	1927	2174	2372	2535	7100.00	1220	1897	2378	2673	2919	3123
5000.00	1000	1551	1939	2188	2387	2551	7150.00	1224	1903	2385	2681	2928	3133
5050.00	1006	1561	1952	2202	2402	2567	7200.00	1228	1909	2393	2690	2937	3142
5100.00	1013	1571	1964	2215	2417	2583	7250.00	1232	1915	2400	2698	2946	3152
5150.00	1019	1580	1976	2229	2432	2599	7300.00	1235	1921	2408	2707	2956	3162
5200.00	1025	1590	1988	2243	2447	2615	7350.00	1239	1927	2415	2716	2965	3172
5250.00	1032	1599	2000	2256	2462	2631	7400.00	1243	1933	2423	2724	2974	3181
5300.00	1038	1609	2012	2270	2477	2647	7450.00	1247	1939	2430	2733	2983	3191
5350.00	1045	1619	2024	2283	2492	2663	7500.00	1251	1945	2438	2741	2993	3201
5400.00	1051	1628	2037	2297	2507	2679	7550.00	1255	1951	2446	2750	3002	3211
5450.00	1057	1638	2049	2311	2522	2695	7600.00	1259	1957	2453	2758	3011	3220
5500.00	1064	1647	2061	2324	2537	2711	7650.00	1263	1963	2461	2767	3020	3230
5550.00	1070	1657	2073	2338	2552	2727	7700.00	1267	1969	2468	2775	3030	3240
5600.00	1077	1667	2085	2352	2567	2743	7750.00	1271	1975	2476	2784	3039	3250
5650.00	1083	1676	2097	2365	2582	2759	7800.00	1274	1981	2483	2792	3048	3259
5700.00	1089	1686	2109	2379	2597	2775	7850.00	1278	1987	2491	2801	3057	3269
5750.00	1096	1695	2122	2393	2612	2791	7900.00	1282	1992	2498	2810	3067	3279
5800.00	1102	1705	2134	2406	2627	2807	7950.00	1286	1998	2506	2818	3076	3289
5850.00	1107	1713	2144	2418	2639	2820	8000.00	1290	2004	2513	2827	3085	3298
5900.00	1111	1721	2155	2429	2651	2833	8050.00	1294	2010	2521	2835	3094	3308
5950.00	1116	1729	2165	2440	2663	2847	8100.00	1298	2016	2529	2844	3104	3318
6000.00	1121	1737	2175	2451	2676	2860	8150.00	1302	2022	2536	2852	3113	3328
6050.00	1126	1746	2185	2462	2688	2874	8200.00	1306	2028	2544	2861	3122	3337
6100.00	1131	1754	2196	2473	2700	2887	8250.00	1310	2034	2551	2869	3131	3347
6150.00	1136	1762	2206	2484	2712	2900	8300.00	1313	2040	2559	2878	3141	3357
6200.00	1141	1770	2216	2495	2724	2914	8350.00	1317	2046	2566	2887	3150	3367
6250.00	1145	1778	2227	2506	2737	2927	8400.00	1321	2052	2574	2895	3159	3376
6300.00	1150	1786	2237	2517	2749	2941	8450.00	1325	2058	2581	2904	3168	3386
6350.00	1155	1795	2247	2529	2761	2954	8500.00	1329	2064	2589	2912	3178	3396
6400.00	1160	1803	2258	2540	2773	2967	8550.00	1333	2070	2597	2921	3187	3406

**EXHIBIT 1 (continued)**

Combined Monthly Available Income	Child or Children					
	One	Two	Three	Four	Five	Six
8600.00	1337	2076	2604	2929	3196	3415
8650.00	1341	2082	2612	2938	3205	3425
8700.00	1345	2088	2619	2946	3215	3435
8750.00	1349	2094	2627	2955	3224	3445
8800.00	1352	2100	2634	2963	3233	3454
8850.00	1356	2106	2642	2972	3242	3464
8900.00	1360	2111	2649	2981	3252	3474
8950.00	1364	2117	2657	2989	3261	3484
9000.00	1368	2123	2664	2998	3270	3493
9050.00	1372	2129	2672	3006	3279	3503
9100.00	1376	2135	2680	3015	3289	3513
9150.00	1380	2141	2687	3023	3298	3523
9200.00	1384	2147	2695	3032	3307	3532
9250.00	1388	2153	2702	3040	3316	3542
9300.00	1391	2159	2710	3049	3326	3552
9350.00	1395	2165	2717	3058	3335	3562
9400.00	1399	2171	2725	3066	3344	3571
9450.00	1403	2177	2732	3075	3353	3581
9500.00	1407	2183	2740	3083	3363	3591
9550.00	1411	2189	2748	3092	3372	3601
9600.00	1415	2195	2755	3100	3381	3610
9650.00	1419	2201	2763	3109	3390	3620
9700.00	1422	2206	2767	3115	3396	3628
9750.00	1425	2210	2772	3121	3402	3634
9800.00	1427	2213	2776	3126	3408	3641
9850.00	1430	2217	2781	3132	3414	3647
9900.00	1432	2221	2786	3137	3420	3653
9950.00	1435	2225	2791	3143	3426	3659
10000.00	1437	2228	2795	3148	3432	3666

For combined monthly available income less than the amount set out on the above schedules, the parent should be ordered to pay a child support amount, determined on a case-by-case basis, to establish the principle of payment and lay the basis for increased orders should the parent's income increase in the future. For combined monthly available income greater than the amount set out in the above schedules, the obligation shall be the minimum amount of support provided by the guidelines plus the following percentages multiplied by the amount of income over \$10,000:

Child or Children					
One	Two	Three	Four	Five	Six
5.0%	7.5%	9.5%	11.0%	12.0%	12.5%

(7) Child care costs incurred on behalf of the children due to employment, job search, or education calculated to result in employment or to enhance income of current employment of either parent shall be reduced by 25 percent and then shall be added to the basic obligation. After the adjusted child care costs are added to the basic obligation, any moneys prepaid by the noncustodial parent for child care costs for the child or children of this action shall be deducted from that noncustodial parent's child support obligation for that child or those children. Child care costs shall not exceed the level required to provide quality care from a licensed source for the children.

(8) Health insurance costs resulting from coverage ordered pursuant to s. 61.13(1)(b), and any noncovered medical, dental, and prescription medication expenses of the child, shall be added to the basic obligation unless these expenses have been ordered to be separately paid on a percentage basis. After the health insurance costs are added to the basic obligation, any moneys prepaid by the noncustodial parent for health-related costs for the child or children of this action shall be deducted from that noncustodial parent's child support obligation for that child or those children.

(9) Each parent's percentage share of the child support need shall be determined by dividing each parent's net income by the combined net income.

(10) Each parent's actual dollar share of the child support need shall be determined by multiplying the minimum child support need by each parent's percentage share.

(11)(a) The court may adjust the minimum child support award, or either or both parents' share of the minimum child support award, based upon the following considerations:

1. Extraordinary medical, psychological, educational, or dental expenses.
2. Independent income of the child, not to include moneys received by a child from supplemental security income.
3. The payment of support for a parent which regularly has been paid and for which there is a demonstrated need.



4. Seasonal variations in one or both parents' incomes or expenses.

5. The age of the child, taking into account the greater needs of older children.

6. Special needs, such as costs that may be associated with the disability of a child, that have traditionally been met within the family budget even though the fulfilling of those needs will cause the support to exceed the proposed guidelines.

7. Total available assets of the obligee, obligor, and the child.

8. The impact of the Internal Revenue Service dependency exemption and waiver of that exemption. The court may order the primary residential parent to execute a waiver of the Internal Revenue Service dependency exemption if the noncustodial parent is current in support payments.

9. When application of the child support guidelines requires a person to pay another person more than 55 percent of his or her gross income for a child support obligation for current support resulting from a single support order.

10. The particular shared parental arrangement, such as where the child spends a significant amount of time, but less than 40 percent of the overnights, with the noncustodial parent, thereby reducing the financial expenditures incurred by the primary residential parent; or the refusal of the noncustodial parent to become involved in the activities of the child.

11. Any other adjustment which is needed to achieve an equitable result which may include, but not be limited to, a reasonable and necessary existing expense or debt. Such expense or debt may include, but is not limited to, a reasonable and necessary expense or debt which the parties jointly incurred during the marriage.

(b) Whenever a particular shared parental arrangement provides that each child spend a substantial amount of time with each parent, the court shall adjust any award of child support, as follows:

1. In accordance with subsections (9) and (10), calculate the amount of support obligation apportioned to the noncustodial parent without including day care and health insurance costs in the calculation and multiply the amount by 1.5.

2. In accordance with subsections (9) and (10), calculate the amount of support obligation apportioned to

the custodial parent without including day care and health insurance costs in the calculation and multiply the amount by 1.5.

3. Calculate the percentage of overnight stays the child spends with each parent.

4. Multiply the noncustodial parent's support obligation as calculated in subparagraph 1. by the percentage of the custodial parent's overnight stays with the child as calculated in subparagraph 3.

5. Multiply the custodial parent's support obligation as calculated in subparagraph 2. by the percentage of the noncustodial parent's overnight stays with the child as calculated in subparagraph 3.

6. The difference between the amounts calculated in subparagraphs 4. and 5. shall be the monetary transfer necessary between the custodial and noncustodial parents for the care of the child, subject to an adjustment for day care and health insurance expenses.

7. Pursuant to subsections (7) and (8), calculate the net amounts owed by the custodial and noncustodial parents for the expenses incurred for day care and health insurance coverage for the child. Day care shall be calculated without regard to the 25-percent reduction applied by subsection (7).

8. Adjust the support obligation owed by the custodial or noncustodial parent pursuant to subparagraph 6. by crediting or debiting the amount calculated in subparagraph 7. This amount represents the child support which must be exchanged between the custodial and noncustodial parents.

9. The court may deviate from the child support amount calculated pursuant to subparagraph 8. based upon the considerations set forth in paragraph (a), as well as the custodial parent's low income and ability to maintain the basic necessities of the home for the child, the likelihood that the noncustodial parent will actually exercise the visitation granted by the court, and whether the visitation granted by the court, and shared parental arrangement.

10. For purposes of adjusting any award of child support under this paragraph, "substantial amount of time" means that the noncustodial parent exercises visitation at least 40 percent of the overnights of the year.

(d) A noncustodial parent's failure to regularly exercise court-ordered or agreed visitation not caused by the custodial parent which resulted in the adjustment of

the amount of child support pursuant to subparagraph (a)10. or paragraph (b) shall be deemed a substantial change of circumstances for purposes of modifying the child support award. A modification pursuant to this paragraph shall be retroactive to the date the noncustodial parent first failed to regularly exercise court-ordered or agreed visitation.

(12)(a) A parent with a support obligation may have other children living with him or her who were born or adopted after the support obligation arose. If such subsequent children exist, the court, when considering an upward modification of an existing award, may disregard the income from secondary employment obtained in addition to the parent's primary employment if the court determines that the employment was obtained primarily to support the subsequent children.

(b) Except as provided in paragraph (a), the existence of such subsequent children should not as a general rule be considered by the court as a basis for disregarding the amount provided in the guidelines. The parent with a support obligation for subsequent children may raise the existence of such subsequent children as a justification for deviation from the guidelines. However, if the existence of such subsequent children is raised, the income of the other parent of the subsequent children shall be considered by the court in determining whether or not there is a basis for deviation from the guideline amount.

(c) The issue of subsequent children under paragraph (a) or paragraph (b) may only be raised in a proceeding for an upward modification of an existing award and may not be applied to justify a decrease in an existing award.

(13) If the recurring income is not sufficient to meet the needs of the child, the court may order child support to be paid from nonrecurring income or assets.

(14) Every petition for child support or for modification of child support shall be accompanied by an affidavit which shows the party's income, allowable deductions, and net income computed in accordance with this section. The affidavit shall be served at the same time that the petition is served. The respondent, whether or not a stipulation is entered, shall make an affidavit which shows the party's income, allowable deductions, and

net income computed in accordance with this section. The respondent shall include his or her affidavit with the answer to the petition or as soon thereafter as is practicable, but in any case at least 72 hours prior to any hearing on the finances of either party.

(15) For purposes of establishing an obligation for support in accordance with this section, if a person who is receiving public assistance is found to be noncooperative as defined in s. 409.2572, the IV-D agency is authorized to submit to the court an affidavit attesting to the income of the custodial parent based upon information available to the IV-D agency.

(16) The Legislature shall review the guidelines established in this section at least every 4 years beginning in 1997.

(17) In an initial determination of child support, whether in a paternity action, dissolution of marriage action, or petition for support during the marriage, the court has discretion to award child support retroactive to the date when the parents did not reside together in the same household with the child, not to exceed a period of 24 months preceding the filing of the petition, regardless of whether that date precedes the filing of the petition. In determining the retroactive award in such cases, the court shall consider the following:

(a) The court shall apply the guidelines in effect at the time of the hearing subject to the obligor's demonstration of his or her actual income, as defined by subsection (2), during the retroactive period. Failure of the obligor to so demonstrate shall result in the court using the obligor's income at the time of the hearing in computing child support for the retroactive period.

(b) All actual payments made by the noncustodial parent to the custodial parent or the child or third parties for the benefit of the child throughout the proposed retroactive period.

(c) The court should consider an installment payment plan for the payment of retroactive child support.

**History.**—s. 3, ch. 87-95; s. 5, ch. 89-183; s. 5, ch. 91-246; s. 11, ch. 92-138; s. 5, ch. 93-208; s. 2, ch. 94-204; s. 2, ch. 94-318; s. 1366, ch. 95-147; s. 53, ch. 96-175; s. 3, ch. 96-305; s. 11, ch. 97-170; s. 11, ch. 98-397; s. 1, ch. 99-359; s. 2, ch. 2001-91; ss. 15, 16, ch. 2001-158.

## EXHIBIT 1

## License Denial or Revocation (*Statsky 374*)

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Florida has statutes that encourage delinquent payors to meet their child-support obligations. Section 61.13015, Fla. Stat. provides a method for seeking suspension or denial of certain professional licenses and certificates. Florida Statute 61.13016 provides a method for seeking suspension of driver's licenses and motor vehicle registrations.

## Posting Security (*Statsky 377*)

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Florida allows the trial court the discretion to "order a payor to purchase or maintain life insurance or a bond or to otherwise secure the child support award with any other asset which may be suitable for that purpose" but only to "the extent necessary to protect an award of child support." § 61.13(1)(c), Fla. Stat.

## NECESSARIES (*Statsky 378*)

The Florida Supreme Court has abrogated the Doctrine of Necessaries. In *Connor v. Southwest Florida Regional Medical Center, Inc.*, 643 So. 2d 681 (Fla. 2d DCA 1994), *quashed*, 668 So. 2d 175 (Fla. 1995), it was held that a husband can no longer be held liable for medical services (necessaries) rendered to his wife by a hospital.

## SUPPLEMENTAL ASSIGNMENTS

1. Calculate the minimum amounts of child support that are presumptively established under the Florida child support guidelines in the following situations:
  - a. Father's annual net income is \$35,000; mother's annual net income is \$15,000; three children.
  - b. Father's annual net income is \$25,000; mother's annual net income is \$35,000; one child.
2. In a proposed separation agreement, the father will pay the sum of \$100,000 to the mother in exchange for her releasing him of all future child support obligations. If there is only one child from the marriage, will the agreement be enforceable in Florida? What other information would you like to have before you make this decision?

# 11

## TAX CONSEQUENCES OF SEPARATION AND DIVORCE

Federal income tax considerations are not affected by state law. Florida does not levy a state income tax. However, § 61.30(11)(a)(8), Fla. Stat. allows the trial court to adjust the minimum child support guideline award based on “the impact of the Internal Revenue Service dependency exemption and waiver of that exemption. The court may order the primary residential parent to execute a waiver of the Internal Revenue Service dependency exemption if the non-custodial parent is current in support payments.”

# 12

## THE LEGAL RIGHTS OF WOMEN

### **OWNING AND DISPOSING OF PROPERTY (*Statsky 398*)**

Under § 708.08, Fla. Stat., married women are given the right to own and dispose of their separate property.

### **CONTRACTS AND CONVEYANCES (*Statsky 398*)**

In Florida, women have the power to enter into all forms of contracts and conveyances. In addition, pursuant to §§ 708.08, 708.09, and 689.11, Fla. Stat., spouses may enter into contracts with each other, including conveyances of real property.

### **DEATH OF THE HUSBAND (*Statsky 399*)**

In Florida, a surviving spouse is entitled to an elective share equal to 30% of the “elective estate.” § 732.2065, Fla. Stat.

Florida law also provides that homestead property is not subject to devise if the owner is survived by a spouse or minor child, except that the homestead may be devised to the surviving spouse if there are no minor children. § 732.401, Fla. Stat. Effective January 1, 2002, this statute was amended to provide that if the decedent is survived by a spouse and lineal descendants, the surviving spouse takes a life estate in the homestead, with a vested remainder to the lineal descendants in being at the time of decedent’s death per stirpes. This amendment does not apply to property that decedent and the surviving spouse owned as tenants by the entirety. § 732.401, Fla. Stat.

The surviving spouse or, if there is no surviving spouse, the children of the decedent are entitled to exempt certain property that is exempt from claims against the estate, unless the property has perfected security interests thereon (up to \$10,000 in household furnishings and all automobiles held in the decedent’s name and used by him or his immediate family). § 732.402, Fla. Stat.

In addition to homestead and exempt property, the surviving spouse and the decedent’s lineal heirs who the decedent was obligated to support or who were in fact being supported by him are entitled to have a family allowance in the amount of \$18,000 during the administration of the decedent’s estate. § 732.403, Fla. Stat., effective January 1, 2002.

### **NAME (*Statsky 400*)**

In Florida, a woman does not have to use her husband’s surname. A woman also has the right to establish her birth name as her legal name even though her marriage relationship continues.

See *Marshall v. State*, 301 So. 2d 477 (Fla. 1<sup>st</sup> DCA 1974). Once a marriage has been dissolved, a woman may request the court in the dissolution proceeding to permit her to use her maiden name or another name.

In other circumstances, name changes require a petition filed pursuant to § 68.07, Fla. Stat. and Fla. Fam. L.R.P. Form 12.982.

## **Abortion (*Statsky 406*)**

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The Florida Constitution contains a provision guaranteeing a right to privacy for its citizens. *In Re T.W.*, 543 So. 2d 837 (Fla. 5<sup>th</sup> DCA 1989), *affd.*, 551 So. 2d 1186 (Fla. 1989) contains the Florida Supreme Court's holding that the state constitutional right to privacy voided a state law requiring parental consent for a minor's abortion. As a result, under the Florida Constitution, a woman's right to an abortion is guaranteed, no matter what the United States Supreme Court does to the federal constitutional right to privacy found in *Roe v. Wade*, 410 U.S. 959, 93 S. Ct. 1409, 35 L. Ed. 2d 147 (1973).

This Florida Constitutional right may also be applicable to other issues involving government regulation of sexuality and reproduction.

## **THE BATTERED WIFE (*Statsky 408*)**

Florida Statute 741.30(2) provides that any spouse who is the victim of domestic violence may request a restraining order from the circuit court. The Clerk of Circuit Court must provide the necessary forms and assist persons who are making the request. Florida Statutes § 741.30(3) sets forth the form of the petition to be used in domestic violence cases.

In order to obtain relief, the petition must be under oath and allege specific facts and circumstances to justify the relief. The respondent must be served with the petition, notice of hearing, financial affidavit, and any temporary restraining order that has been issued. § 741.30.

A temporary restraining order may be issued *ex parte*, when it appears that an immediate danger of domestic violence exists. The temporary restraining order is valid for a maximum of 15 days. § 741.30(5)(c), Fla. Stat.

In addition to the statutory authority for restraining orders found in Florida Statutes Chapter 741, the Fla. Fam. L.R.P. 12.610 also provides procedures for seeking injunctions against domestic and repeat violence. Also see Fla. Fam. L.R.P. Forms 12.980(a)-(n).

In many parts of Florida, domestic violence courts are being created within each judicial circuit. The purpose of these courts is to have criminal and civil matters heard in an expedited manner before the same judge. In addition, programs for counseling are being required of persons convicted of committing the crime of domestic violence. § 741.281, Fla. Stat.

In criminal cases, the Florida courts have permitted expert testimony regarding whether a defendant acted as a result of the battered women's syndrome. However, when such expert testimony is offered by the defendant, the prosecution is entitled to have their own expert evaluate the defendant and offer evidence to rebut this defense.

## **MARITAL RAPE (*Statsky 414*)**

In Florida, one spouse may be convicted of sexual battery on the other spouse. *State v. Rider*, 449 So. 2d 903 (Fla. 3<sup>d</sup> DCA 1984), *rev. den.*, 458 So. 2d 273 (Fla. 3<sup>d</sup> DCA 1984), *app. Dsmtd.*, 470 U.S. 1075, 105 S. Ct. 1830, 85 L. Ed. 2d 132 (1985).

## **SUPPLEMENTAL ASSIGNMENTS**

1. Look up the Right to Privacy guarantee contained in the Florida Constitution. Besides abortion, what family law issues might this amendment affect?
2. Prepare a petition for a temporary restraining order prohibiting domestic violence pursuant to § 741.30, Fla. Stat.
3. Prepare a petition for an injunction against domestic violence pursuant to Fla. Fam. L.R.P. 12.610(b).

# 13

## ILLEGITIMACY AND PATERNITY PROCEEDINGS

### Inheritance (*Statsky 422*)

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Florida Statute 732.108(2) permits illegitimate children to receive intestate distributions. A person born out of wedlock is a lineal descendant of his or her mother. In addition, the person is a lineal descendant of this father if one of the following applies:

1. The natural parents participated in a marriage ceremony before or after the birth
2. Paternity is established before or after the death of the father
3. The father acknowledges paternity in writing

### Testate Distribution (*Statsky 422*)

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In addition, the Florida courts have held that a testate devise to all “my children” includes illegitimate children if a determination of paternity has been conducted before or after the father’s death. *In re Odom’s Estate*, 397 So. 2d 420 (Fla. 2<sup>d</sup> DCA 1981).

### Artificial Insemination (*Statsky 423*)

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In Florida, children born within wedlock who have been conceived by the means of artificial or in vitro insemination are irrebuttably presumed to be the child of the husband and wife, provided that both husband and wife have consented in writing to the artificial or in vitro insemination. § 742.11, Fla. Stat. Florida Statute 742.14 contains procedures that need to be followed in cases where the donor of any egg, sperm, or preembryo is someone other than a member of the commissioning couple or a father who has executed a preplanned adoption agreement. Florida Statute §§ 742.13-742.17 contains definitions of terms associated with “assisted reproductive technology,” detailed procedures for creating a “Gestational Surrogacy Contract,” how to expedite affirmation of parental status for gestational surrogacy, and how to dispose of eggs, sperm, and preembryos upon a divorce, death of a spouse, or other unforeseen circumstances.

### LEGITIMATION AND PATERNITY (*Statsky 424*)

In Florida, illegitimate children can be legitimized by acknowledgment, marriage of the parents, or paternity proceedings. See Fla. Fam. L.R.P. Forms 12.983.



## **Paternity (*Statsky 425*)**

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Paternity proceedings may be brought in Florida by instituting a paternity proceeding pursuant to Chapter 742, Florida Statutes. Scientific testing for the determination of paternity is addressed in § 742.12, Fla. Stat. In addition, in a dissolution action, if the husband defends a petition for child support by denying paternity, it may be determined in the dissolution action. *Decker v. Hunter*, 460 So. 2d 1014 (Fla. 3<sup>d</sup> DCA 1984).

### **SUPPLEMENTAL ASSIGNMENTS**

1. Look up the Florida Statute regarding the right of illegitimate children to inherit from their parents. What rights does it give?
2. Prepare a petition to determine paternity under Florida law.
3. Look up the Florida statutes that address paternity testing. What statistical probability of paternity creates a rebuttable presumption that the alleged father is the biological father of the child?

# 14

## THE LEGAL STATUS OF CHILDREN

### AGE OF MAJORITY AND EMANCIPATION (*Statsky 439*)

In Florida, § 743.07(1), Fla. Stat. sets the age of majority at 18. Emancipation can occur if the child marries or the circuit court has removed the disabilities of nonage (available to minors who are at least 16 years old). See §§ 743.01-743.015, Fla. Stat.

Florida follows the general rule that a minor who has not been emancipated does not have legal capacity to enter a binding contract. Such contracts are therefore voidable. However, a minor may enter into the following special types of contracts even if the minor has not been emancipated: contracts for education loans, contracts of person at least 17 years old to donate blood, contracts for emergency medical care, contracts of minors in the custody of the Department of Corrections who have been adjudicated as adults, contracts of minors for the performance of artistic or creative services, and contracts of minors who participate or play in professional or semi-professional athletics. Ch. 743, Fla. Stat.

### ESTATES (*Statsky 442*)

In Florida, a person must be 18 years old to dispose of property by will. § 732.501, Fla. Stat.

### EDUCATION (*Statsky 443*)

School attendance is compulsory for children up to age 16. Failure to attend school may permit the school administration to institute a child-in-need-of-services (CHINS) proceeding pursuant to § 232.19 and § 984.15, Fla. Stat.

### NEGLECT AND ABUSE (*Statsky 443*)

Florida's Dependency Statute provides a method for declaring a minor child dependent when his or her parents are unable or unwilling to provide the child with basic care. Ch. 39, Fla. Stat.

### DELINQUENCY (*Statsky 446*)

In Florida, most crimes committed by persons under the age of 18 are prosecuted in juvenile court. If found to be delinquent, the child may be committed to the Department of Children and Family Services for treatment until age 19; however, some serious or habitual juvenile offenders may have this time extended to age 21.

A juvenile may be treated as an adult in the following circumstances:

1. A child, who was at least 14 years of age at the time of the commission of the delinquent act, may have the case transferred to adult court after a waiver hearing.
2. A child of any age who is charged with a violation of law that is punishable by death or life imprisonment may be indicted by a grand jury.
3. A child, joined by a parent or guardian, requests to be treated as an adult.
4. The State Attorney, in his or her discretion, may file an adult information on any child aged 16 or 17, if the offense charged is a felony under Florida law. If the offense charged is a misdemeanor, the State Attorney may file an adult information if the child has previously been convicted of a juvenile offense that would have been a felony, if tried as an adult.

## SUPPLEMENTAL ASSIGNMENTS

1. Discuss the policy reasons behind Florida's law that permits minors to execute contracts for medical services.
2. Give examples of the kinds of felony crimes for which children over the age of 14 may be prosecuted as an adult by a grand jury indictment.

# 15

## ADOPTION

### WHO MAY BE ADOPTED? (*Statsky 454*)

Florida Statute 63.042(1) permits any person, a minor or adult, to be adopted.

### WHO MAY ADOPT? (*Statsky 454*)

Florida Statute 63.042(2) provides that the following persons may adopt:

1. A husband and wife jointly
2. An unmarried adult, including the birth parent of the person to be adopted
3. The unmarried minor birth parent of the person to be adopted
4. A married person without the other spouse joining as a petitioner under special circumstances

Florida law specifically prohibits a homosexual from adopting in § 63.042(3), Fla. Stat.; however several lower courts have declared this provision to be in violation of the Florida Constitutional Right to Privacy.

Although the Florida Supreme Court has avoided this issue in the past, it remanded a case that held that the Florida statute prohibiting adoption by homosexuals was unconstitutional. In this ruling, the Florida Supreme Court stated that the record was insufficient to make an equal protection determination. *State Dept. of H.R.S. v. Cox*, 627 So. 2d 1210 (Fla. 2<sup>d</sup> DCA 1993), *app' d in part, quashed in part*, 656 So. 2d 902 (Fla. 1995).

Florida Statute § 63.042(4) specifically recognizes the right of disabled or handicapped persons to adopt unless it is determined that such disability or handicap renders such person incapable of serving as an effective parent.

### ADOPTION PROCEDURE (*Statsky 458*)

In Florida, adoption proceedings are heard in circuit court. Note Fla. Fam. L.R.P. 12.200(a)(2), which requires a case management conference under certain circumstances. Also see Fla. Fam. L.R.P. Forms 12.981(a)-(g).

## Consent (*Statsky 461*)

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Pursuant to § 63.062, Fla. Stat., unless excused by the court, the following persons are required to consent to an adoption:

1. The mother of the minor
2. The father of the minor, if
  - a. The minor was conceived or born while the father was married to the mother
  - b. The minor is his child by adoption
  - c. The minor has been established by court proceedings to be his child
  - d. He has acknowledged in writing that he is the father and has filed this writing with the Department of Children and Family Services
  - e. He has provided repetitive child support
3. The minor, if more than 12 years old, unless the court dispenses with such consent because it is in the best interest of the child

In addition, the court may require consent to be executed by any person lawfully entitled to custody of the minor, or by the court having jurisdiction over the custody of the minor. If parental rights to the minor have previously been terminated, a licensed child-placing agency or the department with which the child has been placed for subsequent adoption may provide the necessary consent. A petition to adopt an adult may be granted if consented to by the adult and his or her spouse, if any; and if consented to by the birth parents, if any, or proof that they have received notice of the proceeding.

## CONSEQUENCES OF ADOPTION (*Statsky 474*)

Florida Statute 63.172 provides that a judgment of adoption relieves the birth parents of all parental rights and responsibilities. In addition, it terminates all legal relationships between the adopted person and his relatives. Adoption creates the relationship between the adopted person and the petitioner and all relatives to the petitioner that would have existed had the adopted person been a blood descendant born in wedlock.

Section 63.172, Fla. Stat. Effect of judgment of adoption (effective January 1, 2002)

(1) A judgment of adoption, whether entered by a court of this state, another state, or of any other place, has the following effect:

(a) It relieves the birth parents of the adopted person, except a birth parent who is a petitioner or who is married to a petitioner, of all parental rights and responsibilities.

(b) It terminates all legal relationships between the adopted person and the adopted person's relatives, including the birth parents, except a birth parent who is a petitioner or who is married to a petitioner, so that the adopted person thereafter is a stranger to his or her former relatives for all purposes, including the interpretation or construction of documents, statutes, and instruments, whether executed before or after entry of the adoption judgment, that do not expressly include the adopted person by name or by some designation not based on a parent and child or blood relationship, except that rights of inheritance shall be as provided in the Florida Probate Code.

(c) Except for rights of inheritance, it creates the relationship between the adopted person and the petitioner and all relatives of the petitioner that would have existed if the adopted person were a blood descendant of the petitioner born within wedlock. This relationship shall be created for all purposes, including applicability of statutes, documents, and instruments, whether executed before or after entry of the adoption judgment, that do not expressly exclude an adopted person from their operation or effect.

(2) If one or both parents of a child die without the relationship of parent and child having been previously terminated and a spouse of the living parent or a close relative of the child thereafter adopts the child, the child's right of inheritance from or through the deceased parent is unaffected by the adoption and, unless the court orders otherwise, the adoption will not terminate any grandparental rights delineated under chapter 752. For purposes of this subsection, a close relative of a child is the child's brother, sister, grandparent, aunt, or uncle.

## **CONFIDENTIALITY (*Statsky 475*)**

Under Florida Statute § 63.162, all adoption proceedings are confidential. However, the identity of a birth parent, an adoptive parent, or an adoptee may be disclosed in the following circumstances:

1. The birth parent consents to the release of his or her name in writing
2. The adoptee, if over 18, consents in writing to the release of his or her name. If under 18, the written consent may be obtained from the adoptive parent
3. The adoptive parent consents in writing to the release of his or her name
4. Upon court order after a showing of good cause

Section 63.162, Fla. Stat. Hearings and records in adoption proceedings; confidential nature

(1) All hearings held in proceedings under this act shall be held in closed court without admittance of any person other than essential officers of the court, the parties, witnesses, counsel, persons who have not consented to the adoption and are required to consent, and representatives of the agencies who are present to perform their official duties.

(2) All papers and records pertaining to the adoption, including the original birth certificate, whether part of the permanent record of the court or a file in the office of an adoption entity are confidential and subject to inspection only upon order of the court; however, the petitioner in any proceeding for adoption under this chapter may, at the option of the petitioner, make public the reasons for a denial of the petition for adoption. The order must specify which portion of the records are subject to inspection, and it may exclude the name and identifying information concerning the parent or adoptee. Papers and records of the department, a court, or any other governmental agency, which papers and records relate to adoptions, are exempt from s. 119.07(1). In the case of a nonagency adoption, the department must be given notice of hearing and be permitted to present to the court a report on the advisability of disclosing or not disclosing information pertaining to the adoption. In the case of an agency adoption, the licensed child-placing agency must be given notice of hearing and be permitted to present to the court a report on the advisability of disclosing or not disclosing information pertaining to the adoption. This subsection does not prohibit the department from inspecting and copying any official record pertaining to the adoption that is

maintained by the department and does not prohibit an agency from inspecting and copying any official record pertaining to the adoption that is maintained by that agency.

(3) The court files, records, and papers in the adoption of a minor shall be indexed only in the name of the petitioner, and the name of the minor shall not be noted on any docket, index, or other record outside the court file, except that closed agency files may be cross-referenced in the original and adoptive names of the minor.

## SUPPLEMENTAL ASSIGNMENTS

1. What factors should the court consider under Florida Statute 63.162 in determining good cause for the release of confidential adoption information?
2. What items must be contained in a petition for adoption in Florida?

# 16

## THE NEW SCIENCE OF MOTHERHOOD

### INTRODUCTION (*Statsky 482*)

The Florida legislature has specifically addressed artificial insemination, in vitro insemination, donated eggs, preembryos, and other “Assisted reproductive technology” as well as “Gestational surrogacy contracts.” Chapter 742, Fla. Stat.

### SUPPLEMENTAL ASSIGNMENTS

1. Look up the Florida Statute dealing with surrogacy contracts. Make a list of the findings required to be made by a licensed physician before a contract can be entered.
2. Prepare a Gestational Surrogacy Contract form to be used in compliance with § 742.15, Fla. Stat.



# 17

## TORTS AND FAMILY LAW

### **INTRAFAMILY TORTS (*Statsky 505*)**

Florida Statute 741.235 abrogates the common law doctrine of interspousal tort immunity with regard to the intentional tort of battery.

### **CONSORTIUM AND SERVICES (*Statsky 512*)**

Loss of consortium and other similar actions are known as derivative actions because they are derived from the existence of a right of the person injured by the defendant and from the relationship between the person injured by the defendant and the person claiming a loss of services, comfort, companionship, and society.

### **Loss of Services (*Statsky 513*)**

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Under Florida Statute 768.0415, a person who, through negligence, causes significant permanent injury to the natural or adoptive parent of an unmarried dependent resulting in a permanent total disability is liable to the dependent for loss of services, comfort, companionship, and society.

The Florida Wrongful Death Act permits survivors to bring an action against the person causing the death of another when the death is caused by the wrongful act, negligence, default, or breach of contract or warranty. Survivors includes the decedent's spouse, children, parents, and blood relatives dependent on the decedent for support. Sections 768.16-768.27, Fla. Stat.

### **OTHER TORTS (*Statsky 514*)**

Florida's Heart Balm Statute is § 771.01, Fla. Stat. It abolishes the rights of actions for alienation of affections, criminal conversation, seduction, and breach of contract to marry.

## **VICARIOUS LIABILITY OF FAMILY MEMBERS (*Statsky 516*)**

Florida Statute 741.23 abrogates the common law rule whereby a husband was liable for the torts of his wife.

However, under Florida Statute § 741.24, a civil action may be brought against the parents of a minor under the age of 18, living with the parents, who maliciously or willfully destroys or steals real or personal property. Florida Statute § 772.11 holds a parent or legal guardian liable for damages suffered due to civil theft committed by a minor child. Florida Statute § 322.09(2) addresses negligence or willful misconduct of a minor while he or she is driving a motor vehicle. These statutes allow imputation of negligence to a person who signs the permit or license application. They also create joint and several liability.