Trial
Presented by: Robert D. Orshan
Overview of Topics

I. Preparation for Trial

a. Pre-Trial Memorandum

b. Pre-Trial Catalogue

c. Preparation of Final Judgment

i. Equitable Distribution

ii. Alimony

iii. Children's Issues

iv. Relocation

II. During Trial

a. Opening Statement

b. Evidence Presented

c. Records Custodian vs. Affidavit of Records Custodian

d. Objections

e. Motion for Involuntary Dismissal (Fla. Fam. L. R. P. 12.420)

f. Closing Statement

III. Sample Forms

a. Pre-Trial Catalogue

b. Affidavit of Incurred and Projected Attorneys' Fees, Suit Monies and Costs

c. Final Judgment for Contested Dissolution of Marriage – Alimony, Equitable Distribution, No Children

d. Final Judgment for Uncontested Dissolution of Marriage – Without Children

e. Final Judgment for Uncontested Dissolution of Marriage – With Children

f. Affidavit of Records Custodian

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EQUITABLE DISTRIBUTION – § 61.075

A. BRIEF OVERVIEW

- Defines marital assets and liabilities (and non-marital assets and liabilities);
- Establishes a presumption of equal division of all marital assets and liabilities (and the justification criteria for an unequal distribution); and,
- Provides a detailed framework for accomplishing an equitable distribution.

B. REQUIREMENTS OF FINAL JUDGMENT

Must identify, value and distribute marital and non-marital assets and liabilities.

I. IDENTIFY

- Determine whether assets and liabilities are marital or non-marital
- Date for determining the parties' marital and non-marital assets and liabilities is the date the parties enter into a valid separation agreement, such other date as may be expressly established by such agreement, or the date of the filing of a petition for dissolution of marriage, whichever date is earlier. – Section 61.075(7), *Florida Statutes*.
- Non-marital assets are:
  - Property owed prior to the marriage and property acquired by non-inter-spousal gift, bequest, devise, or decent, and assets acquired in exchange for such assets (assuming no commingling). *Florida Statute 61.075(6)(b)(2)*
  - All income derived from non-marital assets during the marriage is considered to be non-marital unless income was treated, used or relied upon by parties as a marital asset. *Florida Statute 61.075(6)(b)(3).*
  - *The party asserting the non-marital status of an asset has the burden of proving same.*

Practice Note: Title of asset is not dispositive of identity.

II. VALUE

- Date of Valuation – Section 61.075(7), *Florida Statutes*.

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- Value of assets and amounts of liabilities identified or classified as marital is the date or dates as the judge determines is just and equitable under the circumstances. "Different assets may be valued as of different dates, as, in the judge's discretion, the circumstances require." Section 61.075(7), *Florida Statutes.*
- Date of filing is not necessarily valuation date.
- Value of assets (whether zero, de minimus or negative) must be specified in final judgment (whether determined by the Court or stipulated to by the parties).
- *Patino v. Patino*, 122 So.3d 961 (Fla. 4th DCA 2013)

  Lower Court Committed Reversible Error In Failing To Make Sufficient Findings Regarding Value Of Property And Identification Of Marital Assets And Debts – In the Patino case, the lower court distributed marital property without stating the value of each asset and distributed marital liabilities without stating the amount of each specific liability. It is essential to establish a value (even if zero or *de minimus*) for all marital assets and liabilities when creating an equitable distribution scheme. Florida Statute §61.075 provides that specific written findings **must be made** which identify, value and distribute marital assets and liabilities. These factual findings are necessary in order to facilitate appellate review of the trial court's property distribution scheme. Failure of the trial court to make sufficient findings in its equitable distribution constitutes reversible error.

  Practice Note: Negative Liabilities must be included – do not use zero value. [i.e. business is valued at -$100,000]

C. ESTABLISHING VALUES AT TIME OF TRIAL:

TYPE OF ASSET OR LIABILITIES	EVIDENTIARY SUPPORT	POTENTIAL WITNESS	POTENTIAL DATE OF VALUATION
Marital home	Appraisal	Appraiser	As close to trial date as possible.
Retirement Accounts	Account Statements	Records custodian/Affidavit of Records custodian	Valued as of date of filing plus any passive appreciation; post-filing contribution should be separated and non-marital plus any passive appreciation on post-filing contributions.
Bank Accounts	Account Statements	Records Custodian/Affidavit of Records custodian	Generally valued as of date of filing
Personal Property	Appraisals	Appraisers	Certain items such as art, collectibles and jewelry may also need to be appraised
Credit Cards	Account Statements	Records custodian/Affidavit of	Generally valued as of date of filing

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		Records custodian	

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Practice Notes:

- Make sure to subpoena witnesses for trial.
- If the parties agree, they may stipulate as to the value of certain assets and liabilities prior to trial or during trial.
- When appropriate, parties may also stipulate as to the authenticity of account statements.

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WestlawNext

Patino v. Patino
District Court of Appeal of Florida, Fourth District. October 9, 2013 122 So.3d 961 38 Fla. L. Weekly D2112 *(Approx. 6 pages)*

Original Image of 122 So.3d 961 (PDF)

122 So.3d 961
District Court of Appeal of Florida,
Fourth District.

Ralph **PATINO**, Appellant,
v.
Yolanda **PATINO**, Appellee.

No. 4D12–2944. Oct. 9, 2013.

Synopsis

Background: In proceedings for dissolution of marriage, the Circuit Court, Seventeenth Judicial Circuit, Broward County, Nicholas Lopane, J., entered order with respect to equitable distribution and alimony. Husband appealed.

Holdings: The District Court of Appeal held that:
1 trial court's order was insufficient to support award of alimony, and
2 trial court's order was insufficient to support equitable distribution of marital assets and liabilities.

Reversed and remanded.

West Headnotes (7)

Change View

1 **Divorce** Grounds and Defenses in Determining Existence and Amount of Obligation
Statutory list of relevant economic factors to be considered in connection with an award of alimony is non-exhaustive. West's F.S.A. § 61.08(2).

2 **Divorce** Determination and Findings
In conducting the required evaluation in connection with an award of alimony, the trial court must make findings of fact regarding each statutory factor. West's F.S.A. § 61.08(2).

3 **Divorce** Determination and Findings
Trial court's order in dissolution proceedings was insufficient to support award of alimony, where trial court stated that it considered six of 10 statutory factors with respect to such award, but made no mention of other four factors and made no factual findings with respect thereto. West's F.S.A. § 61.08(2).

4 **Divorce** Verdict, Findings, or Determination
Factual findings required in connection with the equitable distribution of marital property in a contested dissolution action are necessary in order to facilitate effective appellate review of the trial court's property distribution scheme. West's F.S.A. § 61.075(3).

5 **Divorce** Findings and failure to make findings
Divorce Division and distribution in general
Even when no trial transcript is provided to the reviewing court, failure to make sufficient findings regarding the value of property and identification of marital assets and debts in a contested dissolution action constitutes reversible error and requires remand for appropriate findings to be made.

6 **Divorce** Valuation of Property or Interest in General

SELECTED TOPICS

Divorce
- Alimony, Allowances, and Disposition of Property
  - Tax Consequences of Spousal Support Award
  - Trial Court Award of Percent of Marital Property

Alimony, Allowances, and Disposition of Property
- Property Division Portions of Default Divorce Judgment

Secondary Sources

§ 559.Findings of fact

24 Am. Jur. 2d Divorce and Separation § 559

...in order to allow for meaningful appellate review of equitable distribution of marital property, the trial court must make specific findings as to the value of the marital assets. One court has held th...

§ 8:3.Establishing the factors

2 Equit. Distrib. of Property, 3d § 8:3

...Regardless of where the burden of proof lies, the burden of producing evidence on a particular factor is on the party who seeks to have the court consider it. If a party fails to introduce evidence on ...

Forensic Economics—Use of Economists in Cases of Dissolution of Marriage

17 Am. Jur. Proof of Facts 2d 345 (Originally published in 1978)

...This article is the fifth in a series dealing with forensic application of economics, and treats the measurement of child and spousal support awards, and the evaluation of certain types of community pr...

See More Secondary Sources

Briefs

Motion for Leave to File Brief as Amici Curiae and Brief Amici Curiae of the Women's Equity Action League, the Now Legal Defense and Education Fund, the American Association of Retired Persons, the Ex-Partners of Servicemen/Women for Equality, the Na tional Action for Former Military Wives, the National Organization for Women, the Older Women's League, the Older Women's League (Sacramento Capitol Chapter), the Pension Rights Center, and the Women's Legal Defense Fund in Support of the Appellee

1988 WL 1025827
Gerald E. MANSELL, Appellant, v. Gaye M. (MANSELL) FORBES, Appellee.
Supreme Court of the United States.
October 01, 1988

...Pursuant to Rules 36.3 and 42 of the Rules of the Supreme Court of the United States, the Women's Equity Action League, the NOW Legal Defense and Education Fund, the American Association of Retired Per...

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

1990 WL 10022750
In re Gerald J. SANDERFOOT, Debtor.
Jeanne Farrey, f1k1a Jeanne Sanderfoot, Petitioner, v. Gerald J. Sanderfoot, Respondent.

Divorce Verdict, Findings, or Determination

Trial court's order in dissolution proceedings was insufficient to support equitable distribution of marital assets and liabilities, where trial court distributed marital property without stating value of each asset and distributed marital debts without stating amount of each liability. West's F.S.A. § 61.075(3).

7 **Divorce** Attorney fees and costs

Where equitable distribution or alimony is disturbed due to a reversal on appeal, it may be appropriate to reexamine attorneys' fees to determine if the redistribution of assets and liabilities affects the award; the trial court may determine the parties' relative needs and ability to pay, but only after the trial court clarifies the equitable distribution scheme and alimony.

1 Case that cites this headnote

Attorneys and Law Firms

***962** Chester G. McLeod, Pembroke Pines, for appellant.

Cynthia J. Dienstag of Cynthia J. Dienstag, P.A., Miami, for appellee.

Opinion

PER CURIAM.

We again remind trial judges of the importance of making explicit findings as to all statutorily mandated factors for the determination of alimony in final judgments, as well as establishing a value (even if zero or *de minimus*) for all marital assets and liabilities when devising an equitable distribution scheme. Because the trial court failed to do so in this case, we reverse and remand for further proceedings. [1]

We acknowledge the trial court entered a final judgment with findings of fact and conclusions of law, but as we discuss below, we find the final judgment deficient.

Alimony

1 2 Section 61.08(2), Florida Statutes (2010), mandates that the trial court evaluate "any relevant economic factors, including ***963** standard of living during the marriage, age, earning ability, value of each party's estate and contribution to the marriage." *Ryan v. Ryan,* 927 So.2d 109, 112 (Fla. 4th DCA 2006). The statute provides a specific, non-exhaustive list of factors. *Lule v. Lule,* 60 So.3d 567, 569 (Fla. 4th DCA 2011). In conducting the required evaluation, the trial court must make findings of fact regarding each listed factor. *Ryan,* 927 So.2d at 112; *Ondrejack v. Ondrejack,* 839 So.2d 867, 870 (Fla. 4th DCA 2003) ("A failure to consider all of the mandated factors is reversible error.") (citation omitted); *Koski v. Koski,* 98 So.3d 93, 96 (Fla. 4th DCA 2012) (reversing because appellate court could not determine if trial court considered all applicable section 61.08(2) factors).

3 Here, the trial court explained in the final judgment that it considered six of the ten factors, but no mention was made of the other four factors. Further, the order completely fails to make any factual findings regarding the missing four factors; as a result, the order is insufficient to support an award of alimony. Therefore, we reverse so that the trial court may have an opportunity to make factual findings in accordance with section 61.08(2). *Segall v. Segall,* 708 So.2d 983, 986–87 (Fla. 4th DCA 1998) ("Although the court's final judgment tracked the language of section 61.08(2) in discussing the factors it considered, it failed to make findings of fact relative to those factors.").

Equitable Distribution

4 Section 61.075, Florida Statutes (2011), provides that in any contested action, specific written findings must be made identifying, valuing, and distributing the marital and non-marital assets and liabilities. "These factual findings required by section 61.075(3) are necessary, in order to facilitate effective appellate review of the trial court's property distribution scheme." *Fulmer v. Fulmer,* 961 So.2d 1081, 1082 (Fla. 1st DCA 2007).

5 In *Whelan v. Whelan,* 736 So.2d 732, 733 (Fla. 4th DCA 1999), a final judgment awarded the husband's interest in marital property to the wife but failed to value some of the assets. This court explained: "Even when no trial transcript is provided to the reviewing court, failure to make sufficient findings regarding value of property and identification of

marital assets and debts constitutes reversible error and requires remand for appropriate findings to be made." *Id.* (alteration, internal quotation marks, and citation omitted).

6 Here, the final judgment distributes marital property without stating the value of each asset and distributes marital debts without stating the amount of each liability. Because the final judgment as to equitable distribution is not supported by the required factual findings, it is insufficient, and we reverse so that the trial court may enter an order including these values.

Attorneys' Fees

7 Where equitable distribution or alimony is disturbed due to a reversal on appeal, it may be appropriate to reexamine attorneys' fees to determine if the redistribution of assets and liabilities affects the award. *Segall,* 708 So.2d at 989 ("[W]here ... the results of an appeal materially change the parties' abilities to pay, the issue of attorneys' fees must be revisited upon remand to the trial court."). The trial court may determine the parties' relative needs and ability to pay, but only after the trial court clarifies the equitable distribution scheme and alimony. *See Lee v. Lee,* 56 So.3d 819, 821 (Fla. 2d DCA 2011). If, after reexamination of the equitable distribution scheme, the trial court redistributes ***964*** the parties' assets and liabilities and adjusts incomes through alimony, it may also be necessary to reexamine the parties' need and ability to pay attorneys' fees. Therefore, we reverse the award of attorneys' fees so that the trial court may have such an opportunity.

Reversed and remanded.

DAMOORGIAN, C.J., CIKLIN and CONNER, JJ., concur.

Parallel Citations

38 Fla. L. Weekly D2112

Footnotes

1 The Husband raised four issues on appeal. The Wife recast the Husband's four issues into seven issues. We affirm, without discussion, issues I and IV as framed in the initial brief. Because we reverse and remand for lack of written findings regarding alimony and equitable distribution, we deem the recast issues framed by the Wife to be moot.

End of Document

ALIMONY – § 61.08

I. BRIEF OVERVIEW

Section 61.08(2), Florida Statutes, directs trial courts that "[i]n determining whether to award alimony or maintenance, the court shall first make a **specific factual determination** as to whether either party has an actual need for alimony or maintenance and whether either party has the ability to pay alimony or maintenance. If the court finds that a party has a need for alimony or maintenance and that the other party has the ability to pay alimony or maintenance, then in determining the proper type and amount of alimony or maintenance... the court **shall consider all relevant factors...**" The statute then lists ten (10) factors which the court must consider, though this list is not exhaustive. Fla. Stat. §61.08(2)(a)-(j) (2012). Once the statutory factors have been considered, trial courts are then tasked with determining which type of alimony, if any, is to be awarded.

II. TYPES OF ALIMONY

A. Bridge-the-Gap Alimony

Practice Note for FJ:
The statute places the following limitations on an award of bridge-the-gap alimony: (1) the length of the award may not exceed two years; and (2) the award shall not be modifiable in amount or duration.

B. Rehabilitative Alimony

Practice Note for FJ:
According to the statute, before a trial court can award rehabilitative alimony, "there must be a specific and defined rehabilitative plan which shall be included as a part of any order awarding rehabilitative alimony." Fla. Stat. § 61.08(6)(b)(2012).

C. Durational Alimony

Practice Note for FJ:
The length of an award of durational alimony may not exceed the length of the marriage.

D. Permanent Alimony

Specific statutory findings must be made before an award of permanent alimony may be granted. First, the court shall include a finding that no other form of alimony is fair and reasonable under the circumstances of the parties. Fla. Stat. §61.08(8) (2012). Second, the duration of the parties' marriage indicates the type of presumption either for or against the requesting spouse. Permanent alimony

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may be awarded following a marriage of long duration upon consideration of the factors set forth in Section 61.08(2), Florida Statutes. This language effectively creates a rebuttable presumption in favor of awarding permanent alimony following a long-term marriage. *Hill v. Hooten*, 776 So.2d 1004 (Fla. 5th DCA 2001) ("the court should bear in mind that this 17 year marriage is a long-term marriage which creates a presumption in favor of an award of permanent alimony. The presumption is, of course, rebuttable ... "). However, the shorter the marriage, the more compelling the requesting spouse's situation needs to be for an award of permanent alimony to be granted and affirmed on appeal. Following a marriage of moderate duration "such an award is appropriate based upon clear and convincing evidence after consideration of the factors set forth in subsection (2), or following a marriage of short duration if there are written findings of exceptional circumstances." Fla. Stat. §61.08(8) (2012).

III. EVIDENCE AT TRIAL

A. Need and Ability to Pay

1. FINANCIAL AFFIDAVIT
    - Witness to authenticate = party
    - Make it clear and concise
    - Add footnotes when appropriate
    - Check the numbers and analyze financial records to ensure accuracy (forensic accountant is best to complete this task)
    - *Practice Note: You are likely not an accountant! Advise your client (in writing) to seek any accounting/tax advice from their accountant or tax attorney.*

2. LIFESTYLE ANALYSIS
    - Witness to testify = forensic accountant and party
    - Travel, cars, houses, housekeepers, etc.

3. BANK RECORDS, CREDIT CARD STATEMENTS, RETIREMENT ACCOUNTS, INVESTMENT ACCOUNTS
    - Witness to testify = records custodian or have Affidavit of Records Custodian (prior notice to opposing party required)
    - Show monthly deposits, monthly expenses, monthly credit card charges and payments, etc.

B. Statutory Factors – Fla. Stat. §61.08(2)(a)-(j) (2012)

1. List of Factors

(a) The standard of living established during the marriage.

Evidence:

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- Witnesses: Forensic Accountant, Parties, Records Custodian
- Documents:
  Summaries relating to Lifestyle Analysis
  Bank Account Statements, Credit Card Statements, etc.

(b) The duration of the marriage.

Evidence:

- Witnesses: Records Custodian and/or Parties
- Documents: Certificate of Marriage

(c) The age and the physical and emotional condition of each party.

Evidence:

- Witnesses: Parties, Treating Physicians, Mental Health Providers (i.e. psychologists, therapists, psychiatrists)
- Documents: Medical records, mental health records, evaluations.

(d) The financial resources of each party, including the non-marital and the marital assets and liabilities distributed to each.

Evidence:

- Witnesses: Parties, Records Custodians, Forensic Accountant
- Documents: Bank Account Statements, Investment Account Statements, Retirement Accounts Statements, Deeds, Promissory Notes, etc.

(e) The earning capacities, educational levels, vocational skills, and employability of the parties and, when applicable, the time necessary for either party to acquire sufficient education or training to enable such party to find appropriate employment.

Evidence:

- Witnesses: Parties, Vocational Expert, Records Custodian
- Documents: Vocational Evaluation, Educational Certificates, Transcripts, etc.

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(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.

Evidence:

- Witnesses: Parties, Teachers, Relatives, Friends
- Documents: Transcripts, etc.

(g) The responsibilities each party will have with regard to any minor children they have in common.

Evidence:

- Witnesses: Parties, Teachers, Relatives, Friends, Children's medical Providers, Children's mental health providers.

(h) The tax treatment and consequences to both parties of any alimony award, including the designation of all or a portion of the payment as a nontaxable, nondeductible payment.

Evidence:

- Witnesses: Accountant or Forensic Accountant

(i) All sources of income available to either party, including income available to either party through investments of any asset held by that party.

Evidence:

- Witnesses: Forensic Accountant, Parties, Record Custodians
- Documents: Deeds, Promissory Notes, Bank Account Statements, Investment Account Statements, Retirement Accounts Statements, etc.

(j) Any other factor necessary to do equity and justice between the parties.

This factor allows for the Court to consider any other factor necessary to do equity and justice between the parties. – Be creative!

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Practice Note: In awarding alimony, the Court shall first consider the equitable distribution of the parties' marital and non-marital assets. Fla. Stat. §61.08(2)(d).

IV. FINAL JUDGMENT

A. FJ MUST:

1. First make specific findings as to need and ability to pay;
2. Then consider all relevant factors and make specific findings of fact relative to the factors enumerated in subsection (2) supporting an award or denial of alimony

B. FINAL JUDGMENT AND CASE LAW

Any one of the four statutory types of alimony may be awarded in a final judgment of dissolution of marriage if it was requested in a pleading or the issue of alimony tried by consent of the parties.

- Littleton v. Littleton, 555 So.2d 924 (Fla. 1st DCA 1990)
- Hemraj v. Hemraj, 620 So.2d 1300 (Fla. 4th DCA 1993)
- McClain v. McClain, 105 So.3d 641 (Fla. 3d DCA 2013) Reversing award of permanent alimony to the former wife where neither alimony nor spousal support was sought and the former husband objected specifically on the basis that alimony was never plead and there was no counterclaim asking for alimony after the trial court indicated that he intended to award alimony).

Once alimony has become a triable issue, the trial court must determine whether the requesting spouse has a need for and the other spouse has an ability to pay alimony. Fla. Stat. §61.08(2)(2012). If there is competent, substantial evidence to satisfy that threshold test, then the trial court must consider all relevant factors and make specific "findings of fact relative to the factors enumerated in subsection (2) supporting an award or denial of alimony." Fla. Stat.§ 61.08(1) (2012)

- Justice v. Justice, 80 So.3d 405 (Fla. 1st DCA 2012)
  It is incumbent upon the trial court to include specific findings of fact regarding statutory factors for awards of alimony.

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776 So.2d 1004
District Court of Appeal of Florida,
Fifth District.

Laura M. HILL, Appellant,
v.
Roger Dean HOOTEN, Appellee.

No. 5D00-1095. | Jan. 19, 2001.

Divorce decree was entered in the Circuit Court, St. John's County, Richard G. Weinberg, J. Wife appealed. The District Court of Appeal, Palmer, J., held that: (1) denial of permanent alimony was not supported with required factual findings; (2) rehabilitative alimony award was not supported by required plan of rehabilitation; and (3) income disparity supported husband's payment of wife's appellate attorney fees.

Affirmed in part, reversed in part and remanded.

West Headnotes (6)

[1] **Divorce**
⇦ Determination and Findings

Trial court did not sufficiently support denial of permanent periodic alimony with findings of fact required by statute, when court referred only to ages and incomes of spouses. West's F.S.A. § 61.08.

10 Cases that cite this headnote

[2] **Divorce**
⇦ Rehabilitative awards; awards until self-supporting

Absence of any rehabilitative plan precluded award of $500 per month for 36 months, as rehabilitative alimony for spouse who had worked as nurse. West's F.S.A. § 61.08.

3 Cases that cite this headnote

[3] **Divorce**
⇦ Length of marriage

Divorce
⇦ Presumptions and burden of proof

Marriage of 17 years was "long-term marriage," creating rebuttable presumption in favor of award of permanent alimony.

12 Cases that cite this headnote

[4] **Divorce**
⇦ Standard of living and station in life

In determining the amount of alimony, a trial court must generally look at the standard of living enjoyed by the parties at the time of separation or the filing of the dissolution petition.

1 Cases that cite this headnote

[5] **Child Support**
⇦ Education

Trial court should ordinarily not cut off child support obligation, when child is in high school when she turns 18 and will have graduated by age 19. West's F.S.A. § 743.07.

2 Cases that cite this headnote

[6] **Divorce**
⇦ Financial condition and resources in general

Husband would be required to pay wife's attorney fees on appeal of divorce decree, when his net monthly income at time of trial was $5,850 and wife's was $758.

1 Cases that cite this headnote

Attorneys and Law Firms

***1005** Linda Logan Bryan, Miller, Shine & Bryan, P.A., St. Augustine, for Appellant.

Charles A. Esposito, Upchurch & Esposito, P.A., St. Augustine, for Appellee.

Opinion

PALMER, J.

Laura Hill (Wife) appeals the final judgment dissolving her marriage to Roger Hooten (Husband). We reverse and remand for further proceedings.

The parties were married for 17 years. Both were registered nurses when they married. Husband became a certified nurse anesthesiologist during the marriage. At the time of trial, Husband was earning a net monthly salary of $5,850.00. Wife was earning a net monthly salary of $758.00 although her counsel suggested she had an earning capacity of $1,750.00 per month. The parties have one child who was born in 1985.

At trial the only unresolved issues involved alimony and allocation of marital debt. Wife sought an award of permanent periodic alimony. Neither party claimed that an award of rehabilitative alimony would be appropriate. The marital debt in question consisted of $62,000.00 in student loans incurred by the Husband in becoming a certified nurse anesthesiologist. The final hearing was very informal, with both counsel and the parties (unsworn) primarily responding to questions asked by the court. [1]

At the conclusion of the hearing, the trial court awarded the Wife $500.00 per month for 36 months as rehabilitative alimony. The trial court did not provide any findings of fact to support the ruling. The court further required the Husband to fully assume the marital debt and to pay child support in the amount of $1,000.00 per month until the minor child reached the age of 18. The court did not require the Husband to obtain life insurance to secure his child support obligation in spite of a stipulation to that effect. The court also failed to issue a ruling with respect to the child's non-covered medical expenses.

Alimony

[1] Wife argues that the trial court erred in denying her request for permanent periodic alimony, in failing to set forth findings of fact as to the denial of permanent periodic alimony, and in awarding rehabilitative alimony absent any evidence related thereto.

Section 61.08 of the Florida Statutes (1999) states that in all dissolution actions the court shall include findings of fact relative to the following factors to support its award or denial of alimony:

61.08 Alimony.-

* * *

(2) In determining a proper award of alimony or maintenance, the court shall consider all relevant economic factors, including but not limited to:

(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, the non-marital and the marital assets and liabilities distributed to each.

(e) When applicable, the time necessary for either party to acquire sufficient education or training to enable such party to find appropriate employment.

***1006** (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 consider any other factor necessary to do equity and justice between the parties.

In construing this statute, our court has consistently ruled that the failure to provide such findings constitutes reversible error. *See Brown v. Brown,* 626 So.2d 1121 (Fla. 5th DCA 1993); *Miller v. Miller,* 625 So.2d 1320 (Fla. 5th DCA 1993); *Moreno v. Moreno,* 606 So.2d 1280 (Fla. 5th DCA 1992).

Review of the final judgment reveals that the trial court set forth few facts in support of its rulings. The judgment explains that the Wife is 44 years old and the Husband is 47. The order states that the Wife is a registered nurse with employment prospects upon a return to work, that she last earned $30,000.00 at her highest paid employment, and that she has plans to relocate in an effort to increase her employment prospects. The order further explains that the Husband is a certified nurse anesthesiologist earning $85,000.00 annually. No additional factual findings are set forth in the order.

Although the facts of this case strongly suggest that permanent periodic alimony should have been awarded to the Wife, we cannot say that she was entitled to receive such an award as a matter of law because the trial court failed to set forth sufficient findings of fact. In that regard, the final judgment fails to discuss the standard of living established by the parties during the marriage, the duration of the marriage, the physical and emotional condition of the parties, the financial resources of the Wife, the non-marital and marital assets and liabilities distributed to each party, the time necessary for either party to acquire sufficient education or training to enable such party to find appropriate employment, 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, and all sources of income available to the parties. The trial court's failure to comply with the statutory mandate requires reversal of the dissolution order and remand with instructions that proper findings be provided. *See Rausch v. Rausch,* 680 So.2d 624 (Fla. 5th DCA 1996)(holding that although evidence concerning the statutory factors was presented by the parties during the dissolution hearing, the trial court's failure to set forth findings of fact in the dissolution judgment required reversal). *Accord Henin v. Henin,* 767 So.2d 1284 (Fla. 5th DCA 2000).

[2] In any event, the trial court's award of rehabilitative alimony must be reversed because the parties failed to present evidence of any valid rehabilitation plan which would support the award. The principal purpose of awarding rehabilitative alimony is to provide funds to the requesting spouse so he or she can establish the capacity for self-support, either through the redevelopment of previous skills or the provision of the training necessary to develop potential supportive skills. *Canakaris v. Canakaris,* 382 So.2d 1197, 1202 (Fla.1980). We have ruled that rehabilitative alimony cannot be awarded absent a rehabilitative plan. *Fullerton v. Fullerton,* 709 So.2d 162, 164 (Fla. 5th DCA 1998). Here, the trial court awarded the Wife what it considered to be rehabilitative alimony, yet no evidence was presented during the hearing to support the conclusion that the Wife possessed any 36 month rehabilitation plan or that after the 36 month time period she could earn income that would allow her to enjoy a lifestyle approaching that which she enjoyed during the marriage. [2]

***1007** **[3]** Upon remand, the trial court must either award permanent periodic alimony or set forth findings of fact upon which it bases the denial of such an award. In so doing, the court should bear in mind that this 17 year marriage is a long-term marriage which creates a presumption in favor of an award of permanent alimony. [3] The presumption is, of course, rebuttable, although neither age nor a spouse's ability to earn some income rebuts that presumption. As we explained in *Young v. Young,* 677 So.2d 1301 (Fla. 5th DCA 1996):

> A spouse's age is not a valid basis to deny permanent alimony absent evidence that the spouse's youth would allow her or him to earn income sufficient to support a life-style consistent with that enjoyed during the marriage.

Id. at 1305. We further stated:

> For purposes of determining entitlement to alimony, a spouse is not self-supporting just because he or she has a job and income. To the extent possible, a divorced spouse is entitled to live in a manner reasonably commensurate with the standard established during the course of a marriage, notwithstanding that the spouse is employed.

Young, 677 So.2d at 1306.

[4] In determining the amount of alimony, the trial court must generally look at the standard of living enjoyed by the parties at the time of separation or the filing of the dissolution petition. Husband erroneously argues that alimony should be determined based upon the lower lifestyle which the parties enjoyed earlier in their marriage because his increased earning capacity was realized only toward the end of the marriage. A similar argument was rejected by the court in *Cardillo v. Cardillo,* 707 So.2d 350 (Fla. 2d DCA 1998). In that case the evidence demonstrate that toward the end of the parties' fourteen year marriage, the Husband had begun to experience success in his career and the family's income had increased substantially. In requesting alimony, the Wife petitioned the trial court to consider the income most recently shared by the parties. The trial court refused and instead based its alimony award upon the more modest standard of living enjoyed by the parties for the majority of the marriage. Upon review, the Second District reversed:

> The applicable standard of living which Ms. Cardillo is entitled to maintain is a pivotal consideration in any alimony analysis. A review of the decisions on this issue indicates that

> the standard to be considered is the most recent standard of living shared by the parties. *Bible v. Bible,* 597 So.2d 359 (Fla. 3d DCA 1992); *Lanier v. Lanier,* 594 So.2d 809 (Fla. 1st DCA 1992); *Pfaffko v.. Pfaffko,* 559 So.2d 1204 (Fla. 2d DCA 1990). The trial court's refusal to examine ***1008** the parties' most recent standard of living, a standard they enjoyed for over two years, warrants reversal.

Id. at 350-51. We agree with this conclusion and apply it to this case.

Child Support

Wife contends that the trial court erred in ordering child support which ends when the minor child reaches 18, contending that the minor child will be in the middle of her senior year at the time and thus still in need of receiving support. Husband responds that there is no evidence in the record that the child would be beyond the age of eighteen when she graduates from high school, yet he does not deny that such is the case.

[5] Given the informality of the hearing, it is not surprising that the issue was not clearly established in the record. In any event, the issue can and should easily be determined upon remand. The right to child support belongs to the child and she should not be shortchanged because of a failure to establish this simple fact at the first hearing. If it is established that the child will be in her senior year at the time she turns 18, the trial court should either award child support until the date she graduates or set forth findings of fact explaining why such relief is denied. Although section 743.07 of the Florida Statutes (1999) gives the trial court discretion whether to award extended child support beyond the age of 18, if the child is dependant in fact and reasonably expected to graduate before the age of 19, the denial of such support should be the exception rather than the rule. As the Fourth District has explained, since children who are still attending high school at age 18 are in need of financial support, section 743.07(2) of the Florida Statutes should be interpreted liberally in order to provide such support, thereby mitigating any potential harm to the child resulting from the lack of support. *See Boot v. Sapp,* 714 So.2d 579 (Fla. 4th DCA 1998)(authorizing the trial court to award child support through the date of graduation notwithstanding the fact that the twin children turned 19 a few weeks before graduation because to deny such support could harm the children); *see also Wattenbarger v. Wattenbarger,* 767 So.2d 1172 (Fla.2000)(approving the *Boot* decision).

Wife also contends that the trial court erred by failing to direct the Husband to obtain a life insurance policy to secure his child support obligation. We agree. Husband agreed, on the record, to secure such life insurance. The record reveals no basis on which the Husband's stipulation could properly be disregarded by the trial court. Accordingly, upon remand, the trial court must include in an amended final judgment a requirement that Husband maintain life insurance in the amount of $50,000.00 to secure his child support obligation.

Wife also properly argues that the trial court erred by failing to address the parties' responsibility for the child's non-covered medical expenses in the final judgment. Section 61.13(1)(b) of the Florida Statutes (1999), provides as follows:

> **61.13. Custody and support of children; visitation rights; power of court in making orders.**
>
> (1)
>
> * * *
>
> (b) Each order for child support shall contain a provision for health insurance for the minor child when the insurance is reasonably available. Insurance is reasonably available if either the obligor or obligee has access at a reasonable rate to group insurance. The court may require the obligor either to provide health insurance coverage or to reimburse the obligee for the cost of health insurance coverage for the minor child when coverage is provided by the obligee. *In either event, the court shall apportion the cost of coverage, and any non-covered medical, dental, and prescription medication expenses of the* ***1009** *child, to both parties by adding the cost to the basic obligation determined pursuant to s. 61.30(6).* The court may order that payment of uncovered medical, dental, and prescription medication expenses of the minor child be made directly to the payee on a percentage basis.
>
> (Emphasis added). On remand, the amended final judgment must include a provision with regard to these expenses. *See Rey v. Rey,* 598 So.2d 141 (Fla. 5th DCA 1992).

Other Issues

We have considered Wife's other claims of error relating to COBRA coverage and payment for the marital residence and affirm the trial court's rulings thereon. As to the COBRA claim, the judgment is not ambiguous and it is clear from the record that Wife would be responsible for that payment. Of course, that issue can be revisited in connection with revisiting the alimony issue. With regard to the martial home, the record reveals that Husband did not enter the stipulation suggested by Wife. However, upon remand, the trial court should revisit the issue of the marital home to determine whether the Wife is entitled to receive reimbursement of her deposit monies.

Attorney Fees

[6] Wife has moved for an award of appellate attorneys fees. Given the disparate amount of income between the parties, the motion is granted. Upon remand, the trial court is directed to determine the amount of reasonable fees and the proportion thereof to be paid by Husband, in light of any new alimony determination made.

AFFIRMED in part, REVERSED in part, and REMANDED.

THOMPSON, C.J. and PLEUS, J., concur.

Parallel Citations

26 Fla. L. Weekly D270

Footnotes

1 It was difficult for this court to conduct a proper review of the proceedings below because of the informal nature of the proceeding. Both the parties and this court would have been assisted if normal procedures had been used in the conduct of the hearing.

2 The trial court indicated that the determination of the amount of rehabilitative alimony was based upon the Husband's assumption of $62,000.00 in marital debt. The unequal distribution of marital debt is not a valid basis on which to deny permanent alimony or to award rehabilitative alimony in the absence of a rehabilitation plan. Upon remand, the distribution of marital debt can be revisited in connection with revisiting the alimony issue.

3 While this court has not previously specifically defined when a marriage is deemed to be long-term, in *Young v. Young,* 677 So.2d 1301 (Fla. 5th DCA 1996), the court indicated it was "reluctant" to define a fifteen year marriage as long term. Marriages of seventeen years have specifically been determined by other districts to be long-term. For example, in *Cruz v. Cruz,* 574 So.2d 1117 (Fla. 3d DCA 1990), a marriage of seventeen years was recognized as a long-term marriage, and in *Moorehead v. Moorehead,* 745 So.2d 549, 551 (Fla. 4th DCA 1999), the Fourth District characterized a seventeen year marriage "more on the side of a long-term marriage than one in the grey area." In *Kesling v.. Kesling,* 661 So.2d 919, 920 (Fla. 2d DCA 1995), the Second District implicitly found that a seventeen year marriage was a long term marriage when it determined that a disparity of income between the spouses and one spouse's inability to ever earn as much as her spouse would "alone justify an award of permanent alimony." Although the Second District explicitly held in *Cardillo v. Cardillo,* 707 So.2d 350, 351 (Fla. 2d DCA 1998) that: "Fourteen years is a long-term marriage," a later decision by a different panel receded from the determination. *Knoff v. Knoff,* 751 So.2d 167 (Fla. 2d DCA), *rev. denied,* 767 So.2d 458 (Fla.2000).

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555 So.2d 924
District Court of Appeal of Florida,
First District.

Robert E. LITTLETON, Appellant,
v.
Bobbie J. LITTLETON, Appellee.

No. 88-2688. | Jan. 16, 1990.

Husband appealed from final judgment entered in the Circuit Court for Santa Rose County, Woodrow Melvin, J., dissolving marriage. The District Court of Appeal, Ervin, J., held that: (1) husband's retirement plan could be considered marital asset for purpose of equitable distribution, but (2) issue of wife's entitlement to be maintained under husband's health insurance was not properly raised.

Affirmed in part, reversed in part and remanded.

Zehmer, J., dissented and filed opinion.

West Headnotes (2)

[1] **Divorce**
Retirement or pension rights

Husband's retirement plan could be considered marital asset for purpose of equitable distribution where husband was not retired at time of divorce and thus was not using or in need or retirement plan as source for paying alimony award.

2 Cases that cite this headnote

[2] **Divorce**
Pleading

Issue of wife's entitlement to be maintained under husband's health insurance or to receive monthly amount in lieu thereof was not properly raised in parties' pleadings and was not tried by parties' implied consent, and thus should not have been included in dissolution judgment, particularly in view of fact that husband was unrepresented at final hearing and adamantly refused to pay for wife's health insurance.

2 Cases that cite this headnote

Attorneys and Law Firms

*924 Sherry F. Chancellor, Pensacola, for appellant.

R. Larry Morris, of Levine, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, Pensacola, for appellee.

Opinion

ERVIN, Judge.

Robert E. Littleton, the former husband and appellant herein, seeks review of the final judgment dissolving his marriage to the appellee herein, Bobbie J. Littleton. He contends that the court did not equitably distribute the marital assets, that the alimony and insurance awards were excessive and/or unfair, and that the court erred in awarding attorney's fees to the wife. We affirm the judgment on all points, with *925 the exception of the health insurance provision, which is reversed and remanded.

The parties hereto were both 59 years of age at the time the divorce was granted. They were married in February 1951 and four children, all of whom have attained their majority, were born of the marriage. At the time of the divorce, Mr. Littleton was a full-time professor at the University of West Florida, with a base income of $36,997 for a nine-month period. In addition, he had also taught in the summer, increasing his income by $12,300, and he taught an extra course each semester, thereby increasing his income by another $9,000. As a result, he has earned between $50,000 and $60,000 every year since 1982. During the marriage Mrs. Littleton acted primarily as a homemaker, caring for the parties' minor children. Since 1970 she has worked as a substitute teacher, most recently earning $4,800 per year. Both parties have deteriorating health. The husband claims his health requires him to work less; consequently, he plans to work a regular course load for nine months, with no extra course or summer work in the future.

The trial court found that the marriage was irretrievably broken and granted the divorce. In dividing the parties' assets, it awarded the wife title and exclusive possession of the marital home, for which she was to be responsible for the mortgage, taxes and maintenance, [1] most of the household

furnishings, the boat, motor and trailer, the 1980 Toyota, and her own IRA account. Mr. Littleton was awarded exclusive title and possession to his retirement account, which has a present value of $145,888 if he were to retire at age 62, [2] the airplane, computer, camera, camping equipment, antique furnishings, the 1987 Oldsmobile, and the 1982 Datsun.

The trial court also awarded Mrs. Littleton permanent alimony in the sum of $1,050 per month, and, in the event that the husband should work more than nine months per year, the wife would receive one-third of the net sum of money earned over and above his base income. The husband was directed to provide health insurance through his employer for the wife or to pay her $100 per month for the cost of same; to maintain a $50,000 life insurance policy on his own life, payable to the wife as beneficiary; and finally, to pay the wife's attorney's fees.

In reviewing marital dissolution proceedings, we are mindful of the warning given in *Canakaris v. Canakaris,* 382 So.2d 1197, 1202 (Fla.1980):

> Dissolution proceedings present a trial judge with the difficult problem of apportioning assets acquired by the parties and providing necessary support. The judge possesses broad discretionary authority to do equity between the parties and has available various remedies to accomplish this purpose, including lump sum alimony, permanent periodic alimony, rehabilitative alimony, child support, a vested special equity in property, and an award of exclusive possession of property. As considered by the trial court, these remedies are interrelated; to the extent of their eventual use, the remedies are part of one overall scheme. It is extremely important that they also be reviewed by appellate courts as a whole, rather than independently.

Accord Diffenderfer v. Diffenderfer, 491 So.2d 265, 267-68 (Fla.1986). Because the appropriate standard of review is abuse of discretion, this court should only disturb the lower court's ruling when no reasonable man would take the same view adopted by the trial court. *Canakaris,* 382 So.2d at 1203.

Initially, we find no abuse of discretion in the lower court's division of the marital assets. Neither do we find error in either the form (permanent rather than rehabilitative) or the amount of the alimony award. [3] ***926** We likewise find no merit in appellant's challenges to the life insurance award [4] or the attorney's fee award. [5]

[1] As for the husband's contention that the trial court erroneously considered his retirement plan as both a marital asset and as a source of income, we conclude that no such error occurred. In *Diffenderfer,* our supreme court concluded that a pension plan may properly be considered as either a marital asset for equitable distribution purposes or as a source of income for payment of alimony. The court, however, cautioned:

> [I]njustice would result if the trial court were to consider the same asset in calculating both property distribution and support obligations. If the wife, for example, has received through equitable distribution or lump sum alimony one-half of the husband's retirement pension, her interest in his pension should not be considered as an asset reflecting his ability to pay.

Diffenderfer, 491 So.2d at 267. For proper application of the above language, it is essential for one to realize that the *Diffenderfer* decision was based upon the assumption that the husband would be retiring and that his pension would be his major source of income. *See Diffenderfer v. Diffenderfer,* 456 So.2d 1214 (Fla. 1st DCA 1984).

Unlike the husband in *Diffenderfer,* appellant's retirement is not an established fact. [6] As stated in *Carroll v. Carroll,* 528 So.2d 931, 932-33 (Fla. 3d DCA), *review denied,* 538 So.2d 1255 (Fla.1988),

> *Diffenderfer* approved the consideration of pension benefits 'as a source of payment of permanent periodic alimony,' ... in the context in which pension benefits are the *present* source of income for the party who is compelled to pay the alimony award. Indeed, it is only in this context that it can be said that the same asset is considered as both a marital asset subject to distribution and a factor in calculating a spouse's ability to pay support. But where, as here, the retirement benefits are not being used to pay

alimony, there is no justification for excluding the benefits from the assets subject to distribution, since it cannot be said the same asset is being counted twice.
(Citation and footnote omitted.) *See also Carr v. Carr,* 522 So.2d 880 (Fla. 1st DCA 1988) (reversing trial court's order that treated husband's pension plan as source of payment for alimony rather than marital asset, because the husband had no present need for the benefits to fulfill his alimony obligations-he was currently employed). In that Mr. Littleton had not retired at the time the divorce was entered and therefore was not using or in need of his retirement plan as a source for paying the alimony award, the trial court properly considered the retirement plan as a marital asset for the purpose of equitable distribution. *See McReynolds v. McReynolds,* 546 So.2d 1153 (Fla. 2d DCA 1989).

[2] We do find, however, that the trial judge erred in directing the former husband either to maintain the wife's health insurance through his employment or pay the wife $100 per month in order to defray her expenses for the purchase of medical insurance. The issue of health insurance was not raised in the pleadings, and it cannot be said that the matter was tried by the implied consent of the parties so as to justify the award. *See Versen v. Versen,* 347 So.2d 1047 (Fla. 4th DCA 1977) (reversing dissolution judgment that awarded the wife lump sum and periodic alimony and a ***927** special equity in husband's property, because issues were not raised in the pleadings and an objection was made at trial). *Cf. Shrine v. Shrine,* 429 So.2d 765 (Fla. 1st DCA 1983) (although rehabilitative alimony was not sought in the pleadings, issue had been tried by implied consent, because there was no objection when the issue was raised, no surprise or lack of notice, and counsel for both parties pursued the matter at trial). In the instant case, neither can it be said that Mr. Littleton, who was not represented by counsel at the final hearing, failed to object when the issue was raised. In fact, he adamantly refused to pay for the wife's health insurance. Nor can it be maintained that there was no surprise or lack of notice involved. It was Mrs. Littleton who introduced all of the relevant evidence regarding medical coverage and the record reflects that Mr. Littleton was not prepared to rebut the wife's evidence.

Although we are mindful that a court may properly order a former husband to pay a reasonable amount for medical insurance premiums for the wife as part of an alimony award, [7] the issue was not properly before the trial court, [8] and Mr. Littleton was not provided with sufficient opportunity to defend against Mrs. Littleton's claim therefor. Consequently, that portion of the judgment relating to the health insurance award must be reversed and the cause remanded for redetermination of the alimony award in light of this opinion.

The judgment is therefore AFFIRMED in part, and REVERSED in part, and REMANDED to the trial court for further proceedings consistent with this opinion.

WENTWORTH, J., concurs.

ZEHMER, J., dissents with written opinion.

ZEHMER, Judge (dissenting).
The former husband challenges the appealed judgment of dissolution, contending that it makes an unfair distribution of the marital property and that the award of alimony and insurance benefits was not fair and equitable. I am unable to agree with the majority opinion that no error has been shown in respect to certain provisions of the final judgment.

In the first place, I do not agree that the provision awarding the former wife one third of the former husband's net income from working more than nine months a year is not before us for review; it clearly relates to the fairness of the alimony award. Unless the legality of that provision is reviewed on this appeal, there is no procedure whereby its validity can be challenged after this appeal has become final. Yet, this provison [1] is patently invalid under our decision in *Hamilton v. Hamilton,* 552 So.2d 929 (Fla. 1st DCA 1989). I would, therefore, vacate this provision of the final judgment as being contrary to law.

Second, I find merit in appellant's argument that the distribution of marital assets in a manner likely to subject his retirement plan income to alimony payments was unfair and not in accord with the law. In *Diffenderfer v. Diffenderfer,* 491 So.2d 265, 267 (Fla.1986), the supreme court cautioned against the injustice of distributing a spouse's pension plan as a marital asset ***928** and also treating it as a source of income for alimony payments to the other spouse. The bulk of appellant's share of the marital assets is his retirement plan, yet the judgment leaves his income from that plan subject to payment of alimony to the former wife; the final judgment does not contain any provision that would protect appellant's retirement income from consideration in regard to his ability to pay alimony in the future. I strongly disagree with the majority's reference to this court's opinion in *Diffenderfer,*

456 So.2d 1214, as the basis for inferring that the supreme court's decision "was based upon the assumption that the husband would be retiring and that his pension would be his major source of income." (supra, p. 926.) Our opinion, and the assumptions made therein, were disapproved by the supreme court. To ascribe to the supreme court's opinion a meaning that would permit the retirement plan to be distributed as a marital asset, and thus free from further obligations as to the former wife, while contemplating that such income would be used to pay alimony to the wife in the future, flies directly in the face of the explicit caution set forth in the *Diffenderfer* opinion. The supreme court's opinion directed that Diffenderfer's pension plan be treated as a marital asset, and recognized that many problems might be encountered in respect to the proper disposition of the asset; but the opinion does make clear that the value of such benefit cannot be distributed as one spouse's share of the marital asset while subjecting the retirement income to payment of alimony obligations.

I agree with the majority that appellant's retirement is not an established fact. I recognize that appellant is not currently drawing any retirement pay and that this potential source of income does not enter into consideration of his present ability to pay alimony. But after this judgment and appeal have become final, how is appellant to be sure that this income cannot be considered in determining his ability to pay court-awarded alimony after he is no longer able to work and has become dependent upon his retirement income?[2] In short, I believe that the final judgment should contain some provision recognizing that this source of income has been distributed as the former husband's share of the marital assets and thus cannot be used as a source of alimony payments if the inequity identified in *Diffenderfer* is to be avoided. To this extent, I conclude that the trial court and the majority opinion have misapplied *Diffenderfer* and approved an inequitable disposition of this marital asset. I would thus vacate the provision distributing this marital asset and remand with directions either (1) to delete it from the former husband's share of the marital assets and leave it subject to use as a source of income for payment of alimony, or (2) to distribute it as a portion of the former husband's share of the marital assets with explicit provision that the income therefrom not be considered as a source of payment of the former wife's support alimony.

I agree with the majority that the issue of health insurance was not properly before the court and must be vacated.

Parallel Citations

15 Fla. L. Weekly D254

Footnotes

1 The house was valued at $130,000, and the balance outstanding on the mortgage was $12,700.

2 The retirement plan does not have a present cash value available to the husband.

3 Any issue as to whether the additional one-third payment is an automatic increase in alimony based solely on an increase in the husband's income is not before us. Therefore, we specifically make no ruling in that regard.

4 Although the husband refused to continue to carry the wife as the beneficiary on all of his life insurance, he did agree to carry insurance on his life in the amount of $25,000 with the wife as beneficiary. Considering the amount of insurance that Mr. Littleton owned ($137,000), we cannot say that the trial court's order directing that he maintain a $50,000 life insurance policy for the wife's benefit constituted an abuse of discretion.

5 Attorney's fees are properly awarded when one party is in a financially superior position, even though the other party is not completely unable to pay. *Canakaris,* 382 So.2d at 1204-05.

6 Mr. Littleton, when asked if he planned to retire at age 62, replied, "If I can." Because the former husband's retirement is not a conclusively established fact, he will not be precluded from seeking a reduction of the alimony award in the future should he find that he is unable to continue making the payments.

7 *See Inglett v. Inglett,* 439 So.2d 1389, 1391 (Fla. 1st DCA 1983); *Miller v. Miller,* 466 So.2d 356, 357 (Fla. 5th DCA 1985).

8 *Cf. Schiffhauer v. Schiffhauer,* 485 So.2d 838 (Fla. 1st DCA 1986) (trial court's order requiring the husband to bear all reasonable future medical costs wife might incur as a result of her herpes condition was within the scope of the relief sought in wife's prayer).

1 The final judgment provides:

> In the event that in the future Robert E. Littleton should experience a betterment in his health so that he may work in his profession, or otherwise, more than the nine month period contemplated by his contract with the University of West Florida he shall pay to Bobbie J. Littleton a sum of money equal to one-third of the net sum of money earned by him over and beyond that which will be paid to him for his teaching as a full time professor for the normal nine months contract. It is contemplated that

the additional payment shall be based upon the net sum of money after taxes that Mr. Littleton will receive for any overtime work, extra course work, summer courses taught, or otherwise. He shall account to his former wife for such additional income and pay the same to her on a monthly basis as the same is received by him.

R. 204-205.

2 The final judgment recites:

Mr. Littleton is a full time professor at the University of West Florida. His nine month contract calls for an income of $36,997.00 for a nine month period. In the past Mr. Littleton has taught a full time course in the summer school at the University thereby earning an additional $12,300.00, furthermore, he has taught an overload which consists of extra courses for which he is paid the sum of $3,000.00 for each extra course that he teaches. He has followed that work program for each of the three semesters in the year. The time has come when Mr. Littleton's health has eroded. He has had a severe heart problem and cannot, based on consideration of health and a normal desire to live, continue such a strenuous overload. It was testified by him that he has done the extra work thus far over the year in order to try, the best he could, to provide for his family. For the year of 1988-89 his contract calls for a nine month period of employment for the compensation stated. The Court finds that it is not reasonable to require him to continue to work overloads and also teach summer courses to the detriment of his health. A normal work program consistent with his health is all that, in reason, anyone should expect.

R. 201-202.

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620 So.2d 1300
District Court of Appeal of Florida,
Fourth District.

Beverly HEMRAJ, Appellant,
v.
Goordial HEMRAJ, Appellee.

No. 92-0993. | June 23, 1993.
| Clarification Denied July 30, 1993.

Former wife appealed from final judgment of dissolution entered by the Circuit Court, Palm Beach County, Virginia Gay Broome, J., in case in which pleadings did not contain specific demand for alimony. The District Court of Appeal, Stone, J., held that: (1) trial court's omission of findings of fact mandated by statute in denying alimony warranted reversal of final judgment of dissolution, and (2) issue of alimony was tried by implied consent.

Reversed and remanded.

West Headnotes (2)

[1] **Divorce**
Spousal Support

Omission of findings of fact mandated by statute in denying alimony warranted reversal of final judgment of dissolution. West's F.S.A. § 61.08(1).

2 Cases that cite this headnote

[2] **Divorce**
Pleading

Although pleadings in dissolution action did not contain specific demand for alimony, issue was tried by implied consent, for purposes of rule of civil procedure providing that when issues not raised by pleadings are tried by express or implied consent of parties, they shall be treated in all respects as if they had been raised in pleadings; wife's pretrial statement provided for alimony as disputed issue to be tried, and listed "security" for alimony as issue, husband did not object to portions of statement directed to alimony claim, and alimony issue was argued in opening and closing statements. West's F.S.A. RCP Rule 1.190(b).

9 Cases that cite this headnote

Attorneys and Law Firms

***1300** Lynn G. Waxman of Lynn G. Waxman, P.A., West Palm Beach, for appellant.

Ronald E. Jones of Ronald E. Jones, P.A., West Palm Beach, for appellee.

Opinion

STONE, Judge.

[1] [2] We reverse a final judgment of dissolution. In denying alimony, the trial ***1301** court omitted the findings of fact mandated by section 61.08(1), Florida Statutes.

Although the pleadings do not contain a specific demand for alimony, that issue was clearly tried by implied consent. The wife's pretrial statement provided for "non-deductible, non-reportable permanent periodic alimony," as a disputed issue to be tried. That statement also listed "security" for alimony as an issue. The husband raised objections to portions of the wife's pretrial statement, but none were directed to the alimony claim. In opening statements at trial, the wife's lawyer argued for alimony and the husband's lawyer argued against it on grounds of her alleged misconduct, but no question was raised concerning whether it was an issue before the court. In closing, the wife requested $800-$1,000 per month alimony and the husband's attorney asserted that she was not entitled to it because she had chosen a low earning career and was guilty of adultery. Again, no question was raised concerning alimony as an issue.

Florida Rule of Civil Procedure 1.190(b) provides:

> when issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made

> upon motion of any party at any time, even after judgment, but failure to so amend shall not affect the result of the trial of these issues....

We do note that in *Cooper v. Cooper,* 406 So.2d 1223 (Fla. 4th DCA 1981), this court vacated an alimony award because no such relief was requested in the pleadings. However, in that case an objection to considering the issue was raised at trial, along with a claim of prejudice due to the absence of any notice. Obviously, these factors are not present in this case.

We also reverse the child support award for further consideration as the record reflects that the wrong percentage figures with respect to the wife's income were used in applying the child support guidelines. Additionally, on remand the trial court may review the alimony award with respect to the impact of the subsequent sale of the parties' home.

As to all other issues raised, we find no error or abuse of discretion. The judgment is reversed and remanded for further proceedings.

GLICKSTEIN, C.J., and POLEN, J., concur.

Parallel Citations

18 Fla. L. Weekly D1484

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105 So.3d 641
District Court of Appeal of Florida,
Third District.

Michael McCLAIN, Appellant,
v.
Madlen McCLAIN, Appellee.

No. 3D11–583. | Jan. 23, 2013.

Synopsis

Background: Husband filed petition for dissolution of marriage seeking equitable distribution, exclusive possession of the marital home, shared parental responsibility, and child support. Wife filed an answer to the petition which did not seek alimony or spousal support. The Circuit Court, Monroe County, Tegan Slaton, J., entered final judgment of dissolution that granted permanent periodic alimony to wife. Husband appealed.

[Holding:] The District Court of Appeal, Logue, J., held that trial court was not permitted to award alimony when it was not sought in pleadings.

Affirmed in part and reversed in part.

West Headnotes (2)

[1] Divorce
⇐ Pleading

Trial court was not permitted to award wife permanent periodic alimony in marriage dissolution proceeding in which wife did not seek alimony in her pleadings.

Cases that cite this headnote

[2] Divorce
⇐ Pleading

A court is not at liberty to award alimony where the benefiting spouse has failed to seek such relief in the pleadings.

Cases that cite this headnote

Attorneys and Law Firms

*642 Quintairos, Prieto, Wood & Boyer, P.A., and James J. McNally, Miami, for appellant.

Madlen McClain, in proper person.

Before SALTER, FERNANDEZ, and LOGUE, JJ.

Opinion

LOGUE, J.

Michael McClain, the husband, appeals from the portion of the final judgment of dissolution of marriage that granted permanent periodic alimony to Madlen McClain, the wife. Because the wife never asked for alimony in her pleadings, we vacate the portion of the final judgment of dissolution which awarded alimony.

The husband filed a petition for dissolution of marriage seeking equitable distribution, exclusive possession of the marital home, shared parental responsibility, and child support. The wife, who was represented by counsel in the court below, filed an answer to the petition which did not seek alimony or spousal support. At one point in the proceedings, the wife moved to amend her answer to include counterclaims for alimony and for damages resulting from an alleged tort. But the wife never obtained an order on that motion. As trial approached, the wife filed a pretrial statement which listed "child support, child time-sharing, and division of marital property"-but not alimony-as the issues to be tried.

[1] At the end of the trial, the judge indicated that he intended to award alimony. The husband objected specifically on the basis that alimony "was never plead and there is no counterclaim asking for alimony." The final judgment of dissolution, nevertheless, required the husband to pay $1,000 a month in alimony "until Wife remarries, lives in a supportive relationship as that term is defined by statute or dies."

[2] The husband appealed the final judgment of dissolution. We agree with the husband that the trial court erred in awarding alimony in these circumstances. "A court is not at liberty to award alimony where the benefitting spouse has

failed to seek such relief in the pleadings." *Hines v. Hines,* 494 So.2d 297, 297 (Fla. 3d DCA 1986); *see also Palumbo v. Palumbo,* 576 So.2d 799, 800 (Fla. 1st DCA 1991); *Massey v. Massey,* 478 So.2d 478, 479 (Fla. 2d DCA 1985); *Cooper v. Cooper,* 406 So.2d 1223, 1224 (Fla. 4th DCA 1981). Unless and until is granted, the mere filing of a motion to amend the pleadings does not constitute an actual amendment to the pleadings. Accordingly, the portion of the final judgment awarding alimony is vacated. The remainder is affirmed.

Reversed in part, affirmed in part.

Parallel Citations

38 Fla. L. Weekly D167

End of Document

80 So.3d 405
District Court of Appeal of Florida,
First District.

Jason JUSTICE, Former Husband, Appellant,
v.
Barbara JUSTICE, Former Wife, Appellee.

No. 1D10–5539. | Feb. 9, 2012.

Synopsis

Background: Husband filed a petition for dissolution of marriage. The Circuit Court, Washington County, Brantley S. Clark, Jr., J., entered a final judgment of dissolution, awarded each party $5,000 in jewelry and $4,000 in furniture, and ordered husband to pay $1,157 per month in child support and $1,000 a month in permanent periodic alimony. Husband appealed.

[Holding:] The District Court of Appeal, Wolf, J., held that trial court's failure to make statutory findings concerning needs of wife and husband's ability to pay precluded meaningful appellate review of trial court's permanent periodic alimony award.

Affirmed in part; reversed and remanded in part.

West Headnotes (8)

[1] **Child Custody**
Decision and findings by court

Final judgment in dissolution proceeding awarding timesharing with children was impermissibly inconsistent; in final judgment, court specifically noted that temporary order awarded husband timesharing "every other Monday," and awarded husband timesharing "as ordered in the aforementioned temporary order," but court then stated that timesharing was ordered pursuant to parenting time schedule, an exhibit that only provided for timesharing every other weekend, and thus, it was unclear from this order whether husband was entitled to timesharing every other Monday.

Cases that cite this headnote

[2] **Divorce**
Spousal Support

Trial court's failure to make statutory findings concerning needs of wife, husband's ability to pay, wife's need for permanent alimony, and wife's earning capacity precluded meaningful appellate review of trial court's permanent periodic alimony award. West's F.S.A. § 61.08(2)(a)–(g).

Cases that cite this headnote

[3] **Divorce**
Spousal Support

In order to facilitate a meaningful appellate review of the trial court's alimony determination, it is incumbent upon the trial court to include specific findings of fact regarding statutory factors for award of alimony. West's F.S.A. § 61.08(2)(a)–(g).

Cases that cite this headnote

[4] **Divorce**
Presumptions and burden of proof

In grey-area marriages, which fall between short-term and long-term marraiges, there is no presumption for or against permanent alimony.

Cases that cite this headnote

[5] **Divorce**
Presumptions and burden of proof

Eleven year marriage fell into the "grey area" between short-term and long-term marriages, where there was no presumption for or against alimony.

Cases that cite this headnote

[6] **Divorce**
Personal and household goods

Trial court abused its discretion in failing to award husband nonmarital personal property;

husband showed that the pool cue, guns from his father and grandfather, and quilt were given to him prior to the marriage, and although wife argued that the trial court was not required to award the items as nonmarital because she testified she did not have them, property acquired prior to the marriage or by gift was nonmarital, regardless of where it was currently stored. West's F.S.A. § 61.075.

Cases that cite this headnote

[7] **Divorce**
Time of acquisition

Property acquired prior to the marriage or by gift is nonmarital, regardless of where it is currently stored. West's F.S.A. § 61.075(5).

Cases that cite this headnote

[8] **Divorce**
Personal and household goods

Trial court erred in failing to distribute the parties' furniture and jewelry, where the parties did not agree to divide the items between themselves and wife offered such a division, but husband objected.

1 Cases that cite this headnote

Attorneys and Law Firms

***406** Russell S. Roberts of Roberts, Roberts & Roberts, Marianna, for Appellant.

Rhonda S. Clyatt, Panama City, for Appellee.

Opinion

WOLF, J.

Appellant, the former husband, challenges a final judgment of dissolution of marriage. Appellant raises four issues on appeal: whether the trial court erred in (1) awarding the former wife the majority of timesharing with the minor children; (2) ordering a timesharing schedule in the Final Judgment that conflicts with the timesharing schedule attached as an exhibit to the Final Judgment; (3) awarding the former wife permanent periodic alimony without making any findings of fact; and (4) failing specifically to identify and value assets distributed in the Final Judgment.

We affirm the award of the majority of the timesharing to the former wife without further comment. We find the Final Judgment is internally inconsistent as to the timesharing schedule and remand for clarification. We determine the failure to make factual findings as to the permanent periodic alimony precludes meaningful appellate review and reverse and remand. We also find the trial court erred in failing to distribute the furniture and jewelry, and in failing to address a request that certain assets be declared nonmarital. We affirm, however, the valuation of the parties' bank accounts and travel trailer without further comment.

On March 23, 2007, appellant filed a petition for dissolution of marriage. The petition stated the parties were married on November 4, 1995. The parties had two sons born on April 18, 1996, and February 25, 2002. Both parties sought primary residence for the children.

On August 5, 2008, the trial court entered an order for temporary relief. The court found the former wife would be the primary residential parent, and appellant would have timesharing every other weekend and every other Monday.

A hearing was held that spanned several days in September and October 2009. Appellant entered into evidence a pretrial catalog in which he stated the parties owned $8,000 in furniture and $10,000 in jewelry. He testified to each piece of furniture and its estimated worth. His estimated values totaled $21,800, but he testified he was willing to abide by the $8,000 amount he listed on his pretrial catalog. Appellant also testified as to each piece of jewelry and its estimated worth. He stated the former wife was in possession of most of the furniture and all of the jewelry.

Appellant had several personal items that he wanted to be awarded: a blue and white quilt that his grandmother made for him; a Meucci pool cue stick that his father gave to him when he was 16; two guns given to him by his father and grandfather when he was a child, and two guns he bought for his sons.

Appellant testified he earned $7,735.79 a month, and he lived paycheck to paycheck. He entered into evidence a financial affidavit in which he stated he had a deficit each month.

The former wife entered into evidence her financial affidavit, dated March 18, *407 2009. The affidavit stated she had no income aside from alimony and $3,990 in monthly expenses. She testified appellant had been paying $750 in alimony and $811 in child support a month pursuant to the temporary order, but it was insufficient.

The former wife worked during the beginning of the marriage, but she quit to stay home with the children in May 2003. She was 37 years old and in good health, and she had her AA degree. Her last job was doing configuration management for engineers. She testified she had been unable to find such a job in her local area, but she was also applying in other areas. She estimated her salary would be $25,000 to $35,000. She was also applying for grants to return to school to become a teacher in the event she could not find a job in configuration management.

Her financial affidavit reflected that the parties owned $10,000 worth of jewelry. She testified to each piece of jewelry and its value, and she stated she left it all at the parties' rental house when she moved out. She also testified to each piece of furniture and household item, and she specified which items she took with her, left at the rental house, or were stored elsewhere.

On January 20, 2010, the trial court entered a Final Judgment of Dissolution of Marriage. The court noted the temporary order gave appellant timesharing "every other weekend" and "every other Monday." The court stated it adopted "the parenting plan attached and identified as Exhibit 'A' to this final judgment," which gave appellant "visitation as ordered in the aforementioned temporary order." The court also instructed the parties to abide by the Parenting Time Schedule attached as Exhibit C, which provided appellant timesharing "[e]very other weekend," but did not provide him timesharing every other Monday.

The court awarded each party $5,000 in jewelry and $4,000 in furniture without specifying which personal property would be awarded to each spouse. Last, the court ordered appellant to pay $1,157 per month in child support and $1,000 a month in permanent periodic alimony. Appellant filed a motion for rehearing, raising, among other issues, the matters presently being challenged in this appeal.

Inconsistencies Regarding Timesharing

[1] The Final Judgment is internally inconsistent. In the Final Judgment, the court specifically noted the temporary order awarded appellant timesharing "every other Monday," and awarded appellant timesharing "as ordered in the aforementioned temporary order." However, the court then stated timesharing was ordered pursuant to Exhibit C, the Parenting Time Schedule, which only provided for timesharing every other weekend. Therefore, it is unclear from this order whether appellant is entitled to timesharing every other Monday.

Thus, the trial court abused its discretion in entering an inconsistent award of timesharing. *See Hornyak v. Hornyak,* 48 So.3d 858, 862--63 (Fla. 4th DCA 2010) (finding the trial court abused its discretion in a dissolution proceeding for imputing income to the former wife that was inconsistent with the court's other findings). We remand for entry of a consistent order regarding timesharing.

Permanent Periodic Alimony

[2] Section 61.08(1), Florida Statutes (2006) states, "In a proceeding for dissolution of marriage, the court may grant alimony to either party, which alimony may be rehabilitative or permanent in nature.... In all dissolution actions, the court shall include findings of fact relative to the factors enumerated in subsection (2) *408 supporting an award or denial of alimony." Subsection (2) provides:

> (2) In determining a proper award of alimony or maintenance, the court shall consider all relevant economic factors, including but not limited to:
>
> (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, the nonmarital and the marital assets and liabilities distributed to each.
>
> (e) When applicable, the time necessary for either party to acquire sufficient 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 consider any other factor necessary to do equity and justice between the parties.

[3] [4] "In order to facilitate a meaningful appellate review of the trial court's alimony determination, it is incumbent upon the trial court to include specific findings of fact regarding the factors enumerated in section 61.08(2)(a)-(g)." *Geoghegan v. Geoghegan,* 969 So.2d 482, 485 (Fla. 5th DCA 2007) (citations omitted) (reversing an award of alimony where the court was "unable to reconcile how [the former wife's need] was determined by the trial court" due to a lack of factual findings). "The financial needs of one spouse and the ability of the other spouse to pay are the primary factors for the trial court to consider," and "the lack of adequate findings hampers meaningful appellate review." *Austin v. Austin,* 12 So.3d 314, 317–18 (Fla. 2d DCA 2009) (citations omitted). Furthermore, "Florida courts have held that eleven-year marriages fall within the grey area between short-term and long-term marriages. In grey-area marriages, there is no presumption for or against permanent alimony." *Welch v. Welch,* 951 So.2d 1017, 1019 (Fla. 5th DCA 2007) (citations omitted). *See also Brathwaite v. Brathwaite,* 58 So.3d 398, 401 (Fla. 1st DCA 2011) (finding 14–year marriage fell into the " 'gray area' where no presumption for or against alimony should be applied.' ").

Here, in the Final Judgment, the trial court found, "[appellant] shall pay to the Wife the sum of $1,000 per month as permanent periodic alimony beginning February 1, 2010 and continuing on the 1st day of each and every month thereafter until the death of either party, the Wife's remarriage, or further order of the Court." The trial court clearly failed to include the factual findings required by section 61.08, and the failure to do so precludes meaningful review.

Specifically, the court failed to make any findings concerning (1) the needs of the former wife; (2) appellant's ability to pay; (3) the former wife's need for permanent alimony; and (4) the former wife's earning capacity. Thus, it is unclear how the trial court reached the amount of $1,000 a month, as in *Geoghegan,* 969 So.2d at 485. *See also Segall,* 708 So.2d at 987; *Austin,* 12 So.3d at 317.

[5] Moreover, the parties had been married 11 years when appellant filed a petition for dissolution; therefore, this case falls into the "grey area" where there is no presumption for or against alimony. *Welch,* 951 So.2d at 1019. Thus, the factual findings are particularly important here. *Williams v. Williams,* 923 So.2d 606, 608 (Fla. 2d DCA 2006). The total lack of ***409** factual findings here precludes meaningful review. We reverse and remand for further findings.

Failure to Identify, Value, and Distribute Assets

Section 61.075(1), Florida Statutes (2006), requires the trial court "shall set apart to each spouse that spouse's nonmarital assets and liabilities, and in distributing the marital assets and liabilities between the parties, the court must begin with the premise that the distribution should be equal, unless there is a justification for an unequal distribution based on all relevant factors," including factors set forth in subsections (a) through (j). Pursuant to section 61.075(3), where a dissolution is contested, "any distribution of marital assets or marital liabilities shall be supported by factual findings in the judgment or order based on competent substantial evidence with reference to the factors enumerated in subsection (1)." Subsection (3) further requires,

The distribution of all marital assets ... shall include specific written findings of fact as to the following factors:

(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. (2006).

Appellant argues the trial court abused its discretion in distributing the assets by (1) failing to award appellant his nonmarital assets; and (2) failing to identify specifically the furniture and jewelry to which he was entitled.

1. Nonmarital Assets

[6] Appellant argues the trial court abused its discretion in failing to award him nonmarital personal property. In his motion for rehearing and on appeal, he argues he presented uncontroverted testimony that his grandmother's blue and yellow quilt, a Meucci pool cue stick, and guns were nonmarital property. The former wife does not challenge his assertion that the items are nonmarital, but she argues the court was not required to award them to appellant because she testified he was already in possession of these items.

In *Pridgeon v. Pridgeon,* 632 So.2d 257, 259–60 (Fla. 1st DCA 1994), the trial court failed to award a former wife a refrigerator and freezer she acquired prior to the marriage that were in the former husband's possession. The husband did not dispute that the items were nonmarital, but argued she had not proven that he refused to return the items to her, and the matter was "too trivial to be reviewed." *Id.* at 260. This court found section 61.075 "makes no exception for either appliances or assets deemed by one spouse to be not worthy of taking up the court's time," and directed the trial court to award the items to the former wife on remand. *Id.*

[7] Here, appellant correctly argues he presented evidence that the pool cue, guns from his father and grandfather, and quilt were given to him prior to the marriage. It is noted that the former wife argues the trial court was not required to award the items as nonmarital because she testified she did not have them. However, in *Pridgeon,* 632 So.2d at 259–60, this court rejected a similar argument that the former wife was not entitled to be awarded her nonmarital property because she had not ***410** proven the former husband was unwilling to return it to her. Under section 61.075(5), Florida Statutes (2006), property acquired prior to the marriage or by gift is nonmarital, regardless of where it is currently stored. Therefore, we reverse and remand for the trial court to address appellant's request for these items to be awarded as nonmarital.

2. Furniture and Jewelry

Appellant argues the trial court erred in failing to distribute the parties' furniture and jewelry, instead awarding each party $4,000 worth of furniture and $5,000 worth of jewelry generally. Appellant argues this failure makes him unable to determine which items he is entitled to recover from the former wife, who took most of the items. The former wife responds that she testified she did not take all of the furniture, and she did not take any of the jewelry, and the trial court was entitled to rely on her testimony.

The court's distribution of furniture and jewelry lacked the specific factual findings required by section 61.075(3), including the "[i]dentification of marital assets," the "designation of which spouse shall be entitled to each asset," and "[a]ny other findings necessary to advise the parties or the reviewing court of the trial court's rationale."

In *Kelley v. Kelley,* the Fifth District reversed where a trial court "divided the $48,500 in furniture, furnishings and appliances in the marital home by providing that the parties alternatively select items from the Husband's personal property list." 987 So.2d 1246, 1249 (Fla. 5th DCA 2008). The former husband argued this assignment was in error because it was not agreed to by the parties and precluded appellate review. *Id.* The Fifth District agreed, finding the trial court "erred because there were no specific findings for allocation of all of the personal property and no actual allocation." *Id.*

Similarly in *Shea,* this court reversed the portion of a dissolution final judgment "requiring the parties to compile a list of unspecified items of personal property to be divided between them, with distribution to be made by them on a 'pick and choose' basis." *Shea v. Shea,* 572 So.2d 558, 559 (Fla. 1st DCA 1990). This court reasoned, "such an award affords no basis for appellate review, thus requiring remand to the trial court for further consideration of the rights of the parties with respect to any items of personal property in the possession of either party at the time of final judgment as amended, as disclosed by the evidence of record, and not otherwise disposed of by the judgment and orders of the court." *Id.* The court distinguished that this "method of distribution may be satisfactory for certain property, such as household goods, where the parties agree." *Id.* at n. 1. *See also Burroughs v. Burroughs,* 921 So.2d 802, 804 (Fla. 1st DCA 2006) (reversing a dissolution judgment, finding "the lower court erred in directing the parties to divide their furniture and household items, despite the wife's request for the trial court to make such division in its judgment of dissolution").

[8] Here, however, the parties did not agree to divide the items between themselves. The former wife offered such a division, but appellant objected. Thus, pursuant to *Kelley* and

Shea, the trial court erred in failing to distribute the parties' furniture and jewelry.

Upon review of the record, it seems there is sufficient evidence for the trial court to make this determination. The parties presented evidence as to the identity and value of the furniture and jewelry in their pretrial catalogs and trial testimony. We, therefore, reverse and remand ***411** for the court to distribute the furniture and jewelry.

In all other respects, the trial court's decision is affirmed.

AFFIRMED in part, REVERSED and REMANDED in part.

LEWIS and WETHERELL, JJ., concur.

Parallel Citations

37 Fla. L. Weekly D372

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A. Parental Responsibility & Time-Sharing

"The court shall determine all matters relating to parenting and time-sharing of each minor child of the parties in accordance with the best interests of the child." ***§61.13(2)(c)***

I. Parental Responsibility

- "The court shall order that the parental responsibility for a minor child be shared by both parents unless the court finds that shared parental responsibility would be detrimental to the child." **§61.13(2)(c)2**
- Shared Parental Responsibility with Ultimate Decision-Making: "In ordering shared parental responsibility, the court may consider the expressed desires of the parents and may grant to one party the ultimate responsibility over specific aspects of the child's welfare or may divide those responsibilities between the parties based on the best interests of the child. Areas of responsibility may include education, health care, and any other responsibilities that the court finds unique to a particular family." **§61.13(2)(c)2.a.**

II. Parenting Plans

"A parenting plan approved by the court **must, at a minimum, describe in adequate detail** how the parents will share and be responsible for the daily tasks associated with the upbringing of the child; the time-sharing schedule arrangements that specify the time that the minor child will spend with each parent; a designation of who will be responsible for any and all forms of health care, school-related matters including the address to be used for school-boundary determination and registration, and other activities; and the methods and technologies that the parents will use to communicate with the child." **§61.13(2)(b)**

The Factors – §61.13(3) – Unlike alimony and equitable distribution, the Court is not required to make findings on each of the factors. *Bevil v. Carson,* 966 So.2d 1007 (Fla. 5th DCA 2007). *See also Castillo v. Castillo, 950 So.2d 527 (Fla. 4th DCA 2007).* However, the Court must make a finding supported by substantial competent evidence as to the best interests of the child.

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(a) The demonstrated capacity and disposition of each parent to facilitate and encourage a close and continuing parent-child relationship, to honor the time-sharing schedule, and to be reasonable when changes are required.

(b) The anticipated division of parental responsibilities after the litigation, including the extent to which parental responsibilities will be delegated to third parties.

(c) The demonstrated capacity and disposition of each parent to determine, consider, and act upon the needs of the child as opposed to the needs or desires of the parent.

(d) The length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity.

(e) The geographic viability of the parenting plan, with special attention paid to the needs of school-age children and the amount of time to be spent traveling to effectuate the parenting plan. This factor does not create a presumption for or against relocation of either parent with a child.

(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 demonstrated knowledge, capacity, and disposition of each parent to be informed of the circumstances of the minor child, including, but not limited to, the child's friends, teachers, medical care providers, daily activities, and favorite things.

(k) The demonstrated capacity and disposition of each parent to provide a consistent routine for the child, such as discipline, and daily schedules for homework, meals, and bedtime.

(l) The demonstrated capacity of each parent to communicate with and keep the other parent informed of issues and activities regarding the minor child, and the willingness of each parent to adopt a unified front on all major issues when dealing with the child.

(m) Evidence of domestic violence, sexual violence, child abuse, child abandonment, or child neglect, regardless of whether a prior or pending action relating

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to those issues has been brought. If the court accepts evidence of prior or pending actions regarding domestic violence, sexual violence, child abuse, child abandonment, or child neglect, the court must specifically acknowledge in writing that such evidence was considered when evaluating the best interests of the child.

(n) Evidence that either parent has knowingly provided false information to the court regarding any prior or pending action regarding domestic violence, sexual violence, child abuse, child abandonment, or child neglect.

(o) The particular parenting tasks customarily performed by each parent and the division of parental responsibilities before the institution of litigation and during the pending litigation, including the extent to which parenting responsibilities were undertaken by third parties.

(p) The demonstrated capacity and disposition of each parent to participate and be involved in the child's school and extracurricular activities.

(q) The demonstrated capacity and disposition of each parent to maintain an environment for the child which is free from substance abuse.

(r) The capacity and disposition of each parent to protect the child from the ongoing litigation as demonstrated by not discussing the litigation with the child, not sharing documents or electronic media related to the litigation with the child, and refraining from disparaging comments about the other parent to the child.

(s) The developmental stages and needs of the child and the demonstrated capacity and disposition of each parent to meet the child's developmental needs.

(t) Any other factor that is relevant to the determination of a specific parenting plan, including the time-sharing schedule.

III. Evidence

I. Potential Witnesses to Testify to Factors (not exhaustive):
   1. Parties
   2. Relatives
   3. Teachers
   4. School Counselors
   5. Therapists
   6. Psychologists
   7. Guardian Ad Litem
   8. Physicians

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9. Department of Children and Families Investigator
10. Law Enforcement
11. Child – Standards of Admissibility for Child Hearsay set forth in State v. Townsend, 635 So. 2d 949 (Fla. 1994).

B. **Child Support**

I. **§ 61.13(1)(a) – Orders Establishing Child Support**

1. All child support orders and income deduction orders entered on or after October 1, 2010, must provide:

a. For child support to terminate on a child's 18th birthday unless the court finds or previously found that s. 743.07(2) applies, or is otherwise agreed to by the parties;

b. A schedule, based on the record existing at the time of the order, stating the amount of the monthly child support obligation for all the minor children at the time of the order and the amount of child support that will be owed for any remaining children after one or more of the children are no longer entitled to receive child support; and

c. The month, day, and year that the reduction or termination of child support becomes effective.

Practice Notes:

- Unless otherwise agreed upon by the parties in a marital settlement agreement, alimony paid to a party must be included as income to the payee and deducted as income from the payor for purposes for the child support calculation.
- There are specific findings required by the Court for payment of private school and summer camp. *See Wilson v. Wilson,* 559 So.2d 698 (Fla. 1st DCA 1990).
- Court has discretion to 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.
- §61.13(11)(a) Florida Statutes provides that the court may adjust the total minimum child support award, or either or both parents' share of the total minimum child support award, based upon the following deviation factors:
    1. Extraordinary medical, psychological, educational, or dental expenses.

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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 has been regularly 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 fulfilling those needs will cause the support to exceed the presumptive amount established by the guidelines.
7. Total available assets of the obligee, obligor, and the child.
8. The impact of the Internal Revenue Service Child & Dependent Care Tax Credit, Earned Income Tax Credit, and dependency exemption and waiver of that exemption. The court may order a parent to execute a waiver of the Internal Revenue Service dependency exemption if the paying parent is current in support payments.
9. An application of the child support guidelines schedule that 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 parenting plan, a court-ordered time-sharing schedule, or a time-sharing arrangement exercised by agreement of the parties, such as where the child spends a significant amount of time, but less than 20 percent of the overnights, with one parent, thereby reducing the financial expenditures incurred by the other parent; or the refusal of a parent to become involved in the activities of the child.

- The Court must order payment of child support which varies from the guideline amount as provided in paragraph §61.13(11)(b) whenever any of the children are required by court order or mediation agreement to spend a substantial amount of

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time with either parent. This requirement applies to any living arrangement, whether temporary or permanent.

II. Health Insurance

"Each order for support shall contain a provision for health insurance for the minor child when health insurance is reasonable in cost and accessible to the child. Health insurance is presumed to be reasonable in cost if the incremental cost of adding health insurance for the child or children does not exceed 5 percent of the gross income, as defined in s. 61.30, of the parent responsible for providing health insurance." **§61.13(1)(b)**

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966 So.2d 1007
District Court of Appeal of Florida,
Fifth District.

Krista **BEVIL**, Appellant,
v.
Timothy Robert **CARSON**, Appellee.

No. 5D06-3173. | Oct. 12, 2007.

Synopsis

Background: Father of out of wedlock child filed a petition to establish paternity, child custody, and child support. The Circuit Court, Hernando County, Curtis J. Neal, J., granted father primary custody of child. Mother appealed.

Holdings: The District Court of Appeal, Thompson, J., held that:

[1] evidence was sufficient to support award of primary custody of child to father, and

[2] order requiring mother to bear all costs associated with transportation for visitation with child was an abuse of discretion.

Affirmed in part, reversed in part, and remanded.

West Headnotes (3)

[1] **Children Out-Of-Wedlock**
Particular Disputes

Evidence was sufficient to support award of primary custody of out-of-wedlock child to father; mother had returned to school and had been unemployed for almost one year, she did not present any information as to future employment possibilities, and father's home was stable.

Cases that cite this headnote

[2] **Children Out-Of-Wedlock**
Visitation and Joint Custody

Order requiring mother to bear all costs associated with transportation for visitation with out-of-wedlock child was an abuse of discretion; when the trial court addressed the issue of child support, over which it had reserved jurisdiction, it was required to consider the respective incomes of the parties and reconsider the visitation expense issue.

1 Cases that cite this headnote

[3] **Child Custody**
Transporting and Transferring Child

Child support guidelines provide that transportation expenses, like other child rearing costs, should be shared by the parents in accordance with their financial means.

1 Cases that cite this headnote

Attorneys and Law Firms

***1008** Rhonda Portwood, Inverness, for Appellant.

No Appearance for Appellee.

Opinion

THOMPSON, J.

Krista **Bevil** ("**Bevil**") appeals the trial court's final judgment of paternity awarding Timothy Robert **Carson** ("**Carson**") primary residential custody of J.C. and ordering **Bevil** to bear all transportation costs associated with her visitation schedule. We affirm the order granting **Carson** primary residential custody, but reverse the requirement that **Bevil** pay all transportation costs.

J.C. was born with spina bifida, which required surgery and medical attention. **Bevil** and **Carson** lived together for four years after J.C.'s birth before they separated. **Bevil** subsequently entered a tumultuous marriage and had a second child. The turmoil in her life resulted in two DCF investigations. **Bevil's** husband had been arrested for several crimes, including domestic violence against her. J.C. once witnessed **Bevil's** husband drag her down a staircase. A dependency proceeding ensued in which **Bevil** stipulated

to J.C.'s placement with **Carson**. She testified that because she worked long hours, had multiple surgeries, and a new child, it would be in J.C.'s best interest to live with **Carson**. **Carson** subsequently filed a petition to establish paternity, child custody, and child support and an emergency motion for order preventing removal of minor child from jurisdiction/ motion for temporary custody.

During the evidentiary hearing, the trial court heard testimony from **Bevil**, **Carson**, and their witnesses attesting to **Bevil** and **Carson's** treatment of J.C. and their parenting ability. Both parents presented testimony about the other's shortcomings. The trial court entered a detailed order granting **Carson** primary custody.

***1009** **Bevil** contends that the trial court abused its discretion by awarding **Carson** primary residential custody of J.C. without considering the statutory criteria of section 61.13(3), Florida Statutes (2006). Although **Bevil** concedes that the trial court is not required to make specific written findings of fact as to each factor listed in section 61.13(3), she argues the trial court is required to evaluate each factor because of policy reasons. However, this court stated in *Knifley v. Knifley,* 944 So.2d 1136, 1137 (Fla. 5th DCA 2006), that:

> the statute [61.13(3)] does not require factual findings as to each enumerated factor. It is sufficient for a trial judge to make a finding as to the best interests of the minor child-provided such finding is supported by substantial competent evidence. *Duchesneau v. Duchesneau,* 692 So.2d 205 (Fla. 5th DCA 1997).

This court also declined to require trial judges to make detailed findings in disputed custody cases and suggested that policy arguments for such a requirement be directed to the Florida legislature. *Id.* Here, the record and order reflect that the court considered the required statutory factors.

[1] Further, **Bevil** argues the trial court's decision to award primary residential custody to **Carson** was not supported by substantial, competent evidence. The trial court's ultimate consideration is the best interest of the child. *Duchesneau v. Duchesneau,* 692 So.2d 205, 206 (Fla. 5th DCA 1997). If a finding is made on the record to sustain a custody award, the appellate court considers whether there is substantial competent evidence to support the award. *Id.* **Bevil** cites her 2005 gross income of $70,000 as a reason she should be designated primary residential custodian. However, she had returned to school and had been unemployed for almost a year. At the time of the June 2006 hearing, she was three days from completing her educational program and did not have any information concerning her future employment possibilities or salary potential. The evidence established that **Carson's** home was a stable environment for the child, while **Bevil's** home and lifestyle was in a transitional phase due to her health, career change, and uncertain employment prospects. In light of these findings, the trial court based its ruling on substantial, competent evidence and did not abuse its discretion in awarding **Carson** primary residential custody.

[2] **[3]** Finally, **Bevil** contends that the trial court erred when it ordered her to bear all transportation costs, time, and travel associated with her visitation schedule. She contends that these costs should be borne equally by both parents. In a marital dissolution action, the expense of transporting J.C. for visitation is a childrearing expense like any other. *Drakulich v. Drakulich,* 705 So.2d 665, 667 (Fla. 3d DCA 1998). Child support guidelines provide that transportation expenses, like other childrearing costs, should be shared by the parents in accordance with their financial means. *McKenna v. Fisher,* 778 So.2d 498, 499 (Fla. 5th DCA 2001). Here, the trial court did not consider the parents' respective ability to contribute to transportation costs.

At the time the trial court entered the paternity judgment, it reserved jurisdiction to determine child support because it had no information concerning **Bevil's** income. **Bevil** had been contributing nothing to J.C.'s support. Once the court has information concerning **Bevil's** income, it may then enter the appropriate child support award and reconsider the visitation expense issue.

We AFFIRM the award of primary residential custody to **Carson**, and REMAND ***1010** to consider visitation expense and escort duty in conjunction with the child support calculation.

PALMER, C.J., and LAWSON, J., concur.

Parallel Citations

32 Fla. L. Weekly D2456

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950 So.2d 527
District Court of Appeal of Florida,
Fourth District.

Reynaldo CASTILLO, Appellant,
v.
Ashley CASTILLO, Appellee.

No. 4D06-1833. | March 14, 2007.

Synopsis

Background: In context of divorce proceeding, the Circuit Court, Fifteenth Judicial District, Palm Beach County, John L. Phillips, J., designated mother as child's primary residential parent. Father appealed.

[Holding:] The District Court of Appeal, Warner, J., held that substantial evidence supported trial court's decision designating mother as child's primary residential parent.

Affirmed.

West Headnotes (6)

[1] **Child Custody**
⇦ Discretion

Child Custody
⇦ Discretion

Trial court exercises broad discretion in making a child custody determination, and its decision is reviewed for a clear showing of an abuse of discretion.

1 Cases that cite this headnote

[2] **Child Custody**
⇦ Questions of Fact and Findings of Court

Trial court "abuses its discretion" with respect to a child custody determination only where no reasonable person would take the view adopted by the trial court.

2 Cases that cite this headnote

[3] **Child Custody**
⇦ Welfare and Best Interest of Child

Decisions affecting child custody require a careful consideration of the best interests of the child. West's F.S.A. § 61.13(3).

1 Cases that cite this headnote

[4] **Child Custody**
⇦ Decision and Findings by Court

Trial court is not required to make specific written findings in rendering a child custody decision.

1 Cases that cite this headnote

[5] **Child Custody**
⇦ "Primary Parent"

Substantial evidence supported trial court's decision designating mother as child's primary residential parent, although evidence was conflicting; trial court, as the finder of fact, weighed disputed evidence and made credibility determinations and, although trial court did not make specific written findings regarding its analysis of statutory factors to be considered in determining child custody, trial court stated that it had considered statutory criteria and concluded that mother should be child's primary residential parent. West's F.S.A. § 61.13.

1 Cases that cite this headnote

[6] **Child Custody**
⇦ Questions of Fact and Findings of Court

Appellate court, in reviewing trial court's child custody decision, will not disturb the decision simply because the losing party takes a different view of disputed evidence.

1 Cases that cite this headnote

Attorneys and Law Firms

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*528 Orlando Gonzalez of Law Offices of Cameron, Davis & Gonzalez, P.A., West Palm Beach, for appellee.

Opinion

WARNER, J.

In the final judgment of dissolution of marriage, the court designated the mother as the primary residential parent. The father appeals, claiming that the court did not carefully consider the applicable statutory factors and that its decision was not supported by competent substantial evidence. Because there is competent substantial evidence to support the trial court, and there is no requirement that the trial court make specific written findings in a custody decision, we affirm.

[1] [2] [3] [4] The trial court exercises broad discretion in making a child custody determination, and its decision is reviewed for a clear showing of an abuse of discretion. *Adair v. Adair,* 720 So.2d 316, 317 (Fla. 4th DCA 1998). Under this standard, a trial court abuses its discretion only where no reasonable person would take the view adopted by the trial court. *Canakaris v. Canakaris,* 382 So.2d 1197, 1203 (Fla.1980). "Decisions affecting child custody require a careful consideration of the best interests of the child." *Andrews v. Andrews,* 624 So.2d 391, 392 (Fla. 2d DCA 1993); § 61.13(3), Fla. Stat. (2005). However, section 61.13(3) does not require the trial court to make specific written findings in a custody decision. *See Murphy v. Murphy,* 621 So.2d 455, 456-57 (Fla. 4th DCA 1993).

[5] [6] In this case, while the trial court did not make specific written findings regarding its analysis of the factors of section 61.13, the trial court stated that it had considered the criteria of section 61.13 and concluded that the mother should be the primary residential parent. The trial court, as the finder of fact, weighed disputed evidence and made credibility determinations. There was competent, substantial evidence to support its determination, although the evidence was conflicting. We will not disturb its decision simply because the losing party takes a different view of disputed evidence. *See Adair,* 720 So.2d at 317 ("Despite a conflict in the evidence, an appellate court will not disturb the trial court's custody decision unless there is no substantial competent evidence to support that decision.").

Affirmed.

GROSS and TAYLOR, JJ., concur.

Parallel Citations

32 Fla. L. Weekly D702

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635 So.2d 949
Supreme Court of Florida.

STATE of Florida, Petitioner,
v.
Jack Timothy **TOWNSEND**, Respondent.

No. 81263. | April 21, 1994.

On remand from the District Court of Appeal, 556 So.2d 817, defendant was convicted in the Circuit Court, Brevard County, of sexual abuse of a child, and he appealed. The District Court of Appeal reversed, 613 So.2d 534, and certified question. The Supreme Court, Overton, J., held that: (1) requirements of statute creating child victim exception to hearsay rule are sufficient to meet requirements of confrontation clauses; (2) determination that child victim's statement is clearly reliable is necessary to avoid violating defendant's confrontation and due process rights; (3) incompetent witness is unavailable witness for purposes of admitting hearsay statement; (4) requirement for admission of hearsay statement of child victim that other corroborating evidence exist is in addition to the requirement that the hearsay statement be reliable; (5) expert is prohibited from commenting to fact finder as to truthfulness or credibility of witness' statements; and (6) errors in court's failure to make adequate findings for admission of child victim's hearsay statement and in admitting psychologist's testimony concerning child's credibility required reversal.

Certified question answered in affirmative, result approved, and cause remanded.

McDonald, J., filed a concurring opinion.

West Headnotes (24)

[1] **Constitutional Law**
Hearsay

Criminal Law
Out-of-court statements and hearsay in general

Determination that child victim's statement is clearly reliable is necessary to avoid violating defendant's confrontation and due process rights. U.S.C.A Const.Amends. 6, 14; West's F.S.A. § 90.803(23).

3 Cases that cite this headnote

[2] **Infants**
Other hearsay exceptions; trustworthiness and reliability

For hearsay statement to be admitted under child victim exception, source of information through which statement was reported must indicate trustworthiness and time, content, and circumstances of the statement must reflect that statement provides sufficient safeguards of reliability. West's F.S.A. § 90.803(23).

11 Cases that cite this headnote

[3] **Criminal Law**
Statements of persons not available as witnesses

In order for declarant to be "unavailable" because of infirmity, so as to allow admission of hearsay statement, the infirmity need not arise after the statement was made. West's F.S.A. § 90.804(1)(d).

4 Cases that cite this headnote

[4] **Criminal Law**
Hearsay in General

It is the particularized guarantees of trustworthiness that ensure the reliability of a statement, not the competency of the witness making the statement. West's F.S.A. § 90.804(1)(d).

3 Cases that cite this headnote

[5] **Criminal Law**
Statements of persons not available as witnesses

Incompetent witness is unavailable witness for purposes of admitting hearsay statement. West's F.S.A. § 90.804(1)(d).

Cases that cite this headnote

[6] **Infants**
⇐ Unavailability to testify

Infants
⇐ Other hearsay exceptions; trustworthiness and reliability

If child victim is determined to be incompetent to testify, victim is "unavailable" for purposes of admitting hearsay statement, but judge may look to competency of victim in determining whether hearsay statement is otherwise admissible; competency of victim is factor that should be considered in determining trustworthiness and reliability. West's F.S.A. §§ 90.803(23), 90.804(1)(d).

6 Cases that cite this headnote

[7] **Criminal Law**
⇐ Out-of-court statements and hearsay in general

Infants
⇐ Child hearsay

Requirements of statute creating child victim exception to hearsay rule are sufficient to meet requirements of confrontation clauses of **State** and Federal Constitutions. U.S.C.A. Const.Amend. 6; West's F.S.A. Const. Art. 1, § 16; West's F.S.A. § 90.803(23).

3 Cases that cite this headnote

[8] **Infants**
⇐ Other hearsay exceptions; trustworthiness and reliability

Infants
⇐ Necessity and sufficiency of corroboration

Requirement for admission of hearsay statement of child victim that other corroborating evidence exists is in addition to the requirement that the hearsay statement, in and of itself, be reliable. West's F.S.A. § 90.803(23).

1 Cases that cite this headnote

[9] **Infants**
⇐ Necessity and sufficiency of corroboration

Requirement of other corroborating evidence for admission of hearsay statement of child victim assures that defendant will not be convicted solely on the basis of the hearsay testimony. West's F.S.A. § 90.803(23).

3 Cases that cite this headnote

[10] **Infants**
⇐ Other hearsay exceptions; trustworthiness and reliability

Infants
⇐ Necessity and sufficiency of corroboration

In determining whether to admit hearsay statement of child victim, court must determine whether statement is reliable and from a trustworthy source without regard to corroborating evidence; if it is, court must determine whether corroborating evidence is present; if answer to either question is "no," statement is inadmissible. West's F.S.A. § 90.803(23).

14 Cases that cite this headnote

[11] **Criminal Law**
⇐ Out-of-court statements and hearsay in general

Mere conclusion that child victim's statements are reliable or mere restatement of statute in boilerplate fashion is insufficient to meet requirements of confrontation clauses for admission of child's hearsay statement. U.S.C.A. Const.Amend. 6; West's F.S.A. Const. Art. 1, § 16; West's F.S.A. § 90.803(23).

6 Cases that cite this headnote

[12] **Infants**
⇐ Other hearsay exceptions; trustworthiness and reliability

In determining reliability of child victim's hearsay statement, court may consider statement's spontaneity, whether it was made at first opportunity, whether it was elicited in response to questions, child's mental **state** when abuse was reported, terminology used by child, motive to fabricate, ability of child to distinguish

between reality and fantasy, vagueness of accusations, possibility of improper influence, and contradictions. West's F.S.A. § 90.803(23).

10 Cases that cite this headnote

[13] **Criminal Law**
⇦ Reception of evidence

Infants
⇦ Child hearsay in general; procedure for admission

Court which merely listed hearsay statements of child victim and summarily concluded that time, content, and circumstances of statements were sufficient to reflect that they were reliable did not make adequate findings before admitting statements, and failure was reversible error. U.S.C.A. Const.Amend. 6; West's F.S.A. Const. Art. 1, § 16; West's F.S.A. § 90.803(23).

9 Cases that cite this headnote

[14] **Criminal Law**
⇦ Credibility, Veracity, or Competency

Criminal Law
⇦ Children

Witnesses
⇦ Age and maturity of mind

Expert may testify as to child's ability to comprehend the difference between telling the truth and telling a lie for purposes of determining whether child is competent to testify at trial, but expert is prohibited from commenting to fact finder as to truthfulness or credibility of witness' statements in general.

6 Cases that cite this headnote

[15] **Criminal Law**
⇦ Children

Psychologist should not have been permitted to testify as to credibility of child victim whose hearsay statement was admitted. West's F.S.A. § 90.803(23).

2 Cases that cite this headnote

[16] **Criminal Law**
⇦ Discretion

Trial court has broad discretion in determining range of subjects on which expert will be permitted to testify.

1 Cases that cite this headnote

[17] **Criminal Law**
⇦ Battered or abused children

If relevant, medical expert may testify as to whether, in expert's opinion, behavior of child is consistent with behavior of child who has been sexually abused. West's F.S.A. §§ 90.702, 90.703.

6 Cases that cite this headnote

[18] **Criminal Law**
⇦ Battered or abused children

Great care must be taken by trial court in determining what testimony of expert is admissible in sex abuse case because jury often places great emphasis on testimony of experts in those cases.

4 Cases that cite this headnote

[19] **Infants**
⇦ Other hearsay exceptions; trustworthiness and reliability

When expert testifies as to how child behaved with anatomically correct dolls, expert is repeating communications of child and court must evaluate testimony under requirements of child victim exception to hearsay rule. West's F.S.A. § 90.803(23).

Cases that cite this headnote

[20] **Criminal Law**
⇦ Destruction or Loss of Information

Infants
⇦ Child hearsay in general; procedure for admission

Contacts between child and expert evaluating child for sexual abuse should be videotaped to ensure trustworthiness of communications and to ensure that expert did not lead child during evaluation.

Cases that cite this headnote

[21] **Infants**

Other hearsay exceptions; trustworthiness and reliability

Statements of identity are not admissible in child sex abuse case absent reliability determination under the child victim exception to the hearsay rule. West's F.S.A. § 90.803(23).

2 Cases that cite this headnote

[22] **Criminal Law**

Sufficiency and Scope of Motion

Criminal Law

Cases and questions reserved or certified

Where issue was raised in pretrial motion and had been considered by district court on **state's** pretrial appeal, issue was adequately preserved and could be considered by district court in posttrial appeal and was properly certified to Supreme Court.

6 Cases that cite this headnote

[23] **Criminal Law**

Reception of evidence

Court's failure to make sufficient findings under the child victim statement statute is not fundamental error. West's F.S.A. § 90.803(23).

6 Cases that cite this headnote

[24] **Criminal Law**

Reception of evidence

Criminal Law

Opinion evidence

Errors in court's failure to make adequate findings for admission of child victim's hearsay statement and in admitting psychologist's testimony concerning child's credibility required reversal, in view of limited amount of nonhearsay evidence. U.S.C.A. Const.Amend. 6; West's F.S.A. Const. Art. 1, § 16; West's F.S.A. § 90.803(23).

1 Cases that cite this headnote

Attorneys and Law Firms

***951** Robert A. Butterworth, Atty. Gen., and Barbara C. Davis and Kellie A. Nielan, Asst. Attys. Gen., Daytona Beach, for petitioner.

James G. Kontos of the Law Firm of Daniel S. Ciener, Merritt Island, for respondent.

Opinion

OVERTON, Justice.

[1] We have for review ***Townsend v. State***, 613 So.2d 534 (Fla. 5th DCA 1993) (***Townsend II***), which concerns the admissibility of a two-year-old's hearsay statements in this child-sexual-abuse case. This issue involves a relatively new area of the law in which the legislature and the courts are attempting to provide a means for admitting a child's hearsay testimony at trial, particularly in child abuse cases. Before the enactment of the child hearsay exception at issue in this case, section 90.803(23), Florida Statutes (1987), the hearsay testimony of a child was generally excluded in criminal trials. Today, this type of testimony is allowed only after a determination has been made that the testimony is clearly reliable. Such a determination is necessary to avoid violating a defendant's constitutional rights of confrontation and due process.

In the instant case, the Fifth District Court of Appeal succinctly articulated the difficulty of admitting this type of testimony ***952** by noting that the respondent "is either guilty of one of the most heinous offenses enjoined by civilized society—the sexual abuse of his own child—or is the hapless victim of the most vicious child manipulation coming in the midst of a bitter and recriminating domestic battle." *Id.* at 534–35. In its decision, the district court found the child's testimony to be inadmissible, granted a new trial, and certified the following question as one of great public importance:

> DOES A FINDING OF INCOMPETENCY TO TESTIFY

> BECAUSE ONE IS UNABLE TO RECOGNIZE THE DUTY AND OBLIGATION TO TELL THE TRUTH SATISFY THE LEGISLATIVE "TESTIFY OR BE UNAVAILABLE" REQUIREMENT OF SECTION 90.803(23)(a)(2)?

Id. at 538. We have jurisdiction pursuant to article V, section 3(b)(4), of the Florida Constitution. For the reasons expressed, we answer the question in the affirmative. Accordingly, we disagree with the district court's holding in ***Townsend*** *II* that the child was not "unavailable" for purposes of section 90.803(23)(a)(2), Florida Statutes (1987), the child hearsay exception. Given the other errors in this case, however, we approve the district court's decision to remand this cause for a new trial.

This case concerns Jack Timothy **Townsend's** conviction of sexual battery on his two-year-old daughter in 1988. At the time of the incident in question, **Townsend** and the child's mother had separated and divorce proceedings were in progress, and the child was living with her mother and her maternal grandparents but was spending alternate weekends with **Townsend**. On several occasions, the child allegedly told her mother that "Papa stuck his finger in my [vagina]." Thereafter, the mother reported the child's allegations to the Department of Health and Rehabilitative Services. The Department of Health and Rehabilitative Services then conducted an interview with the child and a medical doctor examined the child. Subsequently, charges were filed against **Townsend**.

Before trial, the **State** and the defense stipulated that the child was incompetent to testify under section 90.603, Florida Statutes (1987), due to her age. [1] After the **State** subsequently filed a notice of intent to introduce the child's statements as hearsay evidence, the trial judge determined that the child was not "unavailable" under section 90.803(23)(a)(2) because the child's incompetency met none of the definitions of unavailability contained in section 90.804, Florida Statutes (1987) (incorporated by reference into section 90.803(23)). The **State** appealed this ruling to the Fifth District Court of Appeal. The district court, relying in part on this Court's decision in *Perez v.* ***State,*** 536 So.2d 206 (Fla.1988), *cert. denied,* 492 U.S. 923, 109 S.Ct. 3253, 106 L.Ed.2d 599 (1989), ruled that the child was in fact "unavailable" under the "existing physical or mental illness or infirmity" exception contained in section 90.804(1) because of the child's age and lack of understanding as to the duty or obligation to tell the truth. ***State*** *v.* ***Townsend,*** 556 So.2d 817 (Fla. 5th DCA 1990) (***Townsend*** *I*).

After remand, the trial judge conducted a hearing pursuant to section 90.803(23) to determine whether the child's hearsay statements were sufficiently reliable to allow the admission of those statements at trial. In determining which statements were admissible, the trial judge listed each statement to be considered and summarily concluded, without explanation or factual analysis, that the circumstances surrounding most of the statements showed them to be trustworthy. The case then proceeded to trial.

At trial, the **State** presented a number of witnesses who testified as to hearsay statements made by the child during the year following the alleged abuse. Additionally, the medical doctor who examined the child after the alleged abuse testified that the ***953** child's hymen was damaged in a manner consistent with penetration and that, in his opinion, the penetration was probably the result of sexual abuse. On cross examination, however, the doctor admitted that the child could have caused the damage herself.

A psychologist, who began treating the child nine months after the alleged abuse, testified as to a number of statements made by the child regarding the alleged abuse. Additionally, this psychologist testified that, in her opinion, the child had been "sexually over-stimulated" by an adult and that the child's statements to her were truthful. The psychologist also testified, based on her observations and based on statements she elicited from the child through the use of anatomical dolls, to facts indicating that **Townsend** was the person who had sexually abused the child. Significantly, other testimony was presented reflecting that a great deal of animosity existed between **Townsend** and the child's mother and maternal grandmother.

Townsend was convicted as charged. **Townsend** appealed the conviction to the Fifth District Court of Appeal. The district court issued a divided en banc decision in which the majority receded from ***Townsend*** *I,* holding that its reliance on *Perez* in ***Townsend*** *I* was misplaced and that incompetency under section 90.603 does not render a witness unavailable for purposes of section 90.803(23). The district court also noted that the admission of the child's statements at trial may have violated **Townsend's** rights under the confrontation clause of the Sixth Amendment of the United **States** Constitution. Based on its ruling as to the unavailability issue, the

district court determined that the child's statements had been erroneously admitted as hearsay evidence at trial, and the district court remanded the case for a new trial. The district court directed the trial court to revisit the issue of whether the child could be "unavailable" because of severe mental or emotional harm rather than incompetency and, if the child was found to be unavailable for that reason, to make specific factual findings as to whether the child's statements were reliable. In rendering its decision, the district court certified the aforementioned question to this Court, seeking to determine whether the two-year-old child in this case was "unavailable," as that term is defined in section 90.804, for purposes of admitting the child's hearsay statements under section 90.803(23).

Child Hearsay—Allowable Under a Special Hearsay Exception

[2] Section 90.803(23), the child-sexual-abuse-hearsay exception, was enacted to enable *trustworthy* and *reliable* statements not covered under any other hearsay exception to be admitted in court. *Fla.S.Comm. on Judiciary–Civ.*, tape recording of proceedings (May 1, 1985) (Florida **State** Archives) (comments of Florida **State** University Law Professor Charles Ehrhardt). That section provides:

> (23) HEARSAY EXCEPTION; STATEMENT OF CHILD VICTIM OF SEXUAL ABUSE OR SEXUAL OFFENSE AGAINST A CHILD.—
>
> (a) *Unless the source* of information or the method or circumstances by which the statement is reported *indicates a lack of trustworthiness,* an out-of-court statement made by a child victim with a physical, mental, emotional, or developmental age of 11 or less describing any act of child abuse or neglect, sexual abuse, or any other offense involving an unlawful sexual act, contact, intrusion, or penetration performed in the presence of, with, by, or on the declarant child, not otherwise admissible, is admissible in evidence in any civil or criminal proceeding if:
>
> 1. *The court finds* in a hearing conducted outside the presence of the jury *that the time, content, and circumstances of the statement provide sufficient safeguards of reliability.* In making its determination, the court may consider the mental and physical age and maturity of the child, the nature and duration of the abuse or offense, the relationship of the child to the offender, the reliability of the assertion, the reliability of the child victim, and any other factor deemed appropriate; and
>
> 2. The child either:
>
> a. Testifies; or
>
> b. Is unavailable as a witness, provided that there is other corroborative evidence ***954** of the abuse or offense. Unavailability shall include a finding by the court that the child's participation in the trial or proceeding would result in a substantial likelihood of severe emotional or mental harm, in addition to findings pursuant to s. 90.804(1).
>
> (b) In a criminal action, the defendant shall be notified no later than 10 days before trial that a statement which qualifies as a hearsay exception pursuant to this subsection will be offered as evidence at trial. The notice shall *include a written statement of the content of the child's statement, the time at which the statement was made, the circumstances surrounding the statement which indicate its reliability,* and such other particulars as necessary to provide full disclosure of the statement.
>
> (c) *The court shall make specific findings of fact, on the record, as to the basis for its ruling* under this subsection.

(Emphasis added). For a hearsay statement to be admitted under this section, the statement must meet two specific reliability requirements: (1) the *source* of the information through which the statement was reported *must indicate trustworthiness;* and (2) the *time, content, and circumstances* of the statement must reflect that the statement *provides sufficient safeguards of reliability.* The legislature established these strict trustworthiness and reliability requirements to balance the need for reliable out-of-court statements of child abuse victims against the confrontation and due process rights of those accused of child abuse. *Weatherford v.* ***State,*** 561 So.2d 629 (Fla. 1st DCA 1990); *Salter v.* ***State,*** 500 So.2d 184 (Fla. 1st DCA 1986). Specifically, the first requirement was added to ensure a careful examination of the source, particularly when, as in the instant case, the circumstances involve marital discord between the child's parents and the possibility exists that one parent might be using the child to seek some advantage over the other parent. Charles W. Ehrhardt, *Florida Evidence* § 803.23, at 652 (1993 ed.). Further, in enacting this exception to the hearsay rule, the legislature was making clear that the admission of a child victim's hearsay statements under this exception would not be allowed absent clear indications of reliability. As discussed later in this opinion, the reliability requirements of this statute are essential in assuring the constitutionality of this exception.

The Unavailability Requirements of Sections 90.803(23) and 90.804(1)

In addition to these strict reliability requirements, the hearsay statement of a child victim is considered admissible under section 90.803(23) only if the child testifies or is judicially found to be unavailable as a witness. A child is "unavailable" as a witness if the court finds, based on expert testimony, that a substantial likelihood exists that the child will suffer severe emotional or mental harm if the child testifies *or* finds that the child falls within one of the definitions for unavailability set forth in section 90.804(1).

Section 90.804(1) provides that a witness is unavailable for purposes of admitting a hearsay statement if the witness:

> (a) Is exempted by a ruling of a court on the ground of privilege from testifying concerning the subject matter of his statement;
>
> (b) Persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so;
>
> (c) Has suffered a lack of memory of the subject matter of his statement so as to destroy his effectiveness as a witness during the trial;
>
> (d) Is unable to be present or to testify at the hearing because of death or *because of then existing physical* or mental illness or *infirmity;* or
>
> (e) Is absent from the hearing, and the proponent of his statement has been unable to procure his attendance or testimony by process or other reasonable means.

(Emphasis added.)

As previously indicated, the child's hearsay statements in this case were admitted based on the district court's ruling in ***Townsend I*** that the child was "unavailable" under section 90.804(1)(d) due to incompetency. In ***Townsend II,*** however, the district court reversed itself, finding that incompetency was not the equivalent of unavailability for purposes of admitting the child's statements under ***955** section 90.803(23), and, as such, that the child's statements should not have been admitted at trial. The district court reached this conclusion by determining that the reference in section 90.804(1) to " '*then existing* ... mental ... infirmity' " requires that the mental condition of the declarant must have arisen *after* the purported hearsay statement was made. The district court also noted that incompetency is not a specifically enumerated definition for unavailability under section 90.804(1). In making these findings, the district court distinguished this Court's discussion of competency and unavailability in *Perez.*

In *Perez,* we specifically **stated** that a child need not be found competent to testify before that child's out-of-court statements could be found to bear sufficient safeguards of reliability to enable admission of that statement at trial.

> The fact that a child is incompetent to testify at trial according to section 90.603(2) does not necessarily mean that the child is unable to **state** the truth. The requirement that the trial court find that the time, content, and circumstances of the statement provide sufficient safeguards of reliability furnishes a sufficient guarantee of trustworthiness of the hearsay statement, obviating the necessity that the child understand the duty of a witness to tell the truth.

Perez, 536 So.2d at 211. In *Perez,* however, we did not specifically address whether incompetency fell within any of the definitions of unavailability set forth in section 90.804(1). It was on that issue that the district court distinguished *Perez* from the instant case. Consequently, we now address that issue.

[3] **[4]** **[5]** **[6]** As noted by the district court, section 90.804(1)(d) provides that a declarant is unavailable if the declarant cannot testify because of a "then existing physical or mental illness or infirmity." Although the "then existing" language of the statute does refer to an infirmity existing at the time the witness is to testify, we find, contrary to the district court's interpretation, that an infirmity under that section need not arise after a hearsay statement was made in order for the declarant to be "unavailable." The district court's evaluation of the statute assumes that the witness must have been competent at the time the hearsay statements were made; however, as we **stated** in *Perez,* it is the particularized guarantees of trustworthiness that ensure the reliability of a statement, not the competency of the witness making the statement. Federal and other **state** courts that have considered similar statutory provisions overwhelmingly agree. *See Gregory v. North Carolina,* 900 F.2d 705, 707 n. 6 (4th Cir.) (incompetency equals unavailability under

rule 804 of the Federal Evidence Code), *cert. denied,* 498 U.S. 879, 111 S.Ct. 211, 112 L.Ed.2d 171 (1990); *United **States** v. Dorian,* 803 F.2d 1439 (8th Cir.1986) (witness who testified but was too young and frightened to be subjected to meaningful direct examination was unavailable for all practical purposes); *Ellison v. Sachs,* 769 F.2d 955, 957 n. 4 (4th Cir.1985) (victim, although present, was unavailable because she was declared incompetent given her young age); *Haggins v. Warden,* 715 F.2d 1050 (6th Cir.1983) (because the declarant was ruled incompetent to testify, she was clearly unavailable under the Federal Evidence Code), *cert. denied,* 464 U.S. 1071, 104 S.Ct. 980, 79 L.Ed.2d 217 (1984); *Government of Virgin Islands v. Riley,* 754 F.Supp. 61, 64 (D.V.I.1991) (even though incompetency is not an enumerated basis for unavailability under rule 804, an incompetent witness is unavailable for purposes of that provision; "[t]he literal language of rule 804(a) suggests that the definition of unavailability is illustrative rather than exhaustive"); *People v. Bowers,* 801 P.2d 511 (Colo.1990) (a finding that a child is incompetent to testify does not necessarily impair any particularized guarantees of reliability that otherwise inhere in the child's hearsay statement); *People v. Hart,* 214 Ill.App.3d 512, 158 Ill.Dec. 103, 573 N.E.2d 1288 (child who was deemed incompetent to testify due to age was unavailable to testify within meaning of statute), *abrogated on other grounds, People v. Schott,* 145 Ill.2d 188, 164 Ill.Dec. 127, 582 N.E.2d 690 (1991); ***State** v. Lanam,* 459 N.W.2d 656 (Minn.1990) (text of federal and **state** provisions are almost identical and, under the statute, incompetency equals unavailability), *cert. denied,* 498 U.S. 1033, 111 S.Ct. 693, 112 L.Ed.2d 684 (1991); ***956 *State** v. Deanes,* 323 N.C. 508, 374 S.E.2d 249 (1988) (the unavailability of a child witness in a sexual abuse trial due to incompetency adequately demonstrates the necessity for using the child's hearsay declaration), *cert. denied,* 490 U.S. 1101, 109 S.Ct. 2455, 104 L.Ed.2d 1009 (1989); *but see **State** v. Ryan,* 103 Wash.2d 165, 691 P.2d 197 (1984) (unavailability and incompetence are not the same because they serve different purposes; if a declarant is incompetent, then the statement is too unreliable). We agree with the majority position and find that an incompetent witness is an unavailable witness within the meaning of section 90.804(1)(d)'s existing mental infirmity requirement. We conclude that a finding of incompetency to testify because one is unable to recognize the duty and obligation to tell the truth satisfies the "testify or be unavailable" requirement of section 90.803(23). This does not mean, however, that a trial judge should not look to the competency of the child in determining whether the hearsay statements of the child are otherwise admissible. To the contrary, as explained in the discussion that follows, the competency of the child is a factor that should be considered in determining the trustworthiness and reliability, and thus the admissibility, of hearsay statements attributable to the child. Having answered the certified question in the affirmative, we turn to the confrontation clause concerns raised by **Townsend** and the district court.

Constitutional Confrontation Clause Requirements

Townsend argues that, even if we answer the certified question in the affirmative, he is still entitled to a new trial because the admission of the child's statements violated his right to confrontation under the Sixth Amendment to the United **States** Constitution and article I, section 16, of the Florida Constitution. Essentially two issues arise in this case under the confrontation clause: (1) whether the requirements of section 90.803(23) are sufficient to comply with the confrontation clause requirements of the federal and Florida constitutions; and (2) whether the trial court properly adhered to those requirements in ruling on the admissibility of the child's hearsay statements.

[7] The first issue was addressed by this Court in *Perez,* and we reaffirm that decision here. In *Perez,* we specifically held that section 90.803(23) complied with the requirements of the confrontation clauses of both the federal and Florida constitutions. In rendering that decision, we noted that the United **States** Supreme Court, in *Ohio v. Roberts,* 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), found that when a declarant is unavailable and the hearsay does not fall within a firmly rooted hearsay exception, the hearsay must be marked with particularized guarantees of trustworthiness in order to be admissible. In applying that holding in the *Perez* case, we determined that the specific reliability requirements in section 90.803(23) provided sufficient safeguards of reliability to meet the "particularized guarantees of trustworthiness" standard set forth in *Roberts. Perez,* however, was rendered before the United **States** Supreme Court issued its ruling in *Idaho v. Wright,* 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990), under which **Townsend** now contends that section 90.803(23) is unconstitutional.

[8] [9] In *Wright,* the United **States** Supreme Court determined that, in evaluating whether a hearsay statement contains sufficient guarantees of trustworthiness, a court must look to the totality of the circumstances surrounding the making of the statement. The Court noted, however, that in determining the reliability of such a statement, a court *cannot look to corroborating evidence* to show the

truth of the statement to be admitted. Section 90.803(23)(a)(2)b. *requires* that other corroborating evidence must exist before the hearsay evidence of an unavailable witness can be admitted. Because of these apparently inconsistent requirements, **Townsend** maintains that section 90.803(23) violates *Wright* 's mandate that a court not look to corroborating evidence to show the truth of the statement to be admitted. Although section 90.803(23)(a)(2)b. does require that other corroborating evidence must exist before hearsay evidence can be admitted, *this requirement is in addition to the requirement that the hearsay evidence, in and of itself, must be reliable. See* ***957** § 90.803(23)(a)(1) (the trial judge must determine that the time, content, and circumstances of the statement provide sufficient safeguards of reliability). Essentially, the other corroborating evidence requirement assures that a defendant will not be convicted solely on the basis of the hearsay testimony. This acts as a safeguard to protect the interests of the accused, which traditionally has been one of the basic underlying reasons for not allowing hearsay testimony in criminal trials.

[10] To clarify, however, any possible inconsistencies between the United **States** Supreme Court's decision in *Wright* and the requirements of section 90.803(23), we hold that under section 90.803(23), the trial judge must adhere to the following procedure: First, the trial judge must determine whether the hearsay statement is reliable and from a trustworthy source without regard to corroborating evidence. If the answer is yes, then the trial judge must determine whether other corroborating evidence is present. If the answer to either question is no, then the hearsay statements are inadmissible. Under this procedure, we specifically find that the procedural requisites of section 90.803(23) are sufficient to meet the constitutional requirements of both the federal and Florida Constitutions. The failure of a trial judge to follow this procedure would render this exception to the hearsay rule unconstitutional under the dictates of the United **States** Supreme Court's decision in *Wright.*

[11] Having determined that the procedural requisites of section 90.803(23) properly protect the constitutional rights of an accused, we address the second portion of **Townsend's** confrontation clause argument, i.e., whether in this case the trial judge properly adhered to the reliability requirements of that section in ruling on the admissibility of this child's hearsay statements. Clearly, both *Roberts* and *Wright* stand for the proposition that the reliability determination as to the admissibility of hearsay evidence is critical to the protection of an accused's rights under the confrontation clause. Accordingly, it is essential that the trustworthiness and reliability requirements of section 90.803(23) be strictly followed. In recognizing the importance of adhering to those requirements, this Court and a majority of the Florida district courts of appeal have consistently found trial courts to have committed reversible error when those courts have failed to place on the record specific findings indicating the basis for determining the reliability of a child's statements introduced as hearsay under that section. *See, e.g., Leggett v.* ***State,*** 565 So.2d 315 (Fla.1990); ***State*** *v. Romanez,* 543 So.2d 323 (Fla. 3d DCA 1989); *Jaggers v.* ***State,*** 536 So.2d 321 (Fla. 2d DCA 1988); *Griffin v.* ***State,*** 526 So.2d 752 (Fla. 1st DCA 1988). A mere conclusion that a child's statements are reliable or a mere restatement of the statute in a boilerplate fashion is insufficient to meet the requirements of the confrontation clause. *Leggett* (the requirements of the statute must be met); *Jaggers* (a court must specifically set forth reasons indicating the reliability of the statements); *see also Hopkins v.* ***State,*** 632 So.2d 1372 (Fla.1994) (failure to make specific findings of fact under section 92.54, Florida Statutes (1989), which section impacts the same constitutional guarantees as those at issue here, constitutes reversible error).

[12] Section 90.803(23)(a)(1) mandates that the trial judge, in a hearing conducted outside the presence of the jury, determine whether a hearsay statement is trustworthy and reliable by examining the "time, content, and circumstances" of the statement. Specifically, in examining the time, content, and circumstances of the hearsay statement,

> the court may consider the mental and physical age and maturity of the child, the nature and duration of the abuse or offense, the relationship of the child to the offender, the reliability of the assertion, the reliability of the child victim, and any other factor deemed appropriate.

§ 90.803(23)(a)(1). Other factors may include, but are not limited to, a consideration of the statement's spontaneity; whether the statement was made at the first available opportunity following the alleged incident; whether the statement was elicited in response to questions from adults; the mental **state** of the child when the abuse was reported; whether the statement consisted of a child-like description of the act; whether the child used terminology unexpected of a child ***958** of similar age; the motive or lack thereof to fabricate the statement; the ability of the child to distinguish between reality and fantasy; the vagueness of

the accusations; the possibility of any improper influence on the child by participants involved in a domestic dispute; and contradictions in the accusation. *Wright; Perez; Romanez; Griffin.* In sum, as noted by the United **States** Supreme Court in *Wright,* a court is to use a totality of the circumstances evaluation in determining reliability. As previously noted, however, a court *should not* consider other corroborating evidence to determine the reliability of the child's statement. *Wright.*

[13] In this case, the trial judge merely listed each of the statements to be considered and summarily concluded, without explanation or factual findings, that the time, content, and circumstances of the statements to be admitted at trial were sufficient to reflect that the statements were reliable. This finding is clearly insufficient under both the statute and the constitutional requirements of *Wright,* and, consequently, constitutes reversible error.

The Child Psychologist's Expert Testimony

[14] **[15]** **Townsend** additionally argues that much of the child psychologist's testimony was erroneously admitted at trial. First, **Townsend** contends that the trial judge erroneously allowed the psychologist to comment on the truthfulness of the child. At trial, the psychologist testified as to the child's credibility by indicating that the child's statements to her were truthful because, in her opinion, the child was capable of distinguishing between the truth and a lie and pretending and playing. An expert may testify concerning a child's ability to comprehend the difference between telling the truth and telling a lie for purposes of determining whether the child is competent to testify at trial. It is well established, however, that an expert is prohibited from commenting to the fact-finder as to the truthfulness or credibility of a witness's statements in general. *Tingle v.* ***State,*** 536 So.2d 202 (Fla.1988); *Weatherford v.* ***State,*** 561 So.2d 629 (Fla. 1st DCA 1990); *Fuller v.* ***State,*** 540 So.2d 182 (Fla. 5th DCA 1989); *Davis v.* ***State,*** 527 So.2d 962 (Fla. 5th DCA 1988); *Ward v.* ***State,*** 519 So.2d 1082 (Fla. 1st DCA 1988); *Kruse v.* ***State,*** 483 So.2d 1383 (Fla. 4th DCA 1986), *review dismissed,* 507 So.2d 588 (Fla.1987). The psychologist should not have been allowed to testify regarding the credibility of the child.

[16] **[17]** **[18]** **Townsend** also asserts that the trial judge erred in allowing the psychologist to testify to a number of hearsay statements of the child, some of which were obtained through the use of anatomical dolls and some of which related to the identity of the abuser. A trial court has broad discretion in determining the range of subjects on which an expert witness will be allowed to testify. *Glendening v.* ***State,*** 536 So.2d 212 (Fla.1988), *cert. denied,* 492 U.S. 907, 109 S.Ct. 3219, 106 L.Ed.2d 569 (1989); *Johnson v.* ***State,*** 393 So.2d 1069 (Fla.1980), *cert. denied,* 454 U.S. 882, 102 S.Ct. 364, 70 L.Ed.2d 191 (1981). Moreover, if relevant,[2] a medical expert witness may testify as to whether, in the expert's opinion, the behavior of a child is consistent with the behavior of a child who has been sexually abused. *Glendening; North v.* ***State,*** 65 So.2d 77 (Fla.1952), *aff'd,* 346 U.S. 932, 74 S.Ct. 376, 98 L.Ed. 423 (1954); *Ward* (doctor's testimony that child was having stomach aches, sleep disturbances, and acting dependent, was admissible to reflect basis for opinion that child suffered from post-traumatic stress syndrome); *Ferradas v.* ***State,*** 434 So.2d 24 (Fla. 3d DCA 1983). Even so, great care must be taken by a trial judge in determining what testimony of an expert is admissible because a jury often places great emphasis on the testimony of experts in this type of proceeding. Dirk Lorenzen, *The Admissibility of Expert Psychological Testimony in Cases Involving the Sexual Misuse of a Child,* 42 U. Miami L.Rev. 1033, 1035–36 (1988) ("Because the lay jury has only the common experience of everyday life to apply to the fact pattern before it, there is a risk that it will defer to the judgment of an expert."). Moreover, the ***959** trier of fact is likely to believe that a clinical evaluation technique employed by an expert, such as the use of anatomically correct dolls to evaluate a child for an incident of sexual abuse, is valid. *Id.*

[19] **[20]** **[21]** When an expert testifies regarding how a child behaved with anatomically correct dolls, the expert is repeating the communications of the child witness. For this reason, a trial court must evaluate such testimony under the requirements of section 90.803(23) just as with any other hearsay statement of a child abuse victim. Experts generally agree that contacts between a child and an expert evaluating the child for sexual abuse *should be videotaped to ensure the trustworthiness* of the communications and to ensure that the expert did not lead the child during the evaluation. Lorenzen, *Expert Psychological Testimony,* 42 U. Miami L.Rev. at 1069–70; *Fla.S.Comm. on Judiciary–Civ.,* tape recording of proceedings (May 1, 1985) (Florida **State** Archives) (comments of Dr. J.M. Whitworth). In any event, courts must take great care to ensure the reliability of the statements admitted at trial. Likewise, statements of identity are not admissible in this type of case absent a reliability determination under section 90.803(23). ***State*** *v. Jones,* 625 So.2d 821 (Fla.1993) (statements of fault or identity are not

admissible under the medical diagnosis hearsay exception contained in section 90.803(4) but may be admissible under section 90.803(23) if they meet the requirements of that section). Consequently, as with other child victim hearsay statements, the trial judge was required to review and make specific factual findings under the strict trustworthiness and reliability requirements of section 90.803(23) as to the admissibility of the child's verbal communications to the psychologist and of the communications observed by the psychologist through the use of anatomical dolls.

Failure to Preserve the Errors in this Case

[22] The **State** argues that the issues in this case have not been properly preserved for appellate review. Specifically, the **State** contends that the incompetency issue was not raised at trial or on appeal before the district court and, consequently, that the district court had no jurisdiction to reverse on this basis. As to the other issues, the **State** asserts that **Townsend** failed to properly preserve those issues through appropriate objections and that those issues are procedurally barred.

First, we note that the issue raised in the certified question was properly raised by **Townsend** in a pre-trial motion and was the same issue before the district court in ***Townsend*** *I.* Under these circumstances, we find that the district court could properly consider this issue in the second appeal and that the question at bar was properly certified to this Court for review.

[23] **[24]** Second, we find that **Townsend** did, in fact, sufficiently preserve objections as to certain portions of the psychologist's testimony. For instance, **Townsend** did properly object to the psychologist's testimony indicating that **Townsend** was the individual who committed the alleged abuse. It is questionable, however, whether **Townsend** properly preserved other issues, such as the failure of the trial judge to make specific factual findings regarding the reliability of the child's statements. Moreover, we recognize that some of the errors in this case, when considered alone, might not constitute error that was so fundamental that no objection was necessary to preserve the error for review. For example, the failure of a trial judge to make sufficient findings under the statute, in and of itself, does not constitute fundamental error. *Hopkins; Seifert v.* ***State,*** 616 So.2d 1044 (Fla. 2d DCA) (a trial court's insufficient findings under 90.803(23) do not equate with fundamental error), *review granted,* 626 So.2d 207 (Fla.1993); *Jones v.* ***State,*** 610 So.2d 105 (Fla. 3d DCA 1992) (issue of whether findings were sufficient under section 90.803(23) not preserved for review because no contemporaneous objection made to the findings), *review denied,* 620 So.2d 761 (Fla.1993). Consequently, were we not reviewing these errors as a whole, we might find that some of the errors to which no objection was made were procedurally barred. When, however, we consider the errors in this case as a whole, we must conclude that **Townsend** was denied the fundamental right to due process and the right ***960** to a fair trial. ***State*** *v. Johnson,* 616 So.2d 1 (Fla.1993) (error so basic to the judicial decision under review that an accused is denied the right to due process is fundamental); *Fuller v.* ***State,*** 540 So.2d 182 (Fla. 5th DCA 1989) (cumulative effect of the errors in child sexual abuse case was so fundamental as to require reversal); *Nazareth v. Sapp,* 459 So.2d 1088 (Fla. 5th DCA 1984); *Dukes v.* ***State,*** 356 So.2d 873 (Fla. 4th DCA 1978). This is especially true in light of the erroneously admitted testimony of the psychologist, which, under the circumstances, cannot be considered harmless. Other than the hearsay statements of the child, the only evidence presented by the **State** was the testimony of the medical doctor and the treating psychologist. The medical doctor's testimony was not conclusive with respect to sexual abuse, and, as indicated previously, much of the treating psychologist's testimony was never subjected to a proper reliability determination under section 90.803(23). Given the errors in this case and the limited amount of non-hearsay evidence introduced at trial, we find that **Townsend** did not receive a fair trial. Consequently, we agree with the district court's finding that **Townsend** is entitled to a new trial.

Conclusion

In remanding this case for a new trial, we are not unmindful of the difficulties inherent in this remand. The child victim in this case is now approximately eight years old. Confronting an eight-year-old about acts that occurred when that child was two years of age could be extremely difficult if not impossible. As Dr. J.M. Whitworth **stated** during a hearing before the Senate Judiciary Civil Committee when the legislature was considering the child sexual abuse hearsay exception: "Children do not retain details for any length of time, so time is very important. This is why *there is a strong need for videotaping the testimony of children." Fla.S.Comm. on Judiciary–Civ.,* tape recording of proceedings (May 1, 1985) (Florida **State** Archives) (comments of Dr. J.M. Whitworth) (emphasis added). In rendering this decision, we can only hope that in the future greater care will be taken to properly preserve testimony in this type of case and that judges will carefully adhere to the trustworthiness

and reliability requirements set forth in section 90.803(23), Florida Statutes.

For the reasons expressed, we answer the certified question in the affirmative, approve the result of the district court's decision, and remand this cause for a new trial.

It is so ordered.

BARKETT, C.J., and SHAW, GRIMES, KOGAN and HARDING, JJ., concur.

McDONALD, J., concurs with an opinion.

McDONALD, Justice, concurring.

I was first inclined to agree with the district court by answering the certified question in the negative. After further reflection, I join the majority on this issue.

I write only to emphasize that the admission of hearsay statements of small children must be carefully reviewed under a strict scrutiny test. An "adequate indicia of reliability" required to allow the admission of out of court statements of a child is an exacting test. All of the criteria set forth in *Idaho v. Wright,* 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990), must be met. As **stated** therein "Evidence possessing 'particularized guarantees of trustworthiness' must be so trustworthy that adversarial testing would add little to its reliability." Because this evidence is an exception to the hearsay, the burden is on the party moving for its admission to clearly and convincingly demonstrate its reliability.

I seriously doubt that the **state** can meet the required standard in this case.

Parallel Citations

19 Fla. L. Weekly S202

Footnotes

1 Section 90.603, Florida Statutes (1987), which governs the disqualification of witnesses, provides as follows:

> A person is disqualified to testify as a witness when the court determines that he is:
>
> (1) Incapable of expressing himself concerning the matter in such a manner as to be understood, either directly or through interpretation by one who can understand him.
>
> (2) Incapable of understanding the duty of a witness to tell the truth.

2 Relevancy of a medical expert's opinion is determined by the requirements set forth in sections 90.702 and 90.703, Florida Statutes (1993).

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C
Wilson v. Wilson
Fla.App. 1 Dist.,1990.

District Court of Appeal of Florida,First District.
Earl Frederick WILSON, III, Appellant,
v.
Rebecca Thames WILSON, Appellee.
No. 89-2871.

April 10, 1990.
Rehearing Denied May 18, 1990.

Wife filed petition for increase in child support awarded under order modifying dissolution decree. The Circuit Court for Duval County, Robert Cowles, J., increased child support, and husband appealed. The District Court of Appeal, Allen, J., held that: (1) competent substantial evidence supported finding that substantial change in circumstances had occurred warranting modification, but (2) there was insufficient evidence justifying award of private educational expenses as part of child support.

Affirmed in part, reversed in part, and remanded.
West Headnotes
[1] Child Support 76E 339(2)

76E Child Support
76EVI Modification
76EVI(C) Proceedings
76Ek333 Evidence
76Ek339 Weight and Sufficiency
76Ek339(2) k. Change in Circumstances. Most Cited Cases
(Formerly 134k309.5(3))

Child Support 76E 339(3)

76E Child Support
76EVI Modification
76EVI(C) Proceedings
76Ek333 Evidence
76Ek339 Weight and Sufficiency
76Ek339(3) k. Obligor's Income or Financial Condition. Most Cited Cases
(Formerly 134k309.5(3))

Child Support 76E 339(4)

76E Child Support
76EVI Modification
76EVI(C) Proceedings
76Ek333 Evidence
76Ek339 Weight and Sufficiency
76Ek339(4) k. Custodian's Income or Financial Condition. Most Cited Cases
(Formerly 134k309.5(3))
Competent substantial evidence supported trial court's finding that substantial change in circumstances, relating to parties' respective incomes and child's needs, had occurred since order modifying child support awarded under dissolution decree, where there was evidence that wife experienced decrease in her net income of about $148 per month, that husband's net income had increased by almost $300 per month, and that child would have increased needs and expenses.

[2] Child Support 76E 117

76E Child Support
76EIII Factors Considered
76EIII(C) Factors Relating to Child
76Ek115 Education
76Ek117 k. Private School. Most Cited Cases
(Formerly 285k3.1(12))
Private educational expenses may be awarded as part of child support payable by noncustodial parent where that parent has ability to pay for private school, and such expenses are in accordance with family's customary standard of living and are in child's best interest.

[3] Child Support 76E 303

76E Child Support
76EVI Modification
76EVI(B) Particular Factors and Grounds
76EVI(B)4 Factors Relating to Child
76Ek301 Education
76Ek303 k. Private School. Most Cited Cases
(Formerly 134k309.2(3))
Wife failed to make requisite showing to justify award of child support for payment of private school expenses, despite passing reference to some "problems" child had experienced in school, where private schooling was not part of child's customary life-style, parents' financial circumstances were not such that private education should be ordinarily

expected, and no special need of child which could only be fulfilled by private school was sufficiently articulated; if wife wished to offer evidence showing entitlement to award of child support for private school expenses, she should be allowed to do so upon remand.

***699** David C. Goodman, Jacksonville, for appellant.
Elliot Zisser and Nancy N. Nowlis, Jacksonville, for appellee.
ALLEN, Judge.
Earl Frederick Wilson, III (husband) appeals a post-dissolution order entered in response to petitions to modify the final judgment dissolving the husband's marriage to Rebecca Thames Wilson (wife). We address only that portion of the husband's appeal relating to the increase in child support which includes private educational expenses for the minor child.

The parties' marriage was dissolved in 1984 in Alabama. The wife was awarded sole custody of the minor child, subject to the husband's visitation, and the husband was ordered to pay $200 per month as child support, which was later modified to require payment only 10 months of the year. Subsequently, the wife moved to Florida, and the final judgment was adopted as a Florida decree. In 1987, pursuant to the wife's petition, child support was increased to $300 per month for 10 months each year.

In May of 1989, the wife filed another petition for modification alleging a substantial change in circumstances since entry of the 1987 order of modification. She alleged that the child's expenses for clothing, medical care and other living expenses had increased substantially and that the child, then 10 years of age, would be entering private school.

At the hearing, evidence was presented to show that the wife had experienced a decrease in her net income of about $148 per month, while the husband's net income had increased by almost $300 per month since 1987. Evidence of the child's increased needs and expenses was also presented, particularly that the child would be entering private school at a cost of approximately $340 per month for tuition and transportation. The court increased child support to $500 per month, 12 months per year, effectively doubling the payments ordered by the 1987 modification.

[1] We find competent substantial evidence in the record to support the court's finding that a substantial change in circumstances, relating to the parties' respective incomes and the child's needs, had occurred since the 1987 order modifying child support. See ***700***O'Brien v. O'Brien,* 407 So.2d 374 (Fla. 1st DCA 1981) and *Canakaris v. Canakaris,* 382 So.2d 1197 (Fla.1980). We do not find a sufficient record basis, however, for the inclusion of private educational expenses in the child support increase.

[2] Private educational expenses may be awarded as part of child support payable by a noncustodial parent where that parent has the ability to pay for private school, and such expenses are in accordance with the family's customary standard of living and are in the child's best interest. *Luskin v. Luskin,* 492 So.2d 783 (Fla. 4th DCA 1986) (private school tuition payable where children had attended a private school during the parties' marriage and guardian ad litem recommended that children continue to attend private school in order to minimize disruption of their lives caused by parties' separation); *Kaufman v. Kaufman,* 491 So.2d 584 (Fla. 3d DCA 1986) (private school tuition payable in accordance with the children's customary standard of living); *Ault v. Ault,* 431 So.2d 302 (Fla. 2d DCA 1983) (private school expenses payable where the noncustodial parent was a practicing attorney with a substantial annual income and children had been attending private schools during the marriage); *Fox v. Haislett,* 388 So.2d 1261 (Fla. 2d DCA 1980) (private school expenses payable where noncustodial parent had paid for several years of private schooling for the child and had earlier agreed to pay all such expenses, and where child had been experiencing academic difficulties in public school); and *Hendry v. Hendry,* 340 So.2d 942 (Fla. 4th DCA 1976) (private school tuition payable by noncustodial father with net worth of several million dollars). Where it cannot be shown that private schooling is in accordance with the family's customary standard of living, or that the child has some special need which cannot be adequately fulfilled by the public schools, payment of private school expenses should not be ordered.

[3] Here, the child was entering the fifth grade and had never previously attended private schools. In fact, the private schooling of the child was apparently not contemplated by either of the parties until very recently. No testimony was presented as to any special needs of the child which public schools had been unable to fulfill, or would be unable to satisfy in the future. The only evidence explaining the enrollment of the child in private school was presented in the wife's testimony. She testified that

some of the children attending the public school her son would otherwise be required to attend were from a part of Jacksonville she considered to be "quite a violent area," that the child was "very advanced for his age," and that she "just wanted the best for him." The husband, whose income was approximately $53,000 per year, objected to enrollment of the child in private school. The husband, who unsuccessfully sought a change of custody below, testified that he favored public schools and would enroll his son in a public school in Alabama should he be awarded custody. The trial court's order stated that expenses for the child had increased, including those for education, and that an increase in child support was in the best interest of the child. However, the trial court did not make any finding as to whether private schooling in particular was found to be justified in accordance with the standard of living enjoyed by the family or was in the best interest of the child.

Upon the record before us, the wife has not made the requisite showing for an award of child support for payment of private school expenses. Private schooling is not a part of the child's customary life-style, nor are the parents' financial circumstances such that private education should be ordinarily expected. Further, as earlier indicated, no special need of the child which could only be fulfilled by a private school has been sufficiently articulated. We note, however, that a passing reference was made to some "problems" the child had experienced in school. We also note that in asking the wife whether she had some objection to the public schools, her attorney instructed her to "please be brief about it." If the wife wishes to offer evidence showing entitlement to an award of child support for private school expenses, she should be allowed to do so upon remand. If the wife is unable to present such evidence,***701** the child support should be set in an amount which reflects only expenses other than for private school.

Accordingly, we reverse the award of increased child support and remand for further proceedings in accordance with this opinion. In all other respects, the order appealed from is affirmed.

AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings.

ERVIN and ZEHMER, JJ., concur.
Fla.App. 1 Dist.,1990.
Wilson v. Wilson
559 So.2d 698, 15 Fla. L. Weekly D931

END OF DOCUMENT

Rules for Avoiding the Pitfalls of Filing Inadequate Affidavits by Custodians of Business Records

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Courts routinely grant dispositive motions based upon business records when such records are accompanied by affidavits establishing their admissibility under the business records exception to hearsay. The rules permitting Courts to do so are key features that contain the cost of business litigation.[1] However, litigators should not take these rules for granted. In several recent opinions, Florida's appellate courts have reversed judgments based upon the improper admission of records custodian affidavits when the affiants or proffered witnesses lacked sufficient knowledge about how the records were maintained.[2] These cases highlight the importance of selecting the correct persons to act as records custodians and the need to assure that their affidavits contain all the elements required under the law governing the business records exception. This article analyzes the lessons to be learned from these cases and offers a list of "dos" and "don'ts."

Rules of Evidence Governing the Business Records Exception to Hearsay

Subject to certain exceptions, hearsay—any oral or written statement offered to prove the truth of the matter asserted, other than one made by the declarant while testifying—is inadmissible.[3] The Federal Rules of Evidence and the evidentiary rules of most states recognize a "business records" exception to hearsay, under which records that are made and kept by a company in its ordinary course of regularly conducted business are admissible if they are "made at or near the time" of the events they record "by—or from information transmitted by—someone with knowledge," so long as neither the source of information nor the method or circumstances of preparing the records indicate that the records are untrustworthy.[4]

A party who wishes to introduce a business record at trial or in support of a dispositive motion must establish each of these elements in one of two ways. First, the party can have the records custodian or other qualified person testify about these facts at the trial or evidentiary hearing.[5] Alternatively, the party can proffer a written "certification" (affidavit) of the records custodian attesting to such facts.[6] A party who chooses the second option must serve "reasonable written notice" to every other adverse party of its intention to proffer such evidence and must "make the record and certification available for inspection—so that the party has a fair opportunity to challenge them."[7]

Most litigants prefer the second option because it is less expensive. It is more convenient for a business to have its custodian execute an affidavit than to force him to miss hours or even days of work travelling to a court to testify. It is also safer. By using an affidavit, a litigant can prevent the custodian from being cross-examined by an adversary, and thereby limit the risk that the custodian will provide harmful answers.

"Dos" and "Don'ts" for Preparing Affidavits of Business Records Custodians

Recent Florida appellate opinions have shown that if a party submits the affidavit of a purported records custodian who lacks knowledge about how business records are collected or maintained,[8] or attempts to establish the foundation for admission of a business record through the testimony of a witness who lacks such knowledge,[9] the party risks rejection of the affidavit and refusal by the court to admit the business records. Florida courts have also confirmed that even if a records custodian possesses the required knowledge, his affidavit may be stricken and the admission of the purported business records may be denied if the affidavit fails to attest to all of the required elements.[10] These opinions call attention to the following rules that attorneys should follow when introducing business records through affidavits:

(1) Do not let your client sign an affidavit without reading it, understanding it, and ensuring that every statement in it is true and accurate. This is common sense—no one should ever sign an affidavit without reading it and making sure it is true and accurate. However, because affidavits are typically drafted by attorneys who represent the employers of the persons asked to sign them, employees often sign them without much thought. To avoid risking harm to the affiant's credibility by filing an affidavit containing false statements, attorneys should stress to both their clients and their selected affiants that they need to closely review the affidavits and confirm the truth of all statements contained in them. Attorneys must assure the affiants that they will not anger their employers if they propose revisions. Even if such revisions call into question whether the document can be admitted as a business record, it is better to learn this before the affidavit is filed.

(2) Assume that the person signing an affidavit will be required to explain the statements in the affidavit. Adverse parties have the right to challenge the statements made in an affidavit,[11] and they typically do so by deposing the affiant. Assume that if any statement in an affidavit is untrue, or if the affiant lacks knowledge about any element needed to establish the admissibility of the proffered business records, the adverse party will find out. Litigants must consider the possibility of a deposition when selecting the person who will sign an affidavit.

(3) When identifying who will sign the affidavit, select an employee who is familiar with how the business records are created and maintained. This is one of several key lessons to be learned from the recent cases: litigants occasionally fail to choose the correct employees with the knowledge required to establish the admissibility of their business records.[12] The company should not simply select any employee with access to documents or the company's computer system. The person selected to sign the affidavit must know: (a) that the records were made at or near the time of the events they record; (b) that the records were made by or from information transmitted by a person with knowledge of the events they record; (c) that the records were kept in the ordinary course of business; and (d) that it was the regular practice of the business to make such records.[13] If the selected affiant does not know one or more of these facts, a person who does must be found to execute an affidavit. (Note, the affidavit does not have to be executed by the employee who *prepared* the document that the client seeks to introduce.[14] But he or she must know that that the document was made by, or from information transmitted by, a person with knowledge of the events they record.[15])

(4) If the affidavit contains statements about computerized data or data compilations, select a person who knows about the computer system to sign the affidavit. This is the lesson

illustrated most clearly by *Glarum*, in which Florida's Fourth District Court of Appeal reversed the entry of summary judgment because the plaintiff offered the affidavit of an employee of a loan servicer who knew nothing about the servicer's data entry system and could not verify the accuracy of that data, even though he relied upon that data to establish the amount of damages owed.[16] If an affiant bases his certification upon data maintained on his employer's computer system, he must be familiar with the computer system and must know who, how, and when data entries are made.[17] The affiant does not have to be the person who actually entered the data; he does not even need to be able to identify the specific persons who made specific data entries.[18] But the affiant must know which department's employees entered the pertinent data, and he must be able to confirm that the data entries were correctly made.[19]

(5) Do not assume that a single person can serve as the records custodian and that only one affidavit is required. Multiple affidavits may be required for any number of reasons. For example, suppose that the only employee who knows that a key record was made by a person with knowledge of the events recorded therein knows nothing about the company's record keeping practices. The company may need to provide two affidavits to establish the admissibility of that record—one by the employee with knowledge of who made the key document and another from an employee familiar with the company's record keeping practices who can attest that the document was created and kept in the ordinary course of the company's regular conducted business. In addition, different records may require different custodians. For example, although an employee of the current loan servicer may have sufficient knowledge to establish the admissibility of a current servicer's records, she may not be able to establish the admissibility of the *prior* loan servicer's records, and an affidavit for those records may need to be obtained from the prior loan servicer.[20]

(6) Clearly lay out all of the elements for admissibility in the affidavit, and do not use overly-simplistic, incomplete language. A records custodian's affidavit must do more than simply set forth the affiant's credentials as a records custodian, identify the documents that the client seeks to introduce, and state that those documents "are kept in the ordinary course of business."[21] The affidavit must state (a) that the records were made at or near the time of the events they record; (b) that the records were made by or from information transmitted by a person with knowledge of the events they record; (c) that the records were kept in the ordinary course of business; and (d) that it was the regular practice of the business to make such records.[22] An affidavit that omits one or more of these key elements may be stricken by the Court.[23]

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[1] *See, e.g.*, Fed. R. Civ. P. 56(c)(1)(A); Fed. R. Evid. 803(6); Fed. R. Evid. 902(11); Fla. R. Civ. P. 1.510(c); Fla. Stat. § 90.803(6)(a)-(c); Fla. Stat. 90.902(11).

[2] *See, e.g., Glarum v. LaSalle Bank National Assoc.*, 83 So. 3d 780, 781-83 (Fla. 4th DCA 2011) (reversing a trial court's entry of summary judgment because of the Court's improper admission of an affidavit of the loan servicer's records custodian, where the custodian lacked sufficient knowledge of the loan servicer's records and electronic data entry system); *Mazine v. M&I Bank*, 67 So. 3d 1129, 1131-32 (Fla. 1st DCA 2011) (reversing the entry of final judgment in favor of the plaintiff based upon the trial court's improper admission of the plaintiff's affidavit attesting to the amount of damages, where the witness offered at trial to establish the admissibility of the affidavit lacked sufficient knowledge of plaintiff's record keeping practices to establish that the affidavit was a business record); *cf. Weisenberg v. Deutsche Bank National Trust Co.*, 89 So. 3d 1111, 1112 (Fla. 4th DCA 2012) (recognizing that an affidavit of a records custodian may be rejected when the affiant does "not know who, how, or when the data entries were made" onto a business's computer system, but affirming the admission of an affidavit of a bank's records custodian because the affiant "was familiar with the bank's record-keeping system and had knowledge of how the data was uploaded into the system").

[3] Fed R. Evid. 802; *see also* Fla. Stat. § 90.802.
[4] Fed R. Evid. 803(6); *see also* Fla. Stat. § 90.803(6)(a).
[5] Fed R. Evid. 803(6)(D); *see also* Fla. Stat. § 90.803(6)(a).
[6] Fed R. Evid. 803(6)(D); *see also* Fla. Stat. § 90.803(6)(a). The Federal Rules of Evidence also contain a self-authentication provision which provides that extrinsic evidence of authenticity is not required for an original or copy of a business record if it is accompanied by a certification from the custodian of the records or "another qualified person" declaring that the record was made at or near the time by (or from information transmitted by) someone with knowledge, that the record was kept in the ordinary course of the company's regularly conducted business, and that making the record was a regular practice of the company. Fed. R. Evid. 902(11); *see also* Fla. Stat. § 90.902(11).
[7] Fed R. Evid. 902(11); *see also* Fla. Stat. § 90.803(6)(c).
[8] *See Glarum*, 83 So. 3d at 792-83.
[9] *See Mazine*, 67 So. 3d at 1131-32. In *Mazine*, the First DCA reversed the admission *at trial* of the affidavit of the plaintiff's records custodian attesting to amounts due and owing because the affiant did not testify at trial and the witness who did testify lacked the knowledge required to establish that the affidavit was a business record. *Id.* The First DCA did not opine on whether the *affiant* had sufficient knowledge of the company's records to opine on the amounts owed. *See id.* (Because the judgment was not entered on a motion for summary judgment, the court could not consider the affidavit on its face, and the plaintiff had to look for an exception to hearsay as a basis for admitting the affidavit.) It is questionable whether the affidavit could have been admitted as a business record even if the trial witness *did* have sufficient knowledge to serve as a records custodian, as it was probably created exclusively for the lawsuit and not in the ordinary course of the plaintiff's regularly conducted business.
[10] *See United Automobile Ins. Co. v. Affiliated Healthcare Centers, Inc.*, 43 So. 3d 127, 129-31 (Fla. 3d DCA 2010) (acknowledging that the trial court had correctly refused to admit documents offered as business records because the affidavit of the custodian of such records failed to state that the documents were "prepared or made by information transmitted by a person with knowledge," but reversing the trial court's refusal to permit the affidavit to be revised).
[11] Fed. R. Evid. 902(11); *see also* Fla. Stat. § 90.803(6)(c).
[12] *See, e.g., Glarum*, 83 So. 3d at 792-93.
[13] *Id.*; *Weisenberg*, 89 So. 3d at 1112; *Vilvar v. Deutsche Bank Trust Co. Americas*, 83 So. 3d 853, 854-55 (Fla. 4th DCA 2011) (affirming the admissibility of the affidavit of the plaintiff's loan officer on grounds that "she was familiar with [the servicer's] books, records, and documents relevant to the allegations in the complaint, and that all of the books, records and documents concerning the loan were kept by [the servicer] in the regular course of its business").
[14] *United*, 43 So. 3d at 130; *Mazine*, 67 So. 3d at 1132.
[15] *United*, 43 So. 3d at 130; *Mazine*, 67 So. 3d at 1132.
[16] *See Glarum*, 83 So. 3d at 782-83; *cf. Weisenberg*, 89 So. 3d at 1112 (affirming the trial court's admission of the affidavit of the loan servicer's servicing agent on grounds that the agent's deposition testimony "demonstrated that she was familiar with the bank's record keeping system and had knowledge of how the data was uploaded").
[17] *Glarum*, 83 So. 3d at 782-83; *Weisenberg*, 89 So. 3d at 1112.
[18] *Weisenberg*, 89 So. 3d at 1112; *Glarum*, 83 So. 3d at 782 n.2.
[19] *Glarum*, 83 So. 3d at 782-83; *Weisenberg*, 89 So. 3d at 1112.
[20] *See Glarum*, 83 So. 3d 782-83 (pointing out that the employee of a loan servicer who provided an affidavit aimed at establishing the admissibility of business records lacked sufficient knowledge concerning both the data supplied by his own employer and by a prior loan servicer).
[21] *United*, 43 So. 3d at 129 n.2, 130 (affirming an order striking such an affidavit because the records custodian failed to state that the business records were made by or from information transmitted by a person with knowledge of the events they recorded).
[22] *Id.* at 130-31.
[23] *Id.*

RELOCATION CASES
§ 61.13001 – A Statute of STRICT Construction

Practice Note: In any order granting or denying relocation, the Court is required to make specific factual findings for each factor. *See Coyle v. Coyle*, 8 So.3d 1271 (Fla. 2d DCA 2009)

I. FACTORS – § 61.13001(7)

(a) The nature, quality, extent of involvement, and duration of the child's relationship with the parent or other person proposing to relocate with the child and with the nonrelocating parent, other persons, siblings, half-siblings, and other significant persons in the child's life.

(b) The age and developmental stage of the child, the needs of the child, and the likely impact the relocation will have on the child's physical, educational, and emotional development, taking into consideration any special needs of the child.

(c) The feasibility of preserving the relationship between the nonrelocating parent or other person and the child through substitute arrangements that take into consideration the logistics of contact, access, and time-sharing, as well as the financial circumstances of the parties; whether those factors are sufficient to foster a continuing meaningful relationship between the child and the nonrelocating parent or other person; and the likelihood of compliance with the substitute arrangements by the relocating parent or other person once he or she is out of the jurisdiction of the court.

(d) The child's preference, taking into consideration the age and maturity of the child.

(e) Whether the relocation will enhance the general quality of life for both the parent or other person seeking the relocation and the child, including, but not limited to, financial or emotional benefits or educational opportunities.

(f) The reasons each parent or other person is seeking or opposing the relocation.

(g) The current employment and economic circumstances of each parent or other person and whether the proposed relocation is necessary to improve the economic circumstances of the parent or other person seeking relocation of the child.

(h) That the relocation is sought in good faith and the extent to which the objecting parent has fulfilled his or her financial obligations to the parent or other person

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seeking relocation, including child support, spousal support, and marital property and marital debt obligations.

(i) The career and other opportunities available to the objecting parent or other person if the relocation occurs.

(j) A history of substance abuse or domestic violence as defined in s. 741.28 or which meets the criteria of s. 39.806(1)(d) by either parent, including a consideration of the severity of such conduct and the failure or success of any attempts at rehabilitation.

(k) Any other factor affecting the best interest of the child or as set forth in s. 61.13.

II. **Potential Witnesses to Testify to Factors (not exhaustive):**

1. Parties
2. Relatives
3. Teachers
4. School Counselors
5. Therapists
6. Psychologists
7. Guardian Ad Litem
8. Physicians
9. Department of Children and Families Investigator
10. Law Enforcement

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8 So.3d 1271
District Court of Appeal of Florida,
Second District.

Mark T. **COYLE**, Appellant,
v.
Lorraine D. **COYLE**, Appellee.

No. 2D08-2216. | May 8, 2009.

Synopsis

Background: Former husband filed a petition for dissolution of marriage. The Circuit Court, Manatee County, Peter A. Dubensky, J., awarded primary residential custody to the former wife and granted her request to relocate. Former husband appealed.

Holdings: The District Court of Appeal, Kelly, J., held that:

[1] trial court was required to consider whether substitute arrangements would be sufficient to foster a continuing meaningful relationship between the former husband and the parties' child, and

[2] trial court was to consider best interests of child, not best interests of former wife.

Reversed and remanded.

West Headnotes (2)

[1] **Child Custody**
Removal from Jurisdiction

Trial court, considering former wife's request to relocate with child, was required to consider whether substitute arrangements would be sufficient to foster a continuing meaningful relationship between the former husband and the parties' child. West's F.S.A. § 61.13001(7)(c).

1 Cases that cite this headnote

[2] **Child Custody**
Removal from Jurisdiction

Trial court, considering former wife's request to relocate with child, was required to consider the best interests of the child, not that relocation would improve the quality of former wife's life.

Cases that cite this headnote

Attorneys and Law Firms

***1271** Shazia N. Sparkman and Kevin M. Sparkman of Sparkman & Sparkman, P.A., St. Petersburg, for Appellant.

James E. Rawe of Law Office of James E. Rawe, P.A., Bradenton, for Appellee.

Opinion

KELLY, Judge.

Mark T. **Coyle**, the former husband, appeals a final judgment of dissolution of marriage. He challenges the provision in the final judgment that allows his former wife, Lorraine D. **Coyle**, to relocate from Florida to New York with their child. We agree with the former husband that the trial court erred in evaluating the former wife's request to relocate, and accordingly, we reverse.

***1272** Approximately one year after the parties were married, the former husband filed a petition for dissolution of marriage. Both the former husband and the former wife sought primary residential custody of their two-year-old child with the former wife requesting that she be allowed to relocate to New York. In the final judgment, the trial court awarded primary residential custody to the former wife and granted her request to relocate. The final judgment rejected the former wife's proposed visitation schedule finding that it would "involve a significant drain" on the parents' limited financial resources and would have a "disorienting effect" on the child. The court did not fashion its own plan for visitation but, instead, scheduled a subsequent hearing to develop a "more practical" visitation plan. After that hearing, the court entered an order delineating the terms under which the former husband would have visitation.

[1] On appeal, the former husband seeks reversal of the final judgment on the ground that the trial court reached its decision on the former wife's request to relocate without properly

evaluating all the factors set forth in section 61.13001(7), Florida Statutes (2007). Section 61.13001(7) sets forth a lengthy list of factors a trial court must evaluate in reaching a decision regarding a proposed temporary or permanent relocation. Pertinent to this case, section 61.13001(7)(c) states that the court must consider:

> The feasibility of preserving the relationship between the nonrelocating parent or other person and the child through substitute arrangements that take into consideration the logistics of contact, access, visitation, and time-sharing, as well as the financial circumstances of the parties; whether those factors are sufficient to foster a continuing meaningful relationship between the child and the nonrelocating parent or other person; and the likelihood of compliance with the substitute arrangements by the relocating parent once he or she is out of the jurisdiction of the court.

When the trial court granted the former wife's request to relocate, no substitute visitation arrangements were in place. Accordingly, the trial court could not have properly evaluated whether the substitute arrangements would be sufficient to foster a continuing meaningful relationship between the former husband and the parties' child. Because that evaluation is required before deciding whether to permit relocation, we agree with the former husband that the provision of the final judgment granting relocation must be reversed.

[2] We also agree with the former husband that the trial court appears to have applied an incorrect legal standard in evaluating the former wife's request to relocate. Under section 61.13001(7), there is no presumption in favor of or against relocation. The burden of proof is on the parent seeking to relocate to prove by a preponderance of the evidence that relocation is in the best interest of the child. § 61.13001(8). Here, the court stated:

> Relocation to New York, of course, will diminish significantly the role Adrianna's father will be able to play in her life. The father has been a positive, loving presence and it would be a loss to Adrianna to miss this on a daily basis. However, since the Court has determined the mother to be the primary residential parent the father will not see her on a daily basis in any event.

The court further noted that "the improvement in the mother's quality of life [by relocating] should indirectly, and directly, benefit Adrianna." These comments indicate to us that instead of focusing on what was best for the child as required under the statute, the court favored the former ***1273** wife because she was the primary residential parent, her reasons for relocation were genuine, and relocation would improve the quality of *her* life, not necessarily the life of the child. This was error. *See Berrebbi v. Clarke,* 870 So.2d 172, 174 (Fla. 2d DCA 2004) (reversing an order granting relocation and noting that the trial court erred in analyzing the petition for relocation under the statutorily superseded rule of law favoring a good-faith request to relocate).

Accordingly, we reverse and remand for the trial court to enter an order vacating that portion of the final judgment which allows relocation and for further proceedings as deemed appropriate on remand. *See Cecemski v. Cecemski,* 954 So.2d 1227, 1231 (Fla. 2d DCA 2007). We affirm the final judgment in all other respects.

Reversed and remanded with directions.

SILBERMAN and WALLACE, JJ., Concur.

Parallel Citations

34 Fla. L. Weekly D933

End of Document

FLORIDA OBJECTIONS

- **Ambiguous** – Confusing question in that it is capable of being understood in more than one sense
- **Argumentative** – Counsel's question summarizes facts, states conclusions based on the facts stated and demands that client agrees
- **Assumes facts not in evidence** – Assumes a fact with no evidentiary basis
- **Asked and Answered** – Repetition of question to attempt to obtain different answer or reiterate a point
- **Lacks Authentication** – Evidence must be offered that exhibit is what it claims to be
- **Best Evidence Rule** – If applicable, original document must be offered or absence accounted for
- **Beyond Scope** – Question unrelated to preceding examination by opposing counsel
- **Bolstering** – Improperly to bolster the credibility of a witness
- **Compound** – More than one question
- **Conclusion** – Witness must testify to facts within personal knowledge (unless expert)
- **Confusing** – Unfamiliar words, disjointed questions, or confuses facts or evidence
- **Counsel testifying** – Opposing counsel is making a statement rather than asking a question
- **Cumulative** – Repeated presentation of same evidence by exhibits or by witness
- **Foundation** – Failure to lay proper predicate for testimony or evidence.
- **Hearsay** – The answer to a counsel's question would elicit hearsay or the question did not call for hearsay but the witness' response was hearsay (consider Motion to Strike)

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- **Improper Character Evidence** – Evidence of character is limited by evidence rules.

- **Improper impeachment** – Methods of impeachment are limited by evidence rules.

- **Irrelevant** – Would not prove or disprove a material fact.

- **Leading** – Form of counsel's question suggests answer.

- **Misstating Evidence** – counsel's questions misstates prior testimony of witness

- **Narrative** – Question is so broad, it would allow witness to ramble and possibly present inadmissible evidence before an objection could be made.

- **Opinion** – Improper opinion testimony

- **Prejudice outweighs probative value** – probative value is substantially outweighed by the danger of unfair prejudice.

- **Privileged** – Answer could violate privilege (i.e. attorney-client, accountant-client, therapist-patient, husband-wife, clergy, etc.)

- **Speculation** – Calls for witness who lack personal knowledge to speculate

- **Unresponsive** – Witnesses answer includes testimony not called for by the question.

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EVIDENCE FOUNDATIONS

Foundations for Exhibit

I. Mark Exhibit for Identification

II. Ask to Approach Witness

III. Provide Exhibit to Witness

IV. Have Witness Identify Exhibit

V. Lay Foundation for Exhibit

VI. Move into Evidence

VII. Examples

A. Letter

Mr. _____, please take a look at what I have just handed to you as Exhibit A for identification.

Have you ever seen it before?

What is it?

How do you recognize it?

Is that your signature at the bottom of the letter?

Your Honor, we now move what has been marked as the Wife's Exhibit A for identification into evidence as the Wife's Exhibit 1.

B. Photograph of Home

Mr. _____, please look at what I have just handed to you as Exhibit B for identification.

Where you the owner of the house located at _____?

How long did you live there?

Are you familiar with the appearance of your home?

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Does Exhibit B fairly and accurately reflect a picture of your home located at _____ as it appears today?

(If answer is no) What changes have been made to the appearance of your home between the date this picture was taken and today's date?

Move into Evidence

C. Business Records

Mr. _____, please look at what I have just handed to you as Exhibit C for identification.

Are you employed by BUSINESS NAME?

Do you recognize Exhibit C?

What is it? (sales ledger example)

What is the function of your sales ledger?

Are the entries in Exhibit C made at or near the time that the sale and payments are made?

Are the entries made by or transmitted from a person with knowledge of the sale and payments?

Are those entries made as a part of the regular business practice of BUSINESS NAME?

Is the ledger book, Exhibit C, kept in the regular course of business?

Move Into Evidence

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SAMPLE FORMS

1) **Pre-Trial Catalogue**
2) **Affidavit of Incurred and Projected Attorneys' Fees, Suit Monies and Costs**
3) **Final Judgment for Contested Dissolution of Marriage – Alimony, Equitable Distribution, No Children**
4) **Final Judgment for Uncontested Dissolution of Marriage – Without Children**
5) **Final Judgment for Uncontested Dissolution of Marriage – With Children**
6) **Affidavit of Records Custodian**

Please Note: These are only sample forms and should be tailored to the specific facts of your case. These sample forms are not a substitute for your responsibility to ensure accuracy and application of the same.

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PRE-TRIAL CATALOGUE

IN THE CIRCUIT COURT OF THE 11TH
JUDICIAL CIRCUIT IN AND FOR
MIAMI-DADE COUNTY, FLORIDA

FAMILY DIVISION
CASE NO.: _____

IN RE: THE MARRIAGE OF:

_____,

Petitioner/Wife,

and

_____,

Respondent/Husband
_____/

HUSBAND'S/WIFE'S PRE-TRIAL CATALOGUE

COMES NOW the Husband/Wife, _____, by and through his undersigned attorneys and files his Pre-Trial Catalogue pursuant to the Order Setting Non-Jury Trial in the Family Division as follows:

A. THE MARRIAGE:

(1) DATE AND PLACE OF MARRIAGE: The parties were married on _____in_____.

(2) DATE OF SEPARATION: The parties separated on _____.

(3) STATEMENT OF MARITAL HISTORY: The parties were married for approximately _____ years prior to their separation which occurred almost _____ months ago. Both parties were employed _____having an ownership interest in a company known_____. which sells _____; and, the Wife being employed at _____in the_____. At the time of their

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separation, the Husband was earning gross income of approximately _____per year and the Wife was earning gross income of approximately _____per year. Since their separation, the Wife is presently employed at the _____earning gross income exceeding $_____. The Husband's income has increased since the time of the parties' separation and he is presently earning gross income in the amount of approximately $_____per year.

B. THE CHILDREN:

(1) NAMES AND AGES OF THE CHILDREN: _____ born on _____(___ years old) and_____, born on _____(__ years old).

(2) STATEMENT AND COMPLIANCE WITH SEC. 61.132, FLORIDA STATUTES:

(3) STATEMENT CONCERNING PRESENT CUSTODY OF CHILDREN:

(4) STATEMENT OF CHILDREN'S COVERAGE UNDER MEDICAL/DENTAL INSURANCE POLICY: _____.

(5) STATEMENT OF SPECIAL MEDICAL PROBLEMS OF CHILDREN: _____

C. CHILD CUSTODY:

Both parties have agreed that there should be shared parental responsibility for the minor children and that both parents should have frequent and continuing contact with the children.

D. CHILD SUPPORT:

(1) A Child Support Guideline Worksheet is attached.

(2) STATEMENT OF AMOUNT OF CHILD SUPPORT PROPOSED: The

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Husband proposes that he pay to the Wife child support in the amount of $_____ per month.

(3) STATEMENT SETTING FORTH BASIS OF CHILD SUPPORT CLAIM:

The Husband has calculated child support based upon him earning net income in the approximate amount of $_____ per month and the Wife earning net income in the approximate amount of $_____ per month. Based upon these income figures, the parties have combined net monthly income of $_____ per month with the Husband earning _____% and the Wife earning _____ of that amount. Pursuant to the Child Support Guidelines, the chart amount used to determine the child support need for parents earning combined monthly available income of $_____ is approximately $_____ per month for two children. This results in child support to be paid by the Husband to the Wife in the amount of $_____ per month. Once the child support for the parties' oldest child terminates, support should be in the amount of $_____ per month. In addition to the aforesaid child support, the Husband should assume responsibility for payment of _____% and the Wife should assume responsibility for payment of _____% of the cost for medical insurance and medical expenses of the children not covered by insurance.

E. ALIMONY - SPECIAL RELIEF:

The Wife has made a claim for alimony in her counter-petition for dissolution of marriage. It is the Husband's petition that based upon the parties' relative financial circumstances at the time of their separation, the Wife is not entitled to alimony or alternatively, the alimony claim is significantly minimized. It is the Husband's position that the applicable post-dissolution standard of living which the Wife is entitled to maintain, is

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the standard of living shared by the parties prior to their separation. The Wife's alimony claim should not be based upon the Husband's current earnings which have increased since the parties were separated. There does not appear to be any basis for the Wife's claim for rehabilitative alimony as she has apparently been employed in the same field throughout the entire marriage and the parties' separation and has no plans to pursue any further education or training which might increase her earnings. The Husband would also contend that there is no basis for an award of permanent alimony in this case. Until the parties' separation, the marriage (15-16 years) is a "gray-area" case in which the length of the marriage does not create a presumption in favor of or against an award of permanent alimony. The Court should therefore look to other factors, including the standard of living established during the marriage (see comments above); the Wife's age (___ years old; ___years old at time of separation); the fact that the Wife has no physical or emotional problems; the fact that the parties' oldest child is about to become an adult and the second child is almost ___ years old and does not require the Wife's constant care; and, the fact that the Wife did not give up a career or otherwise not pursue her employment avenues during the course of the marriage; which precludes or substantially reduces the Wife's alimony claim.

F. **WITNESS LIST:**

(1)

(2)

(3)

G. **EXPERT WITNESSES:**

(1)

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(2)

H. EXHIBIT LIST:

(1)

(2)

(3)

I. DIVISION OF ASSETS:

Attached hereto is a Schedule of Assets.

J. DIVISION OF DEBTS:

Attached hereto is a Schedule of Debts.

K. UNIQUE AREAS OF LAW:

L. STIPULATION:

The respective attorneys have not yet met to discuss stipulating as to the admissibility of records.

M. FINANCIAL AFFIDAVIT:

The Husband's financial affidavit has been filed with the Court.

N. MEDIATION/PARENTING CLASS/SANDCASTLES PROGRAM:

The Husband has attended the necessary classes and the parties have scheduled mediation and anticipate proceeding with an attempt to resolve this case prior to the trial scheduled herein.

WHEREFORE, the Husband has filed his Pre-Trial Catalogue in compliance with the Order Setting Non-Jury Trial in the Family Division.

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to _____this _____day of _____, 201__.

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PRE-TRIAL CATALOGUE

NAME AND ADDRESS OF FIRM

By: _____
NAME OF ATTORNEY AND BAR NO.

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AFFIDAVIT OF INCURRED AND PROJECTED ATTORNEYS' FEES, SUIT MONIES AND COSTS

IN THE CIRCUIT COURT OF THE 11TH
JUDICIAL CIRCUIT IN AND FOR
MIAMI-DADE COUNTY, FLORIDA

FAMILY DIVISION
CASE NO.

IN RE: THE FORMER MARRIAGE OF:

_____,
Petitioner,

And,

_____,
Respondent.
_____/

AFFIDAVIT OF INCURRED AND PROJECTED ATTORNEYS' FEES, SUIT MONIES AND COSTS

COMES NOW, the Affiant, _____, attorney for the Wife, _____, and files this Affidavit of Incurred and Projected Attorneys' Fees, Suit Monies and Costs in support of the Wife's Motion for Temporary Attorneys' Fees and Costs in support thereof states as follows:

1. The Affiant is an attorney with the law firm of _____ and is licensed to practice law in the State of Florida.

2. The Affiant has practiced primarily family law for over _____ years and his hourly rate is $____.00.

3. Since the Affiant was retained to file a motion to enforce the Wife's time-sharing rights, the Husband has embarked upon a course of conduct to attempt to pressure the Wife to capitulate to his demands regarding the parties' child. During the past few weeks, the Husband has filed the following:

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- Urgent Motion for Sanctions
- Husband's Motion to Continue Hearing on Motion for Attorney's Fees and for Protective Order as to Depositions
- Urgent Motion to Compel Wife's Compliance with Order Regarding Payment of Health Care Professional
- Urgent Motion for Order Permitting Husband's International Travel with the Minor Child

The Wife has not yet responded to the myriad of motions filed by the Husband as she has insufficient financial resources to keep pace with the Husband. The Husband's litigation tactics need to be met with a substantial award of attorney's fees and costs to create parity between the parties

4. The Wife's attorneys have spent the following time and incurred the following attorney's fees on this matter through_____,_____. (Billing statements detailing time and fees incurred are attached hereto as Exhibit "A"):

A. **Schedule of Attorneys' Fees, Suit Monies and Costs Incurred and Projected Attorneys' fees to be Incurred through trial (if necessary):**

i.	Attorneys' Fees Incurred (from xx/xx/xx to xx/xx/xx).....	$***0.00***
ii.	Attorneys' Fees projected.....	$***0.00***
iii.	Projected costs.....	**$0.00**

TOTAL AMOUNT OF ATTORNEYS' FEES, SUIT MONIES AND COSTS REQUESTED..... ***$0.00***

B. Schedule of Legal Services Rendered **Time:**

TOTAL NO. OF HOURS (through xx/xx/xx)..... ***0.0***

____:	0.0 Hours at $___.00 per hour.....	$ 0.00
____:	0.0 Hours at $___.00 per hour.....	$ 0.00
____:	0.0 Hours at $___.00 per hour.....	$ 0.00

TOTAL LEGAL FEES INCURRED..... ***$ 0.00***

C.	**Projected Legal Services**	**Estimated Time:**
	Deposition of ___	0.00
	Deposition of ___	0.00
	Office conference to prepare Client for all depositions	0.00
	Preparation of orders, future motions, etc.	0.00
	Telephone conferences, examination of future discovery, review of correspondence and motions, drafting correspondence, etc	0.00*
	Attendance at Motion Calendar and Hearing on pending Motions scheduled for _____(W's Motion for Temporary Attorney's Fees and Costs; Motion to Compel Discovery; H's Motion to Continue Hearing on Fees & Protective Order re: Depos; H's Motion to Compel W Comply w/Order on Health Care Professional; Motion for H to Travel with Child; Motion to appoint Guardian Ad Litem) 0.00	
	Attendance at Hearings on future Motions	0.00*
	Attendance at Mediation	0.00
	: 0 Hours at $___.00 per hour.....	$0.00
	: 0 Hours at $___.00 per hour.....	$0.00
	TOTAL LEGAL FEES PROJECTED.....	***$0.00***

D.	**Projected Costs**	**Estimated Cost:**
	Deposition transcripts.....	$0.00
	Subpoenas for hearings and depositions.....	$0.00
	Witness fees.....	$0.00
	Court reporter attendance fees.....	$0.00
	Miscellaneous copies, postage, etc. costs.....	$0.00
	TOTAL PROJECTED COSTS.....	***$0.00***

_____

_____, **ESQ.**

STATE OF FLORIDA)
) SS:
COUNTY OF MIAMI-DADE)

BEFORE ME, the undersigned authority, personally appeared_____, **ESQ.** to me (___) personally known as identification, who, after having been first duly sworn, deposes and states that he is the Affiant in the above-styled cause and that the facts contained in the foregoing Affidavit are true and correct.

DATED this ___ day of _____, 2014.

My Commission Expires: _____
NOTARY PUBLIC, State of Florida at Large

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via e-mail to _____, Miami, FL _____ this ___ day of _____, 201_.

NAME OF FIRM
ADDRESS

_____
_____, ESQ.
Florida Bar No.: _____

FINAL JUDGMENT OF DISSOLUTION OF MARRIAGE

IN THE CIRCUIT COURT OF THE 17TH
JUDICIAL CIRCUIT IN AND FOR
BROWARD COUNTY, FLORIDA

FAMILY DIVISION
CASE NO. FMCE XXXX-XXXX (xx/xx)

IN RE: THE MARRIAGE OF:

_____,
Petitioner/Husband,

And,

_____,
Respondent/Wife.
_____/

FINAL JUDGMENT OF DISSOLUTION OF MARRIAGE

THIS CAUSE, having come on to be heard on February 5, 2013 on the Husband's Petition for Dissolution of Marriage and Other Relief filed on September 7, 2010 and the Wife's Answer and Counter-Petition for Dissolution of Marriage filed on October 13, 2010 as well as the Husband's Answer to the Wife's Counter-Petition filed on October 21, 2010; and the Court having heard testimony of the parties and the Wife's forensic accountant, _____, CPA; having determined the credibility of the witnesses; having examined exhibits; having reviewed the court file; having heard argument of counsel; and having otherwise been fully advised in the premises,

THE COURT FINDS, ORDERS AND ADJUDGES as follows:

I. MARRIAGE AND JURISDICTION

1. **Marriage.** The parties were married to each other on _____, in Miami-Dade County, Florida, and separated on or about _____. This action was

filed on _____. The Court finds that the marriage of the parties is irretrievably broken.

2. Jurisdiction. The parties are residents of _____ County, Florida and have been so for more than six months prior to the filing of this action. The Court has jurisdiction over the parties and the subject matter.

3. Children. The parties are the parents to _____ children. No further issue is expected.

4. Income. The Husband testified that from the time of the party's separation through the date of the final hearing in this case, he earned minimal income. However, at the commencement of the case, the Husband filed a financial affidavit dated _____ in which he claimed at that time to be earning gross monthly income of $_____ ($_____ per year). During the case, the Husband filed two additional financial affidavits including one dated _____ and one dated _____. In the DATE affidavit, the Husband claimed income of $_____ per month average through DATE ($____ per year); and in the DATE affidavit, the Husband claimed income of $_____ average per month through DATE ($_____ per year). The Husband claimed that for YEAR he earned income of only $_____ for the year. Yet, the Husband testified that he paid between $_____ and $_____ during the ____ calendar year for _____and he spent another $_____ for the year for _____ expenses. The Husband's claims of reduced income are not credible. The Husband's bank statements admitted into evidence for the ____ calendar year and for YEAR contradict the Husband's claims of minimal income. Every month, the Husband deposited funds into his personal bank account. The amounts deposited into the Husband's BANK NAME

personal bank account ending in –xxxx showed regular deposits as high as $_____ per month in YEAR. For the last three months of YEAR when the Husband claimed minimal income, he deposited $_____ into his account for the period xx/xx/xx through xx/xx/xx; $_____ for the period from xx/xx/xx through xx/xx/xx; and, $____ for the period from xx/xx/xx through xx/xx/xx. In YEAR, the Husband had income of $_____ but deducted prior loss carryover which resulted in the parties income tax return showing income of $_____; and in YEAR the Husband earned income of $____ (with the Husband claiming that one-half of the income belonged to the Wife).

The Husband is presently working for the business known as _____ including subsidiaries of that corporation. The Husband started this business during the marriage and he claims to be receiving a salary of $____ per month, plus the business pays $____ toward the Husband's rent. The Husband testified that he has traditionally earned his income throughout the marriage by _____. This has resulted in the Husband receiving significant amounts of income in some years and lesser amounts of income in other years. The Wife's forensic accountant testified that based on his analysis of the Husband's financial status, the Husband earns gross income of between $____ and $____ per year.

The Court finds that for the purpose of calculating financial matters in this case, the Husband earns income of $_____ per year.

The Wife is presently unemployed and earns no income. There was no evidence presented to the court to impute any income to the Wife.

II. ALIMONY

5. Permanent Periodic Alimony. The Court finds that based on the testimony and upon consideration of the factors delineated in Florida Statute §61.08(2) as set forth below and all applicable case law, the Wife is entitled to an award of permanent periodic alimony.

5.1. Duration of the Marriage: The Court finds that the parties were married for ___ years to the date of filing. This was a long term marriage.

5.2. Age, physical and emotional conditions of the parties: The Wife is ___ years old and the Husband is ___ years old. Both parties are in relatively good heath.

5.3. Sources of Income available to the parties: The Wife is a housewife and has no income available to her. She has generally relied on the Husband earning income for the parties throughout the marriage. The Wife has not earned any income throughout the majority of the marriage. The Wife worked as a _____ at the beginning of the marriage and then worked in businesses started by the parties. The Wife worked at these businesses to enable her to spend time with her children doing things that her children enjoyed. The Wife never earned any salary for the work that she did. Throughout the marriage the Wife was a housewife and mother, tending to the care of the parties' children. Presently, the Wife cares for her elderly parents who have health problems. The Husband is a businessman who the Court finds either earns or is capable of earning gross annual income of $____ gross per year. There is a substantial disparity in the parties' incomes and in the parties' potential incomes in the future. Based on the disparity in incomes as well as the other factors stated herein, the Court finds that the Wife has a need for alimony in order to maintain a

lifestyle similar to the lifestyle provided by the Husband during the marriage; and the Husband has the ability to pay alimony.

5.4. Standard of Living: The Husband provided the Wife with an upper middle class lifestyle. During the marriage the parties owned a home at _____. The parties traveled and went on vacations. The Wife's Financial Affidavit filed on DATE indicated that her total monthly expenses were $____ of which $____ were for the children. Therefore, the Wife's claimed need to maintain herself in the standard of living established by the Husband during the marriage was $____ per month. In her Amended Financial Affidavit filed on DATE, the Wife's needs were listed at $____ per month. The alimony awarded herein will be insufficient to meet all of the Wife's financial needs.

5.5. Contributions to the marriage: The Husband's primary contribution to the marriage has been to earn income to support the parties' lifestyle. The Wife's contribution to the marriage included working with the Husband in those businesses that he eventually developed into public entities and then sold, and as a homemaker, wife and mother.

5.6. Financial resources to the parties: The Court finds that the parties have no substantial assets in this case that can be liquidated to provide funds to either of them. The marital home has minimal or no equity. The distribution in this case primarily involves the distribution of ____ interests.

5.7. Education and training: This factor is not applicable to this case.

5.8. Other factors necessary to do equity and justice: The Court finds that the Wife does not have the earnings or earning capacity to support herself in

the lifestyle commensurate with the lifestyle established during the marriage. The Husband has traditionally earned income to meet the parties' needs and he should be required to pay permanent periodic alimony to the Wife. The Husband proposed in closing argument that the Court should award durational alimony to the Wife in the amount of $____ per month. Upon consideration of the statute relating to alimony, the Court believes that an award of permanent periodic rather than durational alimony is appropriate in this case. More specifically, pursuant to F.S. 61.08, the law provides that *"Durational alimony may be awarded when permanent periodic alimony is inappropriate. The purpose of durational alimony is to provide a party with economic assistance for a set period of time following a marriage of ... long duration if there is no ongoing need for support on a permanent basis."* In this case, the Court finds that the Wife has an ongoing need for support on a permanent basis and therefore, an award of durational alimony is inappropriate.

5.9. Alimony Award: Based on the foregoing, the Court finds that the Wife has the need for permanent periodic alimony and that the Husband has the ability to pay same to the Wife, although not enough to meet the lifestyle of the marriage. Therefore, the Court hereby awards alimony to be paid by the Husband to the Wife as follows:

5.9.1. The Husband shall pay to the Wife permanent periodic alimony in the amount of _____ ($____) Dollars per month.

5.9.2. The Husband shall pay the alimony to the Wife at her residential address commencing on DATE and continuing on the first day of each succeeding month thereafter. The alimony shall be taxable to the Wife and deductible

by the Husband for federal income tax purposes and shall terminate on death of either party or the Wife's remarriage.

5.9.3. Pursuant to Florida Statute §61.08 (3), the Husband shall secure a term life insurance policy on his life having a face value in the amount of _____ ($____) Dollars with the Wife named as sole beneficiary of the policy. The Husband shall pay all premiums when due and shall not assign, borrow against, pledge, or otherwise encumber the insurance. The insurance premiums shall be additional non-taxable alimony to the Wife and non-deductible to the husband. The insurance company that provides the life insurance shall be rated no lower than A by AM Best rating service. The Husband shall furnish to the Wife documentation and evidence of the existence of the aforesaid insurance coverage by providing the name and address of the insurance carrier providing insurance under this paragraph and written documentation that the policy is in full force and effect. The documentation and evidence shall be provided within thirty (30) days following the date of execution of this Final Judgment and annually thereafter on the anniversary date of the execution of this Agreement. The Husband shall also notify the insurance carrier of the right of the Wife to obtain any and all information requested with respect to the insurance, its enforceability, beneficiary designation, and any changes to the policy. The Husband shall notify the Wife within five (5) days of any change in insurance coverage in compliance with this paragraph. The Husband's responsibility to maintain this life insurance policy shall terminate when his obligation to pay alimony to the Wife terminates. The Court finds that the Husband can afford the cost of the life insurance.

III. ALIMONY ARREARAGES

6. Alimony Arrears. From the date of the parties' separation on DATE through DATE, the Wife has had the need for and the Husband has had the ability to pay the alimony awarded in this Final Judgment. However, during this XX-month time span, the Husband failed to pay any support whatsoever to the Wife. The Husband should be required to pay alimony arrearages and he is hereby ordered to pay those arrearages to the Wife in the amount of $____. The amount owed herein shall be paid by the Husband from his share of the equitable distribution of the parties' assets or from his future income. The amount owed shall accrue interest at the statutory judgment interest rate until paid. The Wife is hereby provided a judgment against the Husband for the amount owed. The Court shall retain jurisdiction to otherwise provide for payment of the arrearages owed.

IV. CHILD SUPPORT ARREARAGES

7. Child Support Arrears. From the date of the parties' separation on DATE through the date that the parties' daughter graduated from high school in DATE (XX months) the child resided with the Wife and the Husband failed to pay child support to the Mother. The Husband testified that he provided the minor child with a credit card that the child used to charge $____ for the child's expenses between the time of the parties' separation and the date that the child turned eighteen years old in DATE. While these claimed payments may have been provided, they do not constitute child support which was required to be paid by the Husband directly to the Wife.

7.1. At the inception of this case, the Husband claimed on his financial affidavit dated _____ that he earned gross income of $_____ per month and net income of $_____ per month. The Wife was unemployed at this time not earning any

income. Based on the Husband's income set forth on his financial affidavit, his child support obligation during this XX month time period was $_____ per month pursuant to the Florida Child Support Guidelines. *See* Child Support Guidelines Worksheet attached hereto as Exhibit "A". As such, the Husband owes to the Wife child support arrearages of $_____.

7.2. The Husband is hereby ordered to pay the sum of $____ to the Wife. Payments shall be made at the rate of $___ per month plus statutory interest on the amount owed. Payments shall commence on DATE and continue on the first day of each succeeding month thereafter until the entire amount due has been paid in full.

7.3. All child support payments shall be paid directly to the Wife.

V. EQUITABLE DISTRIBUTION

8. Assets. The Court finds that the parties have limited assets for distribution. Those assets shall be distributed as follows:

8.1. Marital Home

The parties own the property located at _____, that is titled in the joint names of the parties and legally described as follows:

LEGAL DESCRIPTION

The parties have agreed that the property should be sold and that the Wife shall have the right to reside on this property until the property is sold under the following terms:

8.1.1. The Wife shall have the right to the exclusive use and possession of the property should she desire, until the sale of the property.

8.1.2. The property shall be listed for sale. The parties have stipulated and agreed that the property shall be listed for sale with REALTOR NAME from REAL ESTATE COMPANY.

8.1.3. The parties shall confer and agree upon the initial listing price for the sale of the property. If they cannot agree, the property shall be listed for sale at the listing price determined by the listing real estate broker. If the parties do not otherwise agree, they shall accept any bona fide offer within XX% of the then listing price. The parties shall provide each other by fax or hand delivery any offer received within 24 hours of receipt. The Wife shall provide brokers and prospective purchasers with access to the property as needed.

8.1.4. In the event there is any dispute between the parties involving any matter relating to the sale of the property (such as, but not limited to choosing an initial or replacement real estate broker, determining the listing price for the property, deciding whether to accept the terms of an offer to purchase, etc.), that dispute shall be resolved by the Court based upon commercially reasonable standards.

8.1.5. Until the Wife's exclusive possession of the property ends, the parties agree that except as hereinafter set forth, neither shall be responsible for payment of any mortgages, lines of credit, real estate taxes, homeowner's insurance, homeowner's association dues, or other obligations relating to the ownership and use of the property. The parties understand that a foreclosure action has been filed or may be filed against the property as a result of the parties' failure to pay the aforesaid obligations.

8.1.6. Upon the sale, all utility and other deposits, if any, shall be equally divided between the parties.

8.1.7. If there are net proceeds of the sale after the payment of all closing costs, brokerage fees and existing encumbrances against the property, those net proceeds shall be equally disbursed with the Wife receiving ____ (XX%) percent of the net proceeds and the Husband receiving ____ (XX%) of the net proceeds. However, if the Husband owes to the Wife any funds pursuant to other provisions of this judgment then said funds owed shall be deducted from the Husband's share of the net proceeds and paid to the Wife. If the sale does not generate sufficient funds to pay existing encumbrances against the property in full, then the parties shall each be responsible for payment of one-half of any and all deficiencies associated with the sale of the property.

8.2. Furniture, Furnishings, Jewelry And Personal Property

The parties agreed that they equitably distributed the bulk of their personal property at the time of their separation. Each party shall hereafter own their respective clothing, jewelry and personal effects. Except as hereinafter set forth, the Wife shall retain ownership of the household furniture, furnishings, collectibles and other personal property located in the former marital home property or otherwise in her possession; and, the Husband shall retain ownership of all household furniture, furnishings, collectibles and other personal property located in his rental home property or otherwise in his possession.

8.2.1. Artwork. The parties own the following items of artwork: (1) _____; (2) _____; (3) _____; and (4) _____. The parties stipulated that they

shall either divide these assets or otherwise sell the assets and equally divide the sales proceeds. In the event there is any dispute between the parties involving any matter relating to the division or sale of the assets, that dispute shall be resolved by the Court.

8.3. Automobile

The parties' stipulated that the Wife shall retain as her sole and exclusive property the YEAR MAKE MODEL automobile and shall assume sole responsibility for payment of all expenses associated with the ownership and use of this automobile.

8.4. Bank Accounts

Prior to the trial in this case, the parties divided and closed all jointly held bank accounts and divided their cash funds. Each party is hereby awarded those bank accounts and cash funds in their respective possession.

8.5. Retirement Assets

The Wife is the owner of a _____ Retirement Account ending in account number -XXXX having a value of $_____ that the parties have stipulated shall continue to belong solely to the Wife. The Husband testified that he does not own any retirement or pension assets.

8.6. The Family Trust

The parties are the Settlors and Trustees of a trust known as The Family Trust (hereinafter referred to as "Trust") that was created pursuant to a trust document executed by the parties on DATE. The Trust contains assets including, but not limited to: (1) _____; (2) _____; (3) _____; (4) _____; (5) _____; (6) _____; (7) _____; and, (8) other assets.

8.6.1. The Trust is not a party to the divorce proceedings and the Court does not have jurisdiction over this asset. The Trust remains in full force and effect and the parties shall be bound by the terms of the Trust agreement when administering the Trust and dealing with Trust assets. Neither party shall take any action to violate or circumvent the provisions of the Trust.

8.7. Stocks

8.7.1. In addition to stocks held by the parties in The Family Trust, the parties, either individually or jointly, maintain ownership interests in various business entitles and stocks. The assets owned by the parties include stock or interests in:

(1)

(2)

(3)

(4)

(5)

(6)

(7)

8.7.2. The Wife claimed that the Husband _____. The evidence showed that _____. The evidence also showed that _____.

8.7.3. _____, **Inc.** The parties acknowledge that the primary marital asset is _____. The Husband currently controls ____ as its director and officer. The significant asset owned by ____ is ____'s interest in its subsidiary, SUB COMPANY NAME, a company that sells _____. As of DATE, as reported in the

SEC Form 10Q for the quarter ending DATE, _____ has a total of _____ common shares outstanding and the Husband claimed that this accurately reflects the current status of the outstanding shares of ____; and as of DATE, _____had a total of _____ common shares outstanding. According to the most recent ____ Form 4 filings, the following share ownerships have been reported which the Husband claimed accurately reflects the status of ownership of the parties and their children in _____:

i. HUSBAND NAME……_____ (Husband Shares)

ii. WIFE NAME……_____ (Wife's Shares)

iii. TRUST NAME……_____ (Trust Shares)

TOTAL ……_____ shares

The Court finds that all shares set forth above and delineated as "Husband's Shares", and "Wife's Shares" (as well as any additional shares that are later found to exist that would have been "Husband's Shares" and "Wife's Shares" and shares owned by The Trust) shall constitute marital assets which shall hereafter be owned equally by the parties (or in the case of the Trust, by the Trust).

8.7.3.1. The Husband testified that the shares of ____ held by him include _____ shares of stock that the Husband purchased from _____, for $____. The Husband claimed that he entered into an agreement with Mr. ____ to return the shares of stock to him. The Agreement for the purchase of this stock was submitted into evidence and did not contain any reference to the Husband's claimed agreement to re-sell the stock to Mr. _____. Further, the Court does not accept the Husband's claims. As such, the _____ shares of stock that the Husband purchased from Mr. ____ shall constitute a marital asset.

8.7.3.2. Prior to the filing of the petition for dissolution of marriage in this case the Husband entered into an Agreement to purchase _____ shares of _____ stock for $____ from _____, a company shareholder. When the parties separated, the Husband changed the purchase agreement for the purchase of this stock and listed _____ as the purchaser of the stock. The Court finds that the Husband's actions constitute a ruse to deprive the Wife of her share of this marital asset. The evidence showed that it was the Husband who negotiated the purchase of the stock in the name of _____; the Husband established a stock account for _____ at COMPANY NAME; the Husband directed the stock broker to sell approximately _____ shares of the stock; the proceeds from the sale of the stock were deposited into a BANK NAME bank account in the name of ____ that was linked to an account in the name of the Husband; the funds received from the sale of stock were immediately transferred from ____'s account into the Husband's account; the Husband had full access to ____'s account and the authority to direct the transfer of funds as he desired; the Husband then utilized the funds from the sale of this stock in the amount of $____ as his own funds. The Husband has claimed that the stock and funds received from _____ constitute "loans" to him. The Court rejects the Husband's claims. The Husband shall immediately take such action as may be required to transfer _____'s Shares into the joint names of the parties.

8.7.4. In order to establish a mechanism to enable the Husband to appropriately run the businesses while providing the Wife and The Family Trust with protection from any dilution or diminishment in the value of the Wife's interest or the

Trust's interests in _____, SUB COMPANY NAME and all of the other business assets and stock (hereinafter "Enjoined Companies"), the Court hereby orders as follows:

8.7.4.1. Pursuant to the terms of this judgment, the Husband shall continue to control ____ and SUB COMPANY NAME both as a director and officer, as well as other Enjoined Companies, without any interference from the Wife. In order to protect the Wife's interest in the assets, the Court hereby appoints a "Financial Overseer" to assist the parties in resolving any matters affecting the party's stock ownership and the operations of the business entities and to report to the Court with regard to any disputes between the parties. The parties have stipulated and agreed that _____ shall be the Financial Overseer. If Mr. ____ refuses or is unable to be the Financial Overseer, the parties shall agree upon a replacement Financial Overseer. If the parties are unable to agree upon the choice of who should be appointed as the Financial Overseer, one will be appointed by the Court. In the event either party disagrees with the determination of the Financial Overseer, the matter may be presented to the Court for a determination. Subject to the approval of both parties before or after input from the Financial Overseer, the parties shall abide by the following:

(1) The Husband shall not appoint any other officer or director to any of the Enjoined Companies without the Wife's consent.

(2) Shareholder's meetings shall be held pursuant to the terms of the applicable corporate by-laws and both parties shall follow the requirements set forth in those by-laws.

(3) Although the Husband shall be entitled to make those business decisions that he deems appropriate in the best interest of the Enjoined Companies, he shall be enjoined from transferring, issuing, buying, selling or releasing new issue shares or shares for any affiliated companies or subsidiaries of the Enjoined Companies except for legitimate business purposes which shall be subject to the Wife's consent or, pursuant to a review of the Financial Overseer.

(4) The Husband shall not spin-off any new business entities or create any new subsidiaries of the Enjoined Companies without first obtaining the Wife's consent or a determination is made after input from the Financial Overseer.

(5) Neither the Husband, the Wife nor any nominees of the parties shall hereafter transfer, issue, buy, sell or release existing Marital Shares or shares of the Enjoined Companies, without the express written consent of the other party

(6) A Transfer "Stop" shall be placed on the transfer records recorded by STOCK TRANSFER COMPANY, or such other transfer agent as the Enjoined Companies may employ from time to time regarding all Marital Shares, shares held by the Family Trust and/or of the Enjoined Companies. The Marital Shares and shares held by the Family Trust and/or of the Enjoined Companies shall contain a legend on the front of each share certificate stating that "the transfer of the shares are subject to this Martial Settlement Agreement". In the event of any proposed sale or liquidation of the Marital Shares, the other party shall have the initial right to approve the sale or liquidation and receive one-half of all sale proceeds received from the sale or liquidation of the shares. If a party chooses not to approve the sale of any shares of stock proposed by the other party, the party who proposes the sale shall still be entitled

to sell the shares of sock but those shares sold shall be allocated against that party's one-half interest in the Marital Shares. [For example, if the Husband finds a buyer for 100,000 shares of stock for $5,000, if the Wife approves this sale, then 100,000 shares of Marital Shares shall be sold and the $5,000 shall be equally divided between the parties. If the Wife does not approve the sale, then the 100,000 shares of Marital Shares may still be sold by the Husband but those shares shall be allocated against the Husband's undivided one-half interest in the Marital Shares and he shall receive the entirety of the $5,000, but the Wife shall thereafter own an additional 100,000 shares of Marital ____ Shares more than the Husband in order to equalize the parties interests in the asset.]

(7) The Husband shall be enjoined from causing Enjoined Companies to make loans to the Husband or to anyone else and he shall be enjoined from receiving loans from the Enjoined Companies.

(8) The Husband shall not receive or obtain any further compensation, salary, bonuses, commissions, perquisites or other financial benefits from the Enjoined Companies beyond that which he is presently entitled to receive pursuant to the terms of his employment agreement, unless the Husband receives prior written approval from the Wife. The Husband may only incur charges paid by the Enjoined Companies and any subsidiary and affiliated companies for legitimate business purposes. The Husband shall not incur any personal expenses or charges payable by the Enjoined Companies or any subsidiary and affiliated companies.

8.7.5. Nothing herein shall preclude the parties from agreeing after their divorce to either sell or agree for the Husband to purchase the Wife's interest in the Enjoined Companies upon mutually agreeable terms.

8.7.6. The Order Granting _____ entered by the Court on _____ shall hereafter have no further force or effect and shall be superseded by the terms of this Final Judgment, upon entry of the judgment and the appointment of the Financial Overseer.

9. Liabilities. During the trial, the parties stipulated that the Husband would assume the responsibility for payment of the Wife's BANK NAME card obligation in the approximate amount of $____ associated with account number ending in -XXXX. Payment of this obligation shall be made within ____ (XX) days following the execution of this Final Judgment. Other than the aforesaid obligation, the parties presented no other evidence of marital debts and liabilities. Each party shall assume the responsibility for payment of those debts and obligations incurred in their individual names both prior to and after the date of filing of the Petition for Dissolution of Marriage in this case.

VI. ATTORNEY'S FEES, COSTS AND SUIT MONIES

10. Attorney's Fees and Costs. Pursuant to Florida Statute §61.16, the Court finds that the Husband is in a superior financial position to that of the Wife based on the parties incomes and financial resources and he shall be responsible for the payment of all or a portion of the Wife's attorney's fees, costs and suit monies. The Court reserves and retains jurisdiction to determine the amount of fees, costs and suit monies to be paid by the Husband to the Wife or for her benefit.

VII. RESERVATION OF JURISDICTION

11. Wife's Verified Motion to Re-open Final Hearing Due to Misconduct of Husband and Newly Discovered Evidence. The Wife has filed a Verified Motion to Re-open Final Hearing Due to Misconduct of Husband and Newly Discovered Evidence. The Court shall retain jurisdiction to address this motion and to enter such other and further orders as the Court may deem necessary to determine the claims set forth in that motion.

12. Reservation of Jurisdiction. The Court reserves jurisdiction to enter such further orders and judgments as may be necessary to determine the Wife's award of attorney's fees and costs and to ensure compliance with the Final Judgment and for the purposes of modifying or enforcing the terms of this Final Judgment.

DONE AND ORDERED in Chambers at Broward County, Florida, this _____ day of February, 2013.

_____
HONORABLE DALE COHEN
CIRCUIT COURT JUDGE

Copies furnished to:
Robert D. Orshan, Esq.
Felicia Shaman, Esq.
Alan Lerner, Esq.

FINAL JUDGMENT OF DISSOLUTION OF MARRIAGE

IN THE CIRCUIT COURT OF THE 11th
JUDICIAL CIRCUIT IN AND FOR
MIAMI-DADE COUNTY, FLORIDA

FAMILY DIVISION
CASE NO.

IN RE: THE MARRIAGE OF:

_____,
Petitioner,

And,

_____,
Respondent.
_____/

FINAL JUDGMENT FOR DISSOLUTION OF MARRIAGE

THIS CAUSE having come on to be heard for final hearing on the _____ day of _____, 201_, and the Court having examined the record and finding the cause is at issue, and the Court further having taken testimony of the Petitioner, and it appearing that the Petitioner has been a resident of the State of Florida for more than six months prior to the filing of the Petition for Dissolution of Marriage; that the marriage of the parties is irretrievably broken, and the Court being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED as follows

1. **JURISDICTION:** The Court has jurisdiction of the parties and the subject matter herein.

2. **MARRIAGE IRRETRIEVABLY BROKEN:** The marriage between _____, the Petitioner/Husband, and _____, the Respondent/ Wife, be and the same is hereby dissolved as it is irretrievably broken.

3. **MARITAL SETTLEMENT AGREEMENT:** The Marital Settlement Agreement

executed by the parties on the ___ day of _____, 201_, and introduced into evidence was freely entered into by the parties and is in the best interest of the parties. The Agreement is ratified, approved, adopted and incorporated in this judgment by reference, and the parties are ordered to fully comply with its terms and provisions.

4. **RESERVATION OF JURISDICTION:** The Court reserves jurisdiction over the parties and subject matter to resolve all issues relating to enforcement of the provisions of the Marital Settlement Agreement; for the entry of a charging lien for attorney's fees and costs, if necessary; and to provide such other and further relief as the Court may deem necessary.

DONE AND ORDERED in Chambers in Miami-Dade County, Florida on this ____ of _____, 201__.

_____
CIRCUIT COURT JUDGE

Copies furnished to:
You
Opposing Attorney/Party

FINAL JUDGMENT OF DISSOLUTION OF MARRIAGE

IN THE CIRCUIT COURT OF THE 11TH
JUDICIAL CIRCUIT IN AND FOR
MIAMI-DADE COUNTY, FLORIDA

IN RE: THE MARRIAGE OF:

FAMILY DIVISION
CASE NO. - FC

NAME,
Petitioner/ ,

And,

NAME,
Respondent/ .
_____/

FINAL JUDGMENT FOR DISSOLUTION OF MARRIAGE

THIS CAUSE having come on to be heard for final hearing on the _____ day of _____, 201_, and the Court having examined the record and finding the cause is at issue, and the Court further having taken testimony of the Petitioner, and it appearing that the Petitioner has been a resident of the State of Florida for more than six months prior to the filing of the Petition for Dissolution of Marriage; that the marriage of the parties is irretrievably broken, and the Court being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED as follows:

1. **JURISDICTION:** The Court has jurisdiction of the parties and the subject matter herein.

2. **MARRIAGE IRRETRIEVABLY BROKEN:** The marriage between **NAME,** the Petitioner/ , and **NAME**, the Respondent/ , be and the same is hereby dissolved as it is irretrievably broken.

3. **MARITAL SETTLEMENT AGREEMENT:** The Marital Settlement Agreement executed by the parties on the _____ day of _____, 201_, and introduced into evidence was freely entered into by the parties and is in the best interest of the parties. The

Agreement is ratified, approved, adopted and incorporated in this judgment by reference, and the parties are ordered to fully comply with its terms and provisions.

4. **CHILD CUSTODY JURISDICTION**: The parties are the parents of two (2) minor children, to wit: NAME (born XX/XX/XXX) and NAME (born XX/XX/XXX). The United States is the country of habitual residence of the minor children. The State of Florida maintains the most significant contacts with the children and is the most appropriate forum for addressing parental contact. The State of Florida is the home state for the purpose of the Uniform Child Custody Jurisdiction and Enforcement Act, Parental Kidnapping Prevention Act and future modification actions. Venue shall remain in Miami-Dade County, Florida.

5. **CHILD SUPPORT**: The Court finds that the parties have the present ability to pay support as agreed to in the Marital Settlement Agreement as ratified and made part of this Final Judgment.

6. **RESTORATION OF WIFE'S PRIOR NAME:** The Wife's prior name is hereby restored and she shall hereinafter be known as _____.

7. **RESERVATION OF JURISDICTION:** The Court reserves jurisdiction over the parties and subject matter to resolve all issues relating to enforcement of the provisions of the Marital Settlement Agreement; for the entry of a charging lien for attorney's fees and costs, if necessary; and to provide such other and further relief as the Court may deem necessary.

DONE AND ORDERED in Chambers in Miami-Dade County, Florida on this ____ day of June, 2013.

Copies furnished to:

, Esq.
, Esq.

_____
CIRCUIT COURT JUDGE

AFFIDAVIT OF RECORDS CUSTODIAN

IN THE CIRCUIT COURT OF THE 11th JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

IN RE: THE MARRIAGE OF:

FAMILY DIVISION
CASE NO.

_____,
Petitioner/___,

And,

_____,
Respondent/___.
_____/

AFFIDAVIT OF RECORDS CUSTODIAN

The undersigned is the Records Custodian for _____, with offices located at: _____ and declare that all of the attached records:

1. Were made at or near the time of the occurrence of the events set forth by the records,

2. Were made from information transmitted by, a person having knowledge of the events they record;

3. Were kept in the course of regularly conducted activity of the Company; and,

4. Were made as a regular practice in the course of the regularly conducted activity of the Company.

I hereby certify under penalty of perjury that the facts stated above are true and correct to the best of my knowledge, and understand that falsely making such a certification would subject the undersigned to a criminal penalty under the laws of the foreign or domestic location in which the certification was signed.

DATED this ____ day of _____, 2014.

By: _____
RECORDS CUSTODIAN

Sworn and subscribed to before me
This ____ day of _____, 20____.

_____
Notary Public
My commission expires:_____

_____
PRINT NAME

Orshan Law Group, LLC
PH: (305) 858-0220 • FX: (305) 854-6810