Nuts and Bolts of Family Law

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Chapter I:
Child Support

The purpose of this section is **NOT** aimed at teaching the reader how to calculate child support. Fla. Stat. §61.30 dives profoundly into the ins and outs of calculating child support. In addition, the child support guidelines worksheets, which have been approved by the Florida Supreme Court, can be found on the forms section of this book and are highly instructive on how to calculate child support. It is however, highly recommended that attorneys invest in a child support guidelines program in order to raise productivity, ensure accuracy, minimize liability and shun away from preventable stress. A standard child support case may require various versions of guidelines to account for different scenarios which can ultimately alter the final number considerably; therefore, calculations by hand are typically disfavored. In addition, the client will benefit deeply in that his or her attorney fees should be significantly reduced. A happy client is a referring client.

Unlike Alimony, the Florida Legislature has enacted a set of guidelines codified under Fla. Stat. §61.30 which "presumptively establishes the amount the trier of fact shall order as child support . . . ."[1] Given the mathematical nature of this procedure, one would deduce an absence of argument in this area of the law; however, child support can be, and often is, incredibly litigated. Consider the following points of argument:

FLA. STAT. §61.30(1)(A)

Fla. Stat. §61.30(1)(a) gives the trier of fact discretion in adjusting the child support guidelines plus or minus 5% after considering "all relevant factors, including the needs of the child or children, age, station in life, standard of living, and the financial status and ability of each parent."[2] The trier of fact can break the 5% cap "only upon written finding[s] explaining why ordering payment of such guideline amount would be unjust or inappropriate."[3] Failure to provide written findings in awarding more than five percent deviation from the guidelines constitutes reversible error. *Lotz v. Lotz*, 686 So. 2d 704, 705 (Fla. 2d DCA 1996).[4]

The case of *Dep't of Revenue v. Williams*, 39 Fla. L. Weekly D166 (Fla. 2nd DCA January 24, 2014) seems to support the notion that the child support award could also be deviated downwards up to 5% based on an unapproved parenting plan or informal visitation schedule through the following quotes:

- In arguing against a deviation of more than 5% absent a court approved written parenting plan, the Dep't of Revenue asserted that "the agreement could not support a deviation of more than five percent because it was neither approved nor established by a court." *Id.*

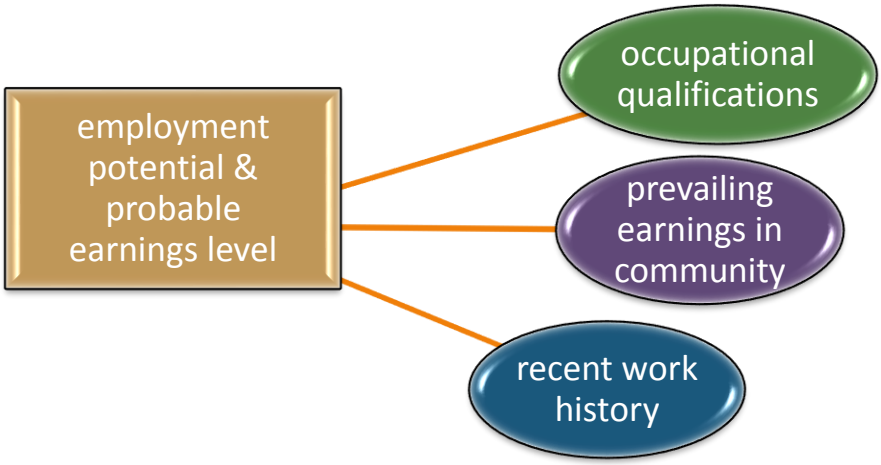
[1] Fla. Stat. §61.30(1)(a).
[2] *Id.*
[3] *Id. See Dep't of Revenue v. Daly*, 74 So. 3d 165, 167 (Fla. 1st DCA 2011)(finding that Fla. Stat. §61.30 "prohibits more than 5% deviation from the child support guidelines except in certain circumstances.")
[4] See also Caudill-Rosa v. Rosa, 38 Fla. L. Weekly D1969 (Fla. 2d DCA September 27th, 2013).

- The Williams court held that "deviations of more than five percent based on visitation are only authorized pursuant to a court-approved parenting plan." *Id*. at 167.

It should be noted that although no specific written findings are necessary, the case of *Cash v, Cash*, 38 Fla. L. Weekly D2016 (Fla. 2d DCA September 27th, 2013) reversed the lower court's deviation of five percent citing that "neither the record nor the order in [the] . . . case indicates that the court considered any of the statutory factors in increasing the presumptive child support obligation by five percent." *Id; see also Thyrre v. Thyrre*, 963 So. 2d 859, 863-64 (Fla. 2d DCA 2007).

IMPUTATION OF INCOME

Absent physical or mental incapacity, the court shall impute income "to an unemployed or underemployed parent if such unemployment or underemployment is found . . . to be voluntary . . . ."[5] The court will determine the payor's employment potential & probable earnings level by looking at the recent work history, occupational qualifications and prevailing earnings in the community.[6]



If the parent's income is unavailable, the parent fails to participate in the proceeding or fails to provide adequate information regarding his/her finances, "there is a rebuttable presumption that the parent has income equivalent to the median income of year round full-time workers as derived from current population reports or replacement reports published by the United States Bureau of the Census."[7] For easy reference, this type of imputation will be termed hereinafter "US Census Imputation". A parent may avoid being subjected to the imputation of income if the court makes finding that it is necessary for said parent to stay home with the child and/or children who are the subject(s) of the child support action.[8]

For those valiant legal knights, undaunted by intricate objectives and motivated by the best interests of the child, Fla. Stat. §61.30(2)(b)1 provides the blueprint for imputing more than the median income as reported by the United States Bureau of the Census; to wit, the moving party bears the burden of presenting competent, substantial evidence demonstrating the voluntariness of the underemployment or unemployment and "[i]dentifies the amount and source of the imputed income, through evidence of

[5] Fla. Stat. §61.30(2)(b).
[6] *Id.*
[7] *Id.*
[8] *Id.*

income from available employment . . . which the party is suitably qualified by education, experience, current licensure, or geographic location, with due consideration . . . to the parties' time-sharing schedule and their historical exercise . . .[of same]."[9]

Other than through the "US Census Imputation" method described above, income will not be imputed based on "[i]ncome records . . . more than 5 years old . . . or . . .[i]ncome at a level that a party has never earned . . ., unless recently degreed, licensed, certified, relicensed, or recertified and thus qualified for, subject to geographic location, with due consideration of the . . . time-sharing schedule and their historical exercise of [same] . . . ."[10] Bare allegations regarding employability will fall short of equating to competent, substantial evidence for imputation purposes. *See Burkley v. Burkley*, 911 So. 2d 262, 269 (Fla. 5th DCA 2005).

Coupled with the statute and other cases cited above, the following cases are cite worthy to include in relevant motions, pleadings, etc.,

- "A court may impute income where a party is willfully earning less and the party has the capability to earn more by the use of his best efforts." *Schram v. Schram*, 932 So. 2d 245, 249 (Fla. 4th DCA 2005).

- "Florida courts have consistently held that the imputation of income be supported by factual findings as to the 'probable and potential earning level, source of imputed and actual income, and adjustments to income." *Marlowe v. Marlowe*, 38 Fla. L. Weekly D2271 (Fla. 1st DCA November 8th, 2013) quoting *Harrell v. Harrell*, 947 So. 2d 638, 639 (Fla. 4th DCA 2007).

- "Particularized findings relating to the current job market, the party's most recent work history, occupational qualifications, and the prevailing earnings in the local community are all required to support an imputation of income." *Marlowe v. Marlowe*, 38 Fla. L. Weekly D2271 (Fla. 1st DCA November 8th, 2013); *see also Rabbath v. Farid*, 4 So. 3d 778, 782 (Fla. 1st DCA 2009).

- "This court considered imputation of earning $38,000 a year to a former spouse who voluntarily terminated her employment with a retail store to be supported by competent substantial evidence." *Beasley v. Beasley*, 77 So. 3d 751, 756 (Fla. 4th DCA 2011) referring to *Zarycki-Weig v. Weig*, 25 So. 3d 573, 575 (Fla. 4th DCA 2009).

- "The standard for review of a court's decision to impute income is whether it is supported by competent, substantial evidence." *Mount v. Mount*, 989 So. 2d 1208, 1209 (Fla. 2d DCA 2008).

- "[T]he court must determine whether the subsequent unemployment resulted from the spouse's pursuit of her own interests or through less than diligent and bona fide efforts to find employment paying income at a level equal to or better than that formerly received." *Zarycki-Weig v. Weig*, 25 So. 3d 573, 575 (Fla. 4th DCA 2009).

- The party asserting that the other party's income should be imputed has "the burden of proof." *See Burkley v. Burkley*, 911 So. 2d 262 at 268 (Fla. 5th DCA 2005).

[9] Fla. Stat. §61.30(2)(b)(1).
[10] Fla. Stat. §61.30(2)(b).

- *Roth v. Roth*, 973 So.2d 580, 590 (Fla. 2d DCA 2008)("A court may impute income to a party who has no income or who is earning less than is available to him or her based on a showing that the party has the capacity to earn more by the use of his or her best efforts . . . . Before imputing income, the trial court must consider evidence concerning the party's recent work history, occupational qualifications, and the prevailing earnings in the industry in which the party works.")

- "Imputation of income to a spouse for purposes of determining support is appropriate when someone, such as an employer or parent, is paying or subsidizing some of that spouse's monthly living expenses." *George v. George*, 93 So. 3d 464, 467 (Fla. 2d DCA 2012).

- *Posner v. Posner*, 39 So. 3d 411, 413-14 (Fla. 4th DCA 2010)(affirming the imputation of $1400 where party stayed at his parents home rent-free and where the value of said accommodations were $1400).

- *Chapoteau v. Chapoteau*, 659 So. 2d 1381, 1384 (Fla. 3d DCA 1995)(imputing income to husband residing in employer-provided home).

- "[I]n determining the parties' income levels . . . the court may consider '[r]eimbursed expenses or in kind payments to the extent that they reduce living expenses.'" *Garcia v. Garcia*, 560 So 2d 403, 404 (Fla. 3d DCA 1990)(quoting §61.30(2)(a), Fla. Stat.)

Vocational Rehab Expert should be employed.

- "Housing or housing payments are included in the determination of gross income, not net income." *George v. George*, 93 So. 3d 464, 468 (Fla. 2d DCA 2012).

- *Thomas v. Thomas*, 712 So. 2d 822, 823-24 (Fla. 2d DCA 1998)(holding wife's living expenses were decreased by living in the marital home rent-free);

- *Shrove v. Shrove*, 724 So. 2d 679, 682 (Fla. 4th DCA 1999)("For purposes of child support, the trial court must impute income to a voluntarily unemployed or underemployed parent unless the lack of employment is the result of the spouse's physical incapacity or other circumstances beyond the parent's control.").

- "Voluntary underemployment occurs when a spouse does not put forth a good faith effort to find a position that is comparable to previous employment which was terminated." *Vitro v. Vitro*, 37 Fla. L. Weekly D1333 (Fla. 4th DCA June 6, 2012); *See also Vazquez v. Vazquez*, 922 So. 2d 368, 371 (Fla. 4th DCA 2006).

- Two step process to imputation: Trial court must "conclude that the termination of income was voluntary; second, the court must determine whether any subsequent underemployment 'resulted from the spouse's pursuit of his own interests or through less than diligent and bona fide efforts to find employment paying income at a level equal to or better than that formerly received." *Konsulas v. Konsulas*, 904 So. 2d 440, 443 (Fla. 4th DCA 2005)(*quoting Ensley v. Ensley*, 578 So. 2d 497 (Fla. 5th DCA 1991)).

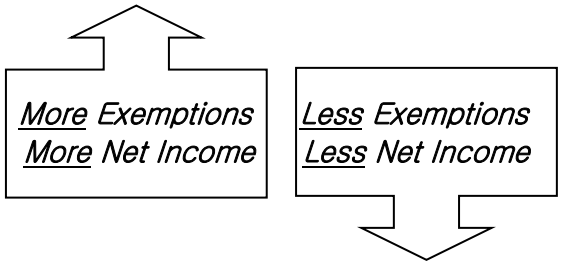
- "[I]t is error to average a spouse's income over previous years where uncontroverted testimony showed a reduction in income." *Weymouth v. Weymouth*, 37 Fla. L. Weekly D850 (Fla. 4th DCA 2012); *see also Greenberg v. Greenberg*, 793 So. 2d 52, 55 (Fla. 4th DCA 2001).

- "The rule for including overtime earnings in gross income is that such earnings should be included when they will be regularly available as a source of income in the future." *Randazzo v. Randazzo*, 89 So. 3d 984, 986 (Fla. 4th DCA 2012); *see also Butler v. Brewster*, 629 So. 2d 1092, 1092-93 (Fla. 4th DCA 1994).

- In imputing income to a party, it is error for the court to base the imputation on "the judge's subjective belief and personal experience" instead of competent, substantial evidence. *Glaister v. Glaister*, 39 Fla. L. Weekly D703 (4th DCA April 11, 2014) quoting *Hale v. Shear Express, Inc*., 946 So. 2d 94, 96 (Fla. 1st DCA 2006). The magistrate in Glaister had relied upon her experience in getting her nails done for years in addition to other cases she had presided over involving nail technicians to determine what the party's income should be imputed to. *Id*.

ALLOWABLE DEDUCTIONS

Child Support is determined based on net income. Obviously, taxes are deducted off the gross income. Litigators need to be cognizant that net income is easily manipulated by shifting the number of exemptions claimed in the party's W-4 form; to wit,



To account for this quandary, the W4 should be requested via discovery or a reputable child support program should be utilized which accounts for these type of issues. A first-rate program will also make necessary adjustments based on what party receives the child tax exemption and/or credits. These exemptions typically have the effect of increasing the parent's net income thereby reducing the non-claiming parent's child support liability. Special attention should be placed on parent's who are self-employed as their taxes are generally higher due to self employment taxes. Fla. Stat. §61.30(3)(b).

Monies deducted for health insurance, "excluding payments for coverage of the minor child"[11] may be excluded. While it sounds easy enough, this deduction is often misinterpreted and misapplied. Paychecks tend to lack specificity on how much of the health insurance premium is attributed to the parent, spouse, children and others who may be insured under the policy raising the following questions:

- How much of the premium is attributed solely to the subject parent?
- What if the premium is also covering third parties? The statute does not address this situation.
- Can the subject parent benefit by decreasing his/her income by adding more people to the policy?

If the party is paying child or spousal support pursuant to court order, said income will also be barred from consideration.[12] The key word in the preceding sentence, besides "pursuant to court order" is "paying"- meaning, the obligor must present actual evidence that they are indeed paying the support for which they are requesting a credit for. *See Dep't of Revenue, v. Cody*, 39 Fla. L. Weekly D309 (1st DCA February 14, 2014)(reversing a deduction from gross income based on prior child support order where the obligor was not actually paying said support); *see also Undercuff v. Undercuff*, 798 So. 2d 867, 869 (Fla.

[11] Fla. Stat. §61.30(3)(e).
[12] Fla. Stat. §61.30(3)(f) & (g).

4th DCA 2001)(reversing deduction where husband presented no evidence he was actually paying the obligation).[13]

Spousal support however, will be added to the receiving spouse's column as income. The other deductions allowed are Mandatory union dues and mandatory retirement payments with the operative word being "Mandatory."[14] "Although for purposes of calculating child support, mandatory retirement payments are included as allowable deductions under section §61.30(3)(d), voluntary retirement payments are not." *Fuesy v. Fuesy*, 64 So. 3d 151, 152 (Fla. 2d DCA 2011); *See Nelson v. Nelson*, 651 So. 2d 1252, 1254 (Fla. 1st DCA 1995)(instructing the trial court to consider the husband's contributions to a voluntary pension plan "as part of his income for purposes of determining child support"). In *Moore v. Moore*, 38 Fla. L. Weekly D1801 (Fla. 5th DCA August 30th, 2013), the wife argued she was obligated to contribute at least 4% of her income towards her retirement account in order to have the employer match same. While the trial court excluded said income from the child support calculation, the appellate court reversed.

CHILD CARE COSTS

When are Child care cost's added to the basic obligation?

Child care costs that don't qualify	Child care costs that do qualify
Child care solely to enhance child's social skills.	Child care due to parent's employment.[15]
Child care solely to enhance child's education.	Child care due to parent's job search.[16]
Child care solely to enhance child's motor skills.	Child care due to education calculated to result in employment or enhance current employment.[17]

These costs are to be added into the basic child support obligation and appropriately assigned to the parents per their respective income percentages. Final judgments failing to factor in child care costs are facially erroneous and subject to appeal even absent a transcript or statement of evidence. *See Wilcox v. Munoz*, 35 So. 3d 136, 139 (Fla. 2d DCA 2010); *see also Waters v. Bland*, 935 So. 2d 1239 (Fla. 2d DCA 2006)(reversing award of child support which failed to include child care costs). Further, "[c]hild care costs may not exceed the level required to provide quality care from a licensed source." Fla. Stat. §61.30(7).

Child care is an exceedingly global term which encompasses day care, after school care, summer school care, summer camp, etc. Practitioner's should be wary to properly calculate the child care on an annualized basis and be mindful that most after school care costs only last ten (10) months with each month costing a different amount depending on the number of actual school days; to wit, a month like December typically costs less as children have a long winter break. Don't be duped into thinking that the cost is unchanged on a monthly basis.

HEALTH INSURANCE

[13] *See also Dep't of Revenue v. Cody*, 39 Fla. L. Weekly D309 (1st DCA February 14th, 2014).
[14] Fla. Stat. §61.30(c) & (d).
[15] Fla. Stat. §61.30(7).
[16] *Id.*
[17] *Id.*

The children's health insurance amount as well as "noncovered medical, dental, and prescription medication expenses of the child . . .[is also] added to the basic obligation unless these expenses have been ordered to be separately paid on a percentage basis."[18] Noncovered expenses if "not factored into the child support guidelines calculation . . . should be apportioned based on the parties' relative incomes." *Rowe v. Borysek-Rodriguez*, 51 So. 3d 1238 (Fla. 2d DCA 2011)(trial court reversed where it attributed half of child's unreimbursed medical expenses to each party where one earned more money); *See Wilcox v. Munuz*, 35 So. 3d 136, 141 (Fla. 2d DCA 2010); *See also Martinez v. Martinez*, 911 So. 2d 288, 289-90 (Fla. 2d DCA 2005).

Florida Statute §61.13(1)(b) provides in pertinent part that orders 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."

Reasonable in Cost

- Presumed reasonable if the cost is no more than 5% of obligor's gross income as defined pursuant to Fla. Stat. 61.30. *See Fla. Stat*. 61.13(1)(b).

Accessible to Child

- Accesible if available "to be used in the county of the child's primary residence or in another county if the parent who has the most time under the time-sharing plan agrees." Fla. Stat. 61.13(1)(b). In cases where there is equal time-sharing, accessibility is defined as "available to be used in either county where the child resides or in in another county if both parents agree." *Id*.

"It is implicit within a final judgment of dissolution that medical expenses for which payment is sought must be reasonable and necessary." *Lustergarten v. Lustergarten*, 65 So. 3d 85, 89 (Fla. 4th DCA 2011). *See, e.g., McBride v. McBride*, 637 So. 2d 938, 940-41 (Fla. 2d DCA 1994)("[W]e find that the medical payment provision of the marital settlement agreement, as adopted in the final judgment of dissolution, is nonmodifiable. However, as with any such provision, it is implicit that those expenses must be reasonable and necessary.")

Aside from the defenses listed above, the obligor may rebut the presumption of reasonableness utilizing the factors listed in Fla. Stat. §61.30(11)(a) which are discussed in the following section. If deviating from the presumption of reasonableness, the trial court must add "written findings explaining its determination why ordering or not ordering the provision of health insurance or the reimbursement of the obligee's cost for providing health insurance for the minor child would be unjust or inappropriate."[19]

FLA. STAT §61.30(11)(A) DEVIATION FACTORS

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:

[18] Fla. Stat. §61.30(8); *see also Piedra v. Piedra*, 37 Fla. L. Weekly D1330 (Fla. 4th DCA June 6, 2012)("[T]he court is required by statute to apportion the cost of the insurance between the parties on a percentage basis.") Court may order one party to obtain it though.

[19] Fla. Stat. §61.13(1)(b).

1. Extraordinary medical, psychological, educational, or dental expenses.[20]
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 for which there is a demonstrated need.
4. Seasonal variations in one or both parent's 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 raise 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.[21]
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 from a single order.
10. The particular parenting plan, 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 refusal of a parent to become involved in the activities of the child.
11. Any other adjustment that is needed to achieve an equitable result which may include, but not be limited to, a reasonable and necessary existing expense or debt. Such expense or debt may include, but is not limited to, a reasonable and necessary expense or debt that the parties jointly incurred during the marriage. Fla. Stat. §61.30(11)(a).

Astute lawyers have been known to argue for an upward deviation of child support based on a parent's minimum contact with the child. In *Cash v. Cash*, 38 Fla. L. Weekly D2016 (Fla. 2d DCA September 27, 2013), the trial court deviated the first five percent generally allowed without written findings and then added another five percent for the Father's limited time sharing with the children. The Appellate court found that the lower court abused its discretion in ordering the second five percent as said "finding is insufficient." *Id*; *see also Swantson v. Swantson*, 746 So. 2d 566, 570 (Fla. 1st DCA 1999).

FLA. STAT §61.30(11)(B) SUBSTANTIAL TIME

The crème of the crème of child support deviations. The ultimate, most commanding shield against paying full child support is codified under Fla. Stat. §61.30(11)(B). The theory is simple; to wit,

[20] *Koslowski v. Koslowski*, 78 So. 3d 642, 643 (Fla. 1st DCA 2012)(where child suffered from severe seizures and had need of respite care, court held "[s]ection §61.30(11)(a)1, Florida Statutes (2004), permits adjustments in child support for '[e]xtraordinary medical, psychological, educational, or dental expenses."'

[21] *Fortune v. Fortune*, 61 So. 3d 441, 447 (Fla. 2d DCA 2011)("[t]he trial court cannot allocate the dependency tax exemption directly" but can "require the custodial parent to execute a waiver transferring the exemptions to the noncustodial parent." *See also Wamsley v. Wamsley*, 957 So.2d 89, 92 (Fla. 2d DCA 2007). "[C]ircuit court may [also] determine in its discretion that the parents should share the benefit of the exemption in alternating years." *El-haji v. Elhaji*, 67 So.3d 256, 258 (Fla. 2d DCA 2010); *see also Salazar v Salazar*, 976 So.2d 1155, 1158 (Fla. 4th DCA 2008).

the child support should trail the child. If the child is spending a substantial amount of time with each parent, defined as "at least 20 percent of the overnights of the year",[22] a reduction in child support is warranted and the statute gives a detailed mathematical formula that goes way beyond the scope of this book. Although the theory is admirable, the formula fails to meet its objective in certain scenarios. In other words, there is a glitch in the formula which to my knowledge, has not been redressed as of the date of publication of this book. The diligent practitioner must anticipate this problem and run guidelines both at the regular amount and at the substantial amount and proceed accordingly.

Divorcing parents in Florida have become more scholarly in family law and as such – my practice has experienced a perceptible increase in parents desiring to spend more time with their children. Whether that is because there is a financial inducement, separation anxiety, longing to abuse the other parent or just plain love- the statute has done wonders in developing and growing parent-child relationships and has, in my opinion, decreased parental alienation.

Consider the following cases involving §61.30(b):

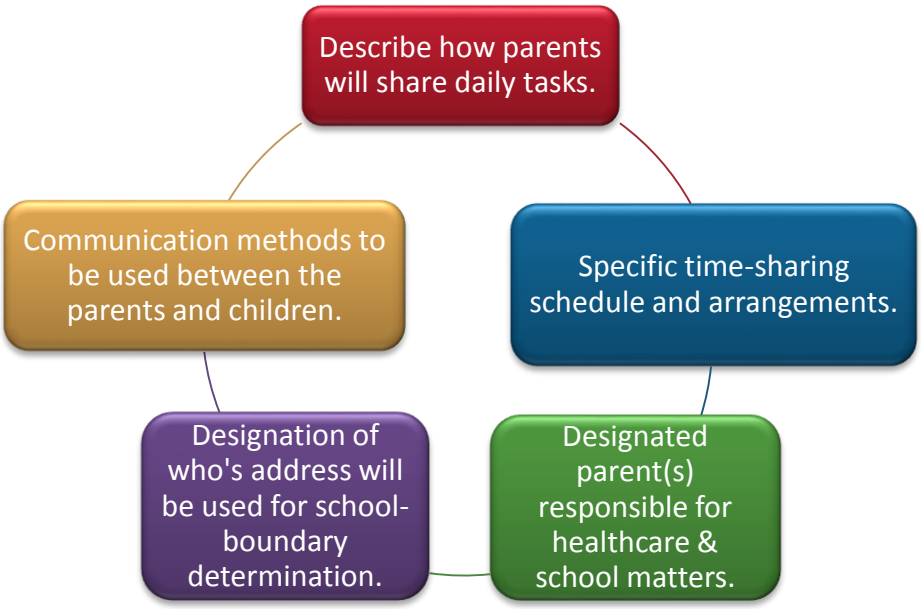
- *Buhler v. Buhler*, 83 So. 3d 790, 792 (Fla. 5th DCA 2011)("[A]pplication of section §61.30(11)(b) is mandatory.) *See also*, *Seiberlich v. Wolf*, 859 So. 2d 570, 571 (Fla. 5th DCA 2003). Florida law mandates a reduction in child support whenever the non-custodial parent spends a 'substantial amount of time' with the child. §61.30(1)(a), Fla. Stat. (2006). "It seems intuitive that, conversely, the failure to spend time with a child mandates forfeiture of the right to a reduction in child support." *Buhler v. Buhler*, 83 So. 3d 790, 792 (Fla. 5th DCA 2011). "Determination of when the failure to exercise visitation has occurred is not instantaneous. Missing an occasional visitation will not give rise to such a finding." *Id*.

    - *Dep't of Revenue v. Daly*, 74 So. 3d 165, 166-67 (Fla. 1st DCA 2011)(holding that "the statutes'plain meaning evidences the Legislature's intent to require deviations from the child support guidelines only where a parent shares at least 20% of the overnight stays pursuant to a . . . parenting plan." *See also* §61.046(14), §61.30(11), Fla. Stat

Case law in Florida is clear that the support is for the benefit of the child and not the parent. *Cronebaugh v. Van Dyke, Jr*., 415 So.2d 738. 741 (Fla. 5th DCA 1982)("Child support is a right that belongs to the Child.") "While the child is a minor, unable to enforce his own right to receive support, a parent or legal guardian may file the appropriate action to enforce such right on behalf of the minor." *Lawrence v. Hershey*, 890 So.2d 350, 351 (Fla. 4th DCA 2004). "[T]he recipient of the child support receives the support monies, not in his own right or for his own benefit, but in trust for the cesti que trust, who is the child." *Cronebaugh*, 415 So. 2d at 741 (Fla. 5th DCA 1982).

Parenting plans should be scrupulously drafted to meet the minimum requirements as described in Fla. Stat. §61.13(2)(b):

[22] Fla. Stat. §61.30(11)(b)8.



The word deviation is so nauseatingly abound throughout this statute that a deviation from a deviation is also allowed pursuant to Fla. Stat. §61.30(11)(b)(7). The court may deviate from the number arrived at via the substantial timesharing calculation "based upon the deviation factors in paragraph (a), as well as the obligee parent's low income and ability to maintain the basic necessities of the home for the child, the likelihood that either parent will actually exercise the time-sharing schedule set forth in the parenting plan granted by the court, and whether all of the children are exercising the same time-sharing schedule.

Use it or lose it! Parents should be aware that they must follow the parenting plan or risk losing the benefit of same. "A parent's failure to regularly exercise the court-ordered or agreed time-sharing schedule not caused by the other parent which resulted in the adjustment of the amount of child support . . . shall be deemed a substantial change in circumstances for purposes of modifying the child support award."[23] The child support may be modified retroactively to the date the parent first failed to exercise it.[24]

OTHER CHILDREN

All children are not created equal, so proclaims statutory Florida law. The statute mandates a deduction from gross income for all parents who are actually paying court-ordered child support.[25] In essence, the first child, via his custodial parent and/or guardian, to win the race to the courthouse will be entitled to the highest amount of on going child support. All other children, although entitled to child support, will probably receive less support, depending on the respective time sharing schedules and other factors.

Subsequent children living with the obligor can offer relief from a modification proceeding seeking upward modification in that the court "may disregard the income from secondary employment obtained in addition to the parent's primary employment if the court determines that the employment was

[23] Fla. Stat. §61.30(11)(c).
[24] *Id.*
[25] Fla. Stat. §61.30(3)(f).

obtained primarily to support the subsequent children."[26] The obligor with the subsequent children "may raise the existence of such subsequent children as a justification for deviation . . . . However, if the existence of such subsequent children is raised, the income of the other parent of the subsequent children shall be considered by the court in determining whether . . . there is a basis for deviation from the guidelines amount."[27] This valuable tool can only be used in upward modifications and "may not be applied to justify a decrease in an existing award."[28]

In situations where the obligor has older children, but does not pay child support via a formal support order because they live with the obligor, the case of *Department of Revenue v. Smith*, 716 So. 2d 333 (Fla. 2d DCA 1998) can offer an argument for relief. The *Smith* court analyzed the language of Section §61.30(11)(k), Florida Statutes (1995) allowing for adjustments to the guidelines where "needed to achieve an equitable result which may include, but not limited to, a reasonable and necessary existing expense or debt." Relying on said language, the court held that two methods were available, in the court's discretion to provide a credit to the obligor for the expense of his older (live-in) children:

1. The court can simply subtract the reasonable expense for the "first child's support";[29] or
2. The court can subtract "the amount of child support that [obligor] would have been required to pay pursuant to the child support guidelines for [his or her] . . .older children, if [obligor was divorced and had a support obligation].[30]

The court in *Smith* reasoned that to reward an obligor with credit for support paid for older children only where obligor is divorced "would be unjust and would also be contrary to the State's interest in preserving the family unit."[31] Obligor's coveting to avail themselves of this credit are advised to request the credit in all pleadings, prayers for relief, motions, etc., and must disclose their spouse's income through competent and substantial evidence; to wit, the spouse may be subjected to disclosing financial information as well as testifying.

Unsung to many practitioner's, there is a third way revealed by the desolate and under cited case of *Department of Revenue v. Martinez*, 744 So. 2d 580 (Fla. 2d DCA 1999). In *Martinez*, the father had:

- ✓ three previous children with his wife;
- ✓ one child being the subject of the present case with another woman; and
- ✓ three subsequent children with his wife.

Mr. Martinez was moving for a modification and argued for a reduction based on the support he pays for his older live-in children.[32] The Department of Revenue submitted that his current wife's income should be imputed (although unemployed) and included as Martinez's total income. The court followed

[26] Fla. Stat. §61.30(12).
[27] Fla. Stat. §61.30(12)(b).
[28] Fla. Stat. §61.30(12)(c).
[29] *Dep't of Revenue v. Smith*, 716 So. 2d 333, 334 (Fla. 2d DCA 1998). *See also Flanagan v. Flanagan*, 673 So.2d 894 (Fla. 2d DCA 1996).
[30] *Dep't of Revenue v. Smith*, 716 So. 2d 333, 334 (Fla. 2d DCA 1998).
[31] *Id*. at 335.
[32] *Dep't of Revenue v. Martinez*, 744 So.2d 580, 581 (Fla. 2d DCA 1999).

suit, imputed income to the wife and added said amount to Martinez's income and further ruled "that it should determine the child support by calculating the guidelines support for four children and then dividing that amount by four."[33]

The appellate court stated that although the court did not utilize one of the two methods approved in *Smith*, the trial court had not abused its discretion in utilizing this third method.;[34] however, the court reversed as to the amount holding that "[t]he trial court erred in imputing the income to the wife."[35] The court reasoned that the wife had never worked and was tasked with raising six children and that the record artlessly did not support the finding.[36]

Reading through these cases and statutes, it is toilsome not to conclude that a credit will only be considered where there is a prior support order or where the obligor supports older live-in children; however, here comes *Speed v. Dep't of Revenue*, 749 So. 2d 510 (Fla. 2d DCA 1999) to extend the credit even further. In *Speed*, the obligor had two subsequently born children with his current wife.[37] The court used the same reasoning espoused in *Smith* and held "to allow the payor parent credit for support only in the event of a divorce is both unjust and contrary to the State's legitimate interest in preserving the family."[38] *See also Dep't of Revenue v. Smith*, 16 So. 3d 879 (Fla. 3d DCA 2009)(relying on *Speed*, the State confesses error in failing "to consider the other children residing with the appellant when calculating the child support guidelines . . . and accordingly, reversal is warranted.")

Of noteworthy importance is also the case of *Hutslar v. Lappin*, 652 So. 2d 432 (Fla. 1st DCA 1995) in which the payor had older children who lived with her. The First DCA turned to the "catch all" phrase of Fla. Stat. §61.30(11)(k) which allows "[a]ny other adjustment which is needed to achieve an equitable result." This language was construed to vest "broad discretion in the trial court to consider a custodial parent's obligation of support to other children, in the calculation of his or her income for purposes of determining that parent's support obligation for the minor child who is the subject of the support action."*Hustlar*, 652 So. 2d at 434 (Fla. 1st DCA 1995). While the case involved older children, the court used the broader term "other children" at least twice within their holding of this case.

The following three cases also subscribe to the notion that parents should receive some sort of credit for supporting other children despite no formal child support order:

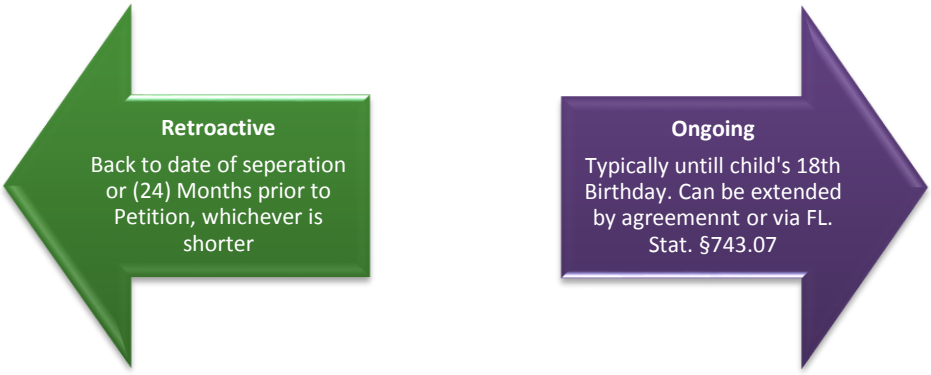
- *Needham v. Needham*, 39 So. 3d 1289, 1290 (Fla. 2d DCA 2010)(noting that the statutes have "no specific method for the resolution [and treatment regarding how to account for other children without a child support order] . . .but the case law provides that the trial court has discretion to consider this factor and can abuse its discretion if it fails to adjust child support to reflect the impact of this factor under some circumstances."

- *Flanagan v. Flanagan*, 673 So. 2d 894, 896 (Fla. 2d DCA 1996)(finding an abuse of discretion where the trial court failed to consider wife's "preexisting support obligation to [her older live-in son] in determining the amount she could pay for support of her two later-born sons."

[33] *Id*. at 581.
[34] *Id*. at 581.
[35] *Id*. at 581.
[36] *Id*. at 581.
[37] *Speed v. Dep't of Revenue*, 749 So. 2d 510 (Fla. 2d DCA 1999).
[38] *Id*. at 511.

- *Joye v. Jones*, 789 So. 2d 508, 509(Fla. 1st DCA 2001)("[C]hild-support guidelines statute vests wide discretion in the trial court to take into account a parent's obligation of support to other children, in the determination of what is a proper child-support award for the minor child who is the subject of the support action . . .")

RETROACTIVE SUPPORT



The court has time traveling powers to require an obligor to pay child support "to the date when the parents did not reside together in the same household with the child, not to exceed a period of 24 months preceding the filing of the petition, regardless of whether that date precedes the filing of the petition."[39] For purposes of the retroactive calculation, the court will utilize the parties' current financial status in setting the retroactive award unless the obligor demonstrates his or her income during that period.[40] The court shall consider "[a]ll actual payments made by a parent to the other parent or the child or third parties for the benefit of the child throughout the proposed retroactive period."[41] In addition, "it is possible that gifts purchased for the benefit of the child might qualify as "'actual payments . . . for the benefit of the child"'. *Dep't of Revenue v. Ingram*, 38 Fla. L. Weekly D1046 (1st DCA May 17, 2013) quoting *Dep't of Revenue v. Soto*, 28 So. 3d 171 (Fla. 1st DCA 2010).

By the time the retroactive child support gets added up, the obligor could be several thousand dollars in the hole before he/she makes their first court ordered payment. The court "should consider an installment payment plan for the payment of retroactive child support."[42]

The award of retroactive support is theoretically discretionary; however, "[a] trial court abuses its discretion when it fails to award retroactive child support from the date of the filing of a petition for dissolution of marriage where there is a need for child support and an ability to pay." *Leventhal v. Levethal*, 885 So. 2d 919, 920 (Fla. 3d DCA 2004).

As with other awards, parties should be explicitly clear in their pleadings and/or motions that they are requesting the child support to also apply retroactively. In *J.L.B v. S.J.B.*, 39 Fla. L. Weekly D360 (5th DCA February 21, 2014), the appellate court "decline[d] to hold the trial court abused its discretion in

[39] Fla. Stat. §61.30(17).
[40] Fla. Stat. §61.30(17)(a). *See also Finch v. Dep't of Revenue*, 36 Fla. L. Weekly D1556 (3rd DCA 2011)("The use of current income is permissible when the obligor fails to demonstrate his or her actual income during the retroactive period.")
[41] Fla. Stat. §61.30(17)(b).
[42] Fla. Stat. §61.30(17)(c).

calculating the retroactive child support" citing that the "[f]ormer husband did not plead for retroactive child support and the issue was not tried by consent . . . ."[43] *See Newberry v. Newberry*, 831 So. 2d 749, 751 (Fla. 5th DCA 2002)("A trial court lacks jurisdiction to enter any judgment on an issue not raised by the pleadings." (citing *Cortina v. Cortina*, 98 So. 2d 334 (Fla. 1957)).

Florida Statute §61.130(1)(b)(2) requires an income deduction order be entered "[u]pon the entry of an order establishing, enforcing, or modifying an obligation for alimony, for child support, or for alimony and child support, other than a temporary order . . . ." Said statute further requires the order to [s]tate the amount of arrearage owed, if any, and direct a payor to withhold an additional 20 percent or more of the periodic amount specified in the order establishing, enforcing, or modifying the obligation, until full payment is made of any arrearage, attorney's fees and costs owed . . . ."[44] In my experience, the 20% requirement is rarely adhered to in Title IV-D cases.

Retroactive support should not be equated to "past due support" as that term is utilized in federal statute 42 U.S.C. § 664(a)(1).[45] Said statute deals with the federal Tax Refund Intercept Program (TRIP) and allows the interception of payor's income tax refund when the "[s]tate has notified the Secretary of the Treasury that the named individual 'owes past-due support.'" *Dep't of Revenue v. Cessford*, 100 So. 3d 1199, 1202-03 (Fla. 2d DCA 2012). Past due support is defined as "the amount of a delinquency, determined under a court order [] or an order of an administrative process established under State law." 42 U.S.C. § 664(c). The *Cessford* court held that "retroactive child support that is not otherwise overdue does not constitute a delinquency or meet the definition of "past-due support." *Cessford*, 100 So. 3d at 1204 (Fla. 2d DCA 2012).

WAIVER OF CHILD SUPPORT

Anomalous is the week where a parent, custodial or otherwise, abstains from asking me whether child support can be waived. The response, quite candidly is plainly:

No! No! ! No!!!

Provisions relieving the obligor from their "duty to support [their] minor child entirely or permanently," is against public policy. *Laussermair v. Laussermair*, 55 So. 3d 705, 706 (Fla. 4th DCA 2011); *See also Lester v. Lester*, 736 So. 2d 1257, 1259 (Fla. 4th DCA 1999)(quoting *Brock v. Hudson*, 494 So. 2d 285, 287 n.3 (Fla. 1st DCA 1986)). "Each parent has a fundamental obligation to support his or her minor or legally dependent child." Fla. Stat. §61.29(1). "The obligation of a parent to not waive or otherwise 'contract away' their child's right to support . . . does not preclude [parents] from making contracts or agreements concerning their child's support so long as the best interests of the child are

[43] *J.L.B v. S.J.B.*, 39 Fla. L. Weekly D598 (March 28th, 2014)(Father was denied retroactive support for failure to plead for same and because matter was not tried by consent).

[44] Fla. Stat. §61.1301(1)(b)(2).

[45] *Dep't of Revenue v. Cessford*, 100 So. 3d 1199, 1204 (Fla. 2d DCA 2012).

served." *Lester*, 736 So.2d at 1259. The *Laussermair* court found that a provision requiring child support money be paid into a college education account was not against public policy.[46]

The waiver above is not to be confused with the termination of child support based on an adoption or termination of parental rights. *Casbar v. Dicanio*, 666 So. 2d 1028, 1029 (Fla. 4th DCA 1996)(termination of parental rights must be the product of chapters 63 (adoption) or 39 (termination of parental rights) and all other attempts to waive child support are void against public policy).

Despite the fact that waiving child support is against the public policy of this state, there are surprisingly a few cases within our state's precedent which have circumvented the policy. While it is not this author's intent to provide the blue print on legally having child support waived, practitioners need to be aware of this surprising precedent in order to avoid costly mistakes. Consider the following two cases:

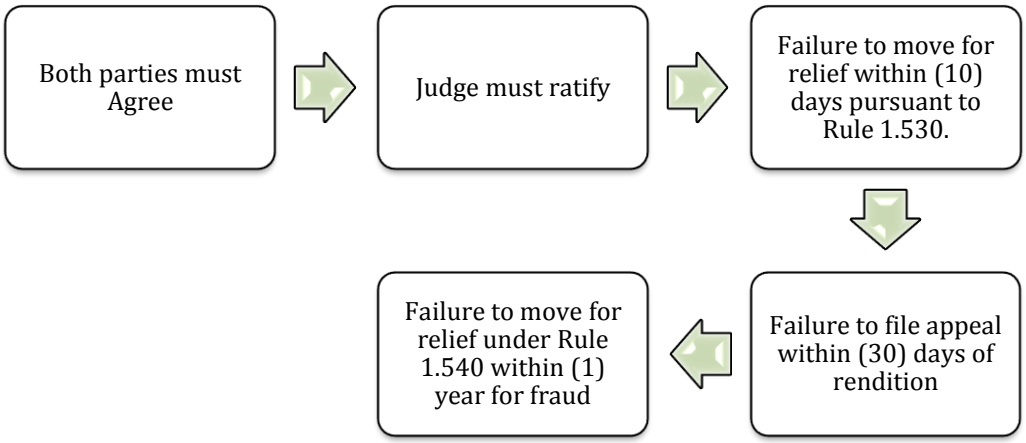
1. *Dep't of Health & Rehabilitative Services v. Morley*, 570 So. 2d 402, 403 (Fla. 5th DCA 1990): The husband and wife entered into a settlement agreement in which he relinquished his parental rights in exchange for the wife's assumption of all the costs associated with the children. The agreement was incorporated into a final judgment executed by a circuit judge. Two years later, the wife attempted to appeal arguing that it was "void insofar as it permanently relieve[d the husband] of any ongoing support obligation . . . ." *Id*. Although contrary to public policy, the 5th DCA found the challenge to be untimely since the provision was merely voidable as opposed to void.

   The court went on to explain that where the "court has jurisdiction over the person and the subject matter, an error in the judgment does not make the judgment void, but rather reversible on appeal." *Id*.

2. *Tannenbaum v. Shea*, 39 Fla. L. Weekly D137 (Fla. 4th DCA January 17, 2014) : The parties here agreed to reduce back due child support to a money judgment which included language that the court "retain jurisdiction of the action, but not of the money judgment contained . . . ." This language had the effect of stripping the obligee of the power of contempt to enforce child support. Similar to the *Morley* case above, the court held that the wife's timing of challenging the provision via rule 1.540 was untimely as it came over three years later. 1.540(b)(4) allows for relief of "void" judgments but not voidable judgments. The court explained that void judgments were generally one's "entered without subject matter jurisdiction or personal jurisdiction . . . ." *Zitani v. Reed*, 992 So. 2d 403, 409 (Fla. 2d DCA 2008). Void judgments were also those in which there was "[a] violation of the due process guarantee of notice and an opportunity to be heard." *Viets v. Am. Recruiters Enters*., 922 So. 2d 1090, 1095 (Fla. 4th DCA 2006)). The wife had also challenged the provision upon fraud grounds pursuant to rule 1.540(b)(3); however, the court stated those claims were limited to one year per the rule.

Graphically, for a voidable order which is "against public policy" to withstand judicial attack, the order would have to get through the following obstacles:

[46] *Laussermair v. Laussermair*, 55 So.3d 705 (Fla. 4th DCA 2011).



Appalling but outwardly plausible, an obligor may be able to escape certain obligation's where the voidable judgment falls through all of the legal safeguards outlined above.

LIFE INSURANCE

My father passed away after being struck by a car as he was crossing the street back in 1994. At the time, I was 17. Because my father was thoughtful, loving and caring enough to secure a life insurance policy, my house was fully paid for thereby relieving the financial strain my family endured due to his untimely passing. While the law does provide for life insurance: the department of revenue child support enforcement office, attorneys and parties rarely make the extra effort to secure it.

> *Family Rule of Procedure 12.360 allows for examination of persons in certain instances. A motion under said Rule may enable the examination of the obligor for purposes of determining insurability.*

Codification for life insurance could be found at Fla. Stat. §61.13(1)(c) and states "[t]o the extent necessary to protect an award of child support, the court may order the obligor to purchase or maintain a life insurance policy or a bond, or to otherwise secure the child support award with any other assets which may be suitable for that purpose." "[T]he amount of life insurance required by the trial court must be related to the extent of the obligation secured." *Beharry v. Drake*, 52 So. 3d 790, 792 (Fla. 5th DCA 2011); *See Kotlarz v. Kotlarz*, 21 So. 3d 892, 893 (Fla. 1st DCA 2009)(citing *Burnham v. Burnham*, 884 So. 2d 390, 392 (Fla. 2d DCA 2004). In the *Drake* case, the court found a $100,000.00 policy as excessive to secure $73,000.00 in child support payments.[47] "Since the father's total child support obligation decreases over time, the amount of the life insurance required should correspondingly decrease over time."[48]

"The courts are statutorily authorized to order the obligor to maintain life insurance to protect alimony awards and child support obligations . . .when 'appropriate circumstances' exist to justify the award.[49] 'Appropriate circumstances' may include the dire impact that the sudden death of the obligated

[47] *Beharry v. Drake*, 52 So.3d 790, 792-93 (Fla. 5th DCA 2010).
[48] *Id*. at 793; *see also Foster v. Foster*, 83 So. 3d 747, 748 (Fla. 5th DCA 2011)(finding error to award life insurance in an amount "exceeding the obligation."
[49] *But see Pinion v. Pinion*, 818 So. 2d 557 (Fla. 2d DCA 2002)("In the absence of special circumstances, a spouse cannot be required to maintain life insurance for the purposes of securing alimony obligations.").

party would have on the receiving party."[50] Plausible examples of this would be where the "recipient was disabled, elderly, or had such limited employment skills that the death of his or her former spouse would cause that person to rely on welfare or the generosity of others." *Lapham v. Lapham*, 778 So. 2d 487, 489 (Fla. 5th DCA 2001).

In ordering this protection, the court should consider the "availability and cost of such insurance and the financial impact it will have on the [obligor]." *See Rashid v. Rashid*, 35 So. 3d 992, 994 (Fla. 5th DCA 2010) *quoting Lorman v. Lorman*, 633 So.2d 106, 108 (Fla. 2d DCA 1994).[51] "[T]he trial court must specify whether the insurance is security for unpaid support obligations, in which case only a portion of the proceeds are to be distributed to the beneficiaries upon the spouse's death to minimize economic harm to the family." *Foster v. Foster*, 83 So. 3d 747, 749 (Fla. 5th DCA 2011); *See also Smith v. Smith*, 912 So.2d 702, 705 (Fla. 2d DCA 2005).

The court must make include "specific evidentiary findings regarding the availability and cost of insurance, the obligor's ability to pay, and the special circumstances that warrant the requirement for security of the obligation." *Foster v. Foster*, 83 So. 3d 747, 748 (Fla. 5th DCA 2011)(citing *Kotlarz v. Kotlarz*, 21 So. 3d 892, 893 (Fla. 1st DCA 2009)).

<u>Practice Tip</u>: Within your request for admissions pursuant to Fla. Fam. R. P. 12.370, ask obligor to admit that he/she is insurable.

Obligor's chief defense is insurability, the cost of the insurance and obligor's ability to afford it. The requesting party is frequently incapable of demonstrating that the obligor is even insurable. A recent case in the 5th DCA struck the trial court's order to secure life insurance, albeit for alimony, where no evidence was presented regarding "husband's insurability, the cost of the proposed insurance, [and] . . .the husband's ability to afford the insurance".[52] "[F]ailure to make the necessary findings constitutes reversible error." *Foster v. Foster*, 83 So. 3d 747, 748 (Fla. 5th DCA 2011).[53]

As with most other relief, if the interested party fails to properly request the life insurance award, the trial court is nigh on powerless to award said relief. *Eisele v. Eisele*, 91 So. 3d 873, 874 (Fla. 2d DCA 2012)("[A] trial court does not have authority to require a party to obtain life insurance in order to secure child support payments where such relief was not sought or litigated.") *See Williamitis v. Williamitis*, 741 So. 2d 1176, 1177 (Fla. 2d DCA 2002); *cf. Broome v. Broome*, 821 So. 2d 406, 408 (Fla. 2d DCA 2002)(reversing order requiring life insurance where party never requested same).

Named Beneficiary

Where life insurance is ordered to secure child support, it is absolute error to order the obligor spouse to list the other parent as the beneficiary. *Alpha v. Alpha*, 885 So. 2d 1023, 1034 (Fla. 5th DCA 2004); *see also Layeni v. Layeni*, 843 So. 2d 295, 300 (Fla. 5th DCA 2003)(finding court "erred by naming the wife as the beneficiary of the life insurance policy securing the payment of child support."). Child support belongs to the child, not the parent, although it is the parent who will ultimately manage the

[50] *Beharry v. Drake*, 52 So. 3d 790 n1 (Fla. 5th DCA 2011).

[51] Record must also reflect "evidence of the payor's insurability, the cost of the proposed insurance, and the payor's ability to afford the insurance." *Lopez v. Lopez*, 780 So. 2d 164, 165 (Fla. 2d DCA 2001).

[52] *David v. David*, 58 So.3d 336, 340 (Fla. 5th DCA 2011).

[53] *See also Schoditsch v. Schoditsch*, 888 So. 2d 709 (Fla. 1st DCA 2004)("before ordering a party to obtain and maintain a life insurance policy, the court is required to make findings regarding the necessity for such coverage.")

funds for the child. "[C]hildren [are to] be designated as the beneficiaries of . . . life insurance purchased to secure . . . child support payments."

Where the obligor has life insurance through the Servicemembers Group Life Insurance Act (SGLIA), said act "bestow[s] upon the service member an absolute right to designate the policy beneficiary." *Ridgeway v. Ridgeway*, 454 U.S. 46, 59 (1981). "[D]ue to the operation of the Supremacy Clause of the United States Constitution, state laws interfering with the right to designate the beneficiary under a qualifying policy are federally preempted." *Id.*

UNCOVERED MEDICAL PAYMENTS

Uncovered medical expenses refers to those medical bills which are not covered by the child's health insurance; i.e., deductible's, co-payments, etc. The statute allows these payments to be added into the "basic" child support obligation pursuant to Fla. Stat. §61.30(8)("any noncovered medical, dental, and prescription medication expenses of the child, shall be added to the basic obligation unless these expenses have been ordered to be separately paid on a percentage basis." While the statute does not mention psychological expenses, "[a] parent's responsibility for a child's medical expenses includes those expenses incurred for reasonable psychological care." *See Engar v. Raizin*, 525 So. 2d 470 (Fla. 4th DCA 1988); *Sulman v. Sulman*, 510 So. 2d 908 (Fla. 4th DCA 1987); *Henderson v. Lyons*, 89 So. 3d 1109 (Fla. 2d DCA 2012).

Caution should be taken in advising a client to simply place it into the basic obligation because these medical expenses will naturally vary month to month. In the interest of fairness, the party incurring the bill should naturally pay same and subsequently request the appropriate contribution from the other parent. Every marital settlement agreement should have a clause specifying how this process will work and the time frames associated with same.

The percentage that each party is responsible for can be found by looking no further than the child support guidelines themselves; to wit, the higher earning parent will always pay a higher percentage of the bill. It should be noted that "[i]t is error for . . .[a] . . . court to equally divide the noncovered medical, dental, and prescription medication expenses when the court arrives at an unequal percentage share of child support."[54] "[A]bsent some logically established rationale in the final judgment to the contrary, [uncovered medical bills] must be allocated in the same percentage as the child support allocation."[55] A parent does however have a right to contest the necessity and reasonableness of the services in issue and his [or her] ability to pay for those services." *Sulman*, 510 So. 2d at 909.

SOCIAL SECURITY DISABILITY

The case of *Wallace v. Dep't of Revenue ex rel. Cutter*, 774 So.2d 804 (Fla. 2d DCA 2000), explains this legal concept as follows:

> [W]hen a parent is receiving social security disability due to the disability and, as a result, his or her children receive independent benefits, the total benefits received by or on behalf of that parent are attributed to the disabled parent as income in the child support guideline calculation. The dependent benefits are then credited toward the disabled

[54] *Wilcox v. Munoz*, 35 So. 3d 136, 141 (Fla. 2d DCA 2010); *See also O'Byrne v. Miller*, 965 So. 2d 316, 317-18 (Fla. 2d DCA 2007).

[55] *Zinovoy v. Zinovoy*, 50 So. 3d 763, 764-65 (Fla. 2d DCA 2010).

> parent's obligation, that is, they are a payment of the obligation on behalf of the disabled parent. If the benefits are less than the support obligation, the disabled parent must pay the difference. If they are more, the benefits pay the obligation in full, but any excess inures to the benefit of the children.

Wallace v. Dep't of Revenue ex rel. Cutter, 774 So.2d 804, 808 (Fla. 2d DCA 2000). Similar cases include:

- The case of *Maslow v. Edwards*, 36 Fla. L. Weekly D266 (5th DCA 2011) extends the same concept to disability benefits paid by the Veteran's Administration;

- *Sealander v. Sealander*, 789 So. 2d 401, 403 (Fla. 4th DCA 2001)(holding Social Security benefits paid to a child as a result of obligors voluntary early retirement entitled the obligor to a credit against child support obligation);

- *J.L.B. v. S.J.B.*, 39 Fla. L. Weekly D360 (5th DCA February 21st, 2014)(finding stipend paid by State of Georgia on behalf of adopted child was properly awarded to the custodial parent).

STATUTE OF LIMITATIONS

"Florida does not have a limitations period for enforcement of alimony or child-support orders . . . ." *Jackmore v. Jackmore*, 71 So. 3d 912, 913 (Fla. 1st DCA 2011). This is not to be befuddled with Florida's (24) Month limit on retroactive support pursuant to Fla. Stat. §61.30(17). Said limitation applies to initial determinations only. *Id*. The action may however be limited by the statute of laches. "Laches . . . is an affirmative defense that must be proven by facts about both the plaintiff's and the defendant's conduct, and is not established merely by the passage of an inordinate period of time." *Jackmore v. Jackmore*, 71 So. 3d 912, 913 (Fla. 1st DCA 2011); *See also Bethea v. Langford*, 45 So. 2d 496 (Fla. 1949).

Laches

"Laches is effective to bar enforcement when there has been a substantial and inexcusable delay in enforcing the claim to arrears of support and the delay has prejudiced the defendant or led him to change his position to such an extent that enforcement of the decree would be inequitable or unjust." *Garcia v. Guerra*, 738 So.2d 459, 461 (Fla. 3d DCA 1999)(quoting Homer H. Clark, Jr., The Law of Domestic Relations in the United States section 18.3, at 394 (2d ed. 1987)); *See also Edge v. Edge*, 69 So. 3d 348, 349 (Fla. 3d DCA 2011).

> Laches has four elements: (1) conduct on the part of the defendant giving rise to the situation of which the complaint is made; (2) failure of the plaintiff to assert his or her rights by suit, even though the plaintiff has had knowledge of the defendant's conduct and ha s been afforded the opportunity to institute suit; (3) lack of knowledge on the defendant's part that the plaintiff would assert the right on which he or she bases the suit; and (4) injury or prejudice to the defendant in the event relief is accorded to the plaintiff

or the suit is held not to be barred. *McIlmoil v. McIlmoil*, 784 So. 2d 557, 563 (Fla. 1st DCA 2001).

- Applying laches to child support should only be done "under the rarest of circumstances." *Hewett v. Grant*, 913 So. 2d 108, 109 (Fla. 1st DCA 2005).

- The prejudice to the defendant must be extreme to justify applying the doctrine of laches to a child support matter. *Ticktin v. Kearin*, 807 So. 2d 659, 664 (Fla. 3d DCA 2001).

- Delays in filing, standing alone, is insufficient to apply laches. *Hewett*, 913 So. 2d at 109.

- Delays coupled with change of financial position alone do not justify application of laches. *Hewett* at 913 So. 2d at 109.

Equitable Estoppel

Equitable Estoppel, much like it's legal sister laches is only to be applied in "rare circumstances." *Dep't of Revenue v. Holley*, 86 So. 3d 1199, 1203 (Fla. 1st DCA 2012). To be successful, there must be "a showing that a party misrepresented a material fact upon which the party asserting estoppels relied." *State, Dep't of Revenue ex rel. Dees v. Petro*, 765 So. 2d 792, 793 (Fla. 1st DCA 2000). Satisfaction of the reliance prong involves proof that he or she made a detrimental change of position based on a belief in the misrepresented fact. *Schroeder v. Peoplelease Corp*., 18 So. 3d 1165, 1168 (Fla. 1st DCA 2009).

The elements of equitable estoppel are "(1) a representation as to a material fact that is contrary to a later-asserted position; (2) reliance on that representation; and (3) a change in position detrimental to the party claiming estoppels, caused by the representation and reliance thereon." *Id*.

Limitations on Claims on Estates

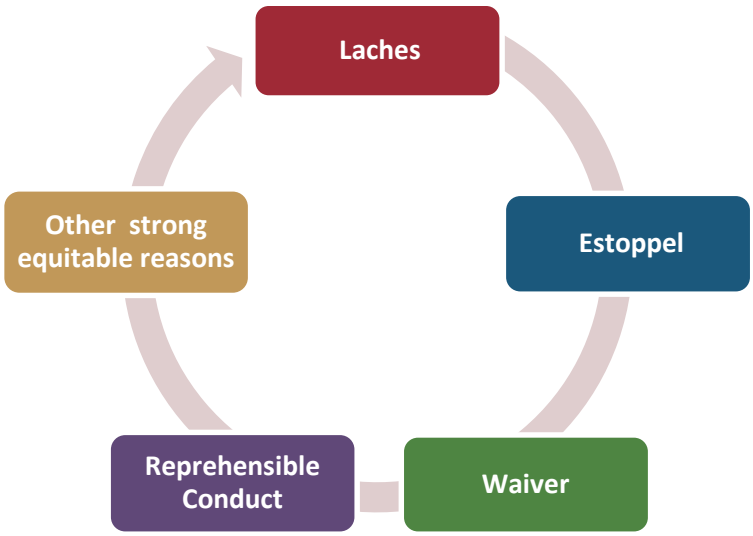
The savvy practitioner also needs to be aware of limitations upon claims on estates pursuant to Fla Stat. 733.710. The statute, in pertinent part states "2 years after the death of a person, neither the decedent's estate, the personal representative, if any, nor the beneficiaries shall be liable for any claim or cause of action against the decedent, whether or not letters of administration have been issued . . . ." The statute gives the following two exceptions:

1. Where a creditor "has filed a claim pursuant to s. 733.702 within 2 years after the person's death, and whose claim has not been paid or otherwise disposed of pursuant to s. 733.705."[56]
2. Where there exists a "lien of any duly recorded mortgage or security interest or the lien of any person in possession of personal property or the right to foreclose and enforce the mortgage or lien."[57]

PANGANIBAN DEFENSE

The *Panganiban* case offers several defenses against the collection of child support arrearages.[58] While "[c]hild support is normally the vested right of the child which the court has no power to modify when past due,"[59] the court can override this legal principle upon showing of the following:

[56] Fla. Stat. §733.710(2).
[57] Fla. Stat. §733.710(3).
[58] *See Panganiban v. Panganiban*, 396 So. 2d 1156 (Fla. 2d DCA 1981).



In *Panganiban*, the court held that the Mother waived child support arrearages by "acceptance of a lower payment over a period of years without complaint . . . ."[60] The court also proclaimed that the "classic example of this power to refuse to enforce accrued child support is when the custodial parent has refused to comply with the visitation provisions of the court order."[61] *See also Kirby v. Kirby*, 405 So.2d 207, 209 (Fla. 3d DCA 1981)(finding "that appellant willfully refused to comply with its order directing her to allow the children to visit with their father (which finding is amply supported by the record), is an extraordinary circumstance justifying the discharge of the past due amounts.)" The *Panganiban* court further notes that a "court may refuse to hold a party in contempt for failure to pay an arrearage . . . ."[62]

TERMINATION DATE AND STEP DOWN

Child support is normally awarded until the 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 . . . ."[63] Statute §743.07(2) was crafted for those situations where a child has reached the age of eighteen but has not graduated from high school yet or where the child remains dependent due to "a mental or physical incapacity which began prior to such person reaching majority . . . ."[64]

In order to require the obligor to continue paying child support for the benefit of his or her eighteen year old offspring, the child must be "dependent in fact, . . . between the ages of 18 and 19, and is still in high school, performing in good faith with a reasonable expectation of graduation before the age

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[59] *Id.*
[60] *Id.* at 1157.
[61] *Id. See also Warrick v. Hender*, 198 So. 2d 348 (Fla. 4th DCA 1967; *Denton v. Denton*, 147 So. 2d 545 (Fla. 2d DCA 1962).
[62] *Panganiban v. Panganiban*, 396 So. 2d 1156, 1157 (Fla. 2d DCA 1981). *See also Smithwick v. Smithwick*, 343 So.2d 945, 947 (Fla. 3d DCA 1977)("it is within the discretion of the court to refrain from holding the husband in contempt for non-payment [of alimony and child support arrears]").
[63] Fla. Stat. §61.13(1)(a)(1)(a).
[64] Fla. Stat. §743.07(2).

of 19."[65] The following cases stand for the proposition that a parent may still have standing to sue for child support despite the child reaching age of majority:

- *Dep't of Revenue v. Lockmiller*, 791 So. 2d 552, 553 (Fla. 2d DCA 2001)(determining that Department of Revenue has legal standing to maintain child support action on behalf of the former wife where child was already 18).

- "[N]othing in section 743.07(2) suggest that the former wife's ability to seek support for the dependent child terminated on that child's eighteenth birthday." *J.S. and M.S., v. W.R.R.*, 99 So. 3d 991, 993 (Fla. 2d DCA 2012).

- *Campagna v. Cope*, 971 So. 2d 243, 249 (Fla. 2d DCA 2008)("the parent can file a petition seeking child support up and until high school graduation for the appropriate eighteen-year-old child.")

While parents can be compelled to pay support past the age of majority where the child is in high school, they can't be made to pay college expenses. *Grapin v. Grapin*, 450 So. 2d 853, 854 (Fla. 1984)("[A] trial court may not order post-majority support simply because the child is in college and the divorced parent can afford to pay"); *see also Rey v. Rey*, 598 So. 2d 141, 145 (Fla. 5th DCA 1992)("There is no legal obligation to support the non-dependent adult children of the parties.").[66]

The court enjoys continuing jurisdiction post final judgment for purposes of modifying the "amount and terms and conditions . . .if the modification is found . . .

to be in best interests of the child . . .;"[67]

[C]hild reaches majority;[68]

"[S]ubstantial Change in the circumstances of the parties;"[69]

Florida Statute §743.07(2) applies;[70]

Child emancipates;[71]

Child marries;[72]

Child joins military;[73]

Child dies.[74]

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[65] *Id.*
[66] *See also Quinones v. Quinones*, 84 So. 3d 1101, 1104 (Fla. 3d DCA 2012).
[67] Fla. Stat. §61.13(1)(a)(2).
[68] *Id*.
[69] *Id.*
[70] *Id*.
[71] *Id*.
[72] *Id*.
[73] *Id*.
[74] *Id*.

Florida law now requires that an actual termination date for each child be outlined in "[a]ll child support orders and income deduction orders entered on or after October 1, 2010 . . . ." The statute also requires a schedule stating "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 . . . ."[75] This requirement is categorically vital to families with multiple children in that the support will change upon each child's set termination date. These provisions were drafted to shun the former outmoded and inept remedy of having to actually petition the court for a modification thereby saving time, money and needless litigation.

While this statute seems to have received its fair share of attention and glare of publicity when it was first enacted, I have been sorrowfully mystified at how many practitioner's are oblivious to this fundamental defense tool. I have witnessed an overabundance of otherwise fine lawyers, allowing their client's to enter into child support agreements where the child support amount for all the children remain the same until the youngest child reaches majority. Keep in mind that the parties can always agree to pay more than that provided by the Florida Child Support Guidelines.

INTEREST ON CHILD SUPPORT

"The entitlement to interest in the child support context is well established in Florida law." *Vitt v. Rodriguez*, 960 So.2d 47, 48 (Fla. 5th DCA 2007). A great array of cases hold that prejudgment interest applies from:

See Lamar v. Lamar, 889 So. 2d 983, 984 (Fla. 4th DCA 2004)("The former wife is . . . entitled to prejudgment interest for all arrearages from the date the child support is due until the date of the arrearage judgment, along with interest that accrues on the arrearage judgment itself."); *Warner v. Warner*, 692 So. 2d 266, 270 (Fla. 5th DCA 1997); *Matteo v. Matteo*, 667 So. 2d 1003, 1004 (Fla. 3d DCA 1996); *Romans v. Romans*, 611 So. 2d 92, 93 (Fla. 1st DCA 1992). Unpaid child support is a "vested property right", not much different than a regular judgment. *See Dep't of Health & Rehab. Serv. v. Atterberry*, 578 So.2d 485, 486 (Fla. 5th DCA 1991); *see also Cortina v. Lorie*, 95 So. 3d 467, 468 (Fla. 5th DCA 2012)("Child support obligations vest at the time payments are due.")[76]

The interest rate is set by Fla. Stat §55.03 and if the support is being paid through the depository, than Fla. Stat. §61.14(6)(d) provides that the depository "shall charge interest at the rate established in s. 55.03 on all judgments for support." As child support is paid, payments must be applied as follows:

[75] Fla. Stat. §61.13(1)(a)(1)(b).

[76] *See Puglia v. Puglia*, 600 So. 2d 484, 485 (Fla. 3d DCA 1993)("Child support obligations vest at the time payments are due."). "[A]ccrued child support, or child support in arrears, becomes vested rights of the payee and vested obligations of the payor . . ." *Cortina v. Lorie*, 95 So. 3d 467, 468 (Fla. 5th DCA 2012).

FEDERAL TAX EXEMPTION

What better way to help finance a child's needs than by finding a third party contributor or sponsor. While this author does not dare imply he is an accountant, tax consultant, CPA, etc., common sense and general knowledge dictate that the government allows for a suitable credit and/or deduction in one's tax returns by simply claiming to have and support children. Fla. Stat. §61.30(11)(a)(8), empowers the court to consider the "impact of the Internal Revenue Service dependency exemption and waiver of that exemption" in considering child support.

While courts are unauthorized *per se* to directly allocate the exemption,[77] the court may order the custodial parent to waive and release their claim to exemption in favor of the non-custodial parent. The transfer is however "conditioned on that parent being current with support payments." *Robertson v. Bretthauer*, 712 So. 2d 1140, 1141 (Fla. 3d DCA 1998). As of the publishing of this book, Federal Tax Form 8332 is the appropriate vehicle to accomplish said objective. The form may be downloaded from www.irs.gov and should always be handy when going to mediations or hearings addressing this significant issue.

Before requesting this relief and/or agreeing to same, both parents should be made aware as to how this award may affect the child support obligation. Generally, the payor will end up paying higher child support if he/she is awarded this tax relief. The effect, as stated by the 5th DCA is "mak[ing] more money available for child support through tax savings." *Vick v. Vick*, 675 So. 2d 714, 719 (Fla. 5th DCA 1996).[78] In my experience, the increase in child support is far less than the credit received at the end of the year.

Florida Statute §61.30(11)(a)(8), empowers the court to order this relief as long as "the paying parent is current in support payments."[79] It also follows that non-working spouse's would not benefit from this relief and therefore should not be awarded said relief. *See McDaniel v. McDaniel*, 835 So. 2d 1265, 1268 (Fla. 1st DCA 2003)(reversing tax dependency award to parent where said parent had no taxable income or liability for the given tax year).

The court's jurisdiction in awarding this relief is so broad, that court's have allocated same even:

- ✓ where the parties have not presented the issue at trial *per se*. *See El-hajji v. El-hajji*, 67 So. 3d 256, 259 (Fla. 2d DCA 2010)(holding that "[s]ection §61.30(11)(a)(8) authorized the circuit court to consider the impact of the dependency exemption . . . [a]lthough neither party addressed the issue

[77] *Geddies v. Geddies*, 43 So. 3d 888, 889 (Fla. 1st DCA 2010).
[78] *See also Negron v. Ray*, 769 So.2d 524, 525 (Fla. 5th DCA 2000)("The purpose of the exemption is to permit the party paying the support to have more disposable income from which to make such payment.")
[79] *See Camus v. Prokosch*, 919 So. 2d 679 (Fla. 1st DCA 2006)(reversing award of exemption where court failed to condition the award on being current on child support obligations).

at the final hearing . . .[but where] . . . [h]usband's pretrial memorandum specifically asked the circuit court to [address it]."

- ✓ where neither party requested the allocation but where allocating it to the husband would have maximized disposable income available for the child's benefit. *Geddies v. Geddies*, 43 So.3d 888, 889-90 (Fla. 1st DCA 2010).

Despite the above authority, the 5th DCA in *J.L.B. v. S.J.B.*, 39 Fla. L. Weekly D598 (5th DCA March 28, 2014) reversed an award of the exemption to the Wife where she failed to request same in her pleadings. The court cited *Newberry v. Newberry*, 831 So. 2d 749, 751 (Fla. 5th DCA 2002)("A trial court lacks jurisdiction to enter any judgment on an issue not raised by the pleadings." (citing *Cortina v. Cortina*, 98 So. 2d 334 (Fla. 1957)).

PRIVATE SCHOOL COSTS

Private school costs are awardable "as part of child support paid by a noncustodial parent when that parent has the ability to pay and such expenses are in accordance with the family's customary standard of living and are in the child's best interest." *Kaiser v. Harrison*, 985 So.2d 1226, 1231 (Fla. 5th DCA 2008).[80] In *Kaiser*, the child was eleven and had been attending the same private school since she was a baby.[81] Findings were made that the child was progressing within her school environment, despite being "embroiled" in her parent's stormy relationship for years, "which provided a stabilizing element in the child's life, and school [should not] be disturbed."[82] The net effect of this decision is that the child support payments with the school costs exceed the guidelines "by 17% and represent 17.8" of . . . [payors] . . .income."[83] In contrast, the court in *Pollow v. Pollow*, 712 So. 2d 1235, 1236 (Fla. 4th DCA 1998)(reversed a private school tuition order where the father would have to pay 78% of his income towards his child support obligations).

- In *Betemariam v. Said*, 48 So. 3d 121, 127 (Fla. 4th DCA 2010), the court ordered private school payments where payor's "income clearly could support such payments, and the parties had sent their children to [that particular school] . . . for five years." The children "had never attended another school . . . [and everyone] . . . testified to how well the children were doing in life generally."[84]

- *Crowley v. Crowley*, 672 So.2d 597, 600 (Fla. 1st DCA 1996)(holding private school expenses awardable where "(1) the parties have the ability to pay; (2) such expenses are in accordance with the customary standard of living; and (3) it is in the child's best interest." *See also Stefanowitz v. Stefanowitz*, 586 So.2d 460, 463 (Fla. 1st DCA 1991). In *Crowley*, the appellate court reversed the trial court's denial of private school costs where "[t]he only testimony was that it would be in the boys' best interest to continue in private school . . . .[and] . . . [t]hat the parties have the ability to pay for private school . . . ."[85]

[80] *See also Wilson v. Wilson*, 559 So. 2d 698, 700 (Fla. 1st DCA 1990).
[81] *Kaiser v. Harrison*, 985 So.2d 1226, 1231 (Fla. 5th DCA 2008).
[82] *Id.*
[83] *Id*. at 1232.
[84] *Betemariam v. Said,* 48 So. 3d 121,127 (Fla. 4th DCA 2010).
[85] *Crowley v. Crowley*, 672 So. 2d 597, 600 (Fla. 1st DCA 1996).

- *Musser v. Watkins*, 752 So.2d 141, 142 (Fla. 2d DCA 2000)(reversing an award of private school tuition exceeding the child support guidelines by more than 5% where trial court failed to make written findings that guidelines amount were unjust or inappropriate and where the evidence showed that the child had "excelled in his first year of private school", that it "'appeared' to be in the child's best interest to continue there" but where the annual expenses for the schooling was $10,599.00 and the parties' monthly net income was $4,000.00.[86] The court reasoned that "[g]iven the income of the parties and the lack of any prior custom of sending their children to private school, a greater finding of the child's need for such schooling is required.")[87]

- *Brennan v. Brennan*, 38 Fla. L. Weekly D2081 (Fla. 4th DCA October 11th, 2013)(Private school expenses are awardable where "(1) the parent has the ability to pay for private school, (2) the expense is in accordance with the family's established standard of living, and (3) attendance is in the child's best interest." *See Gelman v. Gelman*, 24 So. 3d 1281, 1283 (Fla. 4th DCA 2010)." "Where the trial court has failed to make each of the required factual findings [for private school award] reversal is required." *Brennan v. Brennan*, 38 Fla. L. Weekly D2081 (Fla. 4th DCA October 11th, 2013)(*See McDaniel v. McDaniel*, 835 So. 2d 1265, 1268 (Fla. 1st DCA 2003).

- The standard of review for private school orders is abuse of discretion. *Thomas v. Thomas*, 776 So. 2d 1092, 1094 (Fla. 5th DCA 2001).

EXTRACURRICULAR ACTIVITIES

After copying the entire child support statute and pasting it onto my word program, I ran a search for the word extracurricular activities and came up with zero entries. Legislatively, extracurricular activities are simply not addressed. In practice, it is not unusual however to see agreements where the parents voluntarily agree to split extracurricular activities if both parents agree to same. The recent case of Wright v. Wright, 39 Fla. L. Weekly D817 (5th DCA April 25th, 2014) does find that "children's . . . extracurricular activities are a consideration in establishing child support" and notes that the court may order the guidelines be adjusted by up to 5% or more with written findings.

ALIMONY'S EFFECT ON CHILD SUPPORT

"Spousal support received from a previous marriage or court ordered in the marriage before the court" shall be deemed as gross income against the receiving spouse. Fla. Stat.§ 61.30(2)(a)9. Conversely, "[s]pousal support paid pursuant to a court order from a previous marriage or the marriage before the court" will be subtracted from the obligor's gross income before calculating available net income for child support purposes. *Id*. at (3)(g); to wit, an award of alimony generally has the effect of reducing the receiving spouse's award of child support. *See Pike v. Pike*, 932 So. 2d 229, 230 (Fla. 4th DCA 2005)("In a dissolution of marriage case such as this one, in which alimony is required because of the disparity in income between the parties, the court must first determine the amount of alimony and then, considering alimony as income, determine the amount of child support."[88] Practitioners should be mindful that

[86] *Musser v. Watkins*, 752 So. 2d 141, 142 (Fla. 2d DCA 2000).
[87] *Id*. at 142.
[88] *See also Christensen v. Christensen*, 39 Fla. L. Weekly D1741 (1st DCA August 22, 2014).

alimony is typically taxed against the receiving spouse as income and deductible to the paying spouse where child support is wholly tax free.

While spousal support received from a previous marriage can count as income for child support purposes, the same rational does not hold true for child support received from another obligor. *See Sotoloff v. Sotoloff*, 745 So. 2d 959, 961-62 (Fla. 4th DCA 1998) and *Bower v. Handman*, 39 Fla. L. Weekly D1685 (5th DCA August 15th, 2014).

DETERMINING INCOME

"In making an award of child support, the trial court is required to determine the net income of each parent pursuant to section 61.30, Florida Statutes, and to include such findings in the final judgment." *Johnson v. Mccullough*, 39 Fla. L. Weekly D1649 (4th DCA August 15th, 2014).[89] If " a trial court fails to make findings regarding the parties' incomes, the final judgment is facially erroneous." *Whittingham v. Whittingham*, 67 So. 3d 239, 239-40 (Fla. 2d DCA 2010).

It is furthermore error to fail to "include in its order a child support guidelines worksheet . . . show[ing] how the trial court calculated the child support amount." *DOR v. BJM*, 38 Fla. L. Weekly D2533 (Fla. 2d DCA December 13, 2013).

The court usually bases their determination of income on financial affidavits, testimony, paystubs, bank records and other similar criteria. At times, the court may even base their "findings . . . solely on the parties' child support guideline worksheet . . . ." *Id*. Two requirements are necessary for the court to base their income determination solely on guidelines:

1. They are "offered into evidence pursuant to stipulation" *Reddick v. Reddick*, 728 So. 2d 374, 375 (Fla. 5th DCA 1999);
2. They are "subject to a contemporaneous objection." *Id.*

In *Johnson*, the court erred in basing its decision solely on guidelines filed by one party where they were never actually admitted, stipulated to and actually contradicted the other party's financial affidavit.

MODIFICATION OF CHILD SUPPORT

"The party moving for a modification of child support has the burden of proving all of the following factors, or rather, three fundamental prerequisites: First, there must be a substantial change in circumstances. Second, the change was not contemplated at the time of final judgment of dissolution. Third, the change is sufficient, material, involuntary, and permanent in nature." *Maher v. Maher*, 96 So. 3d 1022, 1022 (Fla. 4th DCA 2012).

Retroactive Application

"Retroactivity is the rule rather than the exception which guides the trial court's application of discretion when modification of alimony or child support is granted." *Walters v. Walters*, 96 So. 3d 972, 976 (Fla. 4th DCA 2012). "[T]here is a presumption of retroactivity which applies unless there is a basis

[89] *See Deoca v. Deoca*, 837 So. 2d 1137, 1138 (Fla. 5th DCA 2003).

for determining that the award should not be retroactive." *Thyrre v. Thyrre*, 963 So. 2d 859, 862 (Fla. 2d DCA 2007).

The retroactive aspect of an award may go as far back as the date the petition for modification was filed, not the date that the substantial change in circumstances necessarily took place unless said change occurred on or after the filing date. "Where the circumstances that give rise to a modification of child support exist at the time during which a petition of modification is filed, failure to order the modification retroactive to the date of filing of the petition constitutes an abuse of discretion." *Spano v. Bruce*, 62 So. 3d 2, 6 (Fla. 3d DCA 2011).

Non-Modifiable clauses

While parties may lawfully agree to waive their ability to modify alimony, they do not enjoy the same freedom to contract away their abilities to modify child support. No contract can "divest the courts of their authority to modify support, for inherent in a court's authority is the authority to modify child support- regardless of any agreement between the parties." *Guadine v. Guadine*, 474 So. 2d 1245 (Fla. 4th DCA 1985).

CHILD SUPPORT BLUE PRINT

Child support concepts and defenses are comprehensively copious in nature as evidenced by the number of pages devoted to this chapter. Even the most scholarly of attorneys can subtlety overlook a child support defense, credit, strategy, ect., absent the aid of a cheat sheet *per se*. While hauling around this whole book may enliven one's memory, a concise one-page summation may be of enhanced service in locating the desired defense when time is of the essence.

On the following two pages, you will find the P E R E Z – C E B A L L O S child support blueprint. It is urged that these two pages be:

- ✓ printed out onto one page (front & back);
- ✓ laminated; &
- ✓ stuffed into one's briefcase of legal battle.

Self Employment Dilemma: Self employed parents have higher taxes due to self-employment tax and this should be reflected on guidelines.

Fla. Stat. §61.30(1)(A): Court has discretion plus or minus 5% considering "all relevant factors, including the needs of the child or children, age, station in life, standard of living, and the financial status and ability of each parent." Court can break 5% cap "only upon written finding[s] explaining why ordering payment of such guideline amount would be unjust or inappropriate." 1 Fla. Stat.

Imputation of Income: Absent physical or mental incapacity, court shall impute income "to income "to an unemployed or underemployed parent if such unemployment or underemployment is found . . . to be voluntary . . . ." Fla. Stat. §61.30(2)(b). Employment potential and probable earnings are ascertained by looking at the recent work history, occupational qualifications and prevailing earnings in the community. Fla. Stat. §61.30(2)(b).

If the parent's income is unavailable, the parent fails to participate in the proceeding, or fails to provide adequate information regarding his/her finances, "there is a rebuttable presumption that the parent has income equivalent to the median income of year round full-time workers as derived from current population reports or replacement reports published by the United States Bureau of the Census." Fla. Stat. §61.30(2)(b).

To impute more than Median Income: the moving party bears the burden of presenting competent, substantial evidence demonstrating the voluntariness of the underemployment or unemployment and "[i]dentifies the amount and source of the imputed income, through evidence of income from available employment . . . which the party is suitably qualified by education, experience, current licensure, or geographic location, with due consideration . . . to the parties' time-sharing schedule and their historical exercise . . .[of same]." Fla. Stat. §61.30(2)(b)1.

Income will not be imputed based on "[i]ncome records . . . more than 5 years old . . . or . . .[i]ncome at a level that a party has never earned . . ., unless recently degreed, licensed, certified, relicensed, or recertified and thus qualified for, subject to geographic location, with due consideration of the . . . time-sharing schedule and their historical

Panganiban: Mother waived child support arrearage by "accepting lower child support payments and those due over period of years

Child Tax Exemption: The parent claiming the child and therefore getting a tax break is essentially earning more income which should be reflected and accounted for on guidelines.

Exemptions Claimed: In calculating guidelines, be mindful that either party can manipulate net income by the amount of exemptions claimed. More exemptions=More net income. Less Exemptions= Less Net Income.

Allowable Statutory Deductions:
(3) Net income is obtained by subtracting allowable deductions from gross income. Allowable deductions shall include:
(a) Federal, state, and local income tax deductions, adjusted for actual filing status and allowable dependents and income tax liabilities.
(b) Federal insurance contributions or self-employment tax.
(c) Mandatory union dues.
(d) Mandatory retirement payments.
(e) Health insurance payments, excluding payments for coverage of the minor child.
(f) Court-ordered support for other children which is actually paid.
(g) Spousal support paid pursuant to a court order from a previous marriage or the marriage before the court. Fla. Stat. §61.30(3)

Laches: "Laches is effective to bar enforcement when there has been a substantial and inexcusable delay in enforcing the claim to arrears of support and the delay has prejudiced the defendant or led him to change his position to such an extent that enforcement of the decree would be inequitable or unjust." *Garcia v. Guerra*, 738 So.2d 459, 461 (Fla. 3d DCA 1999)(quoting Homer H. Clark, Jr., The Law of Domestic Relations in the United States section 18.3, at 394 (2d ed. 1987)); *See also Edge v. Edge*, 69 So. 3d 348 (Fla. 3d DCA 2011).

Step Down: A termination date for each child must be outlined in "[a]ll child support orders and income deduction orders entered on or after October 1, 2010 . . . ."Fla. Stat. §61.13(1)(a)(1.)(a). A schedule is also required stating "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 . . . ." Fla. Stat. §61.13(1)(a)(1.)(b).

Child Care Costs: Added to basic obligation when due to parent's employment, job search or parent education calculated to result in employment or enhance current employment. Fla. Stat. §61.30(7). "Child care costs may not exceed the level required to provide quality care from a licensed soured." *Id*.

Health Insurance: Support orders "shall contain a provision for health insurance when health insurance is reasonable in cost and accessible to the child." FL. Stat. §61.13(1)(b). Presumed reasonable if no more than 5% of obligor's gross income. *Id*. Reasonableness may be rebutted utilizing factors listed in Fla. Stat. §61.30(11)(a). If court deviates from presumption of reasonableness, needs written findings. Fla. Stat. §61.13(1)(b).

Medical Expenses: "It is implicit within a final judgment of dissolution that medical expenses for which payment is sought must be reasonable and necessary." *Lustgarten v. Lustgarten*, 65 So. 3d 85, 89 (Fla. 4th DCA 2011).

Deduction Manipulation: Watch out for the number of exemptions claimed in the party's W-4 form. Typically, an increase in exemptions equates to an increase in net income. A decrease in exemptions equates to a decrease in net income.

Retroactive Support: Discretionarily awardable "to the date when the parents did not reside together in the same household with the child, not to exceed a period of 24 months preceding the filing of the petition, regardless of whether that date precedes the filing of the petition." Fla. Stat. §61.30(17).
The court shall consider "[a]ll actual payments made by a parent to the other parent or the child or third parties for the benefit of the child throughout the proposed retroactive period." Fla. Stat. §61.30(17)(b).
The court "should consider an installment payment plan for the payment of retroactive child support." Fla. Stat. §61.30(17)(c); however, FL. Stat. §61.130(1)(b)2, requires an additional 20% or more be deducted from obligor's paychecks to pay back arrearages.

Spousal Support: Besides deducting court ordered spousal support, the receiving spouse's income should be increased based on the income he/she receives for spousal support.

Fla. Stat. §61.30(11)(A) Deviation factors: 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.
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 for which there is a demonstrated need.
4. Seasonal variations in one or both parent's 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 raise the support to exceed the presumptive amount established by the guidelines.
7. Total available assets of the oblige, 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.1
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 from a single order.
10. The particular parenting plan, such as where the

Termination Date: Child support is typically awarded until the 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 . . . ." Fla. Stat. §61.13(1)(a)(1.)(a). In order to require obligor to continue payments post 18, child must be "dependent in fact, . . .between the ages of 18 and 19, and is still in high school, performing in good faith with a reasonable expectation of graduation before the age of 19." Fla. Stat. §743.07(2).

Fla. Stat. §61.30(11)(B) Substantial Time: If the child is spending a substantial amount of time with each parent, defined as "at least 20 percent of the overnights of the year", a reduction in child support is warranted. Fla. Stat. §61.30(11)(b)8.

Tax Exemption Waiver: While not a child support defense *per se*. Requesting the court to "require the custodial parent to execute a waiver transferring the exemptions to the noncustodial parent" typically results in a palpable tax break and/or tax refund. *Fortune v. Fortune*, 61 So. 3d 441, 447 (Fla. 2d DCA 2011). Be advised, the award of the exemption naturally results in the child support obligation increasing.

Other Children:

1. If obligor has Court-ordered support for other children which is actually paid, said amount is deducted from the gross. Fla. Stat. §61.30(3)(f).
2. Subsequent children living with obligor offer relief in modification proceedings in that the court "may disregard the income from secondary employment obtained primarily to support the subsequent children." Fla. Stat. §61.30(12).
3. If obligor has older children whom live with him/her, *Dep't of Revenue v. Smith*, 716 So. 2d 333 (Fla. 2d DCA 1998) may provide relief. *Smith* analyzed FL. Stat. §61.30(11)(k) allowing adjustments where "needed to achieve an equitable result which may include, but not limited to, a reasonable and necessary existing expense or debt." The court approved (2) methods for relief, in the court's discretion to give credit to obligor:
    a. Court can subtract the reasonable expense for the "first child's support . . . ." *Smith*, 716 So. 2d at 334 (Fla. 2d DCA 1998).
    b. Court can subtract "the amount of child support that [obligor] would have been required to pay pursuant to the child support guidelines for [his or her] . . . older children, if [obligor was divorced and had a support obligation]. *Id.*
4. There is a third way offered by *Dep't of Revenue v. Martinez*, 744 So. 2d 580 (Fla. 2d DCA 1999)(Obligor had three older live in children, three younger live in children and the one child at issue (not living with him). The court approved a formula where the three oldest kids and the subject child were used to calculate child support for four children and then divide said amount by 4. *See Id*.
5. Where the obligor has subsequent born children who live with him/her, *Speed v. Dep't of Revenue*, 749 So. 2d 510 (Fla. 2d DCA 1999)(extending credit provided for in Smith and reasoning "to allow the payor parent credit for support only in the event of a divorce is both unjust and

Life Insurance: Fla. Stat. §61.13(1)(c) states "[t]o the extent necessary to protect an award of child support, the court may order the obligor to purchase or maintain a life insurance policy or a bond, or to otherwise secure the child support award with any other assets which may be suitable for that purpose." "[T]he amount of life insurance required . . . must be related to the extent of the obligation secured." *Beharry v. Drake*, 52 So. 3d 790 (Fla. 5th DCA 2011)($100,000 policy was found to be excessive to secure $73,000.00 in child support). "Since the father's total child support obligation decreases over time, the amount of the life insurance required should correspondingly decrease over time." *Id*. Awardable when 'appropriate circumstances' exist to justify same. 'Appropriate circumstances' may include the dire impact that the sudden death of the obligated party would have on the receiving party." *Id.* Need evidence regarding "insurability, the cost of the proposed insurance, [and] . . . the [party's] ability to afford the insurance." *David v. David*, 58 So. 3d 336, 340 (Fla. 5th DCA 2011). "[F]ailure to make the necessary findings constitutes reversible error." *Foster v. Foster*, 83 So. 3d 747, 748 (Fla. 5th DCA 2011).

Chapter II:
Paternity

In its simplest form: paternity refers to "who's the baby's daddy?" While Florida Law has various ways of establishing paternity, this chapter will chiefly focus on the determination of parentage via Florida Statute §742. As in most cases, the first thing required to bring this type of action is legal standing. Standing refers to who is eligible to file and be a petitioning party to, in this case, a paternity suit. The statute lists three individuals who are empowered with standing provided paternity is yet to be established:

"[a]ny woman who is pregnant or has a child"[90],

"any man who has reason to believe that he is the father of a child"[91] or

"any child."[92]

JURISDICTION

- The petitioning party may choose to bring the action either where he/she resides or where the respondent resides.[93] Contrary to mainstream belief, the place where the child was conceived, born or primarily raised is not necessarily the appropriate forum for these actions.

- As for personal jurisdiction, it attaches where person "enga[ges] in the act of sexual intercourse within this state with respect to which a child may have been conceived." Fla. Stat. 48.193(1)(h); *See also Dep't of Revenue v. B.E.F.*, Sr., 99 So. 3d 993, 994 (Fla. 2d DCA 2012).

- The Petition must allege that sexual intercourse between the parties went down in the Sunshine State resulting in the birth of the child at issue to invoke long arm jurisdiction. *Rafaeil v. Rafaeil*, 832 So 2d 202, 203 (Fla. 2d DCA 2002).

- "The child's 'home state' determines jurisdiction over the child." *Johnson v. Johnson*, 88 So. 3d 335, 338 (Fla. 2d DCA 2012). Fla. Stat. §61.503(7) states that the home state is "the state in which a child lived with a parent or a person acting as a parent for at least 6 consecutive months immediately before the commencement of a child custody proceeding."

A word on timing-Warning!!! Some Putative Father's are ill-advised into sitting back and waiting for the child to be born before taking legal action. "In order to preserve the right to notice and consent to [an] adoption of the child, an unmarried biological father must, as the "registrant," file a notarized claim

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[90] Fla. Stat. §742.011.
[91] *Id*.
[92] *Id*.
[93] Fla. Stat. §742.021(1).

of paternity form . . . which includes confirmation of his willingness and intent to support the child."[94] This form may be filed at any time prior to the birth of the child but not after "the date a petition for termination of parental rights."

Your common Floridian, whether a lawyer or teacher, parent or not, married or single, elderly or eighteen can probably conclude that the establishment of paternity will likely result in an award of child support. The child support amount in paternity actions are the same as they are in dissolution of marriage actions. In addition to child support, health insurance, life insurance, out of pocket medical expenses, daycare, aftercare and other child support related expenses, the court can, under Fla. Stat §742.031(1), award:

"reasonable attorney's fees"[95];

"hospital or medical expenses"[96];

"cost of confinement"[97];

"all costs of the proceeding"[98];

"other expenses incident to the birth of the child"[99].

The check for the above expenses may be made payable to "the complainant, her guardian, or any other person assuming responsibility for the child. . . ."[100] As for proofs of the amounts charged and/or paid, the statute bypasses the rules of evidence and eliminates the need of any third-party testimony on the issue of foundation. The claimant must simply show the "[b]ills for pregnancy, childbirth, and scientific testing . . . [which] . . . shall constitute prima facie evidence of amounts incurred . . . ."[101]

The attorney fees section discussed previously should not be confused with attorney fees awardable to either party via Fla. Stat. §742.045. In relevant part, the statute reads: "[t]he court may from time to time, after considering the financial resources of both parties, order a party to pay a reasonable amount for attorney's fees, suit money, and the cost to the other party of maintaining or defending any proceeding under this chapter . . . ."[102]

In addition to monetary awards, a petition to determine paternity can also include a request to establish time-sharing, parenting plan, award of right to claim the child for federal income tax deduction purposes and parental responsibility. If neither of those rights are requested or litigated, the "obligee parent shall receive all of the time-sharing and sole parental responsibility without prejudice to the obligor parent."[103] It would behoove the obligor parent, faced with a paternity petition to file a counterclaim requesting all of the rights desired unless they simply do not want to be part of the child's life.

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[94] Fla. Stat. §742.021(2).
[95] Fla. Stat. §742.031(1).
[96] *Id*.
[97] *Id*.
[98] *Id*.
[99] *Id*.
[100] *Id*.
[101] *Id*.
[102] Fla. Stat. §742.045.
[103] Fla. Stat. §742.031(2).

DEFENSES

The spriest, most inviolable, fail-safe method to getting a paternity action dismissed boils down to two words "I do". "If the mother of any child born out of wedlock and the reputed father shall at any time after its birth intermarry, . . . the cause shall be dismissed . . . ."[104] Although this dominant defense is discussed with my client's, the thought of costly litigation by and large seems like the better alternative. For the few who elect to wed, "[t]he record of the proceedings . . . [are] . . .sealed against public inspection in the interests of the child."[105] The dismissal however is conditioned upon the payment of all attorney fees and costs.

The second defense is to deny paternity all together and request a DNA test, assuming *arguendo* that the responding party has a doubt as to paternity. The respondent would have to provide "a sworn statement or written declaration denying paternity and setting forth facts establishing a reasonable possibility of the nonexistence of sexual contact between the parties . . . ." Whether to order the scientific test is within the sound discretion of the court.[106] The test "may" be requested by either party or *sua sponte*, on the court's own motion.[107] Parties requesting these tests merely to slow down the process or buy some time should be aware that there are potential negative consequences for wasting the court's time; to wit, the court may order the requesting party to:

- ✓ pay for the test;
- ✓ pay additional attorney fees;
- ✓ pay additional costs; etc.

The worst punishment however is that the requesting party is establishing a record of paternity denial which may eventually be read by the child who is the object of the litigation. Following the results of a DNA test showing that the responding party is the Father, a motion for summary judgment is usually filed by the petitioner. Some judges will still provide the father one final chance of acknowledging paternity before ruling on the summary judgment. "[T[he court may enter a summary judgment of paternity . . .[if there is a statistical probability of paternity of 95 percent or more and the objecting party fails to rebut the presumption of paternity created]." Fla. Stat. §742.12(4).

For those client's who are skeptically in denial and believe that the test results must have been the product of a wicked widespread conspiracy against their person, payout or blunder, an objection to the test results "must be made in writing and must be filed with the court at least 10 days prior to the hearing."[108] Failure to timely object to the results equates to the admission of the test results "without the need for predicate to be laid or third-party foundation testimony to be presented."[109] Objection or no objection, a party may still call upon an "expert witness to refute or support the testing procedure or results, or the mathematical theory on which they are based . . .

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[104] Fla. Stat. §742.091.
[105] *Id.*
[106] Fla. Stat. §742.12(2).
[107] Fla. Stat. §742.12(1)-(2).
[108] Fla. Stat. §742.12(3).
[109] *Id*.

."[110] A second test may be requested by either party "[s]ubject to the limitations in [Fla. Stat. 742.12(3)], if the test results or the expert analysis of the inherited characteristics is disputed . . . ."[111] The subsequent test may be conducted in the same laboratory or an independent laboratory, expenses being paid by the requesting party.[112] Superfluous to declare, but, if the test demonstrates that the party is not the biological father, the case is dismissed with prejudice.[113]

Defense number three involves situations where the Mother was actually married to someone else at the birth of the child. Florida Statute 382.013 states that where a mother is married "at the time of birth, the name of the husband shall be entered on the birth certificate as the father . . . ."[114] Even where the husband dies before the child is born, his name "shall be entered on the birth certificate . . . ."[115] In situations where the child is conceived during marriage but the parent's divorce prior to the birth of the child, the child is still considered legitimate.[116]

The defense here goes to the very core of chapter 742; in fact, the very first paragraph states that paternity proceedings may be brought "to determine the paternity of the child when paternity has *not been* established by law or otherwise."[117] It is a chapter, principally drafted to determine "paternity for children born out of wedlock."[118] In essence, the respondent, who may very well be the biological father, is attempting to pass the buck to the legal father.

The legal father is an indispensable party to the action as conveyed by the ever potent Florida Supreme Court in *Dep't of Revenue v. Cummings*, 930 So. 2d 604 (Fla. 2006). "An indispensable party is one whose interest in the controversy makes it impossible to completely adjudicate the matter without affecting either that party's interest or the interests of another party in the action." *Id*. at 607.[119] *See also Bastida v. Batchelor*, 418 So 2d 297, 299 (Fla. 3d DCA 1982)("An indispensable party [is] one without whom the rights of others cannot be determined."). The legal Father is indispensable because the presumption of legitimacy is by far "one of the strongest rebuttable presumptions known to law." *Cummings*, 930 So. 2d at 607-08 (Fla. 2006)(quoting *G.T. v. Adoption of A.E.T.*, 725 So. 2d 404, 410 (Fla. 4th DCA 1999)). The presumption bestows upon legal father's an "unmistakable interest" in paternity actions. *Dep't of Health & Rehab. Serv. v. Privette*, 617 So. 2d 305 at 307 (Fla. 1993).

Consider the following helpful case quotes:

- Through Statute §382.013(2)(a), "the legislature has codified the public policy in Florida that the 'legal father' of any child born of a married woman must be that women's husband unless a paternity action has been resolved prior to the child's birth." *J.S. & C.L v. S.M.M.*, 67 So. 3d 1231, 1232 (Fla. 2d DCA 2011).

- The presumption that the married husband is the legal father by virtue that he was married to the mother when the child was born "is so strong it 'can defeat even the claim of a man proven

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[110] *Id*.
[111] Fla. Stat. §742.12(5).
[112] *Id.*
[113] Fla. Stat. §742.12(4).
[114] Fla. Stat. §382.013(2)(a).
[115] Fla. Stat. §382.013(2)(b).
[116] *Smith v. Wise*, 234 So. 2d 145, 146 (Fla. 3d DCA 1970).
[117] Fla. Stat. §742.011.
[118] Fla. Stat. §742.10(1).
[119] *Citing Hertz Corp.v. Piccolo*, 453 So. 2d 12, 14 n.3 (Fla. 1984).

beyond all doubt to be the biological father.'" *S.B. v. D.H*, 736 So. 2d 766, 767 (Fla. 2d DCA 1999)(quoting *Dep't of Health & Rehab. Servs. v. Privette*, 617 So. 2d 305, 308 (Fla. 1993)).

- "[A] putative father cannot maintain [a] paternity action concerning a child conceived by a married woman when both the married woman and her husband object." *S.B. v. D.H*, 736 So. 2d 766 (Fla. 2d DCA 1999)(*quoting Dep't of Health & Rehab. Servs. v. Privette*, 617 So. 2d 305, 308 (Fla. 1993)).

- The Putative biological father "has no right to seek to establish paternity of a child who was born into an intact marriage when the married woman and her husband object." *Johnson v. Ruby*, 771 So. 2d 1275, 1275-76 (Fla. 4th DCA 2000); *See also Tijerino v. Estrella*, 843 So. 2d 984 (Fla. 3d DCA 2003).

- "So long as the husband and wife are married and have no pending divorce proceeding, we will not authorize the trial court to conduct any qualitative evaluation of whether the marriage is 'in-tact.'" *S.B.*, 736 So. 2d at 767; *see also S.D. v. A.G.*, 764 So.2d 807, 809 (Fla. 2d DCA 2000).

- "Because the child was born to an intact marriage between the legal father and mother, the biological father was precluded from bringing the paternity suit and the trial court should not have considered it." *Slowinsky v. Sweeny*, 64 So. 3d 128, 129 (Fla. 1st DCA 2011)

- *Williams-Raymond v. Jones*, 954 So.2d 721, 722 (Fla. 4th DCA 2007)(finding a child's paternity may not be contested when the wife marries after the child is born and the husband participates in parenting the child).

- "A child born or conceived during marriage is legitimate, and a person seeking to challenge the child's paternity must overcome the strong, albeit rebuttable, presumption of legitimacy." *Nevitt v. Bonomo*, 53 So. 3d 1078, 1081 (Fla. 1st DCA 2010). *See also In re Adoption of Baby James Doe*, 572 So. 2d 986, 988 (Fla. 1st DCA 1990);

As a practical matter, this defense is predominantly valuable in limiting the retroactive child support. As discussed in the Child Support section of this book, the court has time traveling powers to require an obligor to pay child support "to the date when the parents did not reside together in the same household with the child, not to exceed a period of 24 months preceding the filing of the petition, regardless of whether that date precedes the filing of the petition."[120] Armed with this knowledge, a savoir-faire (savvy) practitioner can draft a motion to dismiss if the legal father has not been named in the Petition or has not been served. Florida law allows service within 120 days from the date the Petition is filed; to wit, if the legal father has not been served, the Respondent will have a good chance of dismissing the petition. Needless to say, the Petition may be re-filed; however, the retroactive period may now be tactfully condensed since there would be a new and successive Petition filing date.

Let it be known that Florida Statute §409.257(3) actually allows service by publication "on the legal father in any action or proceeding to determine paternity, which may result in termination of the legal father's parental rights, in which another man is alleged to be the biological father." Therefore, the fact that the legal father's whereabouts' are unknown, shall not serve as a shield in the biological father's favor.

[120] Fla. Stat. §61.30(17).

The child's best interests may be raised on the issue of whether to have the Respondent tested where "paternity is contested, the child's legitimacy is at issue, and the legal father has not had an opportunity to be heard . . . ." *Dep't of Revenue v. Iglesias,* 77 So. 3d 878, 879 (Fla. 4th DCA 2012). *See Privette*, 617 So. 2d at 308; *Daniel v. Daniel*, 695 So. 2d 1253, 1255 (Fla. 1997). In fact, the trial court is required to appoint a guardian ad litem and hear from the guardian and all the parties before proceeding[121] in those cases. *See also Hebner v. Barry*, 834 So. 2d 305, 306-07 (Fla. 4th DCA 2003)(reversing blood testing order where trial court made no findings on the issue of whether a paternity test was in the best interests of the child). "By asserting a privacy interest [in seeking to avoid the blood test] the putative father . . . puts in issue the child's best interests, which substantially implicates the presumption. If the child's best interests require maintaining the presumption, then the presumption will prevail because the State will lack a compelling interest justifying the blood test." *Privette*, 617 So. 2d at 309 n.8 (Fla. 1993).

While the cases thus far seem to suggest that the legal father's rights will always trump the biological father's rights, there are cases establishing ways and laying out factors to be considered in allowing the biological father to assert his rights, consider the following cases:

- *Lander v. Smith*, 906 So. 2d 1130 (Fla. 4th DCA 2005)(child conceived while husband and wife separated. The mother placed putative fathers name on birth certificate and accepted support from him. The putative father had a relationship with the child while the husband lived in another state. Despite the fact that the child was born during in-tact marriage and that both objected, Fourth District allowed the paternity action stating "common sense and reason are outraged by rigidly applying the presumption of legitimacy to bar the putative biological father's paternity action." *Id*. at 1134.

- The Biological father must "show that he has manifested a substantial concern for the welfare of [the] child…" *Kendrick v. Everheart*, 390 So. 2d 53, 60 (Fla. 1980).

- One theorized exception is "only in circumstances where there is a claim of a developed relationship between the putative father and the child[;] an allegation of a mere biological link to the child will not suffice." *G.F.C. v. S.G. and D.G.*, 686 So.2d 1382, 1387 (Fla. 5th DCA 1997).

My utmost deference goes out to Katherine Birnbaum who has suggested factors which may be considered by the court in "determining whether to overcome the presumption of legitimacy in cases filed by biological fathers . . . ."[122] She list's the following factors:

- ✓ Is the mother's marriage intact?
- ✓ Does mother agree or object to the paternity action?
- ✓ Was the husband the reputed father at the time of the marriage?
- ✓ Is the timing of the mother's marriage intended to block the father's rights?
- ✓ What is the biological father's relationship/bond with the child? Has he manifested a substantial and continuing concern for the welfare of his child?

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[121] *Privette*, 617 So. 2d at 308.

[122] 2011 Marital & Family Law Review Course, Paternity, presented by Judge Peter Blanc & Materials by Katherine Birnbaum.

- ✓ Best interests of the child.[123]

The final defense addressed in this chapter is our very own statute of limitations. Florida Statute 95.11(3)(b) states in pertinent part that "[a]n action relating to the determination of paternity [must be brought within four years] with the time running from the date the child reaches the age of majority." From a child support perspective, actions brought more than two years after the child turns 18, or in some cases 19, should not have the effect of causing the Respondent to have to pay any child support, absent unusual circumstances.

DISESTABLISHMENT OF PATERNITY

Disestablishment of Paternity is the nuclear bomb of paternity defenses and is aimed at the absolute annihilation of paternity ties including the obligation to pay child support. It is codified under section 742.18 with an effective date as of June 20th, 2006. Standing is exclusively reserved for males who are not the biological father of the child.[124] A female may not file a petition to disestablish the paternity of her husband regardless of the circumstances nor can a biological father file an action to disestablish the paternity of another man utilizing this particular statute. The requirements are very definite and Florida court's will not think twice about dismissing or denying the petition the statute if not meticulously followed. The Petitioner must:

1. File and serve the Petition on the Department of Revenue (where applicable), the mother and/or legal guardian.[125]

2. Petition must include:

(a) An affidavit executed by the petitioner that newly discovered evidence relating to the paternity of the child has come to the petitioner's knowledge since the initial paternity determination or establishment of a child support obligation.
(b) The results of scientific tests that are generally acceptable within the scientific community to show a probability of paternity, administered within 90 days prior to the filing of such petition, which results indicate that the male ordered to pay such child support cannot be the father of the child for whom support is required, or an affidavit executed by the petitioner stating that he did not have access to the child to have scientific testing performed prior to the filing of the petition. A male who suspects he is not the father but does not have access to the child to have scientific testing performed may file a petition requesting the court to order the child to be tested.
(c) An affidavit executed by the petitioner stating that the petitioner is current on all child support payments for the child for whom relief is sought or that he has substantially complied with his child support obligation for the applicable child and that any delinquency in his child support obligation for that child arose from his inability for just cause to pay the delinquent child support when the delinquent child support became due.
Fla. Stat. §742.18(1).

3. Relief granted upon court finding all of the following:

[123] *Id*.
[124] Fla. Stat. §742.18(1).
[125] *Id.*

(a) Newly discovered evidence relating to the paternity of the child has come to the petitioner's knowledge since the initial paternity determination or establishment of a child support obligation.
(b) The scientific test required in paragraph (1)(b) was properly conducted.
(c) The male ordered to pay child support is current on all child support payments for the applicable child or that the male ordered to pay child support has substantially complied with his child support obligation for the applicable child and that any delinquency in his child support obligation for that child arose from his inability for just cause to pay the delinquent child support when the delinquent child support became due.
(d) The male ordered to pay child support has not adopted the child.
(e) The child was not conceived by artificial insemination while the male ordered to pay child support and the child's mother were in wedlock.
(f) The male ordered to pay child support did not act to prevent the biological father of the child from asserting his paternal rights with respect to the child.
(g) The child was younger than 18 years of age when the petition was filed.
Fla. Stat. §742.18(2).

4. Even if the court makes the findings above, the court shall not set aside the determination of paternity "if the male engaged in the following conduct after learning that he is not the biological father of the child:"[126]

(a) Married the mother of the child while known as the reputed father in accordance with s. 742.091 and voluntarily assumed the parental obligation and duty to pay child support;
(b) Acknowledged his paternity of the child in a sworn statement;
(c) Consented to be named as the child's biological father on the child's birth certificate;
(d) Voluntarily promised in writing to support the child and was required to support the child based on that promise;
(e) Received written notice from any state agency or any court directing him to submit to scientific testing which he disregarded; or
(f) Signed a voluntary acknowledgment of paternity as provided in s. 742.10(4).
Fla. Stat. 742.18(3).

The relief intended by the statute is exclusively prospective relief. A successful petitioner will not be allowed to recover any prior or past child support paid.[127] The court equates these past child support amounts as "vested right[s] of the child." *Fernandez v. Dep't of Revenue*, 971 So.2d 875 (Fla. 3d DCA 2007).[128] Lawyers representing the affected father should file a motion early in the case requesting that pending child support payments be paid into the court registry pending the outcome of the case in order to decrease monetary exposure. *See* Fla. Stat. §742.18(6)("the court may order the child support to be held in the registry of the court until final determination of paternity has been made.")

If the scientific DNA test was provided by the "affected male", the court may *sua sponte* or via motion from either party, order a DNA test to "be done no more than 30 days after the court issues its order."[129] If either party willfully fails to submit to the test, "the court shall issue an order determining the relief on the petition against the party so failing to submit to scientific testing."[130] The sole defense to this default is to show good cause for said failure to submit.[131] The test shall be paid by requesting party with

[126] Fla. Stat. §742.18(3).
[127] Fla. Stat. §742.18(5)("relief shall be limited to the issues of prospective child support payments . . . .")
[128] *See also Dep't of Revenue v. Ductant*, 957 So.2d 658, 660 (Fla. 3d DCA 2007).
[129] Fla. Stat. §742.18(7)(a).
[130] Fla. Stat. §742.18(7)(b).
[131] *Id*.

one caveat; to wit, if the requesting party is "an administrative agency in its role as an agency providing enforcement of child support orders, that agency shall pay the cost of the testing if it requests the test and may seek reimbursement for the fees from the person against whom the court assesses the costs of the action.[132]

If the petition for disestablishment is granted, a new birth certificate deleting the name of the petitioner is issued.[133] The mother or legal guardian of the child can request to change the child's surname and, if in the best interest of the child, the court may grant said request.[134] If the petition is not granted, "the court shall assess the costs of the action and attorney's fees against the petitioner." Fla. Stat. §742.18(10).

There is presently a certified conflict between the First and Second District involving the definition of "newly discovered evidence" as that term is used in the statute. What followd is a side-by-side, law school style brief, of both cases to help illustrate their differences:

***Hooks v. Quaintance*, 71 So. 3d 908 (Fla. 1st DCA 2011)**	***P.G., v. E.W.*, 75 So. 3d 777 (Fla. 2d DCA 2011)**
On January 2, 2005, birth certificate was issued for child at issue without listing a Father. On September 21, 2005, Appellant's name was added with his consent after being informed that "there was no more that a fifty percent chance that he was the child's biological father." Appellant then married the Appellee the following day. Parties subsequently divorced on November 30, 2006. The decree identified the child "as the child of their marriage."	Before the parties were married, they maintained an "on and off" relationship. The Former Wife dated other men during this off period. After learning that the Former Wife was pregnant, the parties reconciled and began living together. Two years after the child was born, the parties wed in 1996. The parties subsequently divorced in 2004. As part of the divorce, the Husband acknowledged he was the father and even aggressively pursued and was ultimately awarded primary residential parent for the child.
On January 31, 2010, Appellant files a formal petition to disestablish paternity via section 742.18. Within the petition, Appellant asserted that DNA tests showed he was not the father and that same "constituted newly discovered evidence for purposes of section 742.18(1)." Trial court disagreed and dismissed his petition for failure to include newly discovered evidence.	In June 2009, the child began experiencing "behavioral and mental health issues." Since there was no family history of mental issues in the family, the Former Husband started to question paternity. The Former Husband then took the child for DNA testing which revealed a "zero percent chance" that Former Husband was the biological Father.
The Appellate court affirmed trial court finding "that the plain language in section 742.18 requires a showing of newly discovered evidence in addition to DNA test results . . . ." "The statute treats these two requirements as separate."	The Former wife testified that before the birth of the child, Former Husband questioned the paternity and that she reassured him he was the father after which he stated "he did not care who the father was; that as far as he knew, he was the father; and that he wanted to be the father for her." Former Husband however always maintained he thought he was the father.
The Appellate court suggested that the term "newly discovered evidence" was borrowed from Fla. R. Civ. P. 1.540(b)(2) which provides "that newly	

[132] Fla. Stat. §742.18(7)(c).
[133] Fla. Stat. §742.18(8).
[134] *Id.*

discovered evidence is evidence that by due diligence could not have been discovered in time to move for a trial or rehearing." The court further noted that courts "have stated that rule 1.540(b) . . . 'does not have as its purpose or intent the reopening of lawsuits to allow parties to state new claims or offer new evidence omitted by oversight or inadvertence.'" *Phenion Dev. Grp., Inc. v. Love*, 940 So. 2d 1179, 1183 (Fla. 5th DCA 2006). The court went on to state that relief based on newly discovered evidence should be seldom granted, only after moving party has exercised due diligence. *Junda v. Diez*, 848 So. 2d 457, 458 (Fla. 4th DCA 2003). The court concludes that the appellant here failed to exercise due diligence back in 2005 to discover he was not the biological father because at the time he acknowledged paternity he knew there was only a fifty percent likelihood that he was the father and yet chose not to take the DNA test at that juncture.	Within his petition, Former Husband identified the DNA results as the newly discovered evidence. The trial court ruled against him concluding that the DNA test did not amount to newly discovered evidence and that he knew or should have known there was possibility he was not the father before accepting paternity. Appellate court disagreed with trial court and reversed stating that although evidence indicated Former Husband "should have suspected that he was not the child's biological father, there was no evidence to support a finding that he did in fact know . . . at the time he signed the . . . birth certificate." Former wife testified she was confident he was the father and reassured him of such. The court's holding is "that DNA test results performed since the initial determination of paternity satisfy the statutory requirement for newly discovered evidence so long as they meet the statute's other time requirements." In addition, "because the plain language of the statute only addresses the petitioner's 'knowledge since the initial paternity determination,' see § 742.18(1)(a), (2)(a), any suspicions he may have had prior to that initial establishment of paternity are irrelevant."

Another other part of the statute that has led to some confusion is section 742.18(1)(b) requiring results of DNA test performed "within 90 days prior to the filing of such petition . . . or an affidavit executed by the petitioner stating that he did not have access to the child to have scientific testing performed prior to the filing of the petition." The following is another illustration detailing the different interpretations of the third district compared to the Second:

***Aulet v. Castro*, 44 So. 3d 140 (Fla. 3d DCA 2010)**	***J.C.J., v. Dep't of Revenue*, 80 So. 3d 1106 (Fla. 2d DCA 2012)**
Former husband appeals from a dismissal of his petition to disestablish paternity which was mainly dismissed for his failure to include DNA test results within 90 days of their administration along with the petition. The parties secured a divorce in December of 2003 wherein the husband was named as the father of the minor at issue. Subsequent thereto, the father conducted two DNA tests (April 5, 2007 & May 1 2007) which both excluded him as the biological father. More than (90) days later, he files his petition for disestablishment on September 28, 2007. Said petition referenced the two tests. The petition however was devoid of an "affidavit, pursuant to subsection 742.18(1)(b), stating that the	The Appellant executed a voluntary acknowledgment of paternity for the minor the day after his birth; to wit, May 23, 2005. On November 1, 2007, he took the child for a DNA test, results of which excluded him as the biological father. The father waited more than ninety-days, March 27, 2009, to file a disestablishment petition. The father alleged, under oath, the results as newly discovered evidence and requested the court to order further testing. The mother failed to respond to the petition and the clerk entered a default against her. The trial court ruled against the father because the tests

former husband did not have access to the child to perform the DNA tests within the ninety-day period." The petition did not even request the court to order one.

In reference to the ninety-day requirement, the Appellate court, followed *Dep't of Revenue v. Brinson*, III, 953 So. 2d 38, 39 (Fla. 3d DCA 2007)(noting that the statute "requires the man to file a court petition within ninety days of obtaining a paternity test"); to wit, once the man receives the first set of results, he must act within ninety-days or be forever barred from invoking the powers of the statute.

The court also noted that "sitting on the results disputing paternity . . . goes to the element of 'newly discovered evidence."

were "not obtained within ninety days prior to the filing of the [petition]."

The appellate court reversed because the statute requires the tests results "or" an affidavit declaring that the father did not have access to the child during that time to have him tested. The father here swore under oath that he did not have access and thus requested the trial to order said testing. The appellate court concluded that "the trial court erred in denying the petition without requiring the further testing as requested by the pleadings."

OTHER DEFENSES

This section has explored some of the common child support defenses relative to Paternity cases. For a comprehensive and all-embracing list of additional defenses relative to Paternity cases, this chapter should be read along with the Child Support and Administrative Cases Chapters found within this book.

Chapter III:
Administrative Cases

Florida Statute §409.2563 provides for the establishment of child support on an Administrative level. Administrative orders may include "provisions for monetary support, retroactive support, health care, and other elements of support pursuant to chapter §61."[135] The substitution of this method versus the traditional circuit court method is not intended "to limit the jurisdiction of the circuit courts" but rather to supply "an alternative procedure for establishing child support obligations in Title IV-D cases in a fair and expeditious manner when there is no court order of support."[136] The Division of Administrative Hearings may not hear issues dealings with termination of parental rights, dissolution of marriage, separation, dependency, disputed paternity, etc.[137]

What types of cases may be heard administratively via Fla. Stat. 409.2563?

Cases where:

- ✓ "there is no support order"[138] (&)
- ✓ "Title IV-D case"[139] (&)
- ✓ "paternity has been established or is presumed by law"[140] (or)
- ✓ "whose paternity is the subject of a proceeding under s. 409.256 . . . ."[141]

Who may proceed administratively via Fla. Stat. §409.2563?

"An applicant or recipient of public assistance, as provided by s. 409.2561 and 409.2567;"[142]

"A former recipient of public assistance, as provided by s. 409.2569;"[143]

"An individual who has applied for services as provided by s. 409.2567;"[144]

"[The department] or the child, as provided by s. 409.2561; or"[145]

"A state or local government of another state, as provided by chapter 88."[146]

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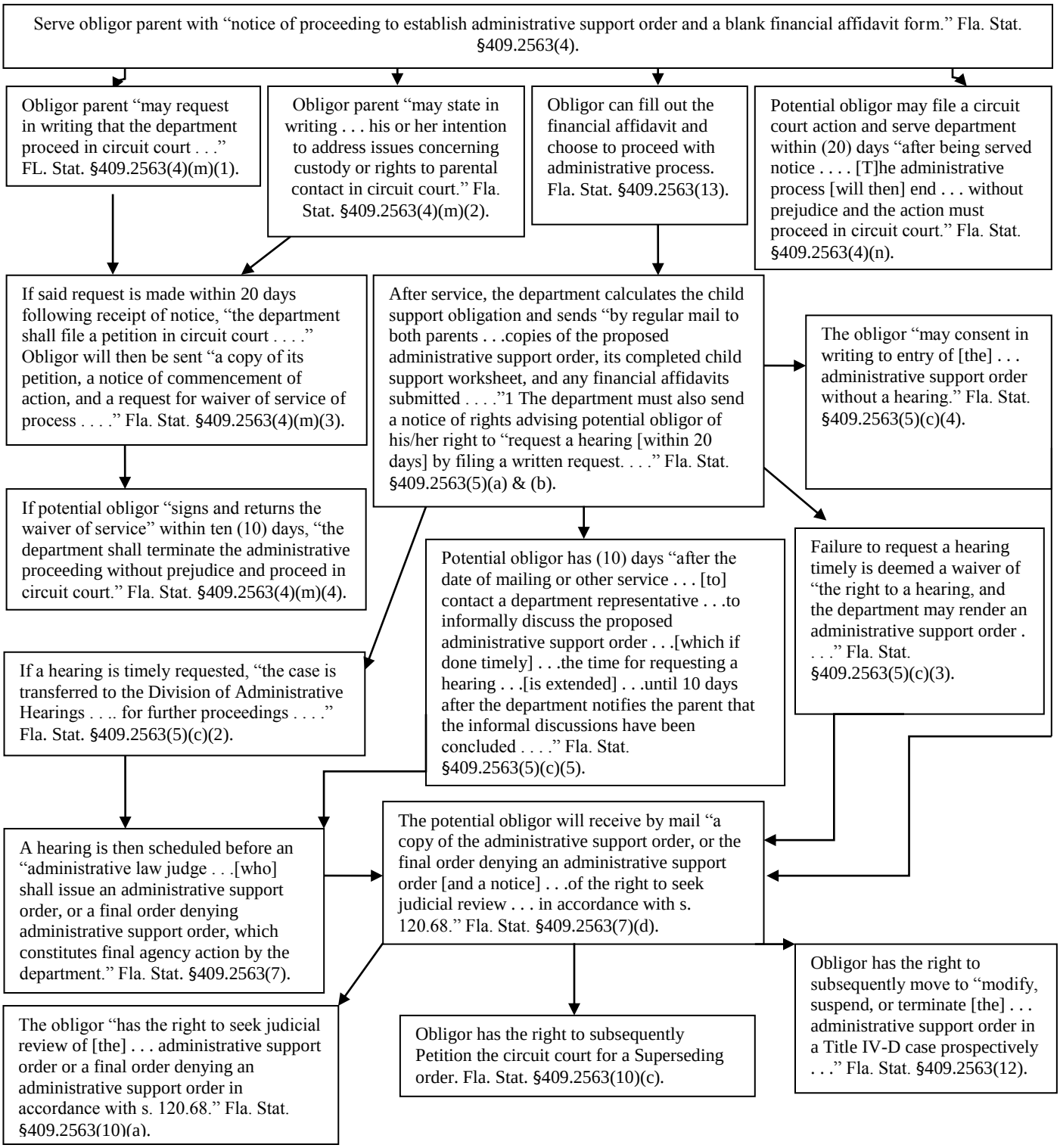
[135] Fla. Stat. § 409.2563(1)(a).
[136] Fla. Stat. § 409.2563(2)(a).
[137] Fla. Stat. § 409.2563(2)(b).
[138] Fla. Stat. § 409.2563(2)(c).
[139] *Id*.
[140] *Id*.
[141] *Id*.
[142] *Id*.
[143] *Id*.
[144] *Id*.
[145] *Id*.

What are the steps involved in an Administrative proceeding pursuant to Fla. Stat. §409.2563?



[146] *Id.*

ENFORCEABILITY OF THE ADMINISTRATIVE ORDER

Administrative support orders are aptly empowered with the "same force and effect as a court order and may be enforced by any circuit court in the same manner as a support order issued by the court, except for contempt."[147] In order to harness the deafening powers of contempt, the circuit court would need to issue "its own order enforcing the administrative support order . . .[as] . . .the circuit court may enforce its own order[s] by contempt."[148] The movant at the contempt hearing enjoys the same "presumption of ability to pay and purge contempt established in s. §61.14(5)(a) . . .[provided the support order] . . .includes a finding of present ability to pay."[149]

Support orders entered administratively remain "in effect until modified by the department, vacated on appeal, or superseded by a subsequent court order."[150] Modifications are statutorily limited to prospective modifications[151] and are "subject to the requirements for modifications of judicial support orders established in chapters 61 and 409, by following the same procedures . . . for establishing an administrative support order . . . ."[152]

There exists a grand deal of bafflement as to how and when an administrative order is superseded. The sheer fact that the circuit court has been called upon to purely enforce the order "without any change by the court in the support obligations established in the support order"[153] does not, without more, create a superseding order. In fact, court participation of this nature does not even "affect the department's authority to modify the administrative support order . . . ."[154] Moreover, orders by the court requiring "a parent to make periodic payments on arrearages . .[do] . . .not supersede the administrative order."[155]

SUPERSEDING ORDERS

Fla. Stat. §409.2563(10)(c) provides in pertinent part that a Florida circuit court, "where venue is proper and the court has jurisdiction of the parties, may enter an order prospectively changing the support obligations established in an administrative support order, in which case the administrative support order is superseded and the court's order shall govern future proceedings in the case."[156] The circuit court is nearly powerless to modify "unpaid support owed under the superseded administrative order . . .except as provided by s. §61.14(1)(a), . . and [said support] remains enforceable . . . ."[157] Within its superseding order, "the court shall determine the amount of any unpaid support owed under the administrative support order and shall include the amount as arrearage in its superseding order."[158]

Superseding orders should be treated as a prayer for relief, to be requested via proper pleadings. A circuit court lacks the authority to, *sua sponte*, enter a superseding order where neither party has pled

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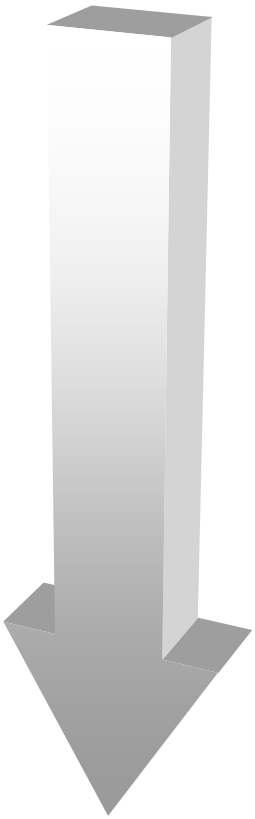
[147] Fla. Stat. §409.2563(10)(b).
[148] *Id.*
[149] *Id.*
[150] Fla. Stat. §409.2563(11).
[151] Fla. Stat. §409.2563(12).
[152] *Id.*
[153] Fla. Stat. §409.2563(10)(b). *See also Dep't of Revenue v. Martin*, 65 So. 3d 603, 604 (Fla. 5th DCA 2011).
[154] *Id.*
[155] *Id.*
[156] Fla. Stat. §409.2563(10)(c).
[157] *Id.*
[158] *Id.*

for same.[159] "It is well settled that an order adjudicating issues not presented by the pleadings, noticed to the parties, or litigated below denies fundamental due process." *Neumann v. Neumann*, 857 So. 2d 372, 373 (Fla. 1st DCA 2003); *But see Dep't of Revenue v. Williams*, 74 So. 3d 115 (Fla. 1st DCA 2011)(affirming a superseding order requested *ore tenus* by the parents, over the Department's objection). Case law aside, the suggested vehicle to apply for the superseding order is via formal pleadings.

Superseding orders have a deviously matchless advantage for the movant as they do not require the movant to meet the standard for regular modifications; to wit, "(1) a substantial change in circumstances, (2) the change was not contemplated at the time of the . . . judgment, and (3) the change is sufficient, material, involuntary, and permanent."[160]

While the Florida Supreme Court has approved a great array of Family law documents,[161] a petition for superseding order has yet to be approved as of the printing of this book; therefore, I have included on the following page, a sample copy of my own Petition for Superseding order which I have previously utilized:



[159] *Dep't of Revenue v. Fredeking*, 68 So.3d 362, 363 (Fla. 1st DCA 2011).
[160] *Poe v. Poe*, 63 So.3d 842, 843 (Fla. 5th DCA 2011). *See also Pimm v. Pimm*, 601 So. 2d 534, 536 (Fla. 1992).
[161] A complete list of approved forms may be found at the following URL: http://www.flcourts.org/gen_public/family/forms_rules/index.shtml

IN THE CIRCUIT COURT OF THE _____ JUDICIAL CIRCUIT,
IN AND FOR _____, FLORIDA

Case No: _____
Division: _____

_____,
Petitioner

and

_____,
Respondent

PETITION FOR CIRCUIT COURT TO ENTER AN ORDER SUPERSEDING THE ADMINISTRATIVE SUPPORT ORDER ENTERED IN THIS CASE PURSUANT TO FLORIDA STATUTE 409.2563(10)(c)

COMES NOW RESPONDENT, _____, by and through undersigned counsel and hereby files this Petition for Circuit Court to Enter an Order Superseding the Administrative Support Order entered in this Case Pursuant to Florida Statute 409.2563(10)(c) and further alleges as follows:

1. That this action is brought pursuant to Florida Statute 409.2563(10)(c) for the purpose of superseding a prior Administrative Support Order. *See also Dep't of Revenue v. Manasala*, 982 So. 2d 1257 (Fla. 1st DCA 2008)(finding that circuit court's are authorized "to supersede the entry of . . .administrative support orders by . . . entering prospective order[s] modifying the child support award."

2. That Florida is the Home State of the minor child involved in this case: _____ born on _____.

3. That both Petitioner and Respondent reside in _____ County, Florida. Venue is proper in _____ County, Florida.

4. That a completed UCCJEA and Financial Affidavit have been filed with this Petition.

5. That on _____ a Final Administrative Support Order was entered by _____ establishing ongoing child support at the Monthly rate of _____. *See* "Exhibit A".

6. This Superseding Order is requested because of the following:
_____
_____
_____
_____.

7. The Respondent is also requesting:
_____
_____
_____
_____.

WHEREFORE, for the foregoing reasons, the Respondent respectfully requests that this court enter the Superseding Order, making it effective retroactively since the date of filing,[162] grant all other relief requested in paragraph (7) and for any other relief this court deems just and proper.

Dated this ____ day of _____, _____.

Respectfully Submitted,

_____
_____
_____
_____
_____
_____
_____

X _____

[162] While a case supporting retroactive application of the superseding order was not found at the time of the publication for this book, I would rely on cases supporting retroactive application in modification cases such as *Spano v. Bruce*, 62 So. 3d 2, 5 (Fla. 3d DCA 2011)("The trial court's authority to order a reduction in a child support obligation retroactive to the date on which a petition for modification is filed is clear.") *See Miles v. Champlin*, 805 So. 2d 1085, 1086 (Fla. 1st DCA 2002)("[A] trial court may modify an order of support . . . by increasing or decreasing the support . . . retroactively to the date of the filing of the action or supplemental action for modification as equity requires'")(citation omitted). Moreover, "child support modifications should be made retroactive to the time when the petition for modification was filed." *See also Batts v Batts*, 600 So.2d 1301 (Fla. 5th DCA 1992).

DEFENSE STRATEGEM

On a personal level, my fondness of traveling the convoluted pathways of the Administrative highways is practically non-existent. An obligor's ultimate shelter is time and these administrative hearings seem to move faster than typical conventional circuit court cases.[163] Time is crucial for a plethora of reasons including the opportunity to enter into a time-sharing/parenting plan agreement, the exchange of discovery and the securing of attorney fees.

Every practicing family law attorney knows or should know that child support is affected by the time-sharing agreement and/or Parenting Plan. A parenting plan is defined as "a document created to govern the relationship between the parents relating to decisions that must be made regarding the minor child and must contain a time-sharing schedule for the parents and child." §61.046(14). If your plan provides your client with a substantial amount of time which is defined as exercising "time sharing at least 20 percent of the overnights of the year," they may be entitled to pay lower child support §61.30(11)(b)(8), Fla. Stat.

For years, I have adhered to the following undemanding but superbly effective defense strategy when defending against a Department of Revenue child support case, whether administratively or via circuit court:

i. Elect that the case proceed in circuit court. If in circuit court, file a responsive pleading to the Department of Revenue child support case.

ii. File a separate action to establish a Parenting Plan and related relief. (Not a counter-petition).

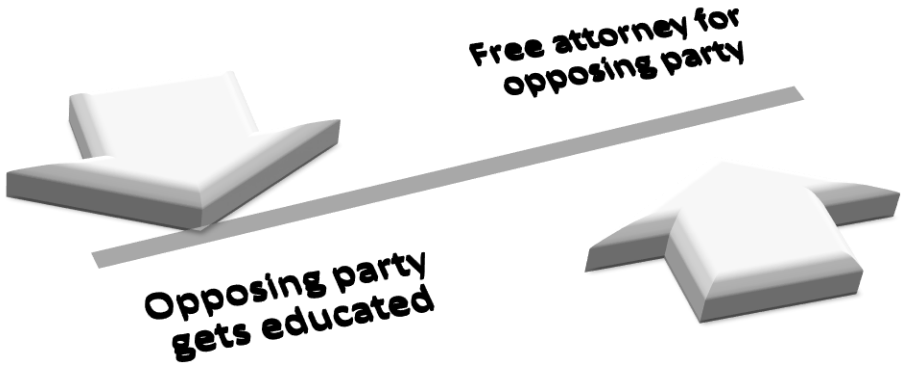
iii. Work quickly and zealously to arrive at and establish a Parenting Plan approved by the court prior to the final hearing on the Department of Revenue child support case.

iv. Attend the Final Department of Revenue hearing, request that the court take judicial notice pursuant to FL. Stat. 90.202 of the court approved parenting plan and final judgment and presto- a commandingly sublime result is achieved for the client.

In my rookie years, taking to heart the lectures my radiant Ivy league educated Civil Procedure professor Sandra Ruffin would conduct regarding the importance of Judicial Economy, I would hastily

[163] This opinion is further bolstered by a handout the department attaches to some of their Administrative cases titled "The path to an Administrative Support Order", What parents and caregivers need to know, which states that "the administrative support procedure may reduce the time it takes to obtain a support order."

move to consolidate the two cases in family court. The net effect was two fold as illustrated below:



Although the State Attorney for the Department of Revenue is acting in a limited capacity for the sole purpose of child support issues,[164] they are now accompanying the opposing party to Mediation and the opposing party will indubitably ask the State Attorney how time-sharing will affect child support. Even if the question is never posed, once child support is calculated, the Mediator will usually note that the amount is based on the overnights. If not the State Attorney or the Mediator, the guidelines will come in so low that the opposing party will eventually ask why it is so low.

Once the opposing party has been properly elucidated as to the correlation of child support and time sharing, the Mediation process usually breaks down. The fact that most of these cases are sent to in-house court mediation with a two hour time limit does not aid in the facilitation of a settlement once the "cat is out of the bag", sort of speak. The free attorney and free education results in a disruption of the scales of justice as illustrated above which climaxes with a Mediation breakdown.

Family law is waist-deep in "child's best interests" analysis'. The above scenario is utterly toxic to the child's best interests as it promotes the deferment of momentous, substantial and harmonious time-sharing with both parents, costly litigation and possible trial. If the parties once enjoyed an informal time-sharing schedule, the opposing party may embark on a damage control crusade to cut off same leading to a costly urgent motion for time-sharing.

Filing Counter-Petition on Behalf of Respondent

Depending on the amount of overnight's secured for the Respondent, the income of the parties and other factors pursuant to Fla. Stat. §61.30, it is quite feasible that the original Respondent in the Child Support case may now have a claim for child support of their own. If that is the case, a motion for leave to amend to include a counter-petition pursuant to Fla. R. Civ. P. 1.190 & Fla. Fam. L. R. Civ. P. 12.190 will need to be filed before the court would be able to award child support to the Respondent who will now also be known as the "Counter-Petitioner."

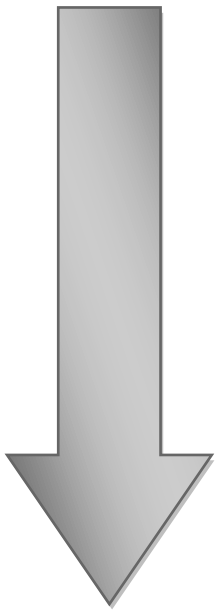
Although the Respondent may be relieved from having to pay ongoing child support, the Respondent may still be on the hook for retroactive child support awardable up to (24) Months since the

[164] Fla. Stat. §409.2564(5)("the department shall be a party to the action only for those purposes allowed under Title IV-D of the Social Security Act. The program attorney shall be the attorney of record solely for the purposes of support enforcement . . . ."; *See also* Fla. Stat. 409.2567(2)("An attorney-client relationship exists only between the department and the legal services provider s in Title IV-D cases. The attorney shall advise the obligee in Title IV-D cases that the attorney represents the agency and not the obligee."); *See* Fla. Stat. 409.2564(5).

filing of the original Petition.[165] Be aware that one or more counties have been known to request more than the statutory cap of (24) Months and that said allegation should be aptly dealt with.

Costs

Rare is the scenario where a Respondent escapes a Title IV-D child support proceeding without being assessed costs against them pursuant to Fla. Stat. 409.2567(3). Cost's are "assessed only against the nonprevailing obligor after the court makes a determination of the nonprevailing obligor's ability to pay such costs and fees."[166] Being triumphant on a well plead counter-petition, effectively converting the purported obligee into the obligor, will provide a strong argument that the costs should be assessed against the Petitioner. Be mindful that the State will counter with their retroactive support claim and the fact that your client only became the obligee at the time of the filing of the counter-petition and/or the establishment of the parenting plan and that costs had already accumulated. At worse, argue that the costs be split between the parties. "The Department of Revenue shall not be considered a party for purposes of this section; however, fees may be assessed against the department pursuant to s. 57.105(1)."[167]



[165] *See* Fla. Stat. §61.30(17)
[166] Fla. Stat. §409.2567(3).
[167] Fla. Stat. §409.2567(4).

State's Interest in Case

"Any payment of temporary cash or Title IV-E assistance made to, or for the benefit of, any dependent child creates an obligation in an amount determined pursuant to the child support guidelines." Fla. Stat. §409.2561. The State has the right to retain child support payments as "necessary to reimburse amounts paid to the family as assistance by the state." Fla. Stat. §409.25§61. Mercifully, obligations to the State are "limited to the amount provided by the [child support] . . . order or decree." Fla. Stat. §409.2561. When a parent "accept[s] temporary cash assistance or Title IV-E assistance, the recipient assigns to the department any right, title, and interest to support the recipient may be owed." Fla. Stat. §409.2561. While difficult not to reflect on the word "ethics" while reading this statute, in essence, this scheme is not so much a "contingency contract" as it is an interest free loan contingent upon an assignment for the benefit of the child.

Life Insurance

The child support section of this book dives profoundly and remarkably into Life Insurance defenses *per se*; however, a caveat with Title IV-D cases is that the extent of the department's questioning into this matter typically starts and ends with, "Do you currently have life insurance?" An answer in the affirmative will instigate the asking of the second and third question, "What is the amount of the payout and who are the beneficiaries?" If the Respondent has no current policy, the State's life insurance claim is routinely denied.

Health Insurance

Much like Life Insurance, there will naturally be a couple of questions regarding the availability and affordability of same. For a complete defense guide on this issue, turn to the Child Support Chapter of this book.

Attorney Fees

The Department of Revenue is not safeguarded from attorney fee awards against it pursuant to Fla. Stat. 57.105. Consider the following authority:

- § 742.045, Fla. Stat. (2010);
- Fla. Admin. Code R. 12E-1.003(2)(b)("[T]he department shall pay any fees assessed by the court pursuant to Section 57.105(1), F.S");
- *State, Dep't of Health & Rehab. Serv., Office of Child Support Enforcement ex rel. Cook v. Carr*, 501 So. 2d 30, 31 (Fla. 2d DCA 1986)(finding 57.105 fees awardable against the Department where "there is a proper finding of a complete absence of a justiciable issue of either law or fact")
- *Collins v. Brodzki*, 574 So. 2d 1157, 1158 (Fla. 3d DCA 1991)("Under the proper circumstances fees may be awarded to a successful respondent in the paternity action pursuant to section 57.105 . . .if the proper predicate is made and the amount is reasonable.").
- 57.105(1) fees are awardable where "the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court . . .[w]as not supported by the material facts necessary to establish the claim or defense" or said defense wasn't "supported by the application of then-existing law to those material facts." *Dep't of Revenue v. Ceesford*, 100 So. 3d 1199, 1205 (Fla. 2d DCA 2012).
- While the statute requires certain notice procedures, the trial court is nevertheless allowed to award such fees,, absent said notice, upon "its own motion if the facts support the award." *Ceesford*, 100 So. 3d at 1205 n.3 (Fla. 2d DCA 2012).

IN THE CIRCUIT COURT OF THE _____JUDICIAL CIRCUIT
IN AND FOR _____ COUNTY, FLORIDA

IN RE: THE MATTER OF CASE NO: _____
FAMILY DIVISION

_____,
Petitioner/_____,
and

_____,
Respondent/_____.
/

STATUS QUO TEMPORARY DOMESTIC RELATIONS ORDER,
WITH OR WITHOUT MINOR CHILDREN

The following Status Quo Temporary Domestic Relations Order, With or Without Minor Children (hereinafter "Order") shall apply to both parties in an original dissolution of marriage or paternity action. This Order shall be in effect with regard to the petitioner upon filing of the petition; and with regard to the respondent, upon service of the summons and petition or upon waiver and acceptance of service. The Order shall remain in effect during the pendency of the action unless modified, terminated, or amended by further order of presiding judge in the action.
It is in the best interests of the parties in a dissolution of marriage or paternity action to learn about the problems, duties and responsibilities that may arise during their dissolution or paternity proceeding. It is also important for the parties to preserve their assets, act in the best interests of their children and comply with Court rules and orders. Therefore, the parties are hereby advised:

1. NO RELOCATION OF CHILDREN: Unless there is a prior court order, domestic violence injunction (permanent or temporary) or agreement signed by both parties, to the contrary, neither party will permanently remove, cause to be removed, nor permit the removal of any minor children of the parties from their current county of residence. The intent of this restriction is not to prohibit temporary travel within the State of Florida. Neither party shall apply for any passport nor passport services on behalf of the children, without an order if the court from the presiding judge.

2. CHILD SUPPORT: Unless there is a prior court order, domestic violence injunction (permanent or temporary) or agreement signed by both parties, if the parties have minor children and choose to live apart while the action is pending the parent with whom the children are not residing for a majority of the time should make voluntary payments of child support to the other parent, prior to entry of an order requiring payment of child support. Child support should in an amount as determined by the Uniform Child Support Guidelines, Section 61.30, Florida Statutes. Since child support can be ordered retroactive to the date of filing the petition, it is advisable that the party making payment keep proof of payments and bring them to court. Signed receipts should be obtained for any cash payments. Parent/Child access and child support are separate and distinct under the law. Accordingly, a child's right to access to his or parent is not contingent upon payment of child support.

3. SHARED PARENTING GUIDELINES: These guidelines apply unless there is a prior court order, domestic violence injunction (permanent or temporary) or agreement of the parties to the contrary. The safety, financial security, and mental well-being of the children involved in these cases are of paramount concern. It is mandatory that parents complete a parenting class and know, understand, and follow the court's guidelines for

parents in dissolution cases with children. The parties are ordered to abide by the principles of shared parental responsibility, which means:

3.1 Both parents shall confer with each other so that major decisions affecting the welfare of the children shall be determined jointly. Such decisions include, but are not limited to, education, discipline, religion, medical, and general upbringing.

3.2 Each parent shall exercise, in the utmost good faith, his and her best efforts at all times to encourage and foster the maximum relations, love, and affection between the minor children of the parties and the other parent. Neither parent shall impede, obstruct, or interfere with the exercise by the other parent of his or her right to companionship with the minor children.

3.3 Each parent shall have access to records and information pertaining to the minor children, including, but not limited to, medical, dental, and school records.

3.4 Neither parent shall make any disparaging remarks about the other parent or quiz the children as to the other parent's private life. It is the children's right to be spared from experiencing and witnessing any animosity or ill-feeling, if any should occur, between the parents, and the minor children should be encouraged to maintain love, respect, and affection for both parents.

3.5 The relationship between the parents shall be courteous and respectful as possible, relatively formal, low-key, and public.

3.6 Each parent has a duty to communicate directly with the children concerning his/her relationship with them to the extent warranted by their age and maturity. Neither parent can expect the other parent to continually act as a "buffer" or "go-between." For example, should either parent be unable to exercise time-sharing, that parent should explain this directly to the child.

3.7 Both parents shall be entitled to participate in and attend special activities in which the minor children are engaged, such as religious activities, school programs, sports events and other extracurricular activities, and important social events in which the children participate. Each parent should keep the other notified of these events.

3.8 The children shall not be referred to by any other last name than the one listed on their birth certificate.

3.9 Each parent has a duty to discuss with the other parent the advantages and disadvantages of all major decisions regarding the children and to work together in an effort to reach a joint decision. For example, this duty would include an obligation to discuss a decision to remove a child from public school in order to enroll the child in private school.

3.10 Neither parent shall conceal the whereabouts of the children, and each parent will keep the other advised at all times of the residential address and phone numbers where the children will be staying while with the other parent. Each parent shall notify the other immediately of any emergency pertaining to any child of the parties.

3.11 Each party shall provide to the other party his or her residence address, residence, work, and cellular telephone numbers, and e-mail address. Each party shall notify the other party, in writing, of any and all changes in his or her residence address and residence, work, and cellular telephone numbers, and e-mail address. Such notification shall be done within five (5) days of any such change and shall include the complete new address or complete new telephone number(s) and/or e-mail address.

4. REQUIRED ATTENDANCE IN A 4-HOUR PARENTING COURSE: SECTION 61.21, FLORIDA STATUTES. All parties to dissolution of marriage proceedings with minor children or to paternity proceedings shall be required to complete the Parent Education and Family Stabilization Course prior to the entry by the court of a final judgment, as follows:

4.1 Required Attendance. The Petitioner must complete the course within 45 days after the filing of the petition, and all other parties must complete the course within 45 days after service of the petition. The presiding judge may excuse a party from attending the parenting course for good reason. The programs are educational programs designed to assist parents and children in making transitions during and after the divorce. A certificate of completion for each party must be filed with the Clerk of Court.

4.2 Cost. Each party shall pay their respective cost of the Certified Parenting Course. The cost is determined by the agencies providing the different programs. No person shall be refused permission to attend because of inability to pay.

4.3 Non-Compliance. If either party does not attend and complete the Certified Parenting Course, upon filing of an affidavit of non-compliance, the presiding judge will enter an Order to Show Cause and will schedule a hearing date. At the hearing, the non-complying party will demonstrate why he or she has not attended the Parenting Education and Family Stabilization Course. The presiding judge may impose sanctions, including a Stay of Proceedings, or any other sanction the presiding judge finds just.

5. MEDIATION: Unless there is a prior court order, domestic violence injunction (permanent or temporary) or agreement signed by both parties, the parties are required to attend mediation prior to any final hearing or as otherwise ordered by the Court. The parties may utilize the mediation services provided by this Circuit's in-house mediators or the services of a private mediator.

6. CONDUCT OF THE PARTIES DURING THE CASE: Both parties are ordered to refrain from physical, verbal, or any other form of harassment of the other, including, but not limited to, acts done in person or by telephone, email, or text messaging at their residence or at work.

7. DISPOSITION OF ASSETS AND CASE: Neither party in a dissolution of marriage action will conceal, damage, nor dispose of any asset, whether jointly or separately owned, nor will either party dissipate the value of any asset (for example, by adding a mortgage to real estate), except by written consent of the parties or an order of court. Neither party will cancel nor cause to be canceled any utilities, including telephone, electric, or water and sewer. Notwithstanding, the parties may spend their income in the ordinary course of their business, personal, and family affairs. Neither party will conceal, hoard, nor waste jointly-owned funds, whether in the form of cash, bank accounts, or other highly liquid assets, except that said funds can be spent for the necessities of life. The use of funds or income after separation must be accounted for and justified as reasonable and necessary for the necessities of the party or to preserve marital assets or pay marital debts. Attorney's fees and costs are necessities and must be accounted for by each party. Both parties are accountable for all money or property in their possession after separation and during the dissolution of marriage proceedings. Any party who violates this provision will be required to render an accounting and may be later sanctioned for wasting a marital asset. To the extent there are pending contracts or transactions affected by this paragraph, the affected party may seek relief from the presiding judge, on an expedited basis, if the parties are unable to resolve the issue.

8. PERSONAL AND BUSINESS RECORDS: Neither party will, directly nor indirectly, conceal from the other or destroy any family records, business records, or any records of income, debt, or other obligations.

9. INSURANCE POLICIES: Any insurance policies in effect at the time the petition was filed, shall not be terminated, allowed to lapse, modified, borrowed against, pledged, or otherwise encumbered by either of the parties or at the direction of either party. This includes medical, hospital and/or dental insurance for the other party or the minor children. Neither party shall change the beneficiaries of any existing life insurance policies, and each party shall maintain all existing insurance policies in full force and effect, without change of their terms, unless agreed to in writing by both parties. All policy premiums will continue to be paid in full on a timely basis, unless there is an order of the court by the presiding judge or written agreement of the parties to the contrary. In order to modify this provision, or any other provision, the party must follow the procedure set forth in Paragraph 12.

10. ADDITIONAL DEBT: Neither party in a dissolution of marriage action may incur any unreasonable debts or additional personal debt which would bind the other spouse, including, but not limited to, further borrowing against any credit line secured by the family residence, further encumbering any assets, or unreasonably using credit/bank cards or cash advances against said cards, except with written consent of the parties or order of the court by the presiding judge. The parties are strongly urged to temporarily refrain from using joint credit cards, except for absolute necessities and only as a last resort. Abuse of credit, especially the other spouse's credit, offends the court's sense of equity and will be dealt with accordingly.

11. SANCTIONS: The presiding judge will sanction any party who fails, without good cause, to satisfactorily comply with the rules pertaining to the production of financial records and other documents, or fails, without good cause, to answer interrogatories or attend a deposition. When setting hearings, conferences, and depositions, an attorney must make a good faith effort to coordinate the date and time with opposing counsel.

12. JUDICIAL ENFORCEMENT: Failure to comply with the terms of this Order may result in appropriate sanctions against the offending party.

13. SERVICE AND APPLICATION OF THIS ORDER: The Petitioner or Petitioner’s attorney shall serve a copy of this Order with a copy of the petition. This Order shall bind the Petitioner upon the filing of this action and shall become binding on the Respondent upon service of the initial pleading. This Order shall remain in full force and effect until further order of the court. Any part of this Order not changed by some later order or subsequent written agreement of the parties remains in effect. Nothing in this Order shall preclude either party from applying to the presiding judge for further temporary orders or any temporary injunction. Should either party wish to modify this Order, an appropriate motion must be filed with the Family Division of the Clerk’s Office in the county where the action is pending, to be set on motion calendar for the court to determine the scheduling of a hearing. An evidentiary hearing on a motion seeking enforcement or modification of this Order shall be accorded priority on the court’s calendar. This entire Order will terminate once a final judgment is entered.

DONE AND ORDERED at Miami-Dade County, Florida, on this 6th day of August, 2014.

BERTILA SOTO, CHIEF JUDGE
ELEVENTH JUDICIAL CIRCUIT

TIME SHARING CHEAT SHEET

By: Raul Perez-Ceballos, Esq.

Readers of this publication are or ought to be comprehensively familiarized with the crème of the crème of all child support deviations; to wit, Fla. Stat. 61.30(11)(B). The theory is simple- the child support should trail the child. Per the statute, a parent spending "at least 20 percent of the overnights of the year", is entitled to a reduction of child support. *See Dept. of Revenue v. Daly*, 36 Fla. L. Weekly D2515 (1st DCA 2011).

All too often, we find ourselves avidly counting the amount of days we are negotiating, sometimes under time-sensitive situations mandating hasty responses. It is here where many lawyer's make costly fumbles. Below, I share my time-sharing cheat sheet. This graph forms a part of my battle book which I march with me to mediations, hearings and trials. It does not provide exact numbers as holidays vary throughout Florida Schools. Instead, it makes certain presumptions as noted on the footnotes below in order to arrive at its conclusions. Adjustments may need to be made according to each child's particular school schedule. This schedule first appeared in the Family Law Section's Commentator magazine.

Overnights	Days	Split Spring [168]	Split Winter [169]	Split Summer [170]	Average Days	Average Percentage
One Overnight per Week	52	+2.5	+5	+25	84.5	23%
Two Overnights per Week	104	+1.5	+3	+15	123.5	34%
Three Overnights per Week	156	+.5	+1	+5	162.5	45%
One Overnight Week A (&) Two Overnights Week B	78	+1.5 thru +2.5	+4	+20	104	29%
One Overnight Week A (&) Three Overnights Week B	104	+.5 thru +2.5	+3	+15	123.75	34%
One Overnight Week A (&) Four Overnights Week B	130	-0.5 thru +2.5	+2	+10	143.25	39%
One Overnight Week A (&) Five Overnights Week B	156	-1.5 thru +2.5	+1	+5	162.5	45%
One Overnight Week A (&) Six Overnights Week B	182.5	-2.5 thru +2.5	0	0	182.5	50%
Two Overnights Week A (&) Three Overnights Week B	130	+0.5 thru +1.5	+2	+10	143	39%
Two Overnights Week A (&) Four Overnights Week B	156	-0.5 thru +1.5	+1	+5	162.5	45%
Two Overnights Week A (&) Five Overnights Week B	182.5	-1.5 thru +1.5	0	0	182.5	50%
Three Overnights Week A (&) Four Overnights Week B	182.5	-0.5 thru +0.5	0	0	182.5	50%
Seven Overnights Week A (&) Zero Overnight Week B	182.5	-3.5 thru +3.5	0	0	182.5	50%

[168] Figure is based on a seven (7) day spring break.

[169] Figure is based on a fourteen (14) day winter break.

[170] Figure is based on a ten (10) week summer break.