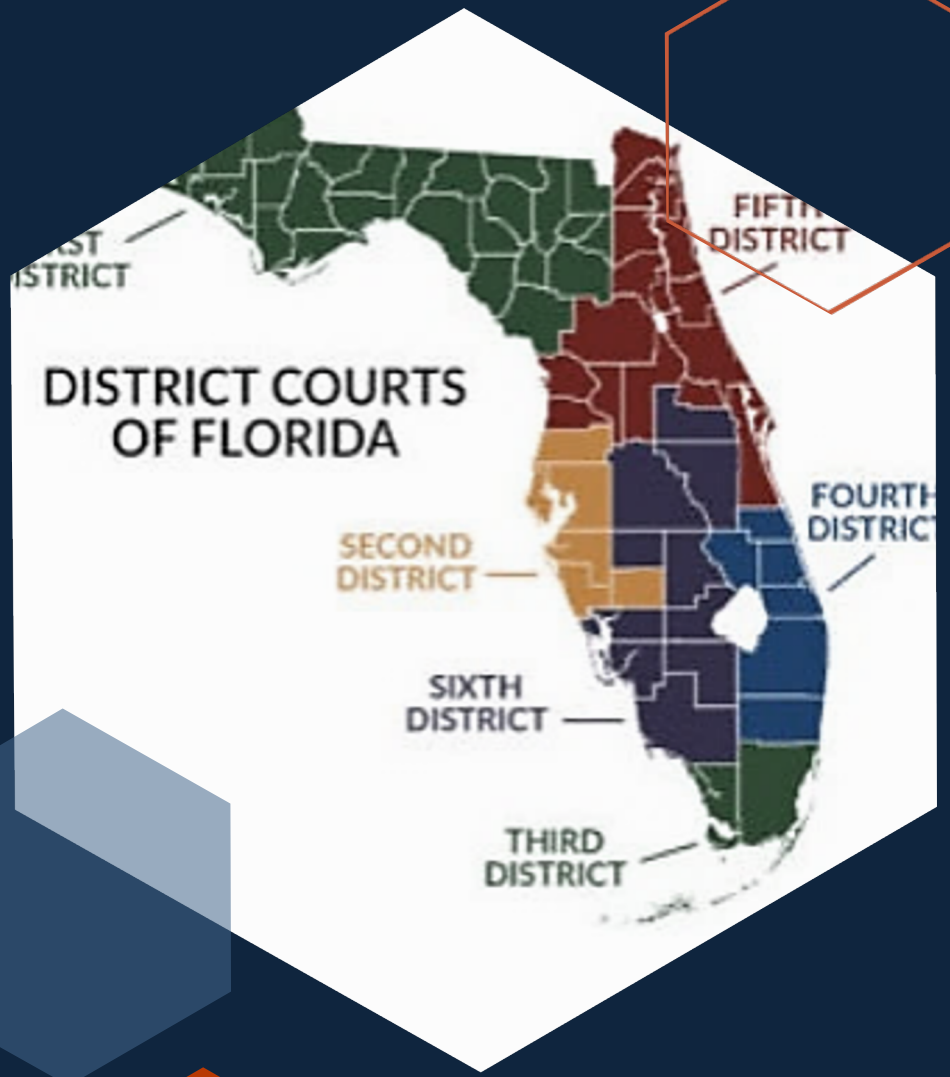
DIFFERENCES AND SIMILARITIES BETWEEN THE 1ST DCA AND 5TH DCA



DIFFERENCES IN PRACTICE BETWEEN THE FIRST DISTRICT COURT OF APPEAL AND THE FIFTH DISTRICT COURT OF APPEAL

THE FIFTH DCA'S APPELLATE MEDIATION PROGRAM

- All civil cases, including family law cases, are screened for eligibility for referral to appellate mediation.
- Unlike the First DCA, there is no policy about expediting "child cases" in the Fifth DCA.
- While the screening process is underway, all appellate deadlines are suspended.
- As a central part of the screening process, the Fifth District requires the parties to submit responses to questionnaires within ten days, to determine if a case is a suitable candidate for appellate mediation.
- The screening process is handled by the Court's Mediation Coordinator, with oversight by one "screening judge," who in the past has also been a certified mediator.
- If the case is referred to mediation, all appellate deadlines are tolled for up to 45 days to allow completion of the mediation (with the parties generally splitting the mediator's fee). The mediator must be selected from the Court's list of approved mediators, and the mediator will report to the court about the results of the mediation.
- If the case is not referred to appellate mediation, the Fifth District's Order declining the referral will begin the time clock for all deadlines.

EXTENSIONS

- Both the First and Fifth DCAs have administrative policies whereby the parties can agree to extensions of time for service of briefs. There are a few differences in the policies.
- In the Fifth DCA, agreed extensions of time are available in dissolution of marriage, probate and guardianship cases.
- However, appeals involving adoption, dependency, termination of parental rights, emergency or expedited circumstances, or original proceedings are not eligible for agreed extensions.
- As for initial briefs and answer briefs in civil cases, the First District's policy allows an aggregate number of 90 days of extensions. The Fifth District's policy currently allows an aggregate number of 60 days.
- As for reply briefs, the First District allows an aggregate of 15 days of extensions, while the Fifth District allows for an aggregate of 30 days. Similar extension limits apply to briefs in cross-appeals.

EXTENSIONS (Cont.)

- Any extensions beyond those limits must be sought by motion.
- Agreed extensions of time will not be accepted for filing deadlines previously established by Court order (such as by a prior order allowing supplementation of the Record).
- Unlike the First DCA, in the Fifth DCA the movant must also certify that a copy of the motion for extension, or notice of agreed extension, has been provided to the client on the day of filing.
- It is not necessary for the client to approve, sign or file anything concerning such extension motions or notices, only that they have been provided a copy.
- The recommended language for a Notice of Agreed Extension is contained in Administrative Order 5D19-02 (Amended).

ORAL ARGUMENTS

- It is currently uncertain whether or when the Fifth District will schedule oral arguments in Jacksonville, or in other locations outside its Daytona Beach headquarters.
- Before COVID, the Fifth District would hold oral arguments from time to time in various locations throughout the District's geographic area.
- Effective July 1, 2021, a party moving for oral argument may request that the Fifth District conduct that argument via "remote access video technology." The written request must briefly explain the reason for the request. Opposing parties may respond in support or opposition within seven days.
- The merits panel will decide whether to grant the request, and the court reserves the right to *sua sponte* order that a scheduled oral argument be conducted using remote access video technology.
- One past trend was that Fifth District merits panels appear somewhat more likely to grant a request for oral argument, but reserve the right to ultimately dispense with oral argument (if that occurs, the parties are usually notified a few weeks before the scheduled date).

Injunctions to Secure Personal Safety

All DCA opinions are binding absent an Interdistrict Conflict

In the absence of interdistrict conflict or a binding decision from the Florida Supreme Court, district court decisions bind all Florida trial courts. See *Pardo v. State*, 596 So. 2d 665, 666 (Fla. 1992) (district court decisions are binding on trial courts); *Wood v. Fraser*, 677 So. 2d 15, 19 (Fla. 2d DCA 1996) ("Although they are free to express their disagreement with decisions of higher courts, trial courts are not free to disregard them in the adjudicatory process.") (citing *Hernandez v. Garwood*, 390 So. 2d 357, 359 (Fla. 1980)).

Stalking Injunctions are NOT a catchall

Baruti v. Vingle, 343 So. 3d 150, 151-52 (Fla. 5th DCA 2022) (concluding that a "mean stare" by an estranged wife who came to the workplace of her husband's paramour to interrupt her while she worked and make her feel "uncomfortable" was insufficient to "constitute substantial emotional distress.")

Imminent Fear of Harm must be Reasonable

- *Stevens v. Hudson*, ____ So. 3d ____, 2022 WL 3905041, 1D21-3142 (Fla. 1st DCA 2022)(Judge Cooper's injunction reversed where the following occurred more than six months before petition was filed: the respondent punched a wall, punched himself, pointed and put his fist in petitioner's face, and told petitioner during a custody discussion "that he would like borrow, steal, or kill over [their daughter] if [petitioner] attempted to remove her." Petitioner described another argument when petitioner repeatedly punched the mattress across the queen-sized bed from where petitioner was sitting. Finally, one of respondent's Facebook posts was admitted into evidence, which said "[y]a know, when you accuse someone of something and it's true, you say it to their face. If the accusation is false you run and hide. Run rabbit, run.").
- "In the final analysis, for the injunction to stand, the party seeking the injunction had to show evidence of either being a victim of domestic violence, of "at the very least" an objectively reasonable fear of 'imminent" violence.'"

Due Process concerns

- Caselaw is clear that the Petition must place the respondent on notice of what is being alleged to support an injunction.

- For example, some petitioners refer to significant events that are not mentioned in a petition. Sometimes Respondent's attorneys object to this on due process grounds and cite binding authority that Respondent has a due process rights that are violated absent proper notice.

- There is an unresolved issue relating to is it just the narrative that counts or should the parties look to the checked boxes that reference prior violence, etc., or do we just look to the narrative?

_____

3. Describe **any other** court case that is either going on now or that happened in the past, including a dissolution of marriage, paternity action, or child support enforcement action, **between Petitioner and Respondent** *{Include city, state, and case number, if known}*: _____

_____

_____

4. Petitioner is either a victim of domestic violence or has reasonable cause to believe he or she is in imminent danger of becoming a victim of domestic violence because respondent has: *{mark all sections that apply and describe in the spaces below the incidents of violence or threats of violence, specifying when and where they occurred, including, but not limited to, locations such as a home, school, place of employment, or time-sharing exchange}*

   a. ☐ committed or threatened to commit domestic violence defined in section 741.28, Florida Statutes, as any assault, aggravated assault, battery, aggravated battery, sexual assault, sexual battery, stalking, aggravated stalking, kidnapping, false imprisonment, or any criminal offense resulting in physical injury or death of one family or household member by another. With the exception of persons who are parents of a child in common, the family or household members must be currently residing or have in the past resided together in the same single dwelling unit.
   b. ☐ previously threatened, harassed, stalked, or physically abused the petitioner.
   c. ☐ attempted to harm the petitioner or family members or individuals closely associated with the petitioner.
   d. ☐ threatened to conceal, kidnap, or harm the petitioner's child or children.
   e. ☐ intentionally injured or killed a family pet.
   f. ☐ used, or has threatened to use, against the petitioner any weapons such as guns or knives.
   g. ☐ physically restrained the petitioner from leaving the home or calling law enforcement.
   h. ☐ a criminal history involving violence or the threat of violence (if known).
   i. ☐ another order of protection issued against him or her previously or from another jurisdiction (if known).
   j. ☐ destroyed personal property, including, but not limited to, telephones or other communication equipment, clothing, or other items belonging to the petitioner.
   k. ☐ engaged in any other behavior or conduct that leads the petitioner to have reasonable cause to believe he or she is in imminent danger of becoming a victim of domestic violence.

   Below is a brief description of the latest act of violence or threat of violence that causes Petitioner to honestly fear imminent domestic violence by Respondent.
   (Use additional sheets if necessary.)

On *{date}*_____, at *{location}*_____,

Respondent:

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

☐ Please indicate here if you are attaching additional pages to continue these facts.

5. **Additional Information**

*{Indicate **all** that apply}*

a. ☐ Other acts or threats of domestic violence as described on attached sheet.

b. ☐ This or other acts of domestic violence have been previously reported to *{person or agency}*: _____

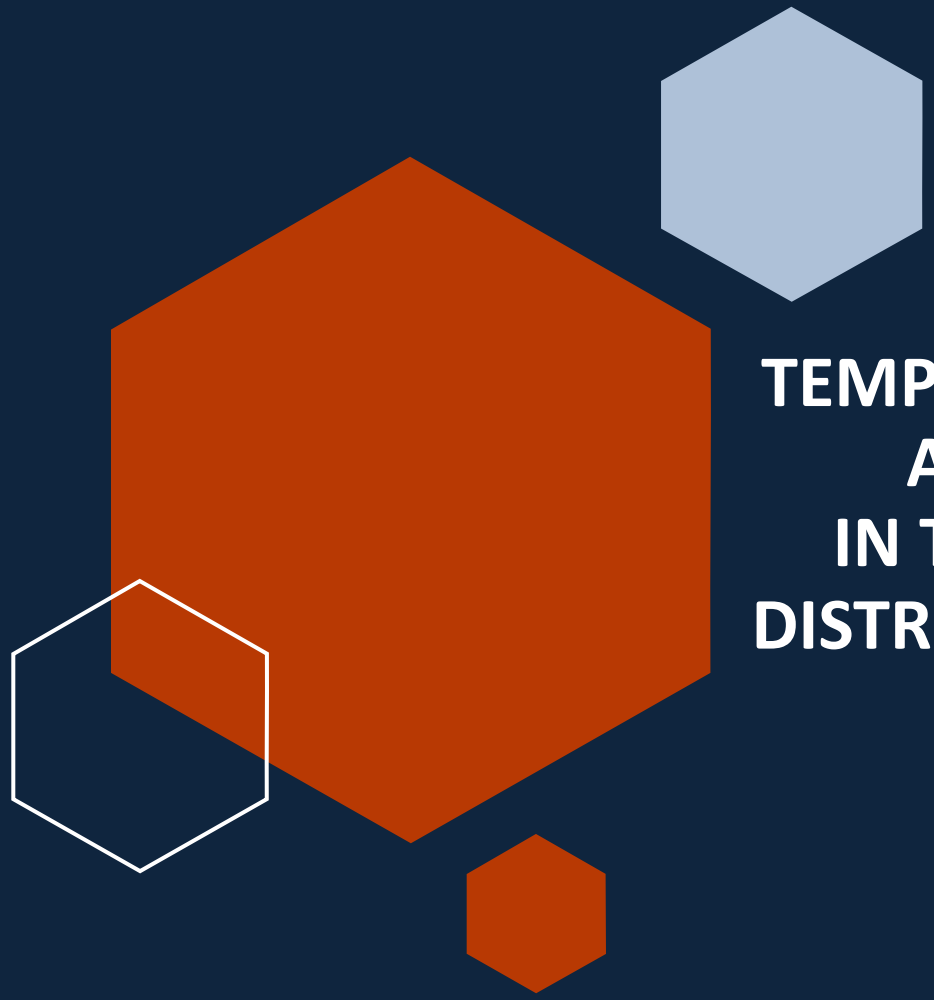
c. ☐ Respondent owns, has, and/or is known to have guns or other weapons.
Describe weapon(s): _____

d. ☐ Respondent has a drug problem.

e. ☐ Respondent has an alcohol problem.

f. ☐ Respondent has a history of mental health problems. If checked, answer the following, if known:
Has Respondent ever been the subject of a Baker Act proceeding? ☐ Yes ☐ No
Is Respondent supposed to take medication for mental health problems?
☐ Yes ☐ No
If yes, is Respondent currently taking his/her medication? ☐ Yes ☐ No

SECTION IV. TEMPORARY EXCLUSIVE USE AND POSSESSION OF HOME (Complete this section **only** if you want the Court to grant you temporary exclusive use and possession of the home that you share with the Respondent.)



TEMPORARY & PERMANENT ALIMONY RULINGS IN THE FIRST AND FIFTH DISTRICT COURTS OF APPEAL

TEMPORARY ALIMONY - Fla. Stat. 61.071 (The standard for awarding temporary alimony is the same as when the trial court considers a request for permanent alimony, namely, the parties' standard of living alone with the need of the petitioning spouse and the ability of the other spouse to pay. Even a spouse in a short-term marriage can be awarded temporary alimony).

- *Jones v. Jones*, 45 Fla Weekly D122a (Fla. 5th DCA 2020). In determining an appropriate temporary award, needs and ability to pay are to be balanced.
    - *Clore v. Clore*, 115 So.3d 1100, 1104 (Fla. 5th DCA 2013). A trial court cannot enter a temporary financial award that exceeds or nearly exhausts a party's income, and it would be abuse of discretion to do so.
        - *Topel v. Topel*, 152 So.3d 863 (Fla. 5th DCA 2015). Temporary support must be based on current income.

PERMANENT ALIMONY – Fla. Stat. 61.08 (First, the court shall include a finding that no other form of alimony is fair and reasonable under the circumstances of the parties. Second, the duration of the parties' marriage indicates the type of presumption either for or against the requesting spouse.

- *Hill v. Hooten*, 776 So.2d 1004 (Fla. 5th DCA 2001). "The court should bear in mind that this 17-year marriage is a long-term marriage, which creates a presumption in favor of an award of permanent alimony. The presumption is of course, rebuttable…"

- *Margaretten v. Margaretten*, 101 So.3d 395 (Fla. 1st DCA 2012). There is no presumption for or against awarding permanent alimony following a moderate-term or "grey area" marriage.

- *Payton v. Payton*, 109 So.3d 280 (Fla. 1st DCA 2013). When an award of alimony is properly granted, such award may not leave the payor with significantly less income than the net income of the recipient unless there are written findings of exceptional circumstances.

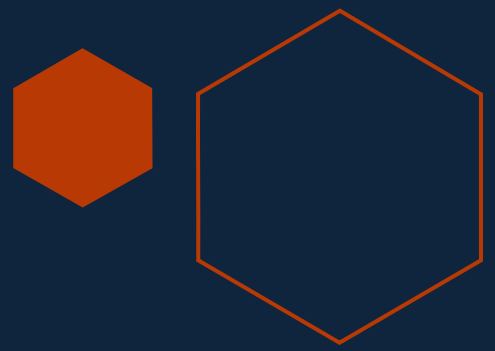
- *Paul v. Paul*, 648 So.2d 1211, 1212-13 (Fla.5th DCA 1995). Since equitable distribution is a trial court's first priority, an alimony award must be viewed after consideration of the parties' respective financial resources after the equitable distribution award.

Motie v. Motie, 132 So.3 1210 (Fla. 5th DCA 2014). After a long-term marriage as defined by Section 61.08(4), Florida Statutes, there is a rebuttable presumption in favor of permanent alimony.

Frerking v. Stacy, 266 So.3d 273 (Fla. 5th DCA 2019). This case reversed a trial court's denial of permanent alimony to a wife of an 18-year marriage, noting that the trial court "failed to mention the presumption in favor of permanent alimony in this marriage."

Walker v. Walker, 818 So.2d 711 (Fla. 1st DCA 2020). The trial court failed to include a finding that no other form of alimony was fair and reasonable under the circumstances.

Gilliland v. Gilliland, 266 So.3d 866 (Fla. 5th DCA 2019). When a trial court gives no guidance in its dissolution judgment as to why permanent periodic alimony is inappropriate after a long-term marriage, and why instead it is awarding durational alimony, reversal is proper.



TRIAL COURT'S FAILURE TO MAKE FACTUAL FINDINGS UNDER SECTION 61.08 AS A BASIS FOR REVERSAL

- *Gray v. Gray*, 103 So.3d 962, 966 (Fla. 1st DCA 2012). A final judgment is legally deficient where it fails to include sufficient findings of fact to support the alimony award in light of the section 61.08(2) factors.
- *Moses v. Moses*, 46 Fla L. Weekly D2065a (Fla. 5th DCA September 17, 2021) (as to life insurance).
- *Tanner v Tanner*, 323 So.3d 808 (Fla. 1st DCA 2021) (as to life insurance)
- *Veith v. Veith*, 315 So.3d 1259 (Fla. 5th DCA 2021)
- *Barrett v. Barrett*, 313 S0.3d 224 (Fla. 5th DCA 2021)
- *Paul v. Paul*, 300 So.3d 811 (Fla. 5th DCA 2020) (as to alimony and life insurance)
- *Pricher v. Pricher*, 300 So.3d 1258 (Fla. 5th DCA 2020) (as to life insurance)

If the Judge tasks you with drafting a Final Judgment, make sure that you include all the necessary section 61.08(2) factors.

See Example Below:

The Court having found that the Wife has a need for support, and the Husband has the ability to contribute to the same, the Court will now analyze the factors found in Section 61.08, Florida Statutes:

a. The standard of living established during the marriage.

The parties have enjoyed a good middle-class lifestyle during the marriage with the Husband being retired from the United States Navy and the Wife being a stay-at-home spouse primarily due to her poor health.

b. The duration of the marriage.

This is a marriage of over eight (8) years from the date of marriage to the date of the filing of Wife's Dissolution of Marriage action. Thus, this is a moderate-term marriage. A needy spouse of a moderate-term marriage is eligible for all forms of alimony but must establish a need for permanent alimony by "clear and convincing evidence."

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

The Husband is sixty-one (61) years old, and the Wife is sixty-one (61) years old. Both parties testified to various physical and emotional conditions that they suffer from. The Husband claims he suffers from ailments that makeup his seventy percent (70%) disability rating despite working while having said disability rating. The Wife suffers from chronic migraines, bulging discs, arthritis, major depressive disorder and is on a significant amount of mediations including several painkillers. The Court finds that the Wife's physical and emotional conditions have a substantial impact on her ability to work and earn income.

d. The financial resources of each party, including the nonmarital and the marital assets and liabilities distributed to each.

As noted above, the Husband's net income, not including any imputed that he might earn from working, his income is $4,363.06 per month, and the Wife's income is limited to the $192.00 in food stamps that she receives each month. The parties' other major asset, the Marital home, has been sold with $49,714.62 remaining in escrow.

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

This factor has been analyzed in paragraphs N through Q above.

f. The contribution of each party to the marriage, including, but not limited to, services rendered in homemaking, childcare, education, and career building of the other party.

The Husband was in the United States Navy, receives retirement and VA disability and he was the primary wage earner during the marriage. The Wife was a stay-at-home Wife.

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

None.

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

As of January 1, 2019, any alimony award by the Court shall be non-taxable to Wife.

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

This factor has been analyzed in paragraphs N, O, P and Q above.

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

None.

Based upon the Court's analysis of the above factors contained in Section 61.08(2), Florida Statutes, as well as the Court's analysis of the Wife's need and the Husband's ability to pay, an award of durational alimony in the amount of $1,500.00 per month for a period of eight (8) years (or ninety-six (96) months) is appropriate. The Wife requested that she be awarded permanent alimony, however, the Court could not, and does not find by clear and convincing evidence that no other form of alimony would be fair and reasonable under the circumstances of the parties.

*Again, if it the Court awards permanent alimony also include the finding that no other form of alimony was fair and reasonable under the circumstances.

Imputation of Income for Child and Spousal Support

Imputation of Income for Child and Spousal Support

- Section 61.30(2)(b), Fla. Stat. governs imputation of income.

- (b) Monthly income shall be imputed to an unemployed or underemployed parent if such unemployment or underemployment is found by the court to be voluntary on that parent's part, absent a finding of fact by the court of physical or mental incapacity or other circumstances over which the parent has no control. In the event of such voluntary unemployment or underemployment, the employment potential and probable earnings level of the parent shall be determined based upon his or her recent work history, occupational qualifications, and prevailing earnings level in the community if such information is available. If the information concerning a parent's income is unavailable, a parent fails to participate in a child support proceeding, or a parent fails to supply adequate financial information in a child support proceeding, income shall be automatically imputed to the parent and 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.

Required Findings

The 1st DCA and 5th DCA agree that a lack of findings regarding work history, occupational qualifications and the current job market in the community would result in reversal of imputed income.

Both Courts 'have required particularized findings regarding work history, occupational qualifications, and the current job market in the community to support the imputation of income. Failure to make these findings results in reversal. see *Broga v. Broga*, 166 So.3d 183, 185 (Fla. 1st DCA 2015) and *Jorgensen v. Tagarelli*, 312 So.3d 505, 507 (Fla. 5th DCA 2020).

The 1st DCA and 5th DCA agree:

Work history alone is insufficient to impute income.

Freilich v. Freilich, 897 So.2d 537, 544 (Fla. 5th DCA 2005)

Broga v. Broga, 166 So.3d 183, 184 (Fla. 1st DCA 2015)

Imputation of Income When Income is Reduced for Educational Pursuits- Alimony

5th Expanded Supreme Court Ruling in Overbey v. Overbey 1st DCA did not

The Florida Supreme Court has held that, when a spouse decides to return to school instead of working, **the question is not whether the decision was voluntary, but whether a temporary reduction in child support was in the best interest of the child.** See Overbey v. Overbey, 698 So.2d 811, 814-15 (Fla.1997).

The Fifth District has extended this reasoning to alimony cases. See *Freilich v. Freilich*, 897 So.2d 537, 542 (Fla. 5th DCA 2005) ("[W]e conclude that the best interest standard should also apply to determine whether imputation of income to a spouse seeking educational enhancement is an appropriate basis for an award of alimony.").

The expansion by the 5th DCA was noted in the 1st DCA case *Vriesenga v. Vriesenga*, 931 So.2d 213 (Fla. 1st DCA 2006) footnotes section, but not specifically adopted.

Awarding Life Insurance as Security for Support

Are there differences between the 1st and 5th DCA?

☒ No.

The 1st DCA and the 5th DCA agree:

Required findings to secure a child support or alimony award with Life Insurance: availability and costs of insurance, ability to pay for insurance and special circumstances to warrant the requirement of life insurance security. *See* Mahoney v. Mahoney, 251 So.3d 977 (Fla. 1st DCA 2018) and *Foster v. Foster*, 83 So.3d 747, 748-49 (Fla. 5th DCA 2011).

Equitable Distribution & Partition

There appears to be a split in jurisdictions as to whether a request for partition must be specifically pled

The Fifth District appears to require that a request for partition be specifically pled

The First District does not

Fifth District

- Trial court is without authority to order partition of property in absence of plea. *Watson v. Watson,* 646 So. 2d 297 (Fla. 5th DCA 1994)
  - Appeal from a marital dissolution judgment.
  - The Court affirmed the trial "in all respects except the order that the marital home be partitioned. Neither party requested it, it was not part of any pleadings or raised in evidence, and thus was not an issue for the judge to decide."
- In *Hodges v. Hodges,* the Fifth District cited its opinion in *Watson*, and stated, "[the] trial court [is] without authority to order partition of property in absence of plea by either party" 128 So. 3d 190 (Fla. 5th DCA 2013).
  - The trial court ordered the partition of the marital home if the husband failed to pay the wife her equity in the home within six months.
  - However, neither party had requested partition.
  - Therefore, the Fifth District reversed the order to the extent that it required the sale of the property. However, the Fifth District stated that the wife may move to enforce the directive to pay her equity, in which case the trial court may order the sale of the property as a mechanism to enforce that aspect of the order, if requested in a motion.

First District

- The prevailing First District case law does not appear to require a plea for partition.
- *Green v. Green*, 16 So. 3d 298 (Fla. 1st DCA 2009)
  - Former husband brought action to partition marital residence after mortgage was satisfied and dependent daughter passed away. The Circuit Court awarded the former husband a credit for court-ordered mortgage payments. Former wife appealed, and former husband cross-appealed. The District Court affirmed in part and reversed in part.
  - Partition proceedings are in equity. *Bermudez y Santos v. Bermudez y Santos*, 773 So.2d 568 (Fla. 3d DCA 2000).
  - Partition principles are flexibly applied in order to arrive at a fair, equitable, and just decree. *Fernandez v. Gonzalez*, 758 So.2d 1192 (Fla. 3d DCA 2000).

Treatment by Other District Courts

Second District

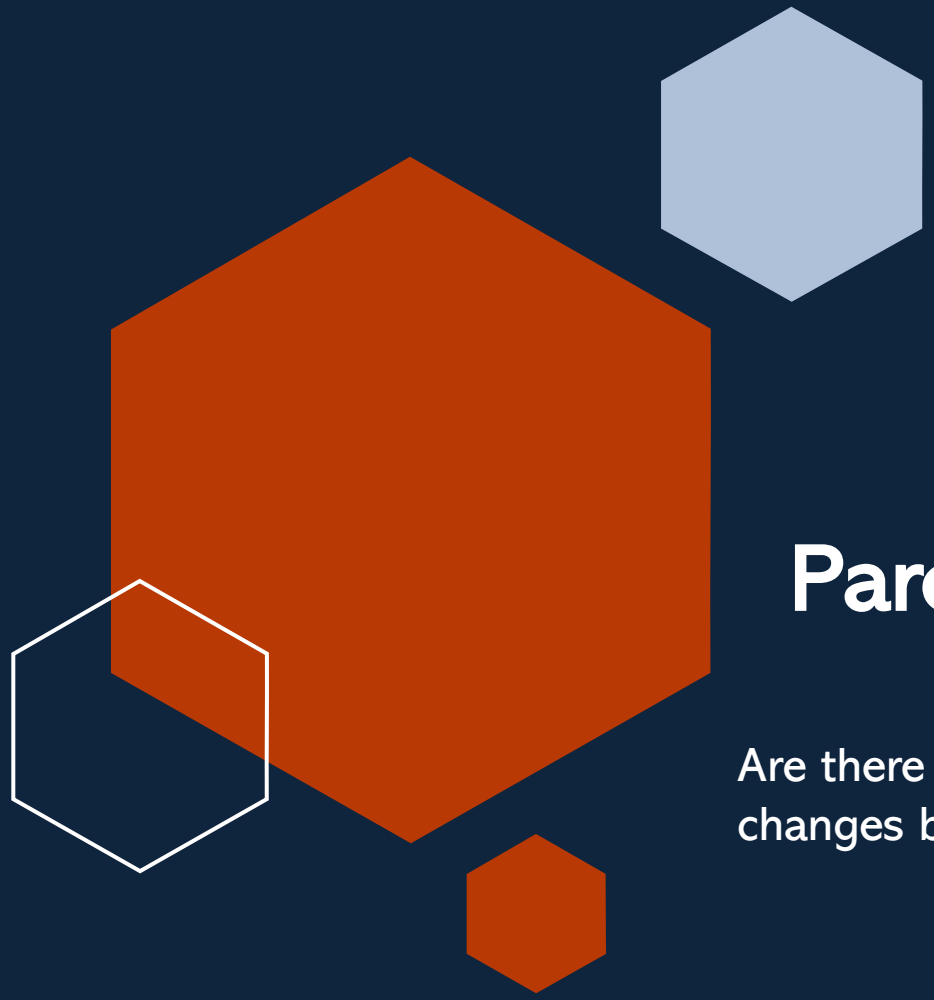
- *Ortiz v. Ortiz*, 315 So. 3d (Fla. 2d DCA 2021)
- Second District ruled that the trial court's conclusion that it did not have jurisdiction to consider the request for partition was erroneous because the trial court has the power to divide and distribute the marital home under Chapter 61, *regardless of whether the party specifically pled for partition.*

Third District

- Riley v. Edwards-Riley, 963 So. 2d 829 (Fla. 3d DCA 2007)
- The Third District held that Chapter 61 allows the trial court to divide and distribute all marital assets, including the marital home, and, as a result "it is no longer necessary to seek partition as part of dissolution action to divide or distribute a parcel of property owned by a husband and a wife"); see also § 61.075(6)(a) 2.

Fourth District

- Salituri v. Salituri, 184 So. 3d 1250 (Fla. 4th DCA 2016)
- The trial court erroneously ordered partition of the marital home depending on the outcome of a foreclosure appeal. There was no pleading seeking partition and the husband did not acquiesce to it at trial. Thus, in the Fourth District, partition must be specifically plead.



Parenting Issues

Are there substantial, material, *permanent and unanticipated* changes between the first and the fifth districts??

Not really

The First and the Fifth tend to be the most aligned on parenting issues relative to the other districts.

Two recent alignments

- Permanency as a modification requirement
- “Keys to the Kingdom”—until, of course, the Supreme Court resolved the split in favor of the First and Fifth

Permanency as a requirement?

Fla. Stat. § 61.13(3):

A determination of parental responsibility, a parenting plan, or a time-sharing schedule may not be modified without a showing of a substantial, material, and unanticipated change in circumstances and a determination that the modification is in the best interests of the child.

HOWEVER

"Some cases mention permanency in the context of timesharing or custody, but they do not address permanency as a requirement. See, e.g., C.N. v. I.G.C., 291 So204 (Fla. 5th DCA 2020); Dukes v. Griffin, 230 So. 3d 155 (Fla. 1st DCA 2017)" P.D.V-G. v. B.A.V-G. 3d, 320 So. 3d 885 (Fla. 2d DCA 2021)

As we will explain, the trial court's determination that modification was warranted in light of a substantial, material, and permanent change in circumstances is supported by competent substantial evidence. C.N. v. I.G.C., 291 So204 (Fla. 5th DCA 2020)

C.N. v. I.G.N., 316 So. 3d 287 (Fla 2021):

In the decision below, the Fifth District found an additional inconsistency between the mother's asserted "concrete steps" requirement and the statutory text. The court of appeal reasoned that to give such steps would constitute an end run around section 61.13(3), Florida Statutes. Again, that provision says that a parenting plan may not be modified unless there has been a "substantial, material, and unanticipated change in circumstances." § 61.13(3), Fla. Stat. According to the Fifth District, "[c]ourts may not circumvent that standard by setting forth extra-statutory contingencies for modification." C.N., 291 So. 3d at 207. The First District Court of Appeal has similarly reasoned that modifications are governed by the statutory framework and that a parent is not "owed a list of alternative steps, created ad hoc by the trial court, to facilitate her quest to reestablish majority time-sharing." Dukes v. Griffin, 230 So. 3d 155, 157 (Fla. 1st DCA 2017).

Special Circumstances Limiting Exclusive Use and Possession

As a general rule, a trial court may award the primary residential parent exclusive use and possession of the marital residence until the youngest child reaches majority or the primary residential parent remarries, unless there are special circumstances

First District

- Murkerson v. Murkerson, 325 So. 3d. 1034 (Fla 1st DCA 2021)
  - "The parties' relative financial positions along with other considerations may constitute special circumstances."
  - Non-residential parent's inability to get a mortgage
  - Residential parent's ability to refinance

Fifth District

- **Coristine v. Coristine, 53 So. 3d (Fla 5th DCA 2011)**
  - Special circumstances" exist where the parties' incomes are inadequate to meet their debts, obligations, and normal living expenses, as well as the expenses of maintaining the marital residence
- **Moody v. Newton, 264 So. 3d 292 (Fla 5th DCA 2019)**
  - [T]he parties were unable to maintain their marital lifestyle, having incurred over $100,000 in marital debts, and that, with her limited income, it was unlikely Former Wife would be able "to afford and maintain the home over an extended period

Ultimate Decision Making

First District

Specific Finding of Detriment Required

- Neville v. McKibben, 227 So. 3d 1270 (Fla 1st DCA 2017)
- "Specifically, the trial court questioned Neville's decisions regarding the child's immunization schedule, chiropractic care, Neville's co-sleeping with the child, the duration of breastfeeding, and the use of amber bead necklaces for teething pain. While the trial court's concerns were sincerely held, no competent, substantial evidence was introduced to support the trial court's findings that Neville's parenting decisions were dangerous or contrary to normal medical care"

Fifth District

No Specific Finding Required so long as there is support in either the trial record or the judgment:

- Posso v. Serra, 311 So. 3d 1021 (Fla 5th DCA 2021)
- While the determination to allow one parent ultimate decision-making should be based upon a finding that to do otherwise would be detrimental to the best interests of the child, *see Cranney v. Cranney*, 206 So. 3d 162, 165 (Fla. 2d DCA 2016), such a finding can be made either during the course of the trial or within the final judgment. *See Lightsey*, 267 So. 3d at 14. As noted in *Lightsey*, "[t]he failure to include a finding of detriment does not render the judgment fundamentally erroneous." 267 So. 3d at 14-15

PREMARITAL AND POSTMARITAL AGREEMENTS

Prenuptial and postnuptial agreements are enforced "as a matter of contract." *E.g.*, *Lashkajani v. Lashkajani*, 911 So. 2d 1154, 1158 (Fla. 2005); *accord Kearney v. Kearney*, 129 So. 3d 381, 388-89 (Fla. 1st DCA 2013); *McNamara v. McNamara*, 40 So. 3d 78, 82 (Fla. 5th DCA 2010).

“When deciding whether to enforce a prenuptial agreement, trial courts must ‘carefully examine the circumstances’ surrounding the agreement because parties to a prenuptial agreement are not ‘dealing at arm's length.’” Lashkajani, 911 So. 2d at 1158.

Premarital agreements are governed by the Uniform Premarital Agreement Act, effective October 1, 2007. § 61.079(1), Fla. Stat. (2021).

Case law specifically interpreting the Act is limited, however. Florida's appellate courts continue to rely on established cases decided before the Act's enactment.

Generally, premarital and postmarital agreements may be challenged on two separate grounds:

First, a spouse may set aside or modify an agreement by establishing that it was reached under fraud, deceit, duress, coercion, misrepresentation, or overreaching.

Second, the challenging spouse must establish that the agreement makes an unfair or unreasonable provision for that spouse, given the circumstances of the parties.

In other words, "Florida's public policy does not protect the spouse who signs an antenuptial contract freely and voluntarily, has some understanding of his or her rights, and who has or reasonably should have had, a general and approximate knowledge of the proponent's property." *McNamara*, 40 So. 3d at 80 (citing *Casto*, 508 So. 2d at 334; *Del Vecchio v. Del Vecchio*, 143 So. 2d 17, 20 (Fla. 1962)).

Relocation with Minor Children

SUPREME COURT:

In Arthur v. Arthur, 54 So. 3d 454, 459-460 (Fla.2010), the Florida Supreme Court vacated the part of a dissolution of marriage judgment that permitted the wife to relocate the parties' child twenty months after the final hearing. It held that the best interest determination was required to be made at the time of the final hearing and that a contrary, "'prospective-based" analysis is unsound. Id. at 459. Natali v. Natali, 313 So. 3d 958 (Fla. 3d DCA 2021).

First District:

In J.P. v D.P., 196 So. 3d 1274 (Fla. 1st DCA 2016) the First District reviewed Arthur and reversed a parenting plan that would require a six year old minor child to move over 300 miles away to live with her mother when she started middle school. The First District concluded such a prospective-based analysis that purported to determine that a change in residence will be in the child's best interests approximately 5 years in the future was impermissible.

Citing Arthur, the First District stated, "Similarly here, the trial court was not equipped with a crystal ball that would enable it to determine whether it would be in the best interests of the child, who is currently in first grade, to relocate over 300 miles away to live with her mother when she begins middle school. The relevant determination is the best interests of the child at the time of the final hearing. At the time of the final hearing, the court determined that it was in the child's best interests to live with appellant in Orlando and go to school there. Thus, the trial court abused its discretion when it ordered that she would relocate to live with her mother upon finishing elementary school." Id. at 1277

Fifth District:

In Rivera v. Purtell, 252 So. 3d 283 (Fla. 5th DCA 2018) the Fifth District, in view of Arthur reversed the trial court's order granting a new trial on the issue of prospective relocation agreeing with the father that the court erroneously concluded in its order granting a new trial that it could not prospectively modify timesharing at the time the child starts kindergarten.

In reference to Arthur, the Fifth District determined in this case, "there was nothing speculative or uncertain about the child in this case starting kindergarten. In fact, section 61.13(2)(b)3.b, Florida Statutes (2016), anticipates that children will start school and therefore requires a trial court to designate a residence for school boundary purposes when entering a timesharing order. Such an event is by definition a reasonably and objectively anticipated change in circumstances that will occur at a time certain. Thus, in this case, it was entirely proper for the trial court to adjust timesharing as of the time the child starts kindergarten. As such, we conclude that the Final Judgment does not violate Arthur's prohibition on prospective-based best interest determinations, and that the trial court erred in granting rehearing and a new trial on that ground." Id. at 287.

UCCJEA/ HAGUE ISSUES

No distinctions 

Military issues

Military issues mostly governed by federal law

Subject Matter Jurisdiction Absent "Residency":

Exists if servicemember in Florida under military orders even if not a "resident" of Florida, but remember you still need concurrent intent to be a permanent Florida Resident.

FIRST DCA:

Eckel v. Eckel, 522 So. 2d 1018 (Fla. 1st DCA 1988)

Coons v. Coons, 765 So. 2d 167 (Fla. 1st DCA 2000).

FIFTH DCA:

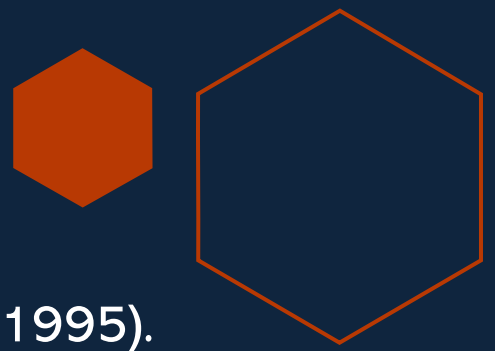
Weiler v. Weiler, 861 So. 2d 472 (Fla. 5th DCA 2003).

Personal Jurisdiction without physical presence:

Proximity test

FIRST DCA:

Garret v. Garret, 652 So. 2d 378 (Fla. 1st DCA 1995).



Division of Military Pensions

State Law Controls

Coverture Fracture expressed as formula:

- **FIRST DCA:** Demming v. Demming, 251 So. 3d 284 (Fla. 1st DCA 2018); Johnson v. Johnson, 162 So. 3d 137 (Fla. 1st DCA 2014).

Post Judgment Remedy for Incorrect Calculation

- **FIRST DCA:** Latent Ambiguity: Toussaint v. Toussaint, 107 So. 3d 474 (Fla. 1st DCA 2013).
- **FIFTH DCA:** Latent ambiguities – Generally: Taylor v. Taylor, 183 So. 3d 1121 (Fla. 5th DCA 2015).

Merger with Civil Pension

- **FIRST DCA:** Martin v. Martin, 276 So. 3d 393 (Fla 1st DCA 2019).

Military Pensions (cont.)

Immediate Offset of Military Pension Against Other Assets

FLA SUPREME COURT: Acker v. Acker, 904 So. 2d 384 (Fla. 2005)

FIFTH DCA: Hodge v. Hodge, 129 So. 3d 441 (Fla. 5th DCA 2013).

SBP Benefits and Premium.

FIRST DCA: Wise v. Wise, 768 So. 2d 1076 (Fla 1st DCA 2000).

FIFTH DCA: Heldmyer v. Heldmyer, 555 So. 2d 1324 (Fla. 5th DCA 1990); Wrinkle v. Wrinkle, 592 So. 2d 7560 (Fla. 5th DCA 1992).

Parenting/Timesharing/Modification Issues

Retirement from military is, in and of itself, not an unanticipated change

FIRST DCA: Garcia v. Guiles, 254 So. 3d 637 (Fla. 1st DCA 2018).

Applicability of Military Deployment Statute - Designation of Timesharing to Third Party

FIRST DCA: Overstreet v. Overstreet, 244 So. 3d 1182 (Fla. 1st DCA 2018) (*temporarily assigned* means assigned to a duty assignment up to six months, not three years).

Relocation/Prospective Best Interest Determination Not Allowed

FIRST DCA: Amoit v. Olmstead, 321 So. 3d 305 (Fla. 1st DCA 2021) (Court cannot make prospective determination of child's best interests in a custody matter for when a military member may move back to the state where child resides).

Modifications

Issue:

Obligor files Supplemental Petition to Modify Child Support due to subst. circumstances/inability to pay AND has stopped paying the support obligation as ordered;

Obligee subsequently files a Motion for Contempt/Enforcement for nonpayment of support

Which is heard first?

1st DCA

Rosenblum v. Rosenblum, 178 So. 3d 49 (1st DCA 2015):

- 1st DCA held Former Husband was entitled to have his motion to modify heard and resolved simultaneously with the hearing on the Former Wife's later-filed motion for contempt.

- In support, the 1st cites the 2004 case out of the 5th (see *Herrera v. Sanchez*, 885 So. 2d 480 (Fla. 5th DCA 2004.)

5th DCA

Carter v. Hart, 240 So. 3d 863 (Fla. 5th DCA 2018):

Same facts, except in this case the Former Husband filed for temporary relief in addition to his Supplemental Petition.

A hearing was held on both the Former Wife's contempt and Former Husband's request for temporary relief, and Former Husband was found to be in contempt. The 5th chose not to apply *Rosenblum* because the Former Husband's request for temporary relief was heard by the court.

> "We conclude that Former Husband is not entitled to relief because the trial court held a simultaneous evidentiary hearing on Former Wife's motion for contempt and Former Husband's motion for temporary reduction or termination of alimony that contained the identical allegations and grounds for relief contained in his amended supplemental petition for modification of alimony." Carter v. Hart, 240 So.3d 863 (Fla. App. 2018)

Contempt and Enforcement

Contempt and Enforcement issues relate to almost every issue in Family Law

From parenting issues to support and everything in between

Other important issues to consider:

Most contempt and enforcement issues are handled similarly in the 1st and 5th DCAs

Example of similarity:

Equitable Distribution: Non-payment of Debt, Property Division, Perform an Act

Property Division Awards may not be enforced by contempt; the only remedies available are those of creditor against debtor

La Roche v. La Roche, 662 So. 2d 1018 (Fla. 5th DCA 1995).

Equitable distribution obligation is not enforceable by contempt.

Lynch v. Lynch, 180 So. 3d 1120 (Fla. 5th DCA 2015)

Defendant cannot be held in contempt due to nonpayment of debt not involving support.

Vassell v. Vassell, 912 So. 2d 1254 (Fla. 1st DCA 2005)

Another example of similarity:

Sanctions:

Contempt should not be used as a basis for change of custody. Purpose of civil contempt is to compel compliance. Sanction of changing custody penalizes children and does not coerce compliance.

Berger v. Berger, 795 So. 2d 113 (Fla. 5th DCA 2001) and
Moody v. Moody, 721 So. 2d 731 (Fla. 1st DCA 1998)

Example of difference in the 1st and 5th DCA:

Standing

CONFLICTING/NEGATIVE TREATMENT

Neither HRS nor mother has standing to sue to collect child support arrearage accumulating after majority of child, where obligation was pursuant to contract obligation between father and mother, and mother had not shown that she had provided any support for the children beyond her own legal responsibility.

HRS v. Holland, 602 So. 2d 652 (Fla. 5th DCA 1992) and
Pyne v. Black, 650 So. 2d 1073 (Fla. 5th DCA 1995)

Former wife filed motions seeking payment for unpaid child support arrears. The Circuit Court entered judgment for former wife but granted former husband's motion for rehearing asserting defenses of laches/estoppel and entered order setting aside judgment. Former wife appealed. The District Court of Appeal, Ervin, J., held that: (1) former wife was not equitably estopped from seeking recovery of unpaid child support arrears, and (2) former wife was not guilty of laches.

State Dept. of Revenue ex rel. Dees v. Petro, 765 So. 2d 792 (Fla. 1st DCA 2000)

New Cases to note – similar treatment from both DCAs

Present ability to pay and purge:

It is error for a court to conclude that a party has the ability to pay a purge based on the fact that the party can borrow money from a third party. Furthermore, it is error for a court to conclude that a party has the ability to pay a purge based on the fact that the party's parents had provided financial support in the past in terms of living expenses and attorney's fees, unless there is also evidence that the parents had paid court-ordered obligations and/or the support from the parents is presently ongoing. Finally, a court's determination that a party is willfully refusing to seek out a kind of employment that would allow a party to meet its domestic support obligations is not sufficient to support a finding that a party has a present ability to pay support obligations for contempt purposes.
Pace v. Pace, 295 So.2d 898 (Fla. 5th DCA 2020)

There was ample evidence for the trial court to find that the Former Husband had the ability to pay the purge of the attorney's fees and contempt sanctions levied against him for his discovery failures and nonpayment to his Former Wife. In determining the contemnor's present ability to pay, "the trial court is not limited to the amount of cash immediately available to the contemnor; rather, the court may look to all assets from which the amount might be obtained." This means a trial court is not cabined by what it suspects is the under-reported income of a self-employed spouse, especially when that spouse has failed to disclose the pertinent financial information to back up his claim. Where the self-employed spouse's own misconduct is responsible for the inability of the trial court to accurately determine his income, he cannot then be heard to complain about the trial court's reliance on evidence of unexplained withdrawals from his business and indicators of his comfortable lifestyle that contradict his claimed inability to pay. The trial court has the discretion to consider the self-employed spouse's available business assets in these circumstances when making its present-ability-to-pay determination.

Finch v. Cribbs, 1D18-3855, 2021 WL 2547914 (Fla. 1st DCA 2021)