PARENTING PLANS

&

MARITAL SETTLEMENT AGREEMENTS

Presented by:
The Honorable George Odom & Meghan M. Clary, Esq.

Parenting Plans

Definition of a Parenting Plan

Florida Statutes § 61.046 (14)

“Parenting plan” means 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. The issues concerning the minor child may include, but are not limited to, the **child's education, health care,** and **physical, social,** and **emotional well-being**. In creating the plan, all circumstances between the parents, including their historic relationship, domestic violence, and other factors must be taken into consideration.

Parenting Plans

Definition of a Parenting Plan

Florida Statutes § 61.046 (14)(a)(b)

The parenting plan must:

- Be developed and agreed to by the parents and approved by a court; ***or***
- Be established by the court, with or without the use of a court-ordered parenting plan recommendation, if the parents cannot agree to a plan or the parents agreed to a plan that is not approved by the court.
- Address all **jurisdictional** issues such as: Uniform Child Custody Jurisdiction and Enforcement Act ("**UCCJEA**"), International Child Abduction Remedies Act ("**ICARA**"), the Parental Kidnapping Prevention Act ("**PKPA**"), and the Convention on the Civil Aspects of International Child Abduction enacted at the Hague on October 25, 1980 ("**Hague Convention**")

Parenting Plans

Definition of a Parenting Plan

Florida Statutes § 61.13(2)(b)

A parenting plan approved by the Court must:

- Describe in adequate detail how the parents will share and be responsible for the daily tasks associated with the upbringing of the child.
- Include the time-sharing schedule arrangements that specify the time that the minor child will spend with each parent.
- Describe in adequate detail the methods and technologies that the parents will use to communicate with the child.
- Designate who will be responsible for:
  - Any and all forms of health care. If the court orders shared parental responsibility over health care decisions, the parenting plan must provide that either parent may consent to mental health treatment for the child.
  - School-related matters, including the address to be used for school-boundary determination and registration.
  - Other activities.

Parenting Plans

Drafting a Parenting Plan

- **Make it Unique:** Make the parenting plan unique to your client's family. Give your client a blank parenting plan to fill out and express what their ideal parenting plan looks like.
- **Future Plans:** Address any understandings or agreements they parties may have had about future plans for the child (e.g. where the child will go to high school).
- **List Residential Addresses:** Include the current address for both parents at the time of parenting plan, as Florida's relocation statute (Fla. Stat. §61.13001) looks to the parent's address at the time of the last order establishing or modifying timesharing, and whether the new proposed residence is at least 50 miles from the parent's prior residence. If the address in the parenting plan changes before the final hearing, then acknowledge the change in the final judgment.
- **Have a Default:** Include specific information for the timesharing schedule as a default in the event the parent's don't agree in the future. For instance, when and were pick-ups and drops off should occur for regular and holiday timesharing, who is responsible for transportation, etc.

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- **Holidays**: Have your client think about how holidays were historically celebrated, where they were celebrated, which religious holidays were celebrated, which holidays matter to them and which do not.
- **Teacher Planning Days & Sick Days**: Think about when the timesharing exchange time should be when the child is not in school because of a teacher planning day or the child is sick that day and needs to say home from school.
- **Travel:** A parent may want to include restrictions on travel to certain countries (e.g. countries not a member of the Hague Convention, U.S. Department of State Travel Advisory Warning). However, be mindful when prohibiting travel to a country that has a certain level (e.g. Level 2) issued by the U.S. Department of State given the current times. You also may want to exclude certain countries from that list if a parent has historically traveled there with the child.
- **Passports**: If international travel is anticipated, then include a provision that they must maintain the child's passport. Also, address who is going to hold the passport.

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Drafting a Parenting Plan

- **Substance Abuse Issues**: Address what mechanisms are in place to promote a safe environment for the child when having timesharing with the parent with the substance abuse issue (e.g. Sober Link, monitored timesharing, random drug testing). You should include a gradual schedule if a parent maintains sobriety, while also addressing what happens to the timesharing schedule if a parent relapses.
- **School Designation.** Address where the child should go to school in the future. Sometimes parenting plans will indicate that whichever parent is zoned for the school that is considered the highest rated school will be the address used for the child to attend the highest rated school, absent an agreement to the contrary. The parties may utilize the Florida Department of Educating Rating for the school in question. Another option is to indicate if the parents cannot agree, then either parent may bring the issue before the court by a motion (not a supplemental petition) to determine where the child will attend school, or to give one of the parent's ultimate decision making authority to address the school designation issue for that particular year.

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- **Ultimate Decision Making**: Be careful not to state that a parent has ultimate decision making on all child related issues, and instead, specifically identify which issue that parent has ultimate decision making authority (e.g. education, extracurricular activities, medical, summer camp).
  - Seligsohn v. Seligsohn, 259 So. 3d 847 (Fla. 4th DCA 2018) (holding it is impermissible to award a parent ultimate decision making authority on all issues).
  - Clarke v. Stofft, 263 So. 3d 84 (Fla. 4th DCA 2019) (holding a final judgment is deficient if it fails to identify specific areas were a parent has ultimate decision-making authority, and when the parenting plan includes ultimate decision making authority and language that states “including, but not limited to” and “other responsibilities unique to this family,” then this is giving that parent care blanche to make decisions over every aspect of the child’s life).

Parenting Plans

Pre-Judgement Attack

- A court is NOT bound by an agreement of the parents regarding a parenting plan or child support before it is incorporated into a final judgment.
- Therefore, when seeking to set aside a parenting plan prior to its incorporation into a final judgment, the moving party does not need to plead and prove a substantial change in circumstances.
- Rather, the party must assert the parenting plan is not in the best interests of the child, and upon doing so, the court must hold an evidentiary hearing to determine if the parenting plan is in the child's best interest.

Trang Ngoan Le v. Tung Phuong Nguyen, 98 So. 3d 600 (5th DCA 2012)

Parenting Plans

Post-Judgment Attack

- *Fla. Stat.* §61.13(3). A parenting plan may not be modified absent a showing of a substantial, material and unanticipated change in circumstances and a determination that the modification is not in the best interests of the child.
- *Fla. Fam. L. R. P.* 12.540. A party may seek to set aside a parenting plan under 12.540, but only if that rule applies, i.e. mistake, inadvertence, excusable neglect, newly discovered evidence, fraud, etc. *See* Williams v. Taylor, 306 So. 3d 164 (Fla. 3d DCA 2020) (party could not seek 12.540 relief from final judgment approving parenting plan where motion was not filed within one year of final judgment).

Parenting Plans

Child Emergencies

What is a Child Emergency?

- A child emergency is a matter of imminent or impending abuse, neglect or abandonment affecting the health, safety, or welfare of a child.
- The "true emergency" test applies in very limited situations, "such as where the child is threatened with physical harm or is about to be improperly removed from the state." Bon v. Rivera, 10 So. 3d 193 (Fla. 4th DCA 2009).
- Administrative Order No. 2019-9-UFC states "[v]isitation is not an emergency," citing to *Fla. Stat.* §61.13(4).
- Therefore, if the other party refuses to comply with the timesharing in the Parenting Plan, a party should seek relief under §61.13(4).

17th Judicial Circuit Court Administrative Order No. 2019-9-UFC

Parenting Plans

Child Emergencies

Requirement When Seeking Relief Based Upon a Child Emergency:

- File a written verified motion that is signed by the filing party.
- The lawyer filing the verified motion signed by his/her client also must include a certification that the motion is an emergency and the lawyer is acting in good faith in seeking such relief. Sanctions may be ordered if filed in bad faith.
- If the motion is not seeking ex parte relief, then the filing party must provide a copy of the written verified motion to the opposing party and the divisional judge. If the motion is seeking ex parte relief, then the motion shall be provided to the divisional judge.
- A UCCJEA affidavit shall be filed and a copy of the affidavit shall be provided to the divisional judge.
- For child pick up orders and injunctions related to children, the Florida Supreme Court Approved Family Forms in 12.941 (forms A through E) shall be the exclusive forms used.

17th Judicial Circuit Court Administrative Order No. 2019-9-UFC

Parenting Plans

Temporary Modifications

Requirements When Seeking Temporary Modification of Parenting Plan When *No* Child Emergency Exists:

- If the matter is not a true emergency, then a party seeking a temporary modification of the parenting plan still must:

1. Plead and prove in the motion for temporary relief that there has been substantial change in circumstances and that the modification is in the child's best interests.
2. File a Supplemental Petition for Modification pleading there has been substantial change in circumstances and that the modification is in the child's best interests. Bon v. Rivera, 10 So. 3d 193 (Fla. 4th DCA 2009) (trial court erred in temporarily modifying parenting plan where former husband failed to file a petition or motion that plead a substantial change in circumstances warranting a modification of the parties' parenting plan).

Drafting a Marital Settlement Agreement

General Requirements

- **In Writing** – MSA generally need to be in writing due to the statute of frauds. However, if a party can prove there is complete performance, then that may be a defense to the statute of frauds.
- **Oral MSA** – if the MSA is read into the record, the court must obtain clear and unequivocal assent to the MSA from each party on the record, and must confirm each party has discussed the MSA with his/her attorney and fully understands the terms. Richardson v. Knight, 197 So. 3d 143 (Fla. 4th DCA 2016) (holding trial court erred in accepting oral agreement as valid where judge failed to take sworn testimony of the parties when agreement was read into the record in open court).

Marital Settlement Agreements

Drafting a Marital Settlement Agreement

Equitable Distribution

- **Itemize Distribution of Assets & Liabilities** – Avoid attaching an equitable distribution schedule, and instead, itemize the distribution of the assets and liabilities.
- **Joint Liabilities** – while one of the parties may agree to be responsible for a jointly titled debt, the creditor is not going to be subject to the terms of MSA. Therefore, consider including indemnification language *or* requiring a party to pay a joint debt before entry of the final judgment *or* if a jointly titled debt on real property, then for the home to be sold if the debt is not paid.
- **Real Property Distributed to a Party** – address the execution of the deed, the type of deed, who is drafting the deed, whether deed needs to be held in escrow for a period of time, who is responsible for recording costs, issues concerning mortgage and what happens if it is not paid, payment of expenses, utility deposits, etc.
- **Real Property Listed for Sale & Distributed to Parties** – address all matter concerning listing and sale, side agreement on list price reduction, distribution of net proceeds, homestead assessment difference (“portability”), exclusive use pending sale, payment of expenses, setoffs or credits from other party’s half of net proceeds, etc.

Marital Settlement Agreements

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Equitable Distribution

- **Individual Retirement Accounts** – an IRA can be distributed through a direct IRA rollover. To avoid tax consequences, consider equal distribution of parties' respective IRAs.
- **Pension, 401K, Savings Plan** – to distribute these types of retirement assets, you will need to have a Qualified Domestic Relations Order prepared and entered. Also, the MSA should address if there any loans, how the marital portion is determined and distributed, the distribution of the non-marital portion, the costs of the preparation of the QDRO, etc.
- **Tax Payments & Refunds** – a deposit with the IRS to cover future tax payments may be an asset if made from marital funds, and tax refunds for years in which the parties were married and filed a joint returns is a marital asset.
- **Stock Options & Restricted Stock** – include language to impose a constructive trust for the non-owner spouse's share of the unvested options, and for the court to reserve jurisdiction to address distribution of unvested options.
- **Equalizer Payment** – not enforceable by contempt, so include provisions to try and secure the equalizer payment (i.e. mortgage, holding deed in escrow, payment, life insurance policy).

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Alimony

- **Non-Taxable & Non-Deductible** – alimony payments made pursuant to a MSA executed after December 31, 2018 are non-taxable to the alimony recipient and not deductible by the alimony payor.
- **Lump Sum Alimony** – be careful when drafting lump sum alimony provisions in a MSA so that they are not viewed as property distribution, as property distribution is not enforceable by contempt and is dischargeable in bankruptcy.
- **Nominal Alimony** – if there is a need or alimony and entitlement for alimony under the factors set forth in *Fla. Stat.* §61.08 but there are insufficient funds for the payor to pay alimony, then consider including a provision for nominal alimony.

Marital Settlement Agreements

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Alimony

- **Waiver of Alimony** – a waiver of alimony in a MSA should be clear and unambiguous, and it is enforceable regardless of any changed circumstances.
- **Modification & Termination** – while alimony is modifiable under *Fla. Stat.* §61.14, a party may waive his/her rights under §61.14 to modify or terminate alimony, and the provisions are not void as against public policy. Herbst v. Herbst, 153 So. 3d 290 (Fla. 2nd DCA 2014) ("parties may enter into settlement agreements imposing obligations the trial court could not otherwise impose under the applicable statutes").

Marital Settlement Agreements

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Child Support

- **Child Support Cannot be Waived** – both parents have an obligation to support the minor child. The right to child support cannot be waived, and trial court has the authority to reject an agreement which attempts to waive or reduce a parent's obligation to support a minor child.
- **Deviation from Guideline Amount** – if the child support amount is a deviation of greater or less than 5% of the guideline amount, then state why there is a deviation.
- **Imputation of Income** – 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.
- **Proportional Share of Child Related Expenses** – address the payment of child related expenses, including timesharing related expenses.

Marital Settlement Agreements

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Child Support

- **Include Automatic Stepdown** – *Fla. Stat.* §61.13(1)(a)1 provides that every child support order must include a schedule stating the amount of the monthly child support obligation for all the minor children at the time of the order and the amount of child support that will be owed for any remaining children after one or more of the children are no longer entitled to receive child support, along with the month, day and year that the reduction or termination of child support becomes effective.
- **Emancipation Provisions** – *Fla. Stat.* §61.13 and §743.07(2) collectively provide that the duty to support a child ends upon the child's 18th birthday, however it may be extended beyond age 18 if (1) the child is dependent because of a mental or physical incapacity that began before age 18, or (2) the child is between 18 and 19, is still in high school, and reasonably expects to graduate by age 19.
- **Post Majority Support** – agreements to pay post majority support are binding and enforceable (even by the child as a 3rd party beneficiary), so reconsider obligating your client to pay post majority support (e.g. college, health insurance, etc.).

Marital Settlement Agreements

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Attorney's Fees and Costs

- **Temporary Attorney's Fees** – if a party paid for the other party's attorney's fees and costs during the litigation, then be careful how the attorney's fees and costs paragraph is drafted if stating each party shall be solely responsible for his/her attorney's fees and costs.
- **Waiver of Prospective Attorney's Fees and Costs** – in a post-judgment proceeding concerning child related issues of timesharing and child support, the trial court has the discretion to award attorney's fees notwithstanding parties' settlement agreement providing that each party would bear their own attorney's fees and costs in subsequent proceeding. Sanchez v. Sanchez, 647 So. 2d 1046 (Fla. 4th DCA 1994); Helinski v. Helinski, 305 So. 3d 703 (Fla. 3d DCA 2020).

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Attorney's Fees and Costs

- **Prevailing Party Attorney's Fees and Costs** – if a MSA sets forth a provision concerning fees, such as a prevailing party fee provision, it has been held that the court may only award fees pursuant to the terms of the MSA, and not pursuant to *Fla. Stat.* §61.16. Zakian v. Zakian, 837 So. 2d 549 (Fla. 4th DCA 2003) (holding former wife's need for fees under Fla. Stat. §61.16 was irrelevant in enforcement action where MSA stated defaulting party shall pay all reasonable attorney's fees incurred in enforcing MSA, and agreement—rather than—§61.16, controlled determination of fees); Ulbrich v. Coolidge, 935 So. 2d 607 (Fla. 4th DCA 2006) (holding in cases involving MSA with a prevailing party fee provision, *Fla. Stat.* §61.16 cannot be used as a basis for attorney's fees); *Cf.* Mott v. Mott, 800 So. 2d 331 (Fla. 2d DCA 2001) (holding to extent the trial court determines certain fees are not recoverable under the prevailing party provision under the MSA, the trial court must then consider on remand whether those fees would be recoverable under *Fla. Stat.* §61.16)

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Additional Provisions

- Effect of Reconciliation
- Bankruptcy
- Health & Life Insurance
- Taxes
- Harassment
- Testamentary Provisions
- General Release
- Execution of Additional Instruments

Marital Settlement Agreements

Financial Disclosure

- Parties are not in position of mutual trust in confidence, and are adversaries dealing at an arm's length transaction.
- Where agreement is reached after litigation has commenced, *Florida Family Law Rules of Procedure* 12.285(d)(1) requires the parties to, at a minimum have filed and served upon the other party a Family Law Financial Affidavit.
- However, *Fla.Fam.L.R.P.* 12.285(c) does provide the parties are not required to file and serve a financial affidavit if they are seeking a simplified dissolution of marriage, they have no minor children, have no support issues, and have a written settlement agreement disposing of all financial issues, or if the court lacks jurisdiction to determine any financial issues (i.e. no personal jurisdiction over a party).

Marital Settlement Agreements

Challenging Validity of MSA

- The burden of proof necessary to attack a Marital Settlement Agreement depends upon whether the agreement was entered into *after* litigation commenced and whether a court order has been entered ratifying and approving the Marital Settlement Agreement.

1. Pre-Judgment Attack

- This is similar to the direct method set forth in Casto v. Casto, 508 So. 2d 330 (Fla. 1987). To set aside a marital settlement agreement during the course of litigation, "the challenging spouse is … limited to showing fraud, misrepresentation in the discovery, or coercion." Parra de Rey v. Rey, 114 So. 3d 371 (Fla. 3d DCA 2013) quoting Petracca v. Petracca, 706 So.2d 904, 912 (Fla. 4th DCA 1998).
- The marital settlement agreement may not be challenged for "fairness," and therefore, the indirect method in Casto doesn't apply. Kuchera v. Kuchera, 983 S. 2d 776 (Fla. 4th DCA 2008).

Marital Settlement Agreements

Challenging Validity of MSA

2. Post-Judgment Attack

- This is governed under Macar v. Macar, 803 So. 2d 707 (Fla. 2001).
- When each party has been represented by chosen counsel and given the opportunity to learn the financial resources of the other through litigation discovery, settlement agreements made in that context may not be challenged for fairness.
- Rather, Fla. Fam. L. R. P. 12.540 provides the framework for challenging marital settlement agreements, which is (1) mistake, inadvertence, surprise, excusable neglect; (2) newly discovery evidence; (3) fraud, misrepresentation or other misconduct by adverse party; (4) the judgement is void; or (5) the judgement has been satisfied, released, discharged or a prior judgement on which it is based has been reversed or vacated.
- There is a one (1) year time limit to file a 12.540 motion under (1), (2) and (3) above, except no time limitation for motions based on fraudulent financial affidavits.
- The filing of a 12.540 motion does not affect the finality of the judgement or suspend its operation.

Marital Settlement Agreements

Challenging Validity of MSA

What is the Standard for Attacking a Pre-Suit Marital Settlement Agreement?

- Macar v. Macar, 803 So. 2d 707 (Fla. 2001) provides that Casto applies to agreements entered into prior to litigation and discovery, because before spouses file for dissolution, they engage each other as fiduciaries and as such, fraudulent behavior may be perpetrated more easily.
- Therefore, the Supreme Court of Florida has indicated in its holding in Macar that the method for challenging an agreement entered into by the parties before litigation is governed by Casto because technically, a litigation action has not been filed and discovery deadlines under Rule 12.285 have not commenced. Macar, 803 So. 2d at 713.

Marital Settlement Agreements

Ambiguous Terms = Parol Evidence

- A marital settlement agreement is a contract that is subject to interpretation issues like any other contract.
- A provision in a marital settlement agreement is “ambiguous” if it is fairly susceptible to different constructions.
- If a term is ambiguous, the trial court may consider extrinsic evidence as well as the parties' interpretation of the agreement (i.e. parol evidence) to explain or clarify the language. Teague v. Teague, 122 So. 3d 938 (Fla. 4th DCA 2013).
- When accepting parol evidence, this is not done to vary the terms of the contract, but to explain the ambiguous terms. In construing the contract, the court should try to place itself in the situation of the parties, including the surrounding circumstances, to determine the meaning and intent of the language used. Jones v. Treasure, 984 So. 2d 634 (Fla. 4th DCA 2008), *quoting* Miller v. Kase, 789 So. 2d 1095 (Fla. 4th DCA 2001).

Marital Settlement Agreements

Unambiguous Terms ≠ No Parol Evidence

- The unambiguous provisions of the agreement should be interpreted according to its plain meaning. Rector v. Rector, 264 So. 3d 282 (Fla. 2d DCA 2019) *quoting* Johnson v. Johnson, 848 So. 2d 1272, 1273 (Fla. 2d DCA 2003).
- It is reversible error for the court to interpret terms in a marital settlement that are not plainly stated in the agreement. Even where a party attempts to sidestep the agreement by arguing the "intent and spirit" of the agreement meant something different, if the terms of the agreement are unambiguous, then "courts cannot rescue parties from the unintended consequences of knowingly made and otherwise binding contractual obligations." Hobus v. Crandall, 972 So. 2d 867 (Fla. 2d DCA 2007).

THANK YOU

The Honorable George Odom & Meghan Clary, Esq.