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## Monthly Florida Family Law Case Law Update & Florida Family Law Appeals Guide

For the Month Of

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Brought to you by:

**NUGENT ZBOROWSKI & BRUCE**

*Divorce & Appellate Lawyers*

(561) 844-1200

Website: [NugentLawFirm.com](http://NugentLawFirm.com)

Appeals Website: [DivorceCourtAppeals.com](http://DivorceCourtAppeals.com)

Email: [Chris@DivorceCourtAppeals.com](mailto:Chris@DivorceCourtAppeals.com)

Main Office: North Palm Beach

## **About Nugent Zborowski & Bruce**

Nugent Zborowski & Bruce is a law firm located in North Palm Beach, Florida. The firm's attorneys, Matthew S. Nugent, Adam M. Zborowski, Christopher R. Bruce & John Schwencke, limit their practice to resolution of marital and family law matters in Florida's trial and appellate courts. The firm represents clients at the trial court level in South Florida and provides appellate court representation throughout the state. For more information about the firm, call (561) 844-1200 or visit [NugentLawFirm.com](http://NugentLawFirm.com) or [DivorceCourtAppeals.com](http://DivorceCourtAppeals.com).

The firm pays [referral fees](#) in accordance with Florida Bar Rules for appellate matters when handled on a [fixed fee basis](#). To help curb against excessive delays on appeal, the firm designed a [limited money back promise](#) if the brief is not filed within 30 days of the firm receiving the transcript and record on appeal.

## **About DivorceCourtAppeals.com**

The attorneys of Nugent Zborowski & Bruce created [DivorceCourtAppeals.com](http://DivorceCourtAppeals.com) to serve as a resource to practitioners and the public on the process and procedure for appealing a divorce or child custody matter in Florida. One of the highlights of the website is the [Florida Divorce and Custody Appeals Overview](#), which outlines the appellate process, explaining everything from the applicable deadlines to the specifics of appealing divorce and child custody matters. The Florida Divorce and Custody Appeals Overview is included in full at the end of this material.

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**NOTE: CLICKING ON THE NAME OF A CASE IN THE SUMMARIES THAT FOLLOW ALLOW YOU TO VIEW THE WRITTEN OPINION OF THE CASE ON THE APPELLATE COURT'S WEBSITE.**

## ALIMONY

**Case:** [Niekamp v. Niekamp](#)  
**Court:** Second District Court of Appeal.  
**Trial Judge:** John S. Carlin.  
**Attorneys:** Sam R. Assini, Matthew P. Irwin, Luis E. Insignares.  
**Issues:** Alimony, Equitable Distribution, Time-sharing, Spousal Support, Child Support, Imputing Income, Attorney's Fees.

Moneys from retirement accounts which are distributed to the parties are considered income for the purpose of determining alimony where the principal of the retirement account will not be invaded for the purpose of support. It does not matter whether the party has attained the age at which funds may be withdrawn without penalty. Under Florida Statutes (2013), income includes retirement benefits, pensions, dividends, and interest. In this case, the trial court erred in not considering as income interest from pension accounts distributed to the Former Wife and interest-generating equalization payments from the Former Husband. The interest earned on the equalization payments fell within the statutory definition of income and should have been considered in calculating the Former Wife's income. The amended final judgment also contained a mathematical error in the calculation of the Former Wife's need. The appeals court reversed and remanded for a redetermination and recalculation.

**Case:** [Hutchinson v. Hutchinson](#)  
**Court:** First District Court of Appeal.  
**Trial Judge:** Monica J. Brasington.  
**Attorneys:** Stephen K. Johnson, Emily A. Snider, Jonathan P. Culver.  
**Issues:** Alimony, Attorney's Fees.

An award of attorney's fees is reviewed for an abuse of discretion. Under Florida Statute, such awards are to ensure that both parties have a similar ability to obtain competent legal counsel. The general consideration is the requesting spouse's financial need and the other spouse's ability to pay. Where the parties are equally able to pay attorney's fees, the trial court abuses its discretion by requiring one spouse to pay the other's fees. Where marital property has been equitably distributed and alimony is awarded such that the parties' incomes have been equalized, a trial court abuses its discretion by awarding attorney's fees. In this case, the trial court erred in that it awarded the Former Wife attorney's fees after it had rendered final judgment by which equitable distribution and alimony left the parties in substantially the same financial position. The appeal court reversed the award of attorney's fees and costs.

**Case:** [Earl v. Earl](#)  
**Court:** Fourth District Court of Appeal.  
**Trial Judge:** Thomas H. Barkdull, III.  
**Attorneys:** Jane Kreusler-Walsh, Stephanie L. Serafin, Troy William Klein.  
**Issues:** Alimony, Procedure.

The written findings of a trial court must conform with the oral pronouncement. In this case, the trial court erred in failing to provide that the Former Husband obtain and maintain life insurance in the (written) final judgment of dissolution despite having made such a determination in the oral pronouncement. The appeals court reversed and remanded to allow the trial court to include the Former Husband's requirement to maintain life insurance.

**Case:** [Niekamp v. Niekamp](#)

**Court:** Second District Court of Appeal.

**Trial Judge:** John S. Carlin.

**Attorneys:** Sam R. Assini, Matthew P. Irwin, Luis E. Insignares.

**Issues:** Equitable Distribution, Time-sharing, Spousal Support, Child Support, Imputing Income, Attorney's Fees.

**Holding:** Parental Responsibility

Final judgment that provides sole parental responsibility to one party and denies contact to the other must set out for the parent who losing contact what must be done to reconnect with the children. An order that does not do so is deficient as it fails to advise the parent what is expected and prevents a successor judge from monitoring the parent's progress.

Marital Assets

When an asset is acquired during the marriage, it is presumed to be marital unless specifically established otherwise. In considering a business as a marital asset, enterprise goodwill is a distributable marital asset and personal goodwill is non-marital. When a trial court makes an equitable distribution award of a business, characterized as a marital asset, a value must be assigned to the asset.

Alimony

A twenty-two-year marriage is presumed to be long-term. This places a presumption in favor of alimony when warranted by one party's need and the other party's ability to pay. In determining an alimony award, a trial court shall consider the parties' respective physical and emotional conditions and employability.

Dissipation of Assets

When a spouse depletes marital assets during the pendency of dissolution proceedings to pay for support, living expenses and litigation expenses, it is error to include the assets in the equitable distribution scheme unless a there is a specific finding of intentional misconduct. Such a finding must be based on evidence showing that the marital funds were used for one party's own benefit and for a

purpose unrelated to the marriage at a time when the marriage is undergoing an irreconcilable breakdown.

In this case, the trial court erred in that:

- a. The final judgment failed to prescribe any schedule or benchmarks for re-establishing the Former Husband's parenting of the children.
- b. It classified the Former Wife's business as a non-marital asset, which although it depended heavily on her personal expertise and goodwill had tangible assets (bank accounts, instructional books and enterprise goodwill).
- c. It distributed a non-existent asset to the Former Husband (being money that he withdrew from retirement accounts spent on attorney's fees).
- d. It determined the Former Husband was voluntarily unemployed when there was evidence showing he was unemployed for mental health reasons.
- e. It imputed income to him in relation to child support and in its determination regarding payment of attorney's fees.

The appeals court reversed and remanded for further proceedings.

## ATTORNEY'S FEES

**Case:** [Chianese v. Brady](#)  
**Court:** Fourth District Court of Appeal.  
**Trial Judge:** Timothy Bailey.  
**Attorneys:** Nancy A. Hass, Cynthia L. Greene.  
**Issues:** Attorney's Fees.

**Holding:** The award of attorney's fees is premised on the parties' respective need and ability to pay. Notwithstanding, the trial court must also determine the reasonableness of the fees before ordering a party to pay fees. In this case, the trial court did not err in denying the Mother further attorney's fees. The trial court determined that the case was "out of control", the Mother had failed to prove the reasonableness of the fees requested, and the Father has already paid her temporary attorney's fees. Specifically, it had previously awarded the Mother \$30,000.00 for temporary fees, then denied a subsequent request for more, which denial was affirmed on appeal. She then filed an additional (third) motion for temporary attorney's fees on the grounds that further substantial financial discovery was required as the Father was objecting and new and novel theories to obtain an increase in child support were being advanced. The appeals court affirmed the denial of additional fees.

**Case:** [Kemp v. Kemp](#)  
**Court:** First District Court of Appeal.  
**Trial Judge:** Daniel F. Wilensky.  
**Attorneys:** Seth Schwartz, Eric Lawson, Allison E. Folds.  
**Issues:** Equitable Distribution, Attorney's Fees.

**Holding:** A trial court may not order an interim partial equitable distribution in the absence of a verified motion requesting same. In this case the trial court erred when, after a hearing on the Former Wife's motion for temporary attorney's fees (past due and prospective) issued an order finding that the Former Husband lacked the ability to pay her attorney's fees and directed what was effectively an interim partial equitable distribution instead. The trial court lacked authority to do so as the relevant statutory requirements for such an order were not met. The trial court misapplied the law and failed to make proper findings to support its order. The appeals court reversed and remanded for reconsideration of the Former Wife's motion for temporary attorney's fees.

**Case:** [Hutchinson v. Hutchinson](#)  
**Court:** First District Court of Appeal.  
**Trial Judge:** Monica J. Brasington.  
**Attorneys:** Stephen K. Johnson, Emily A. Snider, Jonathan P. Culver.  
**Issues:** Alimony, Attorney's Fees.

**Holding:** An award of attorney's fees is reviewed for an abuse of discretion. Under Florida Statute, such awards are to ensure that both parties have a similar ability to obtain competent legal counsel. The general consideration is the requesting spouse's financial need and the other spouse's ability to pay. Where the parties are equally able to pay attorney's fees, the trial court abuses its discretion by requiring one spouse to pay the other's fees. Where marital property has been equitably distributed and alimony is awarded such that the parties' incomes have been equalized, a trial court abuses its discretion by awarding attorney's fees. In this case, the trial court erred in that it awarded the Former Wife attorney's fees after it had rendered final judgment by which equitable distribution and alimony left the parties in substantially the same financial position. The appeal court reversed the award of attorney's fees and costs.



## CHILD SUPPORT

**Case:** [Garcia v. Garcia](#)  
**Court:** Third District Court of Appeal.  
**Trial Judge:** Barbara Areces.  
**Attorneys:** Douglas Isenberg.  
**Issues:** Child support.

**Holding:** Florida Rules of Civil Procedure provide that a magistrate is responsible for creating an accurate and complete record of proceedings. A trial court may not adopt or ratify a magistrate's report if he or she fails to file a complete record of the evidence with the report, regardless of whether exceptions have been filed to that report. If a trial court has not received a complete record, all subsequent actions based on such reports and recommendations may be deemed erroneous. In this case, the trial court erred when it ratified the general magistrate's report despite having an incomplete record of the proceedings. A transcript from the hearing during which the testimony of the Former Husband and his accountant could not be prepared as the recording was inaudible. The testimony was absent from the record provided to the trial judge. The appeals court reversed and remanded with instructions to conduct further proceedings.

**Case:** [Niekamp v. Niekamp](#)  
**Court:** Second District Court of Appeal.  
**Trial Judge:** John S. Carlin.  
**Attorneys:** Sam R. Assini, Matthew P. Irwin, Luis E. Insignares.  
**Issues:** Equitable Distribution, Time-sharing, Spousal Support, Child Support, Imputing Income, Attorney's Fees.

**Holding:** Parental Responsibility

Final judgment that provides sole parental responsibility to one party and denies contact to the other must set out for the parent who losing contact what must be done to reconnect with the children. An order that does not do so is deficient as it fails to advise the parent what is expected and prevents a successor judge from monitoring the parent's progress.

Marital Assets

When an asset is acquired during the marriage, it is presumed to be marital unless specifically established otherwise. In considering a business as a marital asset, enterprise goodwill is a distributable marital asset and personal goodwill is non-marital. When a trial court makes an equitable distribution award of a business, characterized as a marital asset, a value must be assigned to the asset.

## Alimony

A twenty-two-year marriage is presumed to be long-term. This places a presumption in favor of alimony when warranted by one party's need and the other party's ability to pay. In determining an alimony award, a trial court shall consider the parties' respective physical and emotional conditions and employability.

## Dissipation of Assets

When a spouse depletes marital assets during the pendency of dissolution proceedings to pay for support, living expenses and litigation expenses, it is error to include the assets in the equitable distribution scheme unless there is a specific finding of intentional misconduct. Such a finding must be based on evidence showing that the marital funds were used for one party's own benefit and for a purpose unrelated to the marriage at a time when the marriage is undergoing an irreconcilable breakdown.

In this case, the trial court erred in that:

- f. The final judgment failed to prescribe any schedule or benchmarks for re-establishing the Former Husband's parenting of the children.
- g. It classified the Former Wife's business as a non-marital asset, which although it depended heavily on her personal expertise and goodwill had tangible assets (bank accounts, instructional books and enterprise goodwill).
- h. It distributed a non-existent asset to the Former Husband (being money that he withdrew from retirement accounts spent on attorney's fees).
- i. It determined the Former Husband was voluntarily unemployed when there was evidence showing he was unemployed for mental health reasons.
- j. It imputed income to him in relation to child support and in its determination regarding payment of attorney's fees.

The appeals court reversed and remanded for further proceedings.

## CONTEMPT

**Case:** [Whissell v. Whissell](#)  
**Court:** Fourth District Court of Appeal.  
**Trial Judge:** Jeffrey Dana Gillen.  
**Attorneys:** Karen J. Haas, Jonathan S. Root.  
**Issues:** Contempt, Procedure.

**Holding:** Where an appellant has disobeyed an order of the trial court, the appellate court may, in its discretion, either entertain or dismiss an appeal. However, where a dismissal is ordered it is mandatory that the non-compliant appellant must be given a period of grace, prior to the effective date of the dismissal, in which to comply with the order(s) at issue.

In this case, the appellant repeatedly refused to comply with the trial court's orders regarding temporary support and discovery, resulting in four findings of contempt and three writs of bodily attachment. The appellant (Former Husband) was incarcerated for such conduct and was released only after he made some payment on arrearages and promised the trial court future compliance, which he ultimately breached. The appeals court ordered the appeal be dismissed unless he established substantial compliance with the extant orders within 30 days of the appeal court decision. Jurisdiction was relinquished to the trial court for 30 days to determine the appellant's compliance and provide a status report.

## CUSTODY/TIME-SHARING

**Case:** [Lopez v. Lopez](#)  
**Court:** Fourth District Court of Appeal.  
**Trial Judge:** Arthur M. Birken, Merrilee Ehrlich.  
**Attorneys:** Venol C. Adams, Susan R. Brown.  
**Issues:** Custody, Time-sharing.

**Holding:** Orders determining the rights or obligations of a party regarding child custody or time-sharing under a parenting plan can be non-final orders. A timely motion for rehearing will suspend the rendition of a final order until the order disposing of the motion for rehearing is entered. However, a motion for rehearing does not suspend the rendition of a non-final order. Notice must be timely. In this case, the appellant (Father) appealed an order for custody, visitation and proposing a time-sharing schedule, which was conditioned on the successful outcome of reunification therapy. This was a non-final order. His notice of appeal was not filed within the procedural timelines (in this case, within thirty days) after the non-final order was rendered. The appeals court was required to dismiss for lack of jurisdiction.

**Case:** [Felipe v. Rincon](#)  
**Court:** Fifth District Court of Appeal.  
**Trial Judge:** C. Jeffery Arnold.  
**Attorneys:** Alejandro L. Marriaga, Gisela Then Laurent.  
**Issues:** Procedure, Paternity, Custody, Time-sharing.

**Holding:** Florida Family Law Rules of Procedure require sufficient notice to parties of final hearings. In this case, the trial court erred when it entered default judgment against the Mother despite her not being properly served with the motion and receiving insufficient notice. The trial court relied on its own certificate of service noting the wrong address for the Mother despite her having filed an updated address several weeks prior. The record does not reflect that Mother received proper service of the counter-petition, the motion for default, the order granting default, or notice of the final hearing. The appeals court reversed the default final judgment and remanded for the trial court to vacate the judicial default.

**Case:** [Blevins v. Blevins](#)  
**Court:** Fifth District Court of Appeal.  
**Trial Judge:** Scott C. Dupont.  
**Attorneys:** Brian P. North, Mary Esther, Philip J. Bonamo.  
**Issues:** Time-sharing.

**Holding:** A final divorce decree providing for the custody of a child can be materially modified only if there are facts concerning the welfare of the child that the court

did not know at the time the decree was entered, or if there has been a substantial change in circumstances shown to have arisen since the decree. The petitioning parent bears an extraordinary burden to prove a substantial change in circumstances. Substantial, competent evidence of a substantial change of circumstances is required for modification. The parents' inability to communicate does not satisfy the substantial change requirement for modification. In this case, the trial court erred in modifying because the location of the parties' respective residences was known at the time of the final judgment. The parties' evidence established an inability to communicate but this fails to satisfy the substantial change requirement for modification. The appeals court reversed the modification order and remanded with instructions to reinstate the equal time-sharing schedule set forth in the final judgment of dissolution

**Case:** [Felipe v. Rincon](#)  
**Court:** Fifth District Court of Appeal.  
**Trial Judge:** C. Jeffery Arnold.  
**Attorneys:** Alejandro L. Marriaga, Gisela Then Laurent.  
**Issues:** Procedure, Paternity, Custody, Time-sharing.

**Holding:** Florida Family Law Rules of Procedure require sufficient notice to parties of final hearings. In this case, the trial court erred when it entered default judgment against the Mother despite her not being properly served with the motion and receiving insufficient notice. The trial court relied on its own certificate of service noting the wrong address for the Mother despite her having filed an updated address several weeks prior. The record does not reflect that Mother received proper service of the counter-petition, the motion for default, the order granting default, or notice of the final hearing. The appeals court reversed the default final judgment and remanded for the trial court to vacate the judicial default.

**Case:** [Lopez v. Lopez](#)  
**Court:** Fourth District Court of Appeal.  
**Trial Judge:** Arthur M. Birken, Merrilee Ehrlich.  
**Attorneys:** Venol C. Adams, Susan R. Brown.  
**Issues:** Custody, Time-sharing.

**Holding:** Orders determining the rights or obligations of a party regarding child custody or time-sharing under a parenting plan can be non-final orders. A timely motion for rehearing will suspend the rendition of a final order until the order disposing of the motion for rehearing is entered. However, a motion for rehearing does not suspend the rendition of a non-final order. Notice must be timely. In this case, the appellant (Father) appealed an order for custody, visitation and proposing a time-sharing schedule, which was conditioned on the successful outcome of reunification therapy. This was a non-final order. His notice of appeal was not filed within the

procedural timelines (in this case, within thirty days) after the non-final order was rendered. The appeals court was required to dismiss for lack of jurisdiction.

**Case:** [Niekamp v. Niekamp](#)

**Court:** Second District Court of Appeal.

**Trial Judge:** John S. Carlin.

**Attorneys:** Sam R. Assini, Matthew P. Irwin, Luis E. Insignares.

**Issues:** Equitable Distribution, Time-sharing, Spousal Support, Child Support, Imputing Income, Attorney's Fees.

**Holding:** Parental Responsibility

Final judgment that provides sole parental responsibility to one party and denies contact to the other must set out for the parent who losing contact what must be done to reconnect with the children. An order that does not do so is deficient as it fails to advise the parent what is expected and prevents a successor judge from monitoring the parent's progress.

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#### Dissipation of Assets

When a spouse depletes marital assets during the pendency of dissolution proceedings to pay for support, living expenses and litigation expenses, it is error to include the assets in the equitable distribution scheme unless there is a specific finding of intentional misconduct. Such a finding must be based on evidence showing that the marital funds were used for one party's own benefit and for a purpose unrelated to the marriage at a time when the marriage is undergoing an irreconcilable breakdown.

In this case, the trial court erred in that:

- k. The final judgment failed to prescribe any schedule or benchmarks for re-establishing the Former Husband's parenting of the children.
- l. It classified the Former Wife's business as a non-marital asset, which although it depended heavily on her personal expertise and goodwill had tangible assets (bank accounts, instructional books and enterprise goodwill).
- m. It distributed a non-existent asset to the Former Husband (being money that he withdrew from retirement accounts spent on attorney's fees).
- n. It determined the Former Husband was voluntarily unemployed when there was evidence showing he was unemployed for mental health reasons.
- o. It imputed income to him in relation to child support and in its determination regarding payment of attorney's fees.

The appeals court reversed and remanded for further proceedings.

## **DEPENDENCY AND TERMINATION**

**Case:** [J.C. v. D.C.F.](#)  
**Court:** Third District Court of Appeal.  
**Trial Judge:** Rosa C. Figarola.  
**Attorneys:** Richard F. Joyce, Karla F. Perkins, Laura E. Lawson (Sanford).  
**Issues:** Termination, Case Plan.

**Holding:** An order for termination must sufficiently articulate the trial court's considerations and findings. However, if record evidence and the detailed considerations of the trial court support a finding of termination, the wording of the order in that regard may be viewed as harmless error. In this case, the trial court erred in rendering an order that was did not sufficiently articulate that the Mother: (i) materially breached her case plan, and (ii) would be unlikely or unable to comply substantially with the case plan prior to its expiration. However, the appeals court determined this was harmless error as record evidence, together with the trial court's detailed consideration of the Mother's conduct, supported such an order for termination. The appeals court affirmed.

**Case:** [W.L. v. D.C.F.](#)  
**Court:** Fourth District Court of Appeal.  
**Trial Judge:** Edward H. Merrigan, Jr..  
**Attorneys:** Antony P. Ryan, Melanie L. Casper, Paulina Forrest, Pamela Jo Bondi, Carolyn Schwarz, Patricia Murphy Propheter.  
**Issues:** Termination.

**Holding:** Florida Statutes (2013) require trial courts ordering termination of parental rights to enter written orders which contain findings of fact and conclusions of law. In order to terminate on the grounds that a child's life, safety, or health would be threatened by continued interaction with a parent, irrespective of the services being provided in support of the parent, a trial court must find that any provision of services would be futile or that the child would be threatened with harm nonetheless. In this case, the trial court erred in failing to recite which of the petitioned grounds it relied on in entering the final judgment; it failed to make the necessary factual findings; and it omitted key conclusions of law. The appeals court vacated the termination order and remanded.



## EQUITABLE DISTRIBUTION

**Case:** [Kyriacou v. Kyriacou](#)  
**Court:** Second District Court of Appeal.  
**Trial Judge:** John S. Carlin.  
**Attorneys:** Matthew S. Toll, Stephen N. McGuire, II, Robert B. Burandt.  
**Issues:** Equitable Distribution.

**Holding:** Florida Statutes prescribe terms for the distribution of marital assets. The presumption is the distribution should be equal, unless there is a justification otherwise based on the statutorily enumerated factors including the economic circumstances of the parties and any other equitable considerations. Wage earning ability is one such factor although disparate earning capacity, without more, cannot be the sole basis for unequal distribution. In this case, the trial court erred when it made an unequal equitable distribution award when the record contained no indication that it considered the statutory factors listed in doing so. Specifically, it focused on the parties' earning ability and little else. The appeals court reversed as to equitable distribution and the valuation of certain marital assets.

**Case:** [Weaver v. Weaver](#)  
**Court:** Fourth District Court of Appeal.  
**Trial Judge:** Amy L. Smith.  
**Attorneys:** Paul M. Herman, Jr., Jeffrey M. Kirsch.  
**Issues:** Equitable Distribution.

**Holding:** Florida Statutes (2013) provide that when determining equitable distribution a trial court shall consider the contribution of each spouse to the acquisition, enhancement, and production of income, or the improvement of (or the incurring of liabilities to) both the marital assets and the non-marital assets of the parties. Florida Statutes (2013) also provide that the division of marital assets shall be equal unless there is a reason for unequal distribution. In this case, the trial court erred in awarding the Former Wife an interest in the marital home, which the Former Husband acquired prior to marriage, when there was no evidence that she had invested money in the home. Nor was there evidence to show an increase or enhancement of the value of the home during the marriage. The evidence most favorable to the Former Wife showed that she and the Former Husband pooled their incomes and paid the mortgage and other household expenses from their pooled funds. She had sold her own home prior to the marriage and spent the proceeds on their wedding, honeymoon, a boat, and a motor home. The trial court also failed to make the required factual determinations to equitably distribute the proceeds from out of state properties they owned. The appeals court reversed for further proceedings as to the real property.

**Case:** [Hooker v. Hooker](#)  
**Court:** Fourth District Court of Appeal.  
**Trial Judge:** Gregory M. Keyser.  
**Attorneys:** Jane Kreusler-Walsh, Rebecca Mercier Vargas, Stephanie L. Serafin, Melinda P. Gamot, Susan G. Chopin.  
**Issues:** Equitable Distribution.

**Holding:** Florida Statutes allow for unequal distribution of an asset when a trial court finds it is justified based on a non-exhaustive list of relevant factors including, among other things, the contributions of each spouse to the marriage; each spouse's economic circumstances; desirability of retaining an asset; the contribution of each spouse to the acquisition and enhancement of an asset; and any other factors necessary to do equity and justice between the parties.

The statutes also require any distribution of marital assets to be supported by factual findings in the judgment based on competent substantial evidence in the record with reference to these statutory factors.

The fact that an asset is determined to be an interspousal gift and then characterized as a marital asset does not mandate that the asset be split equally if an unequal split is will create equity and justice between the parties. An interspousal gift is established by showing donative intent; delivery or possession of the gift; and surrender of dominion and control of the gift. The burden is on the party seeking to prove an interest in the property to show it was an interspousal gift on a preponderance of credible evidence. An appeals court reviews the determinations of a trial court in regards to a dissolution judgment for an abuse of discretion, and the review of the legal conclusions is de novo. When reversible error occurs with regard to valuation or distribution, the entire distribution scheme must be reversed and remanded to allow the trial court to ensure both parties receive equity and justice.

In this case, the trial court was correct in determining one property was gifted to the Former Wife. It erred, however, in determining the other property was an interspousal gift when the evidence did not show a clear and unmistakable intention on the part of the Former Husband to gift it.

With regard to the erroneous determination, there was no testimony that the Former Husband expressly stated or affirmatively acknowledged that the Former Wife had an interest in the property. The evidence only showed that the Former Wife believed that she had an interest because the family home and family business were situated on it. Specifically, the trial court erred in relying on evidence that:

- a. The Former Husband did not convey to the Former Wife that she did not have an interest in the properties;
- b. He did not contradict her belief that it was a gift; and
- c. She had made significant contributions to the property.

The trial court did not properly consider evidence that showed that the Former Wife's name was kept off the title and the original mortgage for the property and off the corporation created by the Former Husband related to the property (formed solely in his name). The fact that he subsequently included the Former Wife's name

in the final sale of the property did not evidence donative intent. It simply showed the Former Husband ensuring the buyer of unburdened title.

As for the property that was gifted, the evidence provided sufficient donative intent to uphold the trial court's determination. The Former Husband's actions showed clear and unmistakable intent as the property was where the Former Wife desired to live; he told her the home was for both of them; they both contributed to furnishing the home; he provided her with keys to it; and she had unfettered access. The appeals court reversed the amended final judgment as to the trial court's determination that the Former Husband gifted an interest in the one property to the Former Wife and remanded for a recalculation of the entire equitable distribution.

**Case:** [Hall v. Hall](#)

**Court:** Fourth District Court of Appeal.

**Trial Judge:** Timothy L. Bailey.

**Attorneys:** Virginia R. Vetter, Susana Rice Roque, Linda M. Jaffe.

**Issues:** Equitable Distribution, Marital Settlement Agreements.

**Holding:** Two grounds lie for setting aside or modifying a Marriage Settlement Agreement (MSA):

1. By establishing that it was reached under fraud, deceit, duress, coercion, misrepresentation, or overreaching.
2. By establishing the MSA makes an unfair or unreasonable provision for a former spouse, given the circumstances of the parties as shown by evidence of the parties' relative situations (including their respective ages, health, education, and financial status). For this, determination, the trial court must find that the agreement is disproportionate to the means of the defending spouse, shown by record evidence of his or her financial means. If the MSA is found to be unreasonable, a presumption arises that either the defending spouse concealed relevant information or the challenging spouse lacked information regarding the defending spouse's finances when the MSA was reached. The defending spouse can rebut by showing that there was full, frank disclosure or that the challenging spouse had a general and approximate knowledge of the marital property. The test is the challenging spouse's such knowledge at the time of the MSA and whether he or she is prejudiced by lack of information.

Refusal to allow an amendment is an abuse of the trial court's discretion unless it clearly appears that allowing the amendment would prejudice the opposing party, the privilege to amend has been abused, or amendment would be futile.

MSA Was Valid & Enforceable

Regarding the first ground, the Former Husband did not present evidence that the Former Wife or her attorney engaged in any fraud, duress, etc during the relevant proceedings. Rather, his position is that his attorney forgot to present an alleged first (missing) page of a draft version of the MSA to the Former Wife for her to consider.

As to the second ground, the Former Husband did not present evidence as to the parties' relative situations to allow a trial court to make a decision as to its being unreasonable. The form of the MSA accepted by the trial court contained the style of the case, a clear heading, the parties' initials, a signature page, and addressed the parties' financial accounts by stating that they agreed to certain aspects of distribution. As such, and since he did not provide evidence of a purported additional page, the trial court did not err by ruling that the MSA filed by Former Wife was a valid, enforceable agreement.

#### Permission to Amend

The trial court erred when it denied the Former Husband's motion to amend his answer on the grounds that it had been 18 months since the Former Wife filed her petition and the case was 30 days from trial. On the facts, it is not clear that allowing Former Husband leave to amend would have prejudiced Former Wife. Nor did he abuse the privilege to amend as this was his first such request. Finally, he sought to amend to raise and address relevant issues.

The appeals court reversed and remanded with instructions to allow Former Husband to file his amended answer.

**Case:** [Kemp v. Kemp](#)

**Court:** First District Court of Appeal.

**Trial Judge:** Daniel F. Wilensky.

**Attorneys:** Seth Schwartz, Eric Lawson, Allison E. Folds.

**Issues:** Equitable Distribution, Attorney's Fees.

**Holding:** A trial court may not order an interim partial equitable distribution in the absence of a verified motion requesting same. In this case the trial court erred when, after a hearing on the Former Wife's motion for temporary attorney's fees (past due and prospective) issued an order finding that the Former Husband lacked the ability to pay her attorney's fees and directed what was effectively an interim partial equitable distribution instead. The trial court lacked authority to do so as the relevant statutory requirements for such an order were not met. The trial court misapplied the law and failed to make proper findings to support its order. The appeals court reversed and remanded for reconsideration of the Former Wife's motion for temporary attorney's fees.

**Case:** [Somasca v. Somasca](#)  
**Court:** Second District Court of Appeal.  
**Trial Judge:** John S. Carlin.  
**Attorneys:** J P. Brandon Perkins, Kristen D. Perkins, Brett C. Powell, Alexander Brockmeyer, Katheryn E. Smith.  
**Issues:** Equitable Distribution.

**Holding:** When marital assets are used during the marriage to reduce the mortgage on non-marital property, the increase in equity on the property is a marital asset subject to equitable distribution. The increase in equity is not to be confused with the concept of the appreciation in the overall value of the asset. The enhancement in equity is captured under Florida Statute, which holds that marital assets and liabilities include, among other things, the enhancement in value and appreciation of non-marital assets resulting either from the efforts of either party during the marriage or from the contribution to or expenditure thereon of marital funds or other forms of marital assets, or both.

In this case, the trial court erred in its treatment of the reduction in the mortgage indebtedness on a building the Former Husband purchased prior to the marriage, which had depreciated in value (a non-marital asset). The parties used marital funds to reduce the mortgage on the building, which resulted in the Former Husband obtaining enhanced equity in the building despite the building depreciating in value during the parties' marriage. The trial court erred in failing to give the Former Wife a credit for the use of marital funds to pay down the mortgage. The appeals court reversed the equitable distribution and remanded for correction.

**Case:** [Niekamp v. Niekamp](#)  
**Court:** Second District Court of Appeal.  
**Trial Judge:** John S. Carlin.  
**Attorneys:** Sam R. Assini, Matthew P. Irwin, Luis E. Insignares.  
**Issues:** Equitable Distribution, Time-sharing, Spousal Support, Child Support, Imputing Income, Attorney's Fees.

**Holding:** Parental Responsibility

Final judgment that provides sole parental responsibility to one party and denies contact to the other must set out for the parent who losing contact what must be done to reconnect with the children. An order that does not do so is deficient as it fails to advise the parent what is expected and prevents a successor judge from monitoring the parent's progress.

Marital Assets

When an asset is acquired during the marriage, it is presumed to be marital unless specifically established otherwise. In considering a business as a marital asset, enterprise goodwill is a distributable marital asset and personal goodwill is non-marital. When a trial court makes an equitable distribution award of a business, characterized as a marital asset, a value must be assigned to the asset.

### Alimony

A twenty-two-year marriage is presumed to be long-term. This places a presumption in favor of alimony when warranted by one party's need and the other party's ability to pay. In determining an alimony award, a trial court shall consider the parties' respective physical and emotional conditions and employability.

### Dissipation of Assets

When a spouse depletes marital assets during the pendency of dissolution proceedings to pay for support, living expenses and litigation expenses, it is error to include the assets in the equitable distribution scheme unless there is a specific finding of intentional misconduct. Such a finding must be based on evidence showing that the marital funds were used for one party's own benefit and for a purpose unrelated to the marriage at a time when the marriage is undergoing an irreconcilable breakdown.

In this case, the trial court erred in that:

- p. The final judgment failed to prescribe any schedule or benchmarks for re-establishing the Former Husband's parenting of the children.
- q. It classified the Former Wife's business as a non-marital asset, which although it depended heavily on her personal expertise and goodwill had tangible assets (bank accounts, instructional books and enterprise goodwill).
- r. It distributed a non-existent asset to the Former Husband (being money that he withdrew from retirement accounts spent on attorney's fees).
- s. It determined the Former Husband was voluntarily unemployed when there was evidence showing he was unemployed for mental health reasons.
- t. It imputed income to him in relation to child support and in its determination regarding payment of attorney's fees.

The appeals court reversed and remanded for further proceedings.

## IMPUTING INCOME

**Case:** [Niekamp v. Niekamp](#)  
**Court:** Second District Court of Appeal.  
**Trial Judge:** John S. Carlin.  
**Attorneys:** Sam R. Assini, Matthew P. Irwin, Luis E. Insignares.  
**Issues:** Equitable Distribution, Time-sharing, Spousal Support, Child Support, Imputing Income, Attorney's Fees.  
  
**Holding:** Parental Responsibility

Final judgment that provides sole parental responsibility to one party and denies contact to the other must set out for the parent who losing contact what must be done to reconnect with the children. An order that does not do so is deficient as it fails to advise the parent what is expected and prevents a successor judge from monitoring the parent's progress.

### Marital Assets

When an asset is acquired during the marriage, it is presumed to be marital unless specifically established otherwise. In considering a business as a marital asset, enterprise goodwill is a distributable marital asset and personal goodwill is non-marital. When a trial court makes an equitable distribution award of a business, characterized as a marital asset, a value must be assigned to the asset.

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In this case, the trial court erred in that:

- u. The final judgment failed to prescribe any schedule or benchmarks for re-establishing the Former Husband's parenting of the children.

- v. It classified the Former Wife's business as a non-marital asset, which although it depended heavily on her personal expertise and goodwill had tangible assets (bank accounts, instructional books and enterprise goodwill).
- w. It distributed a non-existent asset to the Former Husband (being money that he withdrew from retirement accounts spent on attorney's fees).
- x. It determined the Former Husband was voluntarily unemployed when there was evidence showing he was unemployed for mental health reasons.
- y. It imputed income to him in relation to child support and in its determination regarding payment of attorney's fees.

The appeals court reversed and remanded for further proceedings.



## **MARITAL SETTLEMENT AGREEMENTS**

**Case:** [Hall v. Hall](#)  
**Court:** Fourth District Court of Appeal.  
**Trial Judge:** Timothy L. Bailey.  
**Attorneys:** Virginia R. Vetter, Susana Rice Roque, Linda M. Jaffe.  
**Issues:** Equitable Distribution, Marital Settlement Agreements.  
  
**Holding:** Two grounds lie for setting aside or modifying a Marriage Settlement Agreement (MSA):

1. By establishing that it was reached under fraud, deceit, duress, coercion, misrepresentation, or overreaching.
2. By establishing the MSA makes an unfair or unreasonable provision for a former spouse, given the circumstances of the parties as shown by evidence of the parties' relative situations (including their respective ages, health, education, and financial status). For this, determination, the trial court must find that the agreement is disproportionate to the means of the defending spouse, shown by record evidence of his or her financial means. If the MSA is found to be unreasonable, a presumption arises that either the defending spouse concealed relevant information or the challenging spouse lacked information regarding the defending spouse's finances when the MSA was reached. The defending spouse can rebut by showing that there was full, frank disclosure or that the challenging spouse had a general and approximate knowledge of the marital property. The test is the challenging spouse's such knowledge at the time of the MSA and whether he or she is prejudiced by lack of information.

Refusal to allow an amendment is an abuse of the trial court's discretion unless it clearly appears that allowing the amendment would prejudice the opposing party, the privilege to amend has been abused, or amendment would be futile.

### **MSA Was Valid & Enforceable**

Regarding the first ground, the Former Husband did not present evidence that the Former Wife or her attorney engaged in any fraud, duress, etc during the relevant proceedings. Rather, his position is that his attorney forgot to present an alleged first (missing) page of a draft version of the MSA to the Former Wife for her to consider.

As to the second ground, the Former Husband did not present evidence as to the parties' relative situations to allow a trial court to make a decision as to its being unreasonable. The form of the MSA accepted by the trial court contained the style of the case, a clear heading, the parties' initials, a signature page, and addressed the parties' financial accounts by stating that they agreed to certain aspects of

distribution. As such, and since he did not provide evidence of a purported additional page, the trial court did not err by ruling that the MSA filed by Former Wife was a valid, enforceable agreement.

#### Permission to Amend

The trial court erred when it denied the Former Husband's motion to amend his answer on the grounds that it had been 18 months since the Former Wife filed her petition and the case was 30 days from trial. On the facts, it is not clear that allowing Former Husband leave to amend would have prejudiced Former Wife. Nor did he abuse the privilege to amend as this was his first such request. Finally, he sought to amend to raise and address relevant issues.

The appeals court reversed and remanded with instructions to allow Former Husband to file his amended answer.

## PATERNITY

**Case:** [Felipe v. Rincon](#)  
**Court:** Fifth District Court of Appeal.  
**Trial Judge:** C. Jeffery Arnold.  
**Attorneys:** Alejandro L. Marriaga, Gisela Then Laurent.  
**Issues:** Procedure, Paternity, Custody, Time-sharing.

**Holding:** Florida Family Law Rules of Procedure require sufficient notice to parties of final hearings. In this case, the trial court erred when it entered default judgment against the Mother despite her not being properly served with the motion and receiving insufficient notice. The trial court relied on its own certificate of service noting the wrong address for the Mother despite her having filed an updated address several weeks prior. The record does not reflect that Mother received proper service of the counter-petition, the motion for default, the order granting default, or notice of the final hearing. The appeals court reversed the default final judgment and remanded for the trial court to vacate the judicial default.

## PROCEDURE

**Case:** [Freiha v. Freiha](#)  
**Court:** First District Court of Appeal.  
**Trial Judge:** Charles W. Arnold.  
**Attorneys:** William S. Graessle, Jonathan W. Graessle, Rebecca Bowen Creed.  
**Issues:** Procedure.

**Holding:** An appeal on a non-final Final Judgment of Dissolution of Marriage is premature. Where judgment is partial; reserves jurisdiction to expend additional judicial labor over further matters, such as non-collateral issues of child support and parental responsibility; or retains jurisdiction over integrally related issues, an appeal may be premature and improper. In this case, the appellant pursued appeal on a Final Order of Judgment that did not finally resolve integral matters. The appeal was dismissed without prejudice to the appellant to file a notice of appeal upon the rendition of a final order.

**Case:** [Whissell v. Whissell](#)  
**Court:** Fourth District Court of Appeal.  
**Trial Judge:** Jeffrey Dana Gillen.  
**Attorneys:** Karen J. Haas, Jonathan S. Root.  
**Issues:** Contempt, Procedure.

**Holding:** Where an appellant has disobeyed an order of the trial court, the appellate court may, in its discretion, either entertain or dismiss an appeal. However, where a dismissal is ordered it is mandatory that the non-compliant appellant must be given a period of grace, prior to the effective date of the dismissal, in which to comply with the order(s) at issue.

In this case, the appellant repeatedly refused to comply with the trial court's orders regarding temporary support and discovery, resulting in four findings of contempt and three writs of bodily attachment. The appellant (Former Husband) was incarcerated for such conduct and was released only after he made some payment on arrearages and promised the trial court future compliance, which he ultimately breached. The appeals court ordered the appeal be dismissed unless he established substantial compliance with the extant orders within 30 days of the appeal court decision. Jurisdiction was relinquished to the trial court for 30 days to determine the appellant's compliance and provide a status report.

**Case:** [Felipe v. Rincon](#)  
**Court:** Fifth District Court of Appeal.  
**Trial Judge:** C. Jeffery Arnold.  
**Attorneys:** Alejandro L. Marriaga, Gisela Then Laurent.

**Issues:** Procedure, Paternity, Custody, Time-sharing.

**Holding:** Florida Family Law Rules of Procedure require sufficient notice to parties of final hearings. In this case, the trial court erred when it entered default judgment against the Mother despite her not being properly served with the motion and receiving insufficient notice. The trial court relied on its own certificate of service noting the wrong address for the Mother despite her having filed an updated address several weeks prior. The record does not reflect that Mother received proper service of the counter-petition, the motion for default, the order granting default, or notice of the final hearing. The appeals court reversed the default final judgment and remanded for the trial court to vacate the judicial default.

**Case:** [Earl v. Earl](#)

**Court:** Fourth District Court of Appeal.

**Trial Judge:** Thomas H. Barkdull, III.

**Attorneys:** Jane Kreusler-Walsh, Stephanie L. Serafin, Troy William Klein.

**Issues:** Alimony, Procedure.

**Holding:** The written findings of a trial court must conform with the oral pronouncement. In this case, the trial court erred in failing to provide that the Former Husband obtain and maintain life insurance in the (written) final judgment of dissolution despite having made such a determination in the oral pronouncement. The appeals court reversed and remanded to allow the trial court to include the Former Husband's requirement to maintain life insurance.

## **DIVORCECOURTAPPEALS.COM's FLORIDA DIVORCE & CUSTODY APPEALS OVERVIEW**

Below is the [Florida Divorce & Custody Appeals Overview](#) from DivorceCourtAppeals.com and Nugent Zborowski & Bruce. Clicking on the hyperlinks (blue font) in the text below will take you to the indicated material on [DivorceCourtAppeals.com](#).

# **FLORIDA DIVORCE AND CUSTODY APPEALS OVERVIEW**

Knowledge is power. Before you start throwing money at lawyers to appeal the ruling in your Florida divorce or child custody case you need to understand the laws, deadlines and procedures involved with the process.

For starters, the process of prosecuting an appeal is much different than everything that happened leading up to and including the trial in your divorce or child custody case.

You should read the [Appellate Basics](#) tutorial to learn the major ways that an appellate case is different than what happens at the trial court level. [Click here to learn the Appellate Basics.](#)

## **DEADLINES, REHEARING, "APPEALABILITY" & STAYS PENDING APPEAL**

The most important things to "get right" with an appeal is knowing the filing deadline and making sure to appeal all relevant orders. If you miss the deadline to file your notice of appeal, barring any extreme emergency, you will be "out of luck" as the appeals court will not have jurisdiction to decide your case. Also, if you fail to include the relevant orders on your notice of appeal, the appeals court might not be able to decide the issues that really matter. The bottom line is this: make sure you appeal everything that needs to be appealed without missing any deadlines. For more information, [click here for the tutorial on Appellate Deadlines.](#)

Before you file your appeal, you need to be make sure you've done the right things with the trial court. Depending on your situation, it may be preferred, or even required, to raise certain faults with the judge's ruling in a Petition for Rehearing or Motion for Reconsideration, or to ask the judge to give additional findings to support their ruling. Everything you need to know about this process can be found by [clicking here for the tutorial on Rehearing & Required Findings.](#)

Another preliminary issue that needs to be assessed early on is whether or not your judge's ruling can be immediately appealed, or if you need to wait until a final order has been entered to pursue an appeal. A detailed analysis of whether your judge's ruling is "appealable" can be found by [clicking here for the tutorial on What Decisions Can I Appeal?](#)

In some cases, the divorce court judge may have issued a ruling with "irreversible consequences" that cannot be undone if the ruling becomes effective before an appeal is finalized. Fortunately, there is a process for requesting a "stay", or temporary halt to trial judge's order becoming

effective. [Click here to read everything you need to know about obtaining a stay pending the outcome of your appeal.](#)

## **NUTS AND BOLTS OF APPELLATE PROCEDURE**

The basics of appellate practice and procedure are probably more important for lawyers to understand than for clients to read about. That said, you will likely be a more comfortable and informed client if you have a basic understanding of the processes involved with each step of your appeal. For this reason, you should click the links below and read up on the tutorials for appellate briefs, appellate motion practice, oral argument and reviewing and appealing the appeals court's decision:

- [Tutorial on Appellate Briefs;](#)
- [Tutorial on Appellate Motion Practice;](#)
- [Tutorial on Oral Arguments;](#) and
- [Tutorial on Reviewing and Appealing the Appellate Court's Decision](#)

## **APPEALING SPECIFIC ISSUES**

Once you understand the basic ground rules and procedures, it is time to go into more detail to learn about appealing specific aspects of your judge's decision. Listed below are detailed tutorials on the areas most commonly appealed in Florida divorce and family law cases. Clicking on the tutorials listed below will take you to a section of the website that explains the topic and most frequently asked questions in greater detail:

- [Appealing Child Custody Decisions;](#)
- [Appealing Alimony Orders;](#)
- [Appealing Child Support Decisions;](#)
- [Appealing Equitable Distribution \(Property Distribution\) Orders;](#)
- [Appealing Attorney's Fee Awards;](#)
- [Appealing Temporary Relief Orders;](#)
- [Appealing Domestic Violence Injunctions;](#)
- [Appealing Discovery Orders \(Writs of Certiorari\);](#)
- [Appealing to Disqualify a Biased Judge \(Writs of Prohibition\);](#) and
- [Appealing to Make a Judge Take Action \(Writs of Mandamus\)](#)