

Family Law Section  
by Cynthia Swanson

Here is a review of some recent interesting cases which may of interest to family law and tort practitioners. I obtained much of this information from the Florida Family Law Reporter and from the Statewide Florida Guardian ad Litem Legal Briefs Newsletter.

The “Keeping Children Safe Act” does not apply to dissolution of marriage proceedings. *See, Mahmood v. Mahmood*, Fla. App. LEXIS 572, -- Fla. L. Weekly --, -- So. 2d – Fla. (Fla. 4th DCA Jan. 28, 2009). During a dissolution of marriage proceeding, the trial court set up a temporary visitation (or timesharing) schedule. The two children were 15 year old and 17 year old boys. The mother accused the father of inappropriate sexual contact with the boys, and made a report to the child abuse hotline, and filed a motion to suspend visitation. She also filed a motion for a hearing under Florida Statutes Section 39.0139, the "Keeping Children Safe Act." In her motion, the mother stated that she had reported the father to a child abuse hotline and she sought (1) appointment of a guardian ad litem, (2) prohibition of visitation until the Section 39.0139 hearing, and (3) cancellation of a scheduled hearing on her prior motion to protect the children from lewd and lascivious molestation. The father filed several motions for contempt for the mother’s failure to comply with the temporary visitation schedule. The trial court held several hearings, heard testimony from a detective who had investigated the abuse claims who said he believe the reports were unfounded and there was no probable cause for any arrest. The Court also appointed a guardian ad litem, but ordered the mother to comply with the temporary visitation order. The trial court also held that Section 39.0139 was not applicable in dissolution of marriage proceedings under Florida Statutes Chapter 61.

The Mother filed a Petition for Writ of Certiorari to the Fourth District Court of Appeal. The appellate court ruled that a petition for writ of certiorari was appropriate to be filed in this case, but ruled against the mother. The appellate court held that the presumptions and remedies provided for in Chapter 39 are not applicable to the Chapter 61 proceedings, because dissolution of marriage courts already have broad powers to protect children. Chapter 39 provides an entry into the court system for children who may need protection in the form of dependency and termination of parental rights proceedings. In the instant case, there were dissolution of marriage proceedings pending, and the court in which the proceedings were being conducted was a family division of the circuit court, not a division that hears a docket of dependency and parental termination cases.

The “parenting plan” legislation changes don’t really mean that much. *See, Lombard v. Lombard*, 2008 Fla. App. LEXIS 19261, -- Fla. L. Weekly --, -- So. 2d -- (Fla. 2d DCA Dec. 19, 2008). The Second District Court of Appeal has held that the changes made by the Legislature effective in October 2008 to delete the terms relating to “custody” and “visitation,” and to instead require the adoption of a “parenting plan” and a “timesharing schedule” don’t really change too much. Specifically, the Court held that the party who has more time with the children is the de facto custodial parent, and the other parent is the de facto visiting parent, and further that only the visiting parent can be entitled to makeup visitation.

Despite acknowledging the statutory nomenclature changes, on reviewing the former statutory provisions concerning visitation, the Second District held that the term "visitation" applies only to a noncustodial parent (citing Florida Statutes Section 61.13(4)(a) ("when a noncustodial parent ... who is afforded visitation rights"), (4)(b)-(c) ("when a custodial parent refuses to honor a noncustodial parent's visitation rights"), and Florida Statutes Section 61.13001(2)(a) ("if the primary residential parent and the other parent ... entitled to visitation rights").

In addition to interpreting the prior statutes as applying visitation only to noncustodial parents, the Second District interpreted the 2008 legislative amendments as continuing that principle. In particular, the court held that the 2008 amendments left the principle the same because the amendments maintain the child's best interests as the standard for making timesharing decisions, and maintain discretion in the trial courts to do equity

Which parent will be a child's "natural guardian" for the purposes of bringing lawsuits under the new "timesharing" terminology? *See, e.g., Gordon v. Colin*, 2008 Fla. App. LEXIS 17318, -- Fla. L. Weekly --, -- So. 2d -- (Fla. 4th DCA, Nov. 12, 2008) The parents of a child had been divorced, with them sharing parental responsibility and the mother having primary residence. The Fourth District Court of Appeal held that a trial court correctly interpreted Florida Statutes Section 744.301 to mean that because a father did not have primary residential custody of his son, he was not his son's natural guardian and therefore, he did not have standing to file a tort suit on his son's behalf against a third party.

Under the 2008 legislation, parents and courts may opt for shared parental responsibility arrangements that are based on a traditional primary-residence-and-visitation model as part of their parenting plans, but if traditional terminology is not used in the plans, it is not clear how the statute at issue in this case, Florida Statutes Section 744.301 regarding natural guardians and parental authority to sue on a child's behalf, should be interpreted. That is, if there is no "primary residential parent," it is not clear which parent will be deemed the natural guardian of their child.

It may come down to counting who has the most overnights. *See Lombard* above. Or if parents have equal timesharing under their parenting plan and the 2008 legislation, the arrangement may be equivalent to "joint custody" under Section 744.301, and both parents may continue to be "natural guardians" of their child. There has not been a case on this point yet.

Findings of Fact ARE Required to Justify an Award of Shared Parental Responsibility where the father was incarcerated, was a convicted felon, had threatened bodily harm to himself and his wife, had a history of substance abuse, depression, anger-control problems, and criminal conduct with a deadly weapon. Seems the First District Court of Appeal wasn't able to affirm that decision without some findings of fact. *Smith v. Smith*, 971 So.2d 191 (Fla. 1<sup>st</sup> DCA 2007).

Modification of Alimony Based on Cohabitation- Conflict Between Jurisdictions- The Fourth District Court of Appeal has held that a relationship between an alimony-obligee and his or her cohabitant must be the *economic* equivalent of a marriage to qualify as a statutory "supportive relationship" that will allow a reduction in, or termination of, alimony. *See Linstroth v. Dorgan*, 2008 Fla. App. LEXIS 8434, 33 Fla. L. Weekly D1520, \_\_\_ So. 2d \_\_\_ (Fla. 4th DCA June 11,

2008), reh. denied, 2008 Fla. App. LEXIS 13910 (Sept. 3, 2008). The Second District Court has held that economic impact is only one factor to consider in determining whether a supportive relationship exists as contemplated by the statute ( Buxton v. Buxton, 963 So. 2d 950 (Fla. 2d DCA 2005)).

Party Requesting Alimony Has Burden to Show Lack of Income -More Conflict Between Jurisdictions--In a decision that may conflict with decisions by the Fifth District Court of Appeal on the same issue, the Second District Court of Appeal has held that a spouse who is requesting alimony has the burden to prove that he or she is unable to work and is not voluntarily unemployed if the other spouse requests that income be imputed to the requesting spouse on the basis he or she could be employed. Esaw v. Esaw, 965 So. 2d 1261, 1267 (Fla. 2d DCA 2007) (noting possible conflict with, e.g., Andrews v. Andrews, 867 So. 2d 476, 478 n.2 (Fla. 5th DCA 2004) (party asserting that spouse is voluntarily unemployed or underemployed has burden of proof).

Trial Court May Consider Marketability Discount in Valuing Close Corporation--The Second District has held that trial courts may apply marketability discounts in valuing the shares of closely held corporations or corporate stock. If the evidence is sufficient to support application of such a discount, the court does not abuse its discretion in doing so. Erp v. Erp, 976 So. 2d 1234, 1239 (Fla. 2d DCA 2008).

Finally, I wanted to mention an oldie but goodie, and what may be my favorite case of all time: Gilman v. Butzloff, 155 Fla. 888, 22 So.2d 263 (Fla. 1945): “A party may waive any right to which he is legally entitled, whether secured by contract, conferred by statute, or guaranteed by the Constitution.” Keep a copy of that one on your desk.