2010

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

BETWEEN:

PETITIONER

and

RESPONDENT

EXPERT'S REPORT ON FLORIDA MATRIMONIAL LAWS

Submitted on behalf of

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EXPERT REPORT OF MATTHEW SHIRK NUGENT, ESQUIRE

1. Preliminary Information and Commentary

The purpose of this report is to provide a general summary of the current matrimonial laws of the State of Florida, in the United States of America in relation to the following issues:

- Divorce/Dissolution of marriage;
- Custody and access;
- Child support;
- Spousal support/Alimony;
- Interpretation and application of a Marriage Contract;
- Property division;
- Costs/Attorney's fees; and,
- Rules of disclosure.

In preparing this report, it was understood that this report would be used to provide evidence to assist the Supreme Court of Nova Scotia (Family Division) understand differences or similarities between the current matrimonial laws of Nova Scotia and Florida in the context of a *forum non conveniens* analysis.

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To give context to the issues above, general questions were provided to assist in determining what information and opinions to include in the report. The questions provided were as follows:

- What are the requirements which must be met before a marriage can be dissolved? Can a dissolution of marriage be granted on its own without any other related relief?'

- How will a Court determine custody, access, and parenting in Florida? What factors does the Court consider in making this determination?

- How is child support determined in Florida? What factors are considered? What party's income is relevant and how is income determined?

- How is the quantum and duration of alimony determined in Florida? What factors will the Court consider in making this determination? How will income be determined? Will the Court take into account the division of assets or is the determination of alimony made without regard to the division of assets?

- What is the effect of an agreement made by the parties during their marriage on the dissolution of marriage? What are the requirements for a valid agreement? What issues may be dealt with in the agreement? On what basis will a Court overturn such an agreement? What effect does a choice of law or choice of forum clause in such an agreement have on the enforcement of the agreement?

- How is the division of property determined in Florida as between married spouses? How are assets and debts classified? How are assets and debts valued? What assets and debts will be considered matrimonial? What happens to business assets?

- What are the rules of financial disclosure between parties in a matrimonial action in Florida?

In addition, it was requested that this report provide the source of any opinion information included herein, such as relevant legislative provisions or jurisprudence.

Other than the steps outlined above, the report was prepared based on a review of Florida legislation and common law jurisprudence, as well as experience of the undersigned. Sources consulted to arrive at and prepare the opinions herein, as well as the sources referred to herein, are

summarized at **Exhibit "B"** attached hereto.

The opinions here are not based on factual underpinnings, nor have any specific facts been used to formulate or confirm the opinions herein.

No transcripts, decisions, pleadings, or documents filed in any current proceedings between ________________and ____________were provided or used to prepare this report.

The undersigned has confidence in the opinions provided herein. However, as matrimonial and family law is largely dependent on the particular facts and circumstances of a case, the opinions herein are provided in a general context. Any further qualification on a particular opinion provided herein is set out in the relevant portion of this report.

2. Representations to the Court by Expert:

Pursuant to **Nova Scotia Civil Procedure Rule 55.04**, and in connection with my report dated August ___, 2011, I represent to the Supreme Court of Nova Scotia (Family Division) as follows:

a) I am providing this report as an objective opinion for the assistance of the court, even though I was retained on behalf of the Petitioner;

b) I am prepared to testify at the trial or hearing, comply with directions of the court and apply independent judgment when assisting the court;

c) My report includes everything I regard as relevant to the expressed opinion and it draws attention to anything that could reasonably lead to a different conclusion;

d) I will answer written questions put by parties as soon as possible after the questions are delivered to me;

e) Through legal counsel for the Petitioner, I will notify each party in writing of a change in my opinion, or of a material fact that was not considered when the report was prepared and could reasonably affect the opinion, as soon as possible after arriving at the changed opinion or becoming aware of the material fact;

f) My Curriculum Vitae is attached hereto as **Exhibit "A"** which provides my qualifications for making this report.

I also confirm that I have reviewed **Nova Scotia Civil Procedure Rule 55.04** and that my report contains the information required by the Rule.

____

MATTHEW S. NUGENT

3. Report

A. **Divorce/Dissolution of Marriage**

In Florida, dissolution of marriage is a statutory cause of action and a marriage cannot terminate without the entry of a court order. Florida Statute Chapter 61 designates proceedings under this chapter are to occur in chancery. Further, Chapter 61 regulates entitlement to a dissolution of marriage and all rights and obligations in connection with same. Florida is a "no-fault" state meaning fault need not be proved to entitle a spouse to a dissolution of marriage. Currently, the two grounds which entitle a person to a final judgment of dissolution of marriage are: 1) the marriage is irretrievably broken or 2) one of the parties has been adjudged mentally incapacitated for at least three years. Florida dissolution of marriage proceedings occur in the family division of the various circuit courts throughout the state.

The statutory test for determining if a marriage is irretrievably broken is whether for whatever reason or cause the marriage relationship is for all intents and purposes ended, no longer viable, a hollow sham beyond reconciliation or repair. *Ryan v. Ryan*, 277 So.2d 266, 271 (Fla. 1973). It is the state of mind of husband and wife toward each other and their marital relationship that should be considered rather than objective observable facts. *Riley v. Riley*, 271 So.2d 181 (Fla. 1st DCA 1972).

A party can also rely on mental incapacity as a ground for dissolution of marriage. To rely on this ground, the party alleged to be incapacitated must be adjudged so under Florida Statute 744.331 for a minium of three years. Florida Statute 61.052 governs dissolution proceedings based on incapacity.

Lastly, a court cannot grant a valid judgment of dissolution of marriage unless one of the parties has resided in Florida for the six months before the filing of the petition. See Florida Statute 61.021. This six-month residence requirement is a legislatively imposed condition precedent to the jurisdiction of the circuit court.

B. **Custody and Access**

Prior to a dissolution of marriage, both parents are joint natural guardians of their minor children and have joint and equal rights of access, care and control. If the parties are unable to reach an agreement as to access, care and control of their minor children, then the judge determines same. The public policy of Florida is that each minor child should have frequent and continuing contact with both parents after dissolution of marriage and that parents should share the rights and responsibilities of child rearing. The primary consideration in determining access, care and control is the best interest of the minor children.

Florida Statute 61.13 is the primary parenting statute in Florida. It defines the preferred legal relationship between parents and children after dissolution as "shared parental responsibility," in which both parents have the same legal rights to make major decisions regarding the children's health, education, and welfare. The Court shall order that the parental responsibility for a minor child be shared by both parents unless the court finds that same would be detrimental to the child.

The opposite of shared parental responsibility is sole parental responsibility, which is a court ordered relationship in which one parent makes decisions regarding the minor children. Sole parental responsibility can be ordered only if shared parental responsibility would be detrimental to the children. A court can also award one parent ultimate responsibility over specific aspects of the children's welfare, even when shared parental responsibility is ordered.

A court must approve, grant or modify a parenting plan in all cases involving minor children. This parenting plan, at a minimum, must describe in adequate detail how the parents will share and be responsible for the daily tasks associated with the upbringing of the children; the time sharing schedule arrangements that specify the time that the minor children will spend with each parent, a designation of who will be responsible for any and all forms of health care, school related matters including the address to be used for school boundary determination and registration, and other activities, and the methods and technologies that the parents will use to communicate with the minor children. *F.S. 61.13 (2) (b).* The Court shall determine all matters relating to parenting and timesharing of each minor child in accordance with the best interests of the child and in accordance with the Uniform Child Custody Jurisdiction and Enforcement Act.

In establishing parental responsibility and creating, developing or approving a parenting plan, the best interests of the minor children shall be the primary consideration. Determination of the best interests of the children shall be made by evaluating all of the factors affecting the welfare and best interests of the children and the circumstances of that family including, but not limited to:

1. The demonstrated capacity and disposition of each parent to facilitate and encourage a close and continuing parent-child relationship, to honor the time-sharing schedule, and to be reasonable when changes are required;

2. The anticipated division of parental responsibilities after the litigation, including the extent to which parental responsibilities will be delegated to third parties;

3. The demonstrated capacity and disposition of each parent to determine, consider, and act upon the needs of the child as opposed to the needs or desires of the parent;

4. The length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity;

5. The geographic viability of the parenting plan, with special attention paid to the needs of school-age children and the amount of time to be spent traveling to effectuate the parenting plan. This factor does not create a presumption for or against relocation of either parent with a child;

6. The moral fitness of the parents;

7. The mental and physical health of the parents;

8. The home, school, and community record of the child;

9. The reasonable preference of the child, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference;

10. The demonstrated knowledge, capacity, and disposition of each parent to be informed of the circumstances of the minor child, including, but not limited to, the child's friends, teachers, medical care providers, daily activities, and favorite things;

11. The demonstrated capacity and disposition of each parent to provide a consistent routine for the child, such as discipline, and daily schedules for homework, meals, and bedtime;

12. The demonstrated capacity of each parent to communicate with and keep the other parent informed of issues and activities regarding the minor child, and the willingness of each parent to adopt a unified front on all major issues when dealing with the child;

13. Evidence of domestic violence, sexual violence, child abuse, child abandonment, or child neglect, regardless of whether a prior or pending action relating to those issues has been brought. If the court accepts evidence of prior or pending actions regarding domestic violence, sexual violence, child abuse, child abandonment, or child neglect, the court must specifically acknowledge in writing that such evidence was considered when evaluating the best interests of the child;

14. Evidence that either parent has knowingly provided false information to the court regarding any prior or pending action regarding domestic violence, sexual violence, child abuse, child abandonment, or child neglect;

15. The particular parenting tasks customarily performed by each parent and the division of parental responsibilities before the institution of litigation and during the pending litigation, including the extent to which parenting responsibilities were undertaken by third parties;

16. The demonstrated capacity and disposition of each parent to participate and be involved in the child's school and extracurricular activities;

17. The demonstrated capacity and disposition of each parent to maintain an environment for the child which is free from substance abuse;

18. The capacity and disposition of each parent to protect the child from the ongoing litigation as demonstrated by not discussing the litigation with the child, not sharing documents or electronic media related to the litigation with the child, and refraining from disparaging comments about the other parent to the child;

19. The developmental stages and needs of the child and the demonstrated capacity and disposition of each parent to meet the child's developmental needs; and

20. Any other factor that is relevant to the determination of a specific parenting plan, including the time-sharing schedule. *See F.S. 61.13.*

C. **Child Support**

In Florida, it is the very strong public policy to require each parent to provide support for his or her children. *Evans v. Evans*, 595 So.2d 988, 990 (Fla. 1st DCA 1992). Child support is a right that belongs solely to the child. *Imani v. Imani*, 584 So.2d 596 (Fla. 2st DCA 1991). The duty to support a child exists both before and after a dissolution of marriage and is independent of any settlement agreement made attendant upon dissolution. See *Cronebaugh v. Van Dyke*, 415 So.2d 738, 741 (Fla. 5th DCA 1982).

Child support in Florida is governed by Florida Statutes 61.13 and 61.30. The amount of child support to be paid by one parent to the other is determined by *F.S.* 61.30, which presumptively establishes the amount the trier of fact shall order as child support. The trier of fact may order payment of child support which varies, plus or minus five percent, from the guideline amount, after considering all relevant factors, including the needs of the child or children, age, station in life, standard of living, and the financial status and ability of each parent. The trier of fact may order payment of child support in an amount which varies more than five percent from such guideline

amount only upon a written finding explaining why ordering payment of such guideline amount would be unjust or inappropriate.

The guidelines in *F.S.* 61.30 provide criteria for calculating each parent's net income and share of responsibility for supporting their children. Income shall be determined on a monthly basis for each parent as follows (See *F.S. 61.30* attached hereto as **Exhibit "C")**:

(a) Gross income shall include, but is not limited to, the following:

1. Salary or wages.

2. Bonuses, commissions, allowances, overtime, tips, and other similar payments.

3. Business income from sources such as self-employment, partnership, close corporations, and independent contracts. "Business income" means gross receipts minus ordinary and necessary expenses required to produce income.

4. Disability benefits.

5. All workers' compensation benefits and settlements.

6. Unemployment compensation.

7. Pension, retirement, or annuity payments.

8. Social security benefits.

9. Spousal support received from a previous marriage or court ordered in the marriage before the court.

10. Interest and dividends.

11. Rental income, which is gross receipts minus ordinary and necessary expenses required to produce the income.

12. Income from royalties, trusts, or estates.

13. Reimbursed expenses or in kind payments to the extent that they reduce living expenses.

14. Gains derived from dealings in property, unless the gain is nonrecurring.

Further, pursuant to Florida Statute 61.30, a Court may impute income to an unemployed or underemployed spouse for purposes of calculating child support. Florida Statute 61.30 (2) (b) provides:

> (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. However, the court may refuse to impute income to a parent if the court finds it necessary for that parent to stay home with the child who is the subject of a child support calculation or as set forth below:
>
> 1. In order for the court to impute income at an amount other than 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, the court must make specific findings of fact consistent with the requirements of this paragraph. The party seeking to impute income has the burden to present competent, substantial evidence that:
>
> a. The unemployment or underemployment is voluntary; and
>
> b. Identifies the amount and source of the imputed income, through evidence of income from available employment for which the party is suitably qualified by education, experience, current licensure, or geographic location, with due consideration being given to the parties' time-sharing schedule and their historical exercise of the time-sharing provided in the parenting plan or relevant order.
>
> 2. Except as set forth in subparagraph 1., income may not be imputed based upon:
>
> a. Income records that are more than 5 years old at the time of the hearing or trial at which imputation is sought; or

b. Income at a level that a party has never earned in the past, unless recently degreed, licensed, certified, relicensed, or recertified and thus qualified for, subject to geographic location, with due consideration of the parties' existing time-sharing schedule and their historical exercise of the time-sharing provided in the parenting plan or relevant order.

Pursuant to Florida Statute 61.30 (3) a parties' net income is obtained by subtracting allowable deductions from gross income. Allowable deductions include the following:

(a) Federal, state, and local income tax deductions, adjusted for actual filing status and allowable dependents and income tax liabilities.

(b) Federal insurance contributions or self-employment tax.

(c) Mandatory union dues.

(d) Mandatory retirement payments.

(e) Health insurance payments, excluding payments for coverage of the minor child.

(f) Court-ordered support for other children which is actually paid.

(g) Spousal support paid pursuant to a court order from a previous marriage or the marriage before the court.

The actual amount of child support is determined by the following formula:

1. Each parent's gross income, including imputed income for an unemployed or underemployed spouse is determined;

2. The parents' net incomes are determined by subtracting the allowable deductions from gross income;

3. The parents' net incomes are added to determined a combined net income;

4. The table in *F.S. 61.30 (6)* is applied to the combined net income of the parents to determine the minimum child support need;

5. Child care costs incurred due to employment, job search, or education calculated to result in employment or to enhance income of current employment of either parent shall be added to the basic obligation. After the child care costs are added, any

moneys prepaid by a parent for child care costs for children of this action shall be deducted from that parent's child support obligation for that child or those children;

6. The cost of health insurance coverage ordered under *F.S. 61.13(1)(b)*, and the cost of noncovered medical and dental care and prescription medications for the children are also added to the basic obligation. After the health insurance costs are added, any moneys prepaid by a parent for health insurance costs for children of this action shall be deducted from that parent's child support obligation for that child or those children;

7. Each parent's percentage share of the child support need is determined by dividing each parent's net income by the combined net income; and

8. Each parent's actual dollar share of the total minium child support need shall be determined by multiplying the minimum child support need by each parent's percentage share of the combined monthly income.

D. **Spousal Support/Alimony**

Alimony or spousal support in Florida is governed by Florida Statute 61.08. In a proceeding for dissolution of marriage, the court may grant alimony to either party which alimony may be bridge-the-gap, rehabilitative, durational or permanent in nature or any combination of these forms of alimony (defined below). In determining whether to award alimony or maintenance, the court shall first make a specific factual determination as to whether either party has an actual need for alimony or maintenance and whether either party has to the ability to pay alimony or maintenance. If the Court determines a party has an actual need for alimony and the other party has an ability to pay same, then in determining the proper type and amount of alimony or maintenance, the court shall consider all relevant factors including, but not limited to:

(a) The standard of living established during the marriage;

(b) The duration of the marriage;

(c) The age and the physical and emotional condition of each party;

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

(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;

(f) The contribution of each party to the marriage, including, but not limited to, services rendered in homemaking, child care, education, and career building of the other party;

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

(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;

(I) All sources of income available to either party, including income available to either party through investments of any asset held by that party; and

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

It should be noted that Florida Statute 61.08 does not provide "alimony guidelines" unlike Florida Statute 61.30 (child support).

In determining a party's ability to pay alimony, the court may consider net worth, past earnings and the value of the parties' assets as well as current income. See leading case in Florida: *Canakaris v. Canakaris*, 3982 so.2d 1197 (Fla. 1980). Further, employment income can be imputed to a spouse in determining alimony, but there must be competent, substantial evidence to support specific findings regarding the source and amount of the income.

For purposes of determining alimony, there is a rebuttable presumption that a short-term marriage is a marriage having a duration of less than 7 years, a moderate-term marriage is a marriage having duration of greater than 7 years but less than 17 years, and a long-term marriage is a marriage having a duration of 17 years or greater. The length of the marriage is the period of time from the

date of the marriage until the date of filing of an action for dissolution of marriage.

As noted above there are several types of alimony in Florida. Bridge-the-gap alimony may be awarded to assist a party by providing support to allow the party to make a transition from being married to being single. Bridge-the-gap alimony is designed to assist a party with legitimate identifiable short-term needs, and the length of an award may not exceed two years.

Rehabilitative alimony may be awarded to assist a party in establishing the capacity of self-support through either: 1)the redevelopment of previous skills or credentials; or 2) the acquisition of education, training, or work experience necessary to develop appropriate employment skills or credentials.

Durational alimony may be awarded when permanent alimony is inappropriate. The purpose of durational alimony is to provide a party with economic assistance for a set period of time following a marriage of short or moderate duration. An award of durational alimony terminates upon the death of either party or remarriage of the party receiving alimony.

Permanent alimony is defined as an allowance for the support and maintenance of a spouse during his or her lifetime. Its purpose is to provide nourishment, sustenance and the necessities of life to a former spouse who has neither the resources nor ability to be self-sustaining. Permanent alimony may be awarded to provide for the needs and necessities of life as they were established during the marriage of the parties for a party who lacks the financial ability to meet his or her needs and necessities of life following a dissolution of marriage. Permanent alimony may be awarded following a marriage of long duration, following a marriage of moderate duration if such an award is appropriate upon consideration of the factors set forth in *F.S.* 61.08 (2) or following a marriage

of short-term duration if there are exceptional circumstances. An award of permanent alimony terminates upon the death of either party or remarriage of the party receiving alimony.

Further, it should be noted that temporary alimony may be awarded during the dissolution proceedings. Temporary alimony is determined using the same standards as traditional alimony, i.e. need and ability to pay.

Additionally, Florida courts have jurisdiction to entertain a separate maintenance action under Florida Statute 61.09, for alimony and child support unconnected with marriage dissolution brought by a non-resident of Florida who is temporarily residing in Florida. Florida Statute 61.09 provides:

> "If a person having the ability to contribute to the maintenance of his or her spouse and support of his or her minor child fails to do so, the spouse who is not receiving support may apply to the court for alimony and for support for the child without seeking dissolution of marriage, and the court shall enter an order as it deems just and proper."

In *Weinschel v. Weinschel* 368 So.2d 386 (Fla. 3rd DCA 1979), the appellate court reversed an order dismissing the wife's counterclaim for separate maintenance, holding:

> "It is the established law of this state that Florida courts have jurisdiction to entertain a separate maintenance action under Section 61.09, Florida Statutes (1977), for alimony and child support unconnected with marriage dissolution brought by a non-resident of Florida who is temporarily in this state. Residency in Florida by either party to the proceeding is not required in order to bring such a separate maintenance action. A contrary rule would make public charges out of non-resident spouses and children in this state when the respective providing spouse refuses to support them. For purposes of a separate maintenance action, it is therefore irrelevant where the parties permanently reside or where their marital domicile is located.
>
> Moreover, it is clear that there are no fault prerequisites to an award of alimony or child support apart from marriage dissolution in a separate maintenance action brought under Section 61.09, Florida Statutes."

E. **Interpretation and Application of Marriage Contract**

A valid postnuptial agreement must be entered into with adequate consideration (mutual;

promises encompassing various rights of the parties, in addition to disposing of property owned by them have been considered adequate consideration), mutual consent (the agreement was executed voluntarily and knowingly), legal purpose (the agreement must not expressly encourage divorce) and in compliance with the Statute of Frauds (agreement must be in writing and signed by the person against whom enforcement is sought or, in some instances, an agreement read into the record which settles material matters with sufficient certainty).

A postnuptial agreement can settle all rights and claims between the parties or can serve as a "piecemeal" settlement. Specifically, a postnuptial agreement can settle all parenting issues including parental responsibility and timesharing issues, distribution of property, alimony, child support (although a Court is not required to accept a parties' agreement to child support if same is not by the Guidelines), attorney's fees and costs and any other marital rights, claims or interests.

A postnuptial agreement can have a significant impact on the outcome of a dissolution proceeding. If a Court deems the agreement to be valid, then both parties will be required to abide by the terms of the agreement or a noncompliant party could face contempt of court or other sanctions.

If a final judgment has not been entered, the Florida courts shall apply the same principles applicable to prenuptial agreements when faced with a challenge to the agreement's validity. An otherwise enforceable marital settlement agreement may be set aside or modified on two different levels. First, an agreement shall be set aside if it is established that same was reached as a result of fraud, overreaching, coercion and misrepresentation. See *Casto v. Casto*, 530 So.2d 330 (Fla. 1987). Second, an agreement can be set aside if the challenging spouse establishes the Agreement makes an unfair or unreasonable provision for that spouse, given the circumstances of the parties. Once

unfairness is established, a presumption arises that there was either concealment or a presumed lack of knowledge of the defending spouse's finances at the time the agreement was reached. The burden then shifts to the defending spouse and can be rebutted upon a showing of: 1) the defending spouse made full, frank financial disclosure or b) the challenging spouse had a general knowledge of the character and extent of the other party's assets and income.

It should be noted that a bad bargain, by itself, is not sufficient grounds to set an agreement aside. Further, a bad fiscal bargain that appears unreasonable can still be knowingly entered into for reasons other than insufficient knowledge of assets and income. If an agreement that is unreasonable is nonetheless entered into, it is still enforceable. Lastly, lack of competent assistance of counsel is no basis to vacate an agreement.

Furthermore, *Casto* concepts of fairness do not apply to agreements reached during litigation. See *Petracca v. Petracca*, 706 So.2d 904 (Fla. 4th DCA 1998). In *Petracca*, the court recognized that after resorting to litigation over marital property rights, neither spouse can be thought to be dealing as fiduciaries. Once a case has been litigated, the resulting settlement agreement is not governed by the *Casto* test of fairness. A spouse challenging such an agreement where both parties were adversaries is limited to showing actual fraud, misrepresentation or coercion and cannot claim unfairness. Further, when spouses are involved in litigation over dissolution of marriage, property and other rights, there can be no question of adequacy of knowledge.

Choice of law provisions in marital settlement agreements are enforced in Florida courts absent a public policy violation. *McNamara v. McNamara*, 40 So.3d 78 (Fla. 5th DCA 2010). The mere difference between the law of the forum and that of a foreign state does not make application of the foreign law contrary to Florida public policy. See *McNamara*. Florida courts will only deem

a choice of law provision invalid if the court finds the contract is injurious to the interest of the public or contravenes some established interest in society. See *McNamara*.

In regard to forum selection clauses, said clauses are considered mandatory where it requires that a particular forum be the exclusive jurisdiction for litigation concerning the contract. *East Coast Karate Studios, Inc. v. Lifestyle Martial Arts, LLC*, 2011 Fla. App. LEXIS 10549 (Fla. 4th DCA 2011). A litigant can overcome this presumption if they show the contracted forum will be so gravely difficult and inconvenient that [they] will for all practical purposes be deprived of [their] day in court. *See East Coast Karate Studios, Inc.* and *Manrique v. Fabbri*, 493 So.2d 437, 440 (Fla. 1986). The right of forum selection for contract disputes is premised on the generally accepted notion that forum selection clauses provide a degree of certainty to contracts by obviating jurisdictional struggles and by allowing parties to tailor the dispute resolution mechanism to their particular situation. See *Golden Palm Hospitality, Inc. V. Stearns Bank, N.A.*, 874 So.2d 1231 (Fla. 5th DCA 2004).

F. **Property Division**

Florida Statute 61.075 authorizes courts to distribute marital assets and liabilities between spouses in dissolution of marriage cases. Equitable distribution of the parties' marital assets is the first order of business in a dissolution case. *See Paul v. Paul*, 648 So.2d 1211 (Fla. 5th DCA 1995). Initially, the Court must classify all assets and liabilities as either marital or nonmarital. Marital assets and liabilities include assets acquired and liabilities incurred during the marriage, individually by either spouse or jointly by them including business assets; the enhancement in value and appreciation of nonmarital assets resulting 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; interspousal gifts during the marriage; all vested and non-vested benefits, rights and funds accrued during the marriage in retirement, pension, profit-sharing, annuity, deferred compensation, and insurance plans and programs; all real property held by the parties as tenants by the entireties, whether acquired prior to or during the marriage; and all personal property titled jointly by the parties as tenants by the entireties, whether acquired prior to or during the marriage.

Nonmarital assets include all assets and liabilities acquired or incurred by either party prior to the marriage, and assets acquired and liabilities incurred in exchange for such assets and liabilities; assets acquired separately by either party by non-interspousal gift, bequest, devise or descent and assets acquired in exchange for such assets; all income derived from nonmarital assets during the marriage unless the income was treated, used or relied upon by the parties as a marital asset; assets and liabilities excluded from marital assets and liabilities by valid written agreement of the parties; and any liability incurred by forgery or unauthorized signature of one spouse signing the name of the other spouse.

The cut-off date for determining assets and liabilities to be identified or classified as marital assets and liabilities is the earliest of the date the parties enter into a valid separation agreement, such other date as may be expressly established by such agreement, or the date of the filing of a petition for dissolution of marriage. The date for determining value of assets and the amount of liabilities identified or classified as marital is the date or dates as the judge determines is just and equitable under the circumstances. Different assets may be valued as of different dates at the judge's discretion.

Once the classification is complete, the court must distribute to each spouse that spouse's nonmarital assets and liabilities. Thereafter, marital assets and liabilities must be distributed. The

Court must begin with the premise that the distribution should be equal, unless there is a justification for an unequal distribution based on all relevant factors including:

> (a) The contribution to the marriage by each spouse, including contributions to the care and education of the children and services as homemaker;
>
> (b) The economic circumstances of the parties;
>
> (c) The duration of the marriage;
>
> (d) Any interruption of personal careers or educational opportunities of either party;
>
> (e) The contribution of one spouse to the personal career or educational opportunity of the other spouse;
>
> (f) The desirability of retaining any asset, including an interest in a business, corporation, or professional practice, intact and free from any claim or interference by the other party;
>
> (g) 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 nonmarital assets of the parties;
>
> (h) The desirability of retaining the marital home as a residence for any dependent child of the marriage, or any other party, when it would be equitable to do so, it is in the best interest of the child or that party, and it is financially feasible for the parties to maintain the residence until the child is emancipated or until exclusive possession is otherwise terminated by a court of competent jurisdiction. In making this determination, the court shall first determine if it would be in the best interest of the dependent child to remain in the marital home; and, if not, whether other equities would be served by giving any other party exclusive use and possession of the marital home;
>
> (i) The intentional dissipation, waste, depletion, or destruction of marital assets after the filing of the petition or within 2 years prior to the filing of the petition; and
>
> (j) Any other factors necessary to do equity and justice between the parties.

Further, the Court must make written findings assigning a value to the parties' significant assets. It is the attorney or pro se litigant's duty to present competent substantial evidence of the value of assets to the Court.

G. **Costs/Attorney's Fees**

Florida Statute 61.16 governs awards of attorney's fees and costs in Florida dissolution of marriage proceedings. *F.S.* 61.16 provides in pertinent part:

> (1) The court may from time to time, after considering the financial resources of both parties, order a party to pay a reasonable amount for attorney's fees, suit money, and the cost to the other party of maintaining or defending any proceeding under this chapter, including enforcement and modification proceedings and appeals. In those cases in which an action is brought for enforcement and the court finds that the noncompliant party is without justification in the refusal to follow a court order, the court may not award attorney's fees, suit money, and costs to the noncompliant party. An application for attorney's fees, suit money, or costs, whether temporary or otherwise, shall not require corroborating expert testimony in order to support an award under this chapter. The trial court shall have continuing jurisdiction to make temporary attorney's fees and costs awards reasonably necessary to prosecute or defend an appeal on the same basis and criteria as though the matter were pending before it at the trial level. In all cases, the court may order that the amount be paid directly to the attorney, who may enforce the order in that attorney's name. In determining whether to make attorney's fees and costs awards at the appellate level, the court shall primarily consider the relative financial resources of the parties, unless an appellate party's cause is deemed to be frivolous. In Title IV-D cases, attorney's fees, suit money, and costs, including filing fees, recording fees, mediation costs, service of process fees, and other expenses incurred by the clerk of the circuit court, shall be assessed only against the nonprevailing obligor after the court makes a determination of the nonprevailing obligor's ability to pay such costs and fees. The Department of Revenue shall not be considered a party for purposes of this section; however, fees may be assessed against the department pursuant to S.57.105.

In *Rosen v. Rosen*, 696 So.2d 697, 699 (Fla. 1997), the Court held the purpose of Florida Statute 61.16 is to ensure that both parties have similar ability to secure competent legal counsel. To satisfy this objective, the trial court must look to each spouse's need for suit money versus each spouse's respective ability to pay. Thus, the award of attorneys' fees in dissolution proceedings generally depends on the relative financial circumstances of the parties rather than on who "won." However, the court may consider all relevant factors including the scope and history of the litigation; the duration of the litigation; the merits of the respective positions; whether the litigation is brought

or maintained primarily to harass (or whether a defense is raised mainly to frustrate or stall); and the existence and course of prior or pending litigation in exercising its discretion to award attorney's fees.

The amount of attorney's fees awarded to a spouse is calculated using the "lodestar" method. The "lodestar" amount is determined by multiplying the number of hours reasonably expended by a reasonable hourly rate. Once the "lodestar" amount is determined, the trial court has broad discretion to adjust the amount of the award after considering "all the circumstances surrounding the suit." See *Rosen*.

It should be noted that temporary attorney's fees may be awarded to allow a party to obtain counsel. The appropriate inquiry and standard to be applied [need and ability to pay] is the same whether the fees requested are temporary or final. *Nichols v. Nichols*, 519 So.2d 620, 622 (Fla. 1988).

H. **Rules of Disclosure**

Florida Family Law Rule of Procedure 12.285 requires service of specified documents on the other party in Chapter 61 proceedings wherein permanent financial relief is requested. These documents include the following: a financial affidavit in substantial conformity with Florida Family Law Rules of Procedure Form 12.902 (b) or (c); all federal and state income tax returns, gift tax returns and intangible personal property tax returns filed by the party for the past three years; IRS forms W-2, 1099, and K-1 for the past year; pay stubs or other evidence of earned income for the three months prior to service of the financial affidavit; a statement by the producing party identifying the amount and source of all income received from any source during the 3 months preceding the service of the financial affidavit required by this rule if not reflected on the pay stubs produced; all

loan applications and financial statements prepared or used within the 12 months preceding service of that party's financial affidavit required by this rule, whether for the purpose of obtaining or attempting to obtain credit or for any other purpose; all deeds within the last 3 years, all promissory notes within the last 12 months, and all present leases, in which the party owns or owned an interest, whether held in the party's name individually, in the party's name jointly with any other person or entity, in the party's name as trustee or guardian for any other person, or in someone else's name on the party's behalf; all periodic statements from the last 3 months for all checking accounts, and from the last 12 months for all other accounts (for example, savings accounts, money market funds, certificates of deposit, etc.), regardless of whether or not the account has been closed, including those held in the party's name individually, in the party's name jointly with any other person or entity, in the party's name as trustee or guardian for any other person, or in someone else's name on the party's behalf; all brokerage account statements in which either party to this action held within the last 12 months or holds an interest including those held in the party's name individually, in the party's name jointly with any person or entity, in the party's name as trustee or guardian for any other person, or in someone else's name on the party's behalf; the most recent statement for any profit sharing, retirement, deferred compensation, or pension plan (for example, IRA, 401(k), 403(b), SEP, KEOGH, or other similar account) in which the party is a participant or alternate payee and the summary plan description for any retirement, profit sharing, or pension plan in which the party is a participant or an alternate payee; the declarations page, the last periodic statement, and the certificate for all life insurance policies insuring the party's life or the life of the party's spouse, whether group insurance or otherwise, and all current health and dental insurance cards covering either of the parties and/or their dependent children; corporate, partnership, and trust tax returns for the last 3 tax years

if the party has an ownership or interest in a corporation, partnership, or trust greater than or equal to 30%; all promissory notes for the last 12 months, all credit card and charge account statements and other records showing the party's indebtedness as of the date of the filing of this action and for the last 3 months, and all present lease agreements, whether owed in the party's name individually, in the party's name jointly with any other person or entity, in the party's name as trustee or guardian for any other person, or in someone else's name on the party's behalf; all written premarital or marital agreements entered into at any time between the parties to this marriage, whether before or during the marriage; all documents and tangible evidence supporting the producing party's claim that an asset or liability is nonmarital, for enhancement or appreciation of nonmarital property, or for an unequal distribution of marital property. The documents and tangible evidence produced shall be for the time period from the date of acquisition of the asset or debt to the date of production or from the date of marriage, if based on premarital acquisition; and any court orders directing a party to pay or receive spousal or child support. See *Fla. Fam. Law R. P. 12.285.*

The above mentioned documents required to be served on the opposing party serve as a basic outline for discovery in Florida dissolution proceedings. Typically, parties also serve requests to produce and interrogatories on opposing parties to ensure receiving a complete picture of the financial background of said party.

MATTHEW S. NUGENT

EXHIBIT A

CURRICULUM VITAE

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Admitted to the Florida State Bar 1982 to present
Florida Bar Board Certified Marital and Family Law 1995 to present
Fellow of The American Academy of Matrimonial Lawyers 1996 to present

HONORS:

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EDUCATION:

Stetson University College of Law
Juris Doctor, December 1981
University of Florida
Bachelor of Science in Accounting, May 1979

PUBLISHED CASES:

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Married:	Caroline Nugent, 1980
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	Brittany Nugent, Esquire
	Chase Nugent, Student, University of Florida Levin College of Law
	Dylan Nugent, Student, University of Florida

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