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ALIMONY

[The initial award of alimony upon a dissolution of marriage]

Presented on behalf of Three Rivers Legal Services

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- I. Purpose – “Permanent periodic alimony is used to provide the needs and the necessities of life to a former spouse as they have been established by the marriage of the parties.” Canakaris v. Canakaris, 382 So. 2d 1197, 1201 (Fla. 1980)
- A. A trial court should determine the amount of alimony in accordance with the parties' standard of living during the marriage. See, e.g., Laz v. Laz, 727 So. 2d 966, 967 (Fla. 2d DCA 1998). "In determining the amount of alimony, the trial court should ensure that each party's standard of living comes as close as possible to the prior lifestyle, given the available financial resources. Griffin v. Griffin, 906 So. 2d 386, 389 (Fla. 2d DCA 2005).” Mills v. Mills, 62 So. 3d 672, 676 (Fla. 2DCA 2011).
- B. “Unfortunately, when the dance of marriage has reached its "fine" and the time arrives to pay the fiddler, the predilections for unrestrained pleasures, more often than not, then turn into hues and cries of poverty and despair. Nonetheless, cloth must be cut to fit the pattern, and if excessive indulgences, as a customary norm, accompany private wealth they may very well establish a pattern. Firestone v. Firestone, 263 So. 2d 223, 227 (Fla. 1972).
- C. However, a payor cannot be required to support the former spouse in the marital lifestyle if the payor cannot afford to do that. See, e.g., Ginsburg v. Ginsburg, 610 So.2d 655 (Fla. 1DCA 1992); Squindo v. Osuaa-Squindo, 943 So. 2d 232 9Fla. 3DCA 2006) (Almony award which equals 70% of husband’s net monthly income is excessive.).
- II. P-E-A-C-E
- A. This is the order in which the trial court must rule on the issues before it. E (equitable distribution) comes before A (alimony). The court must consider all financial circumstances when making an award of alimony.
- B. So, for example, if a house which is paid for is awarded to one party, then that

party has no need for funds to pay for rent or for a mortgage payment. Or, if a large investment account is awarded to a party, then income which that investment account may be likely to produce would be included in that party's income in determining his or her need for or ability to pay alimony. Until the assets and debts are identified, valued, and distributed, the court can't know really what each party's needs and abilities will be in connection with an alimony issue.

III. Temporary Awards

- A. May be requested by either the Petitioner or the Respondent in the initial pleadings or by a motion filed later. It is intended to provide support and to prevent the recipient spouse from becoming a charge on the state while his or her rights are being adjudicated.
- B. If the request is well-founded, the court must award a reasonable sum for temporary alimony. Fla. Stat. § 61.07.
- C. Criteria for temporary award is the same for permanent award: Need and ability to pay. "In making a temporary alimony and child support award of \$215 biweekly, plus half the mortgage payments on the parties' home for which the husband was obligated anyway, the trial judge observed that "the only thing I am doing is keeping everybody alive until the final hearing." This just-prevent-them-from-going-to-the-poorhouse-until-the-case-is-over view of the legal principle controlling pendente lite awards, which is directly reflected in the inadequacy of the sums provided, is both widely held and thoroughly wrong." Vickers v. Vickers, 413 So. 2d 788, 789 (Fla. 3DCA 1982)

IV. Factors for Court to Consider [see Fla. Stat. § 61.08(2)]

- A. Parties' standard of living established during marriage.
- B. The duration of the marriage. New as of 01/01/2011 - Fla. Stat. §61.08(4):
 - 1. Short term marriage – less than 7 years;
 - 2. Moderate-term marriage – greater than 7 years but less than 17 years;
 - 3. Long-term marriage – 17 years or greater.
 - 4. The length of a marriage is the period of time from the date of marriage until the date of filing of an action for dissolution of 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.
 - J. Any other factor necessary to do equity and justice between the parties.
- V. Marital Misconduct
- A. Adultery – The adultery of either party is specifically mentioned in Fla. Stat. §61.08(1) as a matter which the court may consider, along with all the other factors listed in §61.08(2). In my experience, however, it would have to be pretty egregious and really affect the need or ability to pay; otherwise, trial judges are pretty much not interested in hearing about adultery. Most appellate courts have held that, unless the adultery is related to a wasting of marital assets, it's not relevant. Noah v. Noah, 491 So.2d 1124 (Fla. 1986); Siegel v. Siegel, 564 So.2d 226 (Fla. 5DCA 1990).
 - B. Spouse Abuse – This is confusing in the cases, because in some it appears that alimony was awarded really as a measure of damages for an intentional tort. See, e.g. Garces v. Garces, 704 So.2d 1106 (Fla. 3DCA 1998).
 - C. Attempted Murder of Spouse. Not even the attempted murder by the wife of her husband was a reason to deny the wife a proper equitable distribution of their property, nor to deny her the permanent alimony she needed. Mosbarger v. Mosbarger, 547 So. 2d 188 (Fla. 2DCA 1989).

D. Any Other Factor – Fla. Stat. §61.08(2)(j) allows the court to take into account any other factor necessary to do equity and justice between the parties.

VI. Types of alimony - New as of 01/01/2011 - Fla. Stat. §61.08(5), (6), (7), (8)

A. **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 2 years**. An award of bridge-the-gap alimony **terminates upon the death of either party or upon the remarriage of the party receiving alimony**. An award of bridge-the-gap alimony shall **not be modifiable** in amount or duration.

1. **What do you need to prove to get it:** Need and ability to pay! Put on evidence about marital lifestyle, incomes and expenses; plus the sort of one-time only expenses that may be needed to set up a separate household, such as first and last month's rent, utility deposits, moving expenses, pet deposits, and so on.
2. **What do you need to prove to defend against it:** Your client can't afford it - show client's income and expenses, with nothing left over at the end of the month. OR the other party can afford his/her own set up expenses; his or her parents or new girlfriend or boyfriend are really paying for all that (although this won't always work - fact that parents are chipping in doesn't absolve ex-spouse of obligation to pay).

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

1. In order to award rehabilitative alimony, there must be a **specific and defined rehabilitative plan** which shall be included as a part of any order awarding rehabilitative alimony.
 - a. **What do you need to prove to get it:** Need and ability to pay. Put on evidence of incomes and expenses; the client can't pay his/her own expenses on present income; that client has the likelihood of becoming self-supporting via a certain plan. Must be specific and detailed in presenting the plan. Just saying "go to nursing school" is not good enough. Is he/she presently qualified or need some pre-qualification? Where? Starting when? How long will it take? How much will it cost for tuition, books, labs, etc.? How much is

needed in living expenses during that time? Assuming client completes program on schedule, what degree will he/she get? With that degree, what is the job client is aiming for? How much does client expense he/she will earn at that job? What benefits will be available?

- b. **What do you need to prove to defend against it:** Party does not need additional training; present job is good enough, opportunities for advancement available without additional training; party never wanted additional training before; party is not capable of completing additional training (although be careful here; you don't want to talk yourself into a permanent alimony award).

2. An award of rehabilitative alimony **may be modified or terminated** based upon a substantial change in circumstances, upon noncompliance with the rehabilitative plan, or upon completion of the rehabilitative plan. A specific and detailed plan is more capable of objective evaluation - is party complying with the plan or not? - and so beneficial to both sides (and the trial judge who may be asked to terminate or modify a rehabilitative alimony away). Most important - the plan must be clear about when the obligation to pay rehabilitative alimony ends.

- C. **Durational alimony** may be awarded when permanent periodic 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 or following a marriage of long duration if there is no ongoing need for support on a permanent basis. An award of durational **alimony terminates upon the death of either party or upon the remarriage of the party receiving alimony**. The amount of an award of durational alimony **may be modified or terminated** based upon a substantial change in circumstances in accordance with s. 61.14. However, the length of an award of durational alimony may not be modified except under exceptional circumstances and **may not exceed the length of the marriage**.

1. **What do you need to prove in order to get it:** Length of marriage, need and ability to pay; and that rehabilitative alimony is not appropriate. Think of durational alimony as being very like permanent alimony, except with a time limit. So, the usual income, expenses, vocational qualifications or lack thereof, etc. You have to show both need and ability to pay. To justify request for a certain time period, consider where both parties will be at the end of the proposed time period – eligible for Medicare? Not yet eligible? Able to make non-taxable withdrawals from IRA's? That is, how will the parties' income and expenses be the same or different some years down the road?

2. **What do you need to prove to defend against it:** All the same things - but it needs to appear that a shorter time period will be sufficient to provide support; or your client can't afford it anyway.

D. **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 if such an award is appropriate upon consideration of the factors set forth in subsection (2), following a marriage of moderate duration if such an award is appropriate based upon **clear and convincing evidence** after consideration of the factors set forth in subsection (2), or following a marriage of short duration if there are **written findings of exceptional circumstances**. In awarding permanent alimony, the court shall include a finding that no other form of alimony is fair and reasonable under the circumstances of the parties. An award of permanent alimony **terminates upon the death of either party or upon the remarriage of the party receiving alimony**. An award **may be modified or terminated** based upon a substantial change in circumstances or upon the existence of a supportive relationship in accordance with Fla. Stat. § 61.14.

1. **What do you need to prove in order to get it:** Same as for durational alimony, but that the length of the marriage is 17 years or greater. Need and ability to pay!
2. **What do you need to prove in order to get it where the marriage was less than 17 years:** Here, the new statute requires clear and convincing evidence related to the factors listed in Fla. Stat. §61.08(2) and a showing of how permanent alimony is the correct award. If the marriage was less than 7 years, then permanent alimony can only be awarded upon a finding of “exceptional circumstances.”
3. **What do you need to prove in order to defend against an award of permanent alimony:** The opposite of the things mentioned above. As always, need and ability to pay. Go down each factor listed in Fla. Stat. §61.08(2) and put on evidence as to each factor showing that permanent alimony is not needed.

VII. Lump Sum Alimony

- A. Lump sum alimony is a method payment, not a specific type of alimony. It is authorized by Fla. Stat. 2161.08(1) - “. . . the court may order periodic payments or payments in lump sum or both.” The Florida Supreme Court, in Canakar, provided for the use of lump sum alimony as a method of equalizing the

distribution of assets as part of equitable distribution, but this does not change the traditional use of lump sum alimony to provide support.

- B. It may be ordered to be paid via cash or by transferring property to the recipient spouse.
- C. Lump sum alimony is a fixed, vested amount, and is not subject to modification or termination. It may be paid in installments. It is still due and owing after both the payor's death and the recipient's death, and after the recipient's remarriage.
- D. Factors or reasons why lump sum payment may be justified:
 - 1. To sever the relationship between acrimonious spouses;
 - 2. If there is a danger of dissipation of assets by the payor spouse;
 - 3. To provide security for the recipient where the payor has health problems or is elderly;
 - 4. Where payor has a lack of liquidity or present income, but does have capital assets;
 - 5. Where payor is unreliable, has demonstrated unwillingness to comply with court orders for temporary support, etc.
- E. It may be ordered to be paid out of non-marital assets. Alternatively, Fla. Stat. §61.08(3) authorizes a trial court to order the payor to obtain life insurance coverage.
- F. Generally, lump sum alimony is taxable to the recipient and deductible to the payor; although the trial court can designate otherwise.
- G. The award of lump sum alimony is a vested property right and should accrue interest if not paid when due; a trial court may also award interest on a lump sum alimony arrearage.

VIII. Taxation of Alimony

- A. Generally, alimony is taxable to the recipient and deductible by the payor. This can result in a significant decrease in the useful value of the alimony to the recipient. However, this can be changed by the agreement of the parties or the order of the court, but it must be clearly stated in order to keep the parties out of trouble with the IRS.

B. IRS criteria for determining whether something is alimony and taxable to recipient (The 7 D's):

1. Dollars - has to be a money payment, can't be in kind (use of car, for example);
2. Delivered to or for a spouse or former spouse (e.g., not child support);
3. Divorce Instrument - paid pursuant to a divorce or separation instrument
4. Does not say that payments are not taxable to recipient;
5. Different households (live in different houses);
6. Death - ends on death of recipient;
7. Don't file a joint return.

C. Accounting for decreased value to recipient because of taxes

1. Increase amount of alimony - easy, clean, no exchange of tax returns, etc.. Note increased amount of alimony increases the deduction to the payor.
2. Require payor to pay an additional amount each year equal to the increase in recipient's taxes as a result of the receipt of alimony - unless parties just trust each other to say, "Oh, my extra tax amount this year was \$2,500 - please just write me a check for that at your earliest convenience," then there needs to be a provision for calculation of recipient's taxes with and without alimony, a disclosure of recipient's tax return, etc.

IX. What to put in the final judgment

- A. Simple, clean, and straightforward way is to list the factors set out in Fla. Stat. 61.08(2) and put some findings beside each one. But, remember, you obviously need to put on evidence about each one, so that the judge can make the findings. This list is a checklist for your trial preparation. Include date of first payment, date of last payment (if applicable). If rehabilitative alimony is awarded, set out plan in detail. Income deduction order if applicable, or paid through depository if applicable (Fla. Stat. §61.08(9)). State who pays taxes on the alimony; can add that it is non-dischargeable in bankruptcy.
- B. Trial court must make specific findings of fact in regard to the factors listed above. Failure to make those findings may allow the judgment to be reversed or

at least remanded for the findings to be made. This will cost your client thousands of dollars in appeal fees, plus may actually delay the receipt of needed alimony.

- C. However, to preserve the issue of insufficient findings of fact for appellate review, you must file a written motion for rehearing to allow the trial judge the opportunity to make such findings in the judgment.
- X. A few useful cases in addition to ones mentioned above
- A. Canakaris v. Canakaris, 382 So. 2d 1197, 1201 (Fla. 1980): "The two primary elements to be considered when determining permanent periodic alimony are the needs of one spouse for the funds and the ability of the other spouse to provide the necessary funds."
 - B. Vickers v. Vickers, 413 So. 2d 788, 789 (Fla.. 3DCA 1982): Criteria for temporary award of alimony.
 - C. Zold v. Zold, 911 So. 2d 1222, 1228 (Fla. 2005): In making an award of alimony, the trial court must consider all sources of income available to either party,
 - 1. Including Subchapter S corporate pass-through income (Zold);
 - 2. Including business income or reimbursed and in kind payments that reduce living expenses: Mills v. Mills, 62 So. 3d 672 (Fla. 2DCA 2011);
 - 3. Including gifts from the payor's family that were regularly received throughout the marriage and relied upon for support: Ordini v. Ordini, 701 So.2d 663 (Fla. 4DCA 1997);
 - 4. Including bonus income regularly received in the past: Crowley v. Crowley, 672 So. 2d 597 (Fla. 1DCA 1996);
 - 5. Including mandatory (not discretionary) IRA withdrawals: (Kitchens v. Kitchens, 4 So.3d 1 (Fla. 4DCA 2009);
 - 6. Including net worth, past earnings, and the value of the parties' capital assets: Firestone v. Firestone, 263 So.2d 223 (Fla. 1972).
 - D. Waite v. Waite, 618 So. 2d 1360 (Fla. 1993): Florida Supreme Court totally abrogated the doctrine of interspousal immunity; action to recover for intentional tort committed by spouse during marriage can be filed as part of dissolution of marriage action . . . or not. CAUTION: Marital settlement agreements usually include a general waiver of any other causes of action not mentioned in the

agreement. This could preclude a separate tort action - be sure your client understands this waiver.

- E. MY ALL TIME FAVORITE CASE which does not really have anything to do with alimony: Gilman v. Butzloff, 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.”



CYNTHIA SWANSON graduated from the University of Florida College of Law in 1981 and was admitted to the Florida Bar in 1982. Since that time, her practice has focused primarily on legal matters which involve individuals and families, including adoptions, wills and probate, divorces, and family law appeals. Cynthia is Florida Bar Board Certified in Adoption Law. She is actively involved in the legal community and chairs the Family Law Section of the Eighth Judicial Circuit Bar Association. She has published several book chapters and articles, and writes a monthly column on family law for the Eighth Judicial Circuit Bar Association newsletter. She is a member of the Eighth Judicial Circuit Bar Association, the Florida Adoption Council, and the James C. Adkins Inn of Court and is a Fellow of the American Academy of Adoption Attorneys, a national association of approximately

300 attorneys who have distinguished themselves in the field of adoption law. She has been the volunteer legal counsel for Planned Parenthood of North Central Florida, Inc. since 1995, and serves as a volunteer attorney for Three Rivers Legal Services, Inc. She is the 2003 recipient of the Florida Bar President’s Pro Bono Service Award for the Eighth Judicial Circuit. Cynthia is trained in Collaborative Practice, and is a member of the Gainesville Collaborative Divorce Team.

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