

FAMILY LAW TRIAL SKILLS: THE BASICS AND BEYOND

Getting What You Need by Pleading: Framing Your Case and Your Issues Persuasively and Comprehensively

by John W. Foster, Sr., Partner, Baker & Hostetler LLP
200 S. Orange Avenue
SunTrust Center, Suite 2300
Orlando, FL 32801
407-649-4030

I. Introduction

In her treatise, "*Florida Family Law and Procedure*", Circuit Judge Renee Goldenberg stated:

The judge is most concerned with being fair and reasonable. Your pleading must be read with the ultimate test: Will it stand under scrutiny of someone who is most concerned with being fair and reasonable?

Every fact in the petition should be able to appear as a factual finding in the final judgment. Clients under the disability of the stages of the emotional dissolution of marriage are not the most reliable reporters of facts. Their adjectives and adverbs are those of emotion, not reason. The judge sees snapshots of the client in hearing and pleadings. As the client's emotional stage changes, his or her view of the case proceeds. If the pleadings set forth in detail allegations given at a previous stage, they may not reflect the client's progress in the stages of the emotional dissolution of marriage. The client becomes unhappy with the lawyer and the legal system. More and more clients end up representing themselves and unable to extricate themselves from pleadings that do not reflect reality and reasonableness. Less is more when drafting pleadings.

Judge Renee Goldenberg, *Florida Family Law and Practice*, § 8:01 Pleadings (Rev. Ed. 6, Dec. 2011).

In addition to her treatise, Judge Goldenberg authored a chapter entitled "Pleading Requirements" for the 2011 Marital and Family Law Review Course that was held on January 28 and 29, 2011. See Vol. I, 2011 Marital and Family Law Review Course (Course No. 87970),

January 28-29, 2011. In drafting the outline for this seminar, my associate, Kelli Murray¹ and I have referred to and substantially relied upon Judge Goldenberg's treatise and course materials, both of which are recommended reading materials

I. **Relief not pled may not be awarded.**

Rogers v. Rogers, 905 So. 2d 1050 (Fla. 2d DCA 2005) (trial court improperly awarded wife the equity in the marital residence where wife did not request such relief in her petition)

Alexander v. Alexander, 683 So. 2d 172 (Fla. 1st DCA 1996) (trial court erred in ordering mother to pay child support and enter IDO where pleadings did not request that relief)

Williamitis v. Williamitis, 741 So. 2d 1176 (Fla. 2d DCA 1999) (trial court erred in requiring husband to maintain life insurance policy to secure child support where wife did not request such relief)

Lift v. Lift, 1 So. 2d 259 (Fla. 4th DCA 2009) (trial court erred in ordering sale of marital home where petition did not request it)

Willis v. Willis, 818 So. 2d 530 (Fla. 2d DCA 2002)

Weiss v. Weiss, 5 So. 3d 758 (Fla. 5th DCA 2009) (“A [trial] court may not entertain injunctive relief *sua sponte* in the absence of the required pleadings and notice.”).

Brown v. Holmes, 31 So. 3d 955 (Fla. 1st DCA 2010) (failure to plead modification or reduction of child support was fatal to the trial court’s ability to grant such relief).

Rotta v. Rotta, 34 So. 3d 107 (Fla. 3d DCA 2010) (vacating part of judgment because relief was never pled, asserted, or claimed in any other fashion).

II. **Issues to Include in Petition for Dissolution of Marriage, including P.E.A.C.E.:**

A. **Jurisdiction**

1. **Subject Matter (Fla. Stat. § 61.021 (2011))**

Allegations in support of the six month residency of one of the spouses.

2. **Personal Jurisdiction (including Long-Arm Jurisdiction)**

¹ My associate, Kelli Murray, assisted in the preparation of the outline for this seminar. I greatly appreciate the time and hard work devoted to this matter by Kelli, who devotes a substantial portion of her practice to the handling of family law matters.

a. Long-Arm Jurisdiction (Fla. Stat. § 48.193 (2011))

Requires the pleading of jurisdictional facts, which may track the language of the statute. Fla. R. Civ. P. 1.070(h).

The petition must make specific allegations demonstrating sufficient jurisdictional facts. Under section 48.193(1)(e), this requires allegations that either (1) the couple maintained their matrimonial domicile in Florida at the time the dissolution was commenced, or (2) that the defendant resided in Florida before the action was commenced. Failure to allege either of these facts is fatal under the Fla. Stat. § 48.193 (2011). McMahan v. McMahan, 826 So. 2d 1024 (Fla. 3d DCA 2001) (failure to allege jurisdictional facts in pleading fatal to service of process); Anderson v. Anderson, 845 So. 2d 307 (Fla. 2d DCA 2003) (failure to allege jurisdictional facts in pleading made final judgment void ab initio).

3. **Jurisdiction over the Children (Uniform Child Custody Jurisdiction and Enforcement Act (“UCCJEA”))**

Pleadings should set forth allegations necessary which establish the trial court’s jurisdiction over the children. Fla. Stat. § 61.522 (2011). Specifically include the name, date of birth, age and sex of the child(ren). This may be included in the petition but is required in an affidavit known as the UCCJEA affidavit. Pleading or affidavit must give information, if reasonably ascertainable, under oath as to the child’s present address or whereabouts, the places where the child has lived during the last 5 years, the names and present addresses of the persons with whom the child has lived during that period, and information regarding proceedings relating to child custody, visitation, domestic violence, protective orders, termination of parental rights, and adoptions. Each party has a continuing duty to inform the court of any proceeding in this or any other state which could affect the current proceeding.

a. **Initial Custody Determination**

If no prior determination been has made in a prior state and Florida is the “home state” of the minor child(ren), see section 61.514, *Florida Statutes*.

b. **Determination Made in Prior State**

A state that has made a prior child custody determination has exclusive, continuing jurisdiction. See sections 61.515 – 61.517, *Florida Statutes*, to determine the Florida court’s ability to make a determination affecting the custody/visitation/time-sharing of the minor child(ren).

A court of this state has temporary emergency jurisdiction, even though a different state may be the “home state” of the child or a different state has exclusive, continuing jurisdiction, over the determinations pertaining to visitation/time-sharing/custody of a child if the child is present in this state and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse.

A dual basis for jurisdiction may exist under the provisions of chapter 741 in an effort to protect a child that is subjected to or threatened with mistreatment or abuse. The UCCJEA (section 61.517, *Florida Statutes*) and the provisions of chapter 741, *Florida Statutes* can work in tandem. Crippen v. Crippen, 610 So. 2d 686, 689 (Fla. 1st DCA 1992). That is, the proceedings under the UCCJEA can be harmonized with the provisions of section 741.30 when it is necessary to protect a child threatened with mistreatment or abuse. Id.; see *also* K.I. v. Dep’t of Children and Families, 70 So. 3d 749, 752 (Fla. 4th DCA 2011) (Virginia properly exercised temporary emergency jurisdiction under the UCCJEA where Florida had continuing, exclusive jurisdiction when minor child was subjected to abuse).

B. Parties (Fla. Fam. R. P. 12.210, Fla. R. Civ. P. 1.210)

Husband and Wife must obviously be parties to an action.

Occasionally, when assets are held in the name in someone other than the parties, for example, a corporation, a trust or a relative, they must be made parties to the dissolution action. Sandstrom v. Sandstrom, 617 So. 2d 327 (Fla. 4th DCA 1993) (corporation must be made party to order transfer of corporate assets); *but see* Ashourian v. Ashourian, 483 So. 2d 486 (Fla. 1st DCA 1986) (Corporation should be stricken as party when relief sought did not state a claim for special equity against the corporation or any other specific relief from the corporation).

C. Children

See II, A., 3., *supra*.

D. Fact of Marriage

The parties must be in a valid marriage (not void) in order to seek a dissolution of marriage.

E. Basis of Dissolution (Fla. Stat. § 61.052(1) (2011))

One of the two grounds for dissolution of marriage must be alleged in the petition

Two grounds for dissolution of marriage:

- Irretrievable Breakdown of the Marriage
- Mental Incapacity of Other Party (for a period of three years before dissolution)

F. Social Security Numbers (Affidavit)

Social Security Numbers should be filed on a Notice of Social Security Number form, accompanied by a Notice of Confidential Information within Filing pursuant to Fla. R. Jud. Admin. 2.420.

G. Military Service (Affidavit)

Prior to entering any judgment in favor of the petitioner, the court must require that the petitioner file with the court an affidavit stating whether or not the respondent is in the military.

Affidavit is filed if the petitioner is certain the respondent is not in the military. The United States Department of Defense website provides the current status of any individual in any branch of the military.

H. Notice of Related Cases

Accompanying the petition should be a notice of related cases, which identifies the style, court, case number, parties, and brief statement of the case, if any related cases are known or reasonably ascertainable.

I. Parental Responsibility (Fla. Stat. § 61.13 (2011))

There is a statutory preference for shared parental responsibility. If sole parental responsibility is sought, it should be specifically pled. Rashid v. Rashid, 35 So. 3d 992, 994 (Fla. 5th DCA 2010) (remanding for a determination of shared parental responsibility when wife did not request sole parental responsibility) (citing Furman v. Furman, 707 So. 2d 1183 (Fla. 2d DCA 1998)).

Parties should plead for the implementation of a parenting plan and request time-sharing.

J. Equitable Distribution of Assets (Fla. Stat. § 61.075 (2011))

A court has inherent power to adjudicate the equitable interests of the parties in property acquired during the marriage, whether or not they are specifically pled. Symons v. Symons, 4 So. 3d 30 (Fla. 3d DCA 2009) (failure to list certain assets on financial affidavit did not result in an automatic waiver of right to claim to that property)

However, the intent to claim certain assets as *non-marital* must be specifically pled. Smith v. Smith, 655 So. 2d 1267 (Fla. 5th DCA 1995) (trial court erred in determining that certain certificates of deposit were non-marital assets where pleadings did not indicate an intent to declare any assets as non-marital).

A prayer for equitable distribution of assets may be broad enough to support an award of lump sum alimony for the purpose of distribution of the parties' assets, Abbe v. Abbe, 475 So. 2d 206 (Fla. 1985).

1. Exclusive Possession of Marital Home

General request for equitable distribution is sufficient to encompass jurisdiction to grant exclusive use and possession of the marital home.

Sugrim v. Sugrim, 649 So. 2d 936 (Fla. 5th DCA 1995) (prayer for equitable distribution is broad enough to include, for existence, exclusive use and possession).

2. Partition (Fla. Stat. § 61.041 (2011))

Partition must be pled specifically. Young v. Young, 507 So. 2d 614 (Fla. 2d DCA 1987) (general pleadings for equitable distribution does not give right to partition); Britt v. Britt, 552 So. 2d 323 (Fla. 1st DCA 1989) (general prayer for equitable distribution does not give the court the authority to partition the property).

Complaint for partition must include: (1) description of the property to be partitioned, (2) names and places of residence of owners, tenants in common, co-partners, or others interested in property, and the quantity held by each; and (3) other matters necessary for the court to adjudicate the rights and interests of the party (which may include claims for credits due on partition).

K. Alimony (Fla. Stat. § 61.08 (2011))

A general prayer for alimony is required (and sufficient) in order for a court to make a determination that alimony is appropriate in a certain case. Palumbo v. Palumbo, 576 So. 2d 799 (Fla. 1st DCSA 1991) (trial court appropriately refused to award permanent alimony, even though it may have been factually appropriate, where it was not specifically requested in petition).

It is not necessary to demand a particular type of alimony. Indeed, if alimony is generally requested, the court may consider the evidence presented and determine the type, if any, to be awarded. Nusbaum v. Nusbaum, 386 So. 2d 1294 (Fla. 4th DCA 1980).

L. Child Support (Fla. Stat. § 61.13 (2011))

Every petition seeking child support must be accompanied by an affidavit in accordance with the Florida child support guidelines (Fla. Stat. § 61.30(14)). In addition, parties must serve financial affidavits and disclosures in accordance with Fla. R. Fam. P. 12.285. Financial information should be supplemented.

M. Everything Else

1. Attorneys' Fees, Costs and Suit Monies (Fla. Stat. § 61.16 (2011))

Pleading must specifically request attorneys' fees and allege entitlement in accordance with statutory criteria. Lindberg v. Lindberg, 651 So. 2d 1294 (Fla. 2d DCA 1995) (reversing award of attorneys' fees where wife did not specifically request such relief)

2. Temporary Relief (Fla. Stat. § 61.052(3) (2011))

A demand for temporary relief, along with the allegations of the need for support or attorneys' fees and the ability of the other party to pay the same, may be included in the party's initial pleading or in a subsequent motion. Request temporary or interim relief in your initial pleading!

Types of Temporary Relief Available:

- **Parental Responsibility/Time-Sharing:** Griffith v. Griffith, 627 So. 2d 527 (Fla. 2d DCA 1993)
- **Alimony:** Belcher v. Belcher, 271 So. 2d 7 (Fla. 1972)
- **Child Support**
- **Attorneys' Fees/Suit Monies:** Nichols v. Nichols, 519 So. 2d 620 (Fla. 1988).
- **Modification of a Child Custody/Time-Sharing/Visitation Order Pending in Another State:** Emergency Jurisdiction Fla. Stat. § 61.514 – 61.517 (2011)

3. **Injunctive Relief (Fla. Fam. R. P. 12.610 and Fla. R. Civ. P. 1.610)**

- Requires pleading and proof of the facts setting forth a clear basis for a need for relief. Specific requirements are set forth in Fla. R. Civ. P. 1.610 (general injunctive relief) or Family Law Rules of Procedure 12.610 (to prevent abuse/domestic violence)
- General pleading requirements for issuance of an injunction in Florida: (1) the likelihood of irreparable harm, (2) the unavailability of an adequate remedy at law, (3) substantial likelihood of success on the merits, and (4) consideration of the public interest. Morgan v. Herff Jones, Inc., 883 So. 2d 309 (Fla. 2d DCA 2004).
- The party seeking a temporary injunction without notice must file a verified pleading or affidavit that alleges specific facts showing immediate and irreparable harm and must detail any efforts made to give notice and the reasons why notice should not be required. Vargas v. Vargas 816 So.2d 238, 238 -239 (Fla. 2d DCA 2002) (reversing issuance of injunction preventing removal of children from jurisdiction where motion was not verified, did not contain an affidavit, and did not detail any efforts made to give notice or state why notice should not be required).

Examples of relief pursuant to Fla. R. Civ. P. 1.610

- To protect Assets
- To prevent removal of children from jurisdiction.
- To temporarily modify a child custody determination. Martin v. Hill, 801 So. 2d 1003 (Fla. 4th DCA 2001)

Examples of relief pursuant to Fla. R. Civ. P. 12.610 and chapter 741, *Florida Statutes*

- To prevent abuse/domestic violence

A petitioner must certify under oath that (1) the party against whom the injunction is sought is a family or household member, (2) petitioner, or the minor child for whom the petitioner seeks relief, has been a victim or fears he is going to be a victim of domestic violence under Fla. Stat. § 741.28 (2011), and (3) that

the specific facts and circumstances alleged as a basis for the relief sought are true.

As indicated above, a dual basis for jurisdiction may exist under section 61.517, *Florida Statutes* in an effort to protect a child that is subjected to or threatened with mistreatment or abuse. The UCCJEA (section 61.517, *Florida Statutes*) and the provisions of chapter 741, *Florida Statutes* can work in tandem. Crippen v. Crippen, 610 So. 2d 686, 689 (Fla. 1st DCA 1992). That is, the proceedings under the UCCJEA can be harmonized with the provisions of section 741.30 when it is necessary to protect a child threatened with mistreatment or abuse. Id.; see also K.I. v. Dep't of Children and Families, 70 So. 3d 749, 752 (Fla. 4th DCA 2011) (Virginia properly exercised temporary emergency jurisdiction under the UCCJEA where Florida had continuing, exclusive jurisdiction when minor child was subjected to abuse).

Temporary injunctions may be issued without notice if it appears that an immediate and present danger of domestic, repeat, dating, or sexual violence exists. Otherwise, the court will hold an evidentiary hearing. Temporary injunctions shall not be effective for longer than fifteen days, unless good cause is shown for a continuance. A permanent injunction shall be granted for a fixed period or until further order of the court.

- To prevent repeat violence

4. **Restoration of Former Name**

If either party requests former name to be restored as a legal matter, he or she must plead that he or she seeks restoration of that name.

Only the party seeking to restore her former name may request the restoration of her maiden name; other party may not request this relief. Smithers v. Smithers, 804 So. 2d 489 (Fla. 4th DCA 2001) (trial court had no authority to order ex-wife to stop using married surname without her consent).

5. **Receivership (Fla. R. Civ. P. 1.620 and Fla. Fam. L. R. P. 12.620)**

A party may seek to have a receiver appointed as a form of temporary relief upon allegations that a legal right or ownership interest exists, or a lien or special interest exists that is to be satisfied out of that property, and that a receiver is required to preserve the property.

Although a matter of the trial court's discretion, the appointment of a receiver is a drastic matter and should not be used except in cases of necessity. Compare Puma Enters. Corp. v. Vitale, 566 So. 2d 1343, 1344 (Fla. 3d DCA 1990) (trial court has discretion to appoint receiver) *with* Electro Mechanical Products, Inc. v. Borona, 324 So. 2d 638 (Fla. 3d DCA 1976) (as it is a taking of property, the appointment of a receiver is a drastic remedy).

6. **Torts**

Tort claims can be entertained by the trial court in the context of a dissolution of marriage proceeding. Waite v. Waite, 618 So. 2d 1360 (Fla. 1993) (doctrine of interspousal immunity does not remain a part of Florida's common law); see also Garces v. Garces, 704 So.2d 1106 (Fla. 3d DCA 1998) (husband was required to pay expenses wife incurred as a result of the domestic abuse which the court found to have occurred during the course of the parties' marriage); see also San Pedro v. San Pedro, 910 So. 2d 426 (Fla. 4th DCA 2005) (wife's counter-petition properly asserted separate counts for negligence, fraud and deceit, intentional infliction of emotional distress, and battery).

However, not all tort claims are properly separate and distinct claims. Beers v. Beers, 724 So. 2d 109 (Fla. 5th DCA 1998). In Beers, which involved a 22-year marriage, wife claimed that the husband had depleted marital assets in furtherance of an adulterous relationship. In addition to filing a counter-petition for dissolution of marriage, the wife joined the husband's mistress as a party-defendant and asserted claims for civil conspiracy, fraud and constructive fraud/breach of fiduciary duty against the husband and his mistress. A jury trial was held on the tort claims. The jury returned a verdict finding that the husband and his mistress had conspired to commit constructive fraud upon the wife during the marriage. The wife was awarded \$132,164 in compensatory damages and \$200,000 in punitive damages. 724 So. 2d at 112.

The trial court vacated the jury verdict against the husband because the wife had an adequate remedy against the husband through equitable distribution under § 61.075 and, thus, could not pursue a claim for constructive fraud against the husband. (Interestingly, the judgment against the husband's mistress stood.)

7. **Life Insurance (Fla. Stat. §61.08(3) (2010))**

A court may order a party who is ordered to pay alimony or child support to maintain a life insurance policy or bond to secure such award.

8. **Health Insurance**

A request for health insurance to be maintained must be specifically pleaded. Littleton v. Littleton, 555 So. 2d 924 (Fla. 1st DCA 1990) (trial court erred in including order that wife be included on husband's health insurance policy where issue of wife's entitlement to be maintained under husband's health insurance plan was not pled)

III. **Answer**

A. **Affirmative Defenses (Fla. R. Civ. P. 1.110(d)).**

A party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, **discharge in bankruptcy, duress, estoppel**, failure of consideration, **fraud**, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of fraud, statute of

limitations, **waiver**, and any other matter constituting an avoidance or affirmative defense.

Affirmative defenses are waived if not pled. White v. White, 3 So. 3d 400 (Fla. 2d DCA 2009) (defense of unclean hands waived for failure to plead).

IV. Simplified Dissolution of Marriage (Fla. Fam. R. P. 12.105)

Applicable when there are no dependent children and wife is not pregnant, the parties have made a satisfactory division of their property and have agreed to the payment of their joint obligations, and the other facts set forth in Fla. Fam. L. R. P. Form 12.901(a) are true.

Both parties are required to appear at the final hearing.

Financial affidavits are not mandatory in a simplified dissolution of marriage. Varrieur v. Varrieur, 775 So. 2d 361 (Fla. 3d DCA 2000) (parties waived filing of financial affidavits where neither party requested or objected to proceeding without financial affidavits)

V. Cover Sheet (Fla. Fam. R. P. 12.100(a), Fla. Fam. R. P. Form 12.928)

The petitioner shall file with the clerk of the circuit court Florida Family Law Rules of Procedure Form 12.928, Cover Sheet for Family Court Cases.

VI. Informational Questionnaire (Fla. Stat. § 61.043(2) (2011))

Upon filing for dissolution of marriage, the petitioner must complete and file with the clerk of the circuit court an unsigned anonymous informational questionnaire. The actual questionnaire shall be formulated by researchers from Florida State University who shall distribute them to the clerk of the circuit court in each county.

009900, 000079, 503882257.3