PLEADING IN FAMILY CASES

Lee County Legal Aid Society, Inc.
"View from the Bench" Seminar, Friday May 1, 2015
Hon. R. Thomas Corbin, Circuit Judge

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1. Notice and opportunity to be heard

This is what pleading is all about, that is, Con Law 1, due process and all of that.

These due process considerations apply to every petition and every motion, legal or evidentiary.

2. Florida is a fact pleading state, not a notice pleading state

In Florida, a pleader must

(a) allege facts and
(b) demand the relief sought

This is essential due process of law in Florida civil actions.

"**Rule 1.110(b) Claims for Relief**. A pleading which sets forth a claim for relief, ... must state a cause of action and shall contain

(1) [jurisdiction if necessary],

(2) a short and plain statement of the ultimate FACTS showing that the pleader is entitled to relief, and

(3) a demand for judgment for the relief to which the pleader deems himself or herself entitled.

Relief in the alternative or of several different types may be demanded. ..."

(*Paragraphing and EMPHASIS supplied*)

3. <u>What is a "pleading?" - Rule 1.100(a)</u>

A "**pleading**" is "a **complaint**, or, when so designated by a statute or rule, a **petition** and an **answer** to it; an answer to a counterclaim denominated as such; an answer to a crossclaim if the answer contains a crossclaim; a third -party complaint ...; and a third-party answer. If an answer or third-party answer contains an **affirmative defense** and the opposing party seeks to avoid it, the opposing party shall file a **reply** containing the avoidance. **<u>No other pleadings shall be allowed</u>**."

An "affirmative defense" is an "admit and avoid;" it admits or affirms the facts in the petition but raises new facts or a claim that avoids or modifies the relief sought in the petition.

E.g., Udell v. Udell, 950 So.2d 528 (Fla. 4th DCA 2007), in which the wife's petition for dissolution requested exclusive use and possession of the marital home pursuant to a prenuptial agreement. The husband filed an answer that did not raise as an affirmative defense set off for the rental value pursuant to §61.077 or otherwise by case law. He filed a pretrial statement which raised the issue but at trial the wife objected to proof of the rental value and set off because it was not pleaded in his answer or anywhere else in a pleading. The trial court awarded the husband a rental value set off and the appellate court reversed that award: "[The husband] failed to plead setoff or rental value offset in his Answer, Affirmative Defenses, and Counter-Petition, or in any other pleading or motion. As such, the trial court was without jurisdiction to consider and decide the rental value offset."

E.g., Cortese v. Cortese, 72 So.3d 269 (Fla. 5th DCA 2011), in which the trial court judgment awarding the husband a credit for half of the marital home mortgage payments and other house-related expenses paid during the parties' separation was reversed because the "husband did not request such a credit in his pleadings."

4. <u>A motion is not a pleading - Rule 1.100(b) - HOWEVER, ...</u>

A "**motion**" is an "application to the court for an order shall be by motion which shall be made in writing unless made during a hearing or trial, <u>shall state with particularity the grounds therefor, and shall set forth the relief or order sought</u>. ..."

Motions come and go but pleadings are forever. Pleadings determine the proof from the beginning to the end of the case.

However, some motions are pleadings because they ask for substantive relief pendent to the main action.

E.g., a motion for attorney's fees,

E.g., a motion to set aside a post marital, post filing marital settlement agreement must allege ultimate facts that state a cause of action for the relief sought, that is, to set aside the agreement. *See Casto v. Casto*, 508 So.2d 330 (Fla. 1987); *Petracca v. Petracca*, 706 So.2d 904 (Fla. 4th DCA 1998); *Crupi v. Crupi*, 784 So.2d 611 (Fla.5th DCA 2001); *Macar v. Macar*, 803 So.2d 707 (Fla. 2001); and *Parra de Rey v. Rey*, 114 So.3d 371 (Fla. 3d DCA 2013) regarding the facts that must be proven, so the facts that must be alleged, to set aside such an agreement.

E.g., a motion for civil contempt: Rule 12.615(a) "... The motion must recite the essential facts constituting the acts alleged to be contemptuous. ..."

If the facts are not alleged in evidentiary motions, the party opposing the motion is not on notice that complies with due process because Florida is a fact pleading state, not a notice pleading state.

5. Motions can be legal or evidentiary.

In family cases 99.99% of all motions are evidentiary.

E.g., evidentiary motions:

a motion for temporary relief,
a motion to compel discovery and disclosure,
(Yes, a motion to compel is evidentiary but usually all I get is lawyers talking.)
a motion for a civil contempt order,
a motion to set aside a marital settlement agreement,
a motion to set aside a judgment,

Examples of a legal motion:

(a) a motion to dismiss for failure to state a cause of action. Rule 1.140(b)
(b) a motion for judgment on the pleadings. Rule 1.140(h)(2)

No evidence can be offered or considered on a legal motion.

Note: the Criminal Rule 3.190 is different: "The court may receive evidence on any issue of fact necessary to the decision on the motion." 3.190(d)

On a motion to dismiss for failure to state a cause of action the court must examine the "four corners" of the petition to determine if it states a cause of action. Rule 1.140(b)

On a motion for judgment on the pleadings the court must examine all of the pleadings to determine if the petition states a cause of action. Rule 1.140(h)(2)

There is no authority for filing a "response" to a motion because a party opposing a motion shows up at the hearing on the motion and presents evidence, if an evidentiary motion, and argument against the motion.

6. <u>Regarding evidence, by the way, lawyers talking is not it</u>

See, e.g., Blimpie Capital Venture, Inc., v. Palms Plaza Partners, Ltd., 636 So.2d 838, 840 (Fla. 2d DCA 1994): "We have held that, in the absence of a stipulation, a trial court cannot make a factual determination based on an attorney's unsworn statements. *State v. Brugman,* 588 So.2d 279 (Fla. 2d DCA 1991). A trial court, as well as this court, is also precluded from considering as fact unproven statements documented only by an attorney. *Schneider v. Currey,* 584 So.2d 86 (Fla. 2d DCA 1991)."

See also Leon Shaffer Golnick Advertising, Inc. v. Cedar, 423 So.2d 1015, 1017 (Fla. 4th DCA 1982) ('If the advocate wishes to establish a fact, he must provide sworn testimony through witnesses other than himself or a stipulation to which his opponent agrees.')".

See also, Florida Standard Jury Instructions in Criminal Cases 2.1: "What the lawyers say is not evidence and you are not to consider it as such."

See also, Florid Standard Jury Instructions in Criminal Cases 2.7: "The attorneys now will present their final arguments. Please remember that what the attorneys say is not evidence ..."

See also Romeo v. Romeo, 907 So.2d 1279, 1284 (Fla. 2d DCA 2005) "argument of counsel does not constitute evidence,"

And Kunsman v. Wall, 125 So.3d 868 (Fla. 4th DCA 2013) "Wall's attorney then explained that the remainder of the money [$2,471.40] was spent by Wall on miscellaneous family expenses. ... Regarding the remaining $2,471.40 for miscellaneous family expenses, the only evidence showing how these marital funds were spent was argument of counsel. ... Thus, we remand for the trial court to equitably divide the ... $2,471.40 spent on miscellaneous family expenses."

What has evidence got to do with pleading? Everything: the petition or evidentiary motion must state concisely the ultimate facts, that is, the facts that must be proven in order to be granted the relief sought.

So, the ultimate facts in the petition or evidentiary motion are the outline of the proof required.

You should be able to draft the order or judgment you seek when the petition or motion is prepared.

7. <u>Do NOT attach documents to a pleading or any motion</u> *Except* you must attach a contract or other "document upon which action may be brought or defense made, ..." Rule 1.130.

The court cannot consider documents intended to be "evidence" that are filed in the court file or attached to a pleading or motion.

Attaching documents to a petition or a motion does not make them "evidence."

"Evidence" is testimony or documents admitted at a hearing or a trial pursuant to the rules in Chapter 90, "Evidence Code" or attached to an affidavit filed in support of a motion for summary judgment under Rule 1.510(e).

Documents may be considered by the court ONLY after being admitted into evidence pursuant to Chapter 90, "Evidence Code," at a duly noticed hearing or trial, or if attached to an affidavit in support of a motion for summary judgment.

8. <u>Do NOT cite law in a pleading or motion - not a case, not a statute, not a rule</u>

Plead FACTS. File a memorandum of law along with your evidentiary motion or pleading if you want to, but DO NOT cite law in your motion or pleading.

9. <u>The ultimate facts are the facts you have to prove to get the relief you seek</u>

So, you have to plead the facts and ask for specific relief and then prove the facts.

10. <u>Facts not pleaded may be tried by consent</u>

Even if facts are not pleaded, if a party does not object to the evidence that is outside of the facts alleged in the pleadings, the issue may be tried by consent.

Rule 1.190(b) - "*When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. ... If the evidence is objected to at trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended to conform to the evidence and shall do so freely when the merits of the cause are more effectually presented thereby and the objecting party fails to satisfy the court that the admissions of such evidence will*

prejudice the objecting party to maintain an action or defense on the merits."

This happens in every case to some degree.

See, Newberry v. Newberry, 831 So.2d 749 (Fla. 5th DCA 2002), in which the trial judge denied the father's supplemental petition and increased the child support obligation after a trial on the father's supplemental petition that requested a modification of the time-sharing schedule and a reduction in the child support if the proposed change was granted. The mother did not file a counter petition to increase the child support. The appellate court held that an increase in the child support was not tried by consent because the father's lawyer objected at trial to evidence regarding an increase.

Note: the dissent in *Newberry* is worthwhile reading: it raises the question of whether a recalculation of child support is at issue every time a supplemental petition is at trial and a modification of child support is at issue.

See, Todaro v. Todaro, 704 So.2d 138 (Fla. 4th DCA 1997), in which the fact of the former husband's income going down was not pleaded, only an increase in her income was pleaded in his supplemental petition to modify the child support, and the former wife objected to proof of his income going down so she did not consent to trying an unpleaded fact, so the judgment lowering the child support because his income went down was reversed.

See Reno v. Reno, 884 So.2d 462 (Fla. 4th DCA 2004), in which the former husband petitioned to reduce his alimony because his income had gone down but at trial the former wife testified she was living with her "fiancé" and he was paying "all of her living expenses." The trial court terminated the alimony obligation and the appellate court reversed saying it could not be terminated when the petition did not request termination and the issue was not tried by consent. In final argument the former husband asked to reduce the alimony. Termination was never mentioned. The case was remanded with instructions to enter a judgment for nominal alimony of $1.

11. <u>The defense of failure to state a cause of action: raise it, raise it, raise it</u>

If a supplemental petition does not allege

(1) ultimate facts amounting to a substantial change in circumstances and
(2) a proposed change that is in the children's best interest

it does not state a cause of action.

A motion to dismiss for failure to state a cause of action may be filed in response to a petition pursuant to Rule 1.140(b)(6).

Note that Rule 1.140(h)(2) provides that the "*defense of failure to state a cause of action ... may be raised by motion for judgment on the pleadings or at the trial on the merits in addition to being raised either in a motion under subdivision (b) or in the answer or reply.*"

So, every answer to a petition should contain the "defense of failure to state a cause of action," that is, "*The petition fails to state a cause of action*," even if the defense had previously been raised in a motion to dismiss that was denied. This defense may be raised at trial and by a motion for judgment on the pleadings "in addition to" being raised by a motion or in the answer.

So, you do not have to raise this defense in a motion to dismiss. You can raise it in the answer, which should always be done in an answer to a petition or supplemental petition, or by a motion at trial, including an *ore tenus* motion at trial.

A judgment based on a petition or complaint that does not state a cause of action is void and may be set aside under Rule 1.540(b)(4). *So, this defense can even be raised after judgment*.

See, e.g., Southeast Land Developers, Inc., v. All Florida Site and Utilities, Inc., 28 So.3d 166 (Fla. 1st DCA 2010): a default judgment based on a petition that does not state a cause of action is a void judgment and must be set aside

See also Slowinski v. Sweeney, 64 So.3d 128 (Fla. 1st DCA 2011): a trial court's temporary order granting a man parental rights in a child born to a woman to whom the man was not married but who was married to another man when the child was born, is void because "it is fundamental error for the trial court to grant relief pursuant to this nonexistent cause of action," that is, a paternity petition claiming parental rights in a child born to an intact marriage, *citing I.A. v. H.H.,* 710 So.2d 162 (Fla. 2d DCA 1998).

12. The effect of a default

A default establishes the particular facts alleged in the complaint, so if only general facts and no particular facts are alleged, the facts are not established by the default and they must be proven by a motion for summary judgment or at trial.

Petitions in family cases always contain general allegations, so a trial is required in every case even after a default.

A trial order must be entered by the court before a trial is valid.

See, e.g., Merrigan v. Merrigan, 947 So.2d 668 (Fla. 2d DCA 2007), in which a final judgment was entered after "a hearing" held before the magistrate pursuant to an order entered by the court that referred the wife's petition for dissolution to the magistrate and scheduled "a hearing" before the magistrate. Both parties appeared at that "hearing" on the wife's petition but it turned out to be "an abbreviated trial" on the merits of her petition. No trial order was entered pursuant to Rule 12.440(a) by either the judge or the magistrate. The appellate court ruled that the court's order of referral that noticed a hearing "did not fairly apprise the Husband that the hearing would result in a final judgment. ... This notice also failed to comply with the procedures required by Florida Rule of Family Law Procedure 12.440(a) for setting a trial or final hearing. This alone merits reversal. ... the procedures in this case were clearly insufficient to provide appropriate notice and an opportunity to be heard on the significant contested issues..."

See also Bennett v. Ward, 667 So.2d 378 (Fla. 1st DCA 1995) the trial judge entered a

judgment of foreclosure at a hearing noticed pursuant to a "notice of hearing" served by counsel and not a trial held pursuant to a trial order entered by the judge under Rule 1.440. The appellate court said that "noncompliance with [Rule] 1.440 can be raised ... by motion" pursuant to Florida Rule of Civil Procedure 1.540, and that "[s]trict compliance with Florida Rule of Civil Procedure 1.440 is required and failure to do so is reversible error." (*Citations omitted*.)

Therefore, a trial held pursuant to a notice of hearing prepared by counsel and any orders or judgments entered from that trial are void because they are contrary to due process, that is, Rule 12.440 requires the court, not counsel, to issue and serve a trial order.

Concerning the necessity for a trial, *see also* §61.052:

"(1) No judgment of dissolution of marriage shall be granted unless one of the following facts appears, which shall be pleaded generally:

(a) The marriage is irretrievably broken.
(b) Mental incapacity of one of the parties. ...

(2) **Based on the evidence at the hearing**, ..."

So, in our "Special Interrogatories" procedure, it is essential for the parties to both waive notice of a trial, a trial order and a trial in writing. *See* the "Answer & Waiver" form signed by the respondent and also the last paragraph of the "Special Interrogatories" form signed by the petitioner.

(*By the way, why does Lee County have a "Special Interrogatories" procedure?* No other county in the state does this and some counties in this circuit no longer do this.)

See, e.g., Lauxmont Farms, Inc., v. Flavin, 514 So.2d 1133 (Fla. 5th DCA 1987), in which a trial to determine the amount of damages was required after a default because the exact amount of the plaintiff's damages was not stated in the complaint, or, as the court said, the damages were "unliquidated." The default established only liability.

See, e.g., BAC Home Loans Servicing, Inc., v. Headley, 130 So.3d 703 (Fla. 3d DCA 2014), in which the counter defendant was defaulted on a counter petition seeking only monetary damages so a final judgment entered against the counter defendant quieting title and nullifying the mortgage lien and mortgage note was void, because this relief was not demanded in the counter petition. The demand in the "wherefore" clause for "such other relief as the court deems just and property under the circumstances" was a "boilerplate" request that did not "provide meaningful notice."

Therefore, if the petition contains only general and not particular allegations, *e.g.*, "the petitioner needs alimony and the respondent has the ability to pay it and still meet her financial needs," then the default establishes a need for alimony and an ability to pay, which could be $1 a month. The default does not establish the dollar amount of the petitioner's monthly financial need or the dollar amount that the respondent is able to pay so a trial must be ordered by the court

under Rule 12.440 and evidence produced to prove these unliquidated allegations.

Again, due process, notice, etc.: If the respondent is served with a petition containing particular facts, *e.g.*, "the petitioner needs alimony of $321.45 per month to meet his monthly financial need and the respondent has the ability to pay that amount and still meet her own monthly financial need," then the respondent is on notice and the default establishes the particular facts pleaded.

Parental responsibility and time-sharing can never be decided by a default no matter how particularly the petition pleads these.

See e.g., *Sloan v. Sloan*, 604 So.2d 862 (Fla. 2d DCA 1992): "We affirm the final judgment of dissolution of marriage, entered upon defendant's default, except that we reverse as to child custody and visitation and remand for evidentiary proceedings in that regard;" *and Longo v. Longo*, 576 So.2d 402 (Fla. 2d DCA 1991); *Dellavechia v. Dellavecchia*, 547 So.2d 287 (Fla. 2d DCA 1989); *Seibert v. Seibert*, 436 So.2d 1104 (Fla. 4th DCA 1983); *Duckworth v. Duckworth*, 414 So.2d 562 (Fla. 3d DCA 1982).

13. Pleading Parental Responsibility

What follows may seem familiar to some of you:

13.1 The parental responsibility order is separate from the time-sharing order Since 1982, Florida law has separated the child's "time-sharing schedule," which is the calendar schedule detailing where the child will be living every night during the year, from "parental responsibility," which is concerned with how parenting decisions will be made now that the parents are separated. *Session Law* 82-96 effective July 1, 1982.

Many parents and many courts confuse these two questions. Some reported decisions use the term "shared parenting" when referring to the time-sharing schedule, which is not helpful.

"Shared parenting" is not a description of a time-sharing schedule. It is one of the three alternatives for parental decision making allowed by §61.13(2).

Some courts use the term "joint custody" when referring to "shared parenting," which is also not helpful. **"Joint custody" is not a term that has ever been used in Chapter 61.**

The order detailing where the child will be living from day to day is now called the "time-sharing order."

Formerly, the "time-sharing order" was the order that named a "custodial parent" or "primary residential parent", which meant "the parent with whom the child maintains his or her primary residence." F.S. §61.046(3)(2004).

However, on October 1, 2008 the terms "custody", "visitation", "custodial parent", and "primary residential parent" were deleted from all Florida statutes dealing with separated parents. *Session Law* 2008-61 effective 10/1/2008.

Before that change in the statutes, the terms "custody and visitation" were generally used to describe the time-sharing order, but **those terms are now obsolete**. "Primary parent," "custodial parent", "noncustodial parent" or "primary residential parent" are also now meaningless terms under Florida law.

F.S. §61.13(2)(b)(2014) now requires the court to order a "parenting plan" that includes a "time-sharing schedule" and a "designation of who will be responsible for" parenting decisions. So, under the current statute the "time-sharing" order and the "parental responsibility" order must be two, separate orders.

"Parental responsibility" means parenting decision-making. The "parental responsibility order" does not specify where the child will be living from time to time during the year. *See* F.S. §61.046(17) & (18) (2014):

"(17) "*Shared parental responsibility*" means a court-ordered relationship in which both parents retain full parental rights and responsibilities with respect to their child and in which *both parents confer with each other so that major decisions affecting the welfare of the child will be determined jointly.*

(18) "*Sole parental responsibility*" means a court-ordered relationship in which *one parent makes decisions regarding the minor child*." (*Emphasis supplied.*)

Further, F.S. §61.13(2)(c)2.,a., provides:

> "In ordering *shared parental responsibility*, the court may consider the expressed desires of the parents and *may grant to one party the ultimate responsibility over specific aspects of the child's welfare or may divide those responsibilities between the parties* based on the best interests of the child. Areas of responsibility may include education, health care, and any other responsibilities that the court finds unique to a particular family." (*Emphasis supplied.*)

So, the "parental responsibility" order is concerned with how parenting decisions will be made after parents separate, and the statute gives the court three choices in that order:

(1) unlimited shared parental responsibility between the parents;

(2) sole parental responsibility to one parent for all parenting decisions; or

(3) shared parental responsibility with ultimate responsibility over one or more aspects of the child's life to one parent or divided between the parents. *See, e.g.,Watt v Watt*, 966 So.2d 455 (Fla. 4th DCA 2007); *Hancock v Hancock*, 915 So.2d 1277 (Fla. 4th DCA 2005); *Schneider v. Schneider*, 864 So.2d 1193 (Fla. 4th DCA 2004);

Further, §61.13(2)(c)2, requires the court to order the first alternative, shared parental responsibility, unless that would be detrimental to the child, in which case the court can order sole parental responsibility.

However, although the statute allows the judge to order one of these three choices in the parental responsibility order, **the procedural law limits the judge's choice to the particular choice pleaded by the parties in their petitions**.

If no particular parental responsibility order is sought in a pleading, then the court can only order shared parental responsibility, even if that is not in the child's best interest. *See, e.g.*, *Furman v. Furman*, 707 So.2d 1183 (Fla. 2d DCA 1998); *McDonald v. McDonald*, 732 So.2d 505 (Fla. 4th DCA 1999)

The procedural law, that is due process of law, requires that a party must plead specifically for sole parental responsibility or shared responsibililty with ultimate responsibility, if either of these is sought. F.S. §61.13(2)(c), 2., provides:

> "The court shall order that the parental responsibility for a minor child be shared by both parents *unless the court finds that shared parental responsibility would be detrimental to the child.... If the court determines that shared parental responsibility would be detrimental to the child, it may order sole parental responsibility* and make such arrangements for time-sharing as specified in the parenting plan ..." (*Emphasis supplied*)

So, if a party wants sole parental responsibility that party must *plead for this choice* and must plead ultimate facts amounting to a detriment if shared parental authority is ordered.

E.g., "If shared parental authority is ordered this would be detrimental to the child because the parents are unable to communicate and cooperate and so unable to share major parenting decisions."

If a party wants shared parental responsibility with ultimate responsibility that party *must plead ultimate facts for this choice but that party does not have to plead and prove detriment to the child*. F.S. §61.13(2)(c)2., a..

If a party wants shared parental responsibility, then this is what the court must order in every case unless sole parental or shared with ultimate is pleaded and then a factual basis for one of these choices is proven at trial.

Of course, a party may plead alternatively for all three choices allowed by law. Fla. Fam. L. R. P. 12.110; Fla. R. Civ. P. 1.110(b).

13.2 Parental responsibility; detriment As discussed above, the law requires the court to "order that the parental responsibility for a minor child be shared by both parents unless the court finds that shared parental responsibility would be detrimental to the child." F.S. §61.13(2)(c)2.

The law defines "shared parental responsibility" as:

> "...a court-ordered relationship in which *both parents retain full parental rights and responsibilities with respect to their child and in which both parents confer with each*

other so that major decisions affecting the welfare of the child will be determined jointly." §61.046(17). (*Emphasis supplied*.)

Many petitions ask for "shared parenting" or, more properly, "shared parental responsibility." Many settlement agreements agree upon "shared parenting."

However, "to share" means "to confer ... so that major decisions ... will be determined jointly."

So, if shared parental responsibility is ordered, then *each parent has an equal say* in major decisions concerning the child.

So, if shared parenting is ordered and the parents have a disagreement on a major decision, it is not for the court to say who is right or who is wrong.

They each have equal control over parenting decisions. In such a situation, nothing happens, so long as a risk to the child's life or safety is not at stake.

It is not for the court to decide the winner of the debate. The court in a Chapter 61 case has no power to overrule a jointly made parenting decision or to make a parenting decision when the parents ordered to share parenting are at an impasse.

The court in a Chapter 61 case cannot substitute its judgment for the parenting decision of either parent because the child has two fit and competent parents, absent any allegations and proof that one or both of the parents are unfit because of abuse, abandonment or neglect.

Chapter 61 does not give the judge the authority to become a "super parent" empowered to make parenting decisions for the child or overrule a parenting decision or decide a parenting decision when parents ordered to share parenting are at an impasse.

See, e.g., Martinez v. Martinez, 573 So.2d 37 (Fla. 1st DCA 1990), in which the court said:

> "[§61.13(2)] contemplates that parents, not the courts, have the responsibility of determining where their children will attend school. In situations where the parents are unable to agree on the education of their children, the court is required to designate, based on the best interests of the children, one parent to have the ultimate responsibility for making decisions regarding that specific aspect of the children's welfare. ... We decline to construe [§61.13(2)] as giving a trial court authority to direct which school the children shall attend; that section only authorizes the court to determine, based on competent substantial evidence, which parent shall make that decision based on the best interests of the children." *Id*. at 41.

In *Martinez*, the issue of the school the children would attend came up at trial on the merits of the initial petitions and no parental responsibility order had yet been entered, so the appellate court remanded for the trial court to conduct further proceedings and to pick a parent to decide upon the children's schools.

Of course, before the trial court would have the authority to do that, one of the parties must plead either for (1) sole parenting authority or (2) shared parenting authority with ultimate authority over education decisions to one parent.

So, the court's authority to designate a parent to make unilateral parenting decisions is limited by traditional concepts of due process, that is, if a party does not plead for a certain relief allowed by law, the court cannot order it even if the substantive law allows it. *See, e.g., Furman v. Furman, supra*, and *McDonald v. McDonald, supra*. The pleadings put the parties on notice of the issues that will be tried at trial.

So, in a Chapter 61 case parties must plead for the particular parental responsibility order requested at trial, and if shared parental responsibility is ordered in a case, after the judgment is entered the judge has no power to overrule either parent and make a parenting decision.

By comparison, Chapter 39 does give the judge the authority to make parenting decisions for a dependent child.

In a Chapter 39 case the issue is whether one or both parents are unfit because of abuse, abandonment or neglect of a child. In such a case if both parents are unfit, then the judge is a "super parent" empowered to make parenting decisions for the child. *See, e.g.*, §39.407(2)(a)2.

A finding that the parents do not confer together and share parenting decisions is a detriment to the child sufficient for a sole parental responsibility order, *see, e.g., Hunter v. Hunter*, 540 So.2d 235 (Fla. 3d DCA 1989); *Roski v. Roski*, 730 So.2d 413 (Fla. 2d DCA 1999); *Grigsby v. Grigsby*, 39 So.3d 453 (Fla. 2d DCA 2010).

This is a detriment to the child because after the parents separate **the best interests of the child require that someone have parental responsibility**, that is, the authority to make a parenting decision.

If shared parenting is ordered but in fact the parents cannot share parenting and make joint decisions together so that they are each equal participants, then no parenting decision at all can be made. But parenting decisions must be made for the child constantly.

So, in a case in which the parents cannot share parenting decisions, sole parental responsibility or shared parental responsibility with ultimate responsibility to one parent or the other must be ordered so that one of them, at least, has the authority to make a parenting decision.

In addition to the need for at least one parent to have parenting authority when the parents cannot agree, the parents inability to share parenting decisions is a detriment to the child if shared parenting is ordered, because a shared parenting order when the parents demonstrate they cannot agree is **an invitation for further discord and further litigation**. *See Furman v. Furman, supra.*

A goal of litigation under Chapter 61 is to reduce discord in the family and to reduce the sources of litigation, not increase it. §61.001(2)(c) provides that one of the purposes of Chapter 61 is:

"To mitigate the potential harm to the spouses and their children caused by the process of

legal dissolution of marriage."

As the court said in *Roski, supra,*:

> "This was the type of custody battle that makes the term 'embittered' a complete understatement. ... The trial court found that shared parental responsibility would be detrimental to the children. ... The record makes it clear that these parties were unable to reach agreement on any subject. Joint custody (*sic*) would be an invitation for weekly journeys to family court. ..." *Id.* at 414.

So, when parents cannot communicate and cannot cooperate concerning their child, the court should not order the parents to do what they have demonstrated they cannot do. Ordering such parents to share major parenting decisions, requiring them to confer together and make joint decisions, creates a situation that will keep the lawsuit going on and on with motions for contempt or supplemental petitions to modify. *See Furman v. Furman, supra.* Continuous litigation is not in the child's best interest and it is a detriment to the child. An object of every legal proceeding is to bring the case to an end, not leave it open to endless litigation. The object is to render a judgment that is truly final.

14. *E.g.*, your client wants to change the time-sharing schedule ordered in the final judgment.

The law says the judge can change a time-sharing schedule after a final judgment if:

(1) there has been a permanent, substantial change in circumstances since the final judgment that was not contemplated in the time-sharing decision in the final judgment, and

(2) the best interests of the child will be promoted by the proposed change. *Wade v. Hirschman,* 903 So.2d 928 (Fla. 2005).

So, the supplemental petition has to plead:

(1) ultimate facts showing a substantial change and

(2) ultimate facts showing a new time-sharing schedule that is in the child's best interest, and

(3) it must demand to modify the prior time-sharing order with another specific time-sharing schedule.

Note: You have to ask for relief in every petition or motion requiring evidence, so, in this example, you must ask for another, specific time-sharing schedule.

A petition alleging that "a substantial change in circumstances has occurred so the time-sharing schedule must be changed" is insufficient. It does not state a cause of action for any relief allowed by law. That is not an allegation of ultimate facts. That is a statement of a conclusion, the

legal conclusion the judge must make to grant the relief. The rule requires FACTS to be pleaded.

The facts of every supplemental petition to modify a time-sharing schedule are unique to that family, so the unique facts of each case must be pleaded.

The case law provides examples of facts that amount to a change in circumstances.

E.g., Ring v. Ring, 834 So.2d 216 (Fla. 2d DCA 2002) = not a substantial change: the parties' failure to communicate and continuing hostility.

E.g., Cooper v. Gress, 854 So.2d 262, 265 (Fla. 1st DCA 2003) = not a substantial change: constant bickering. It's not a change. It's what these parents do. The court also held that the mother had "invoked the 'magic words,' alleging a substantial change of circumstances since the final judgment," but "in fact the general allegations" in her supplemental petition were "insufficient as a matter of law to satisfy the" requirement to plead facts showing a substantial change in circumstances.

E.g., Sanchez v. Hernandez, 45 So.3d 57 (Fla. 4th DCA 2010) = not a substantial change: "the mother had difficulty communicating or cooperating ... and has displayed hostility toward the father. ... proving only an acrimonious relationship ..."

E.g., Ragle v. Ragle, 82 So.3d 109 (Fla. 1st DCA 2011) = not a substantial change: The allegations of the mother's supplemental petition were not proven.

E.g., Delivorias v. Delivorias, 80 So.2d 352 (Fla. 1st DCA 2011) = yes, a substantial change: the father's "counter - petition to modify custody set out detailed allegations of substantial, material changes in circumstances since entry of the final judgment of dissolution, and he testified at the hearing about these changes and ... that transferring primary residential custody would serve the children's best interests."

E.g., Burno v Burno, 135 So.3d 323, FN 1 (Fla. 5th DCA 2013) = yes a substantial change: "... the former wife had violated the visitation (*sic*) schedule and regularly made unilateral decisions regarding the children's upbringing. Those findings supported the trial court's conclusion that there had been a substantial, material, and unanticipated change in circumstances ..."

E.g. Sordo v. Camblin, 130 So.3d 743 (Fla. 3d DCA 2014) = yes a substantial change: "a rotating four-week schedule that proved to be unworkable, unstable, and contrary to the children's best interests."

E.g., Chamberlain v. Eisinger, ___ So.3d ___ (Fla. 4th DCA 2015) = yes, a substantial change: a "contentious relationship between the Mother *(sic*) and her three oldest children."

15. *E.g.*, your client wants to modify the child support order

There are five basic variables that determine a child support order:

(1) his gross monthly income, *see* §61.30(2)(a)
(2) her gross monthly income
(3) monthly health insurance premiums for (a) her, (b) him and (c) the child
(4) monthly employment day care amount for the child
(5) the ratio of overnights every 365 nights under the time-sharing schedule

Then there are some <u>other variables</u> that might apply:

(6) mandatory union dues
(7) mandatory retirement payments
(8) court ordered child support for other children which is actually paid
(9) alimony paid pursuant to an order for a previous spouse

Note: the parties' monthly expenses are irrelevant unless a factual basis for a deviation is pleaded under §61.30(11)(a).

The statute provides: "... *the difference between the existing monthly obligation and the amount provided for under the guidelines shall be at least 15 percent or $50, whichever is greater, before the court may find that the guidelines provide a substantial change in circumstances*." §61.30(1)(b).

Is this allegation in a supplemental petition demanding a modification of the child support order legally sufficient to put the other party on notice of all of the factual matters that might be introduced at trial? :

> "*A substantial change in the circumstances has occurred since the final judgment because the difference between the existing monthly child support obligation and the amount provided for under the statutory guidelines in a present guideline calculation is more than 15% or $50, whichever is greater*."

Does this allegation put the other side on notice that <u>everything</u> in a guideline calculation will be at issue?

How can you tell what will be proven at trial from this allegation?

See the dissenting opinion in *Newberry v. Newberry*, 831 So.2d 749 (Fla. 5th DCA 2002): should a child support recalculation be at issue any time child support is at issue in a supplemental petition?

See Sanford v. Davis, 136 So.2d 785 (Fla. 1st DCA 2014), in which an administrative child support order for $484 per month had been entered earlier in a separate case and the final judgment in this dissolution case modified that order to reduce it to $350 per month: "While the circuit court is permitted to modify child support, *see* § 409.2563(10)(c), Fla. Stat.; *see also Matthews v. Matthews*, 677 So.2d 323, 325 (Fla. 1st DCA 1996) (explaining that the circuit court has the authority to modify child support so long as the modification is requested and supported by evidence justifying modification), there is no record evidence that either party requested a modification ...."

(Why, why, why would a trial judge be motivated to update a child support order when no one pleaded for that????) *See* dissenting opinion in *Newberry*, *supra.*

See Glaister v. Glaister, 137 So.3d 513 (Fla. 4th DCA 2014): The former husband filed a petition to modify the child support because one child turned 18 and had graduated from high school. The lower court admitted evidence of the parties current incomes, health insurance premiums, etc., over objections by the former wife. "Initially, the only basis for modification pled by the former husband was the son's reaching majority and graduating from high school. The former husband did not request a recalculation of support based on any financial change ..."

So, the ultimate facts pled determine the relevant facts that may be proven.

Consider: must the particular changes be alleged? *E.g.*, "*the petitioner's income has gone down, the respondent's has gone up, the health insurance premiums of the children and the parties have increased, there is no longer any employment day care expense, the petitioner now has to pay a mandatory retirement contribution of 3%, etc., etc., so that the difference between the existing monthly child support obligation and the amount provided for under the statutory guidelines in a present guideline calculation is more than 15% or $50, whichever is greater*."

Is the underlined portion a required allegation in every petition to modify child support? No case says so.

Consider: Fla. S. Ct. Form 12.905(a) to modify parental responsibility or time-sharing, paragraph 6:

> "Petitioner ___ requests ___ does not request that child support be modified, consistent with modifications of the Parenting Plan/Time-Sharing schedule."

So, at trial may the petitioner prove that her income has gone down, his has gone up, she pays more for her health insurance, she now has mandatory union dues, he no longer has other children by another relationship living with him, etc.?

Consider: are adjustments under the deviation factors in §61.30(11)(a) included in such an allegation or must the factual basis for the particular adjustment sought be pleaded? Or, is §61.30(11)(a) part of a guideline calculation in every case?

See Todaro v. Todaro, 704 So.2d 138 (Fla. 4th DCA 1997): The former husband's petition to modify alleged only that the former wife's income had gone up. At trial, he proved that his income had gone down and the trial court allowed the evidence over the former wife's objection. The former wife objected to this proof as being outside of the pleadings so the issue was not tried by consent. Held: the judgment was reversed because it was based on findings that the former husband's income had been reduced, which was not pleaded. The former wife was prejudiced by not having notice that his income would be an issue.

Note: No matter what, in every supplemental petition to modify child support you must allege that the modification of the child support is in the best interests of the child, *Wade v.*

Hirschman, supra. *And see, e.g.,* Fla. S. Ct. Form 12.905(b), paragraph 5.

And you must request specific relief: "I ask the court to modify the child support as follows: _____." Fla. S. Ct. Form 12.905(b).

See, Clark v. Clark, 837 So.2d 1120 (Fla. 4th DCA 1120): The mother appealed an order for her to pay a portion of the children's uncovered medical expenses, saying this was not requested in the father's supplemental petition. His petition requested a modification of the time-sharing schedule, "abatement of his child support obligation, and a requirement 'that both parties should pay child support in accordance with the Florida Child Support Guidelines.'" The court held this "pleading was sufficient to put [the mother] on notice" that the court would order the parties to pay the children's uncovered medical expenses on a ratio. "Medical expenses ... fall within the category of child support." *See* §61.13(1)(b) "Each order for support shall contain a provision for health insurance for the minor child ... the court shall apportion the cost of health insurance and any noncovered medical ... on a percentage basis." *And* §61.30(8).

So, are the deviation factors also at issue with a pleading that "both parties should pay child support in accordance with the Florida Child Support Guidelines?"

16. Pleading Fraud

***E.g.,* a motion to set aside a postnuptial settlement agreement entered into during a dissolution action**.

The legal basis for such a motion is "misrepresentation" or "fraud," which is the first basis for setting aside a postnuptial settlement agreement under the decision of *Casto v. Casto*, 508 So.2d 330 (Fla. 1987).

The second basis for setting aside such an agreement under *Casto*, that is, "unfairness" or "unreasonableness," is not available for a marital settlement agreement entered into during dissolution litigation. *Petracca v. Petracca*, 706 So.2d 904 (Fla. 4th DCA 1998); *Crupi v. Crupi*, 784 So.2d 611 (Fla.5th DCA 2001); *Macar v. Macar*, 803 So.2d 707 (Fla. 2001); and *Parra de Rey v. Rey*, 114 So.3d 371 (Fla. 3d DCA 2013).

***E.g.,* a motion to set aside a final judgment under Rule 12.540(a) due to a "fraudulent financial affidavit.**"

These motions require allegations of ultimate facts.

These motions initiate a pendent action within the Chapter 61 action. So, the pleading requirements of the Rules apply to these motions.

All "claims for relief" must contain "a short and plain statement of the ultimate facts showing that the pleader is entitled to relief." Rule 1.110(b)(2).

Further, "**... in all averments of fraud ... the circumstances constituting the fraud ...**

shall be stated with such particularity as the circumstances may permit." Rule 1.120(b).

So, a motion to set aside a settlement agreement or a judgment on the basis of fraud

> "... must clearly and concisely set out the essential facts of fraud, and not just legal conclusions. ... [the motion] must specify the fraud. ... In addition to specifying the fraud, the motion should explain why the fraud, if it exists, would entitle the movant to have [the agreement] set aside.
>
> In many cases, the term 'fraud' is loosely used to label all conduct which has displeased an opposing party. Requiring ... fraud to be stated with particularity allows a trial court to determine whether the movant has made a prima facie showing which would justify relief ... Where fraud exists, it is not so subtle a concept that it cannot be described with precision. If a motion on its face does not set forth a basis for relief, then an evidentiary hearing is unnecessary." *Flamenbaum v. Flamenbaum*, 636 So.2d 579, 580 (Fla. 4th DCA 1994).

See, Hembd v. Dauria, 859 So.2d 1238, 1240 (Fla. 4th DCA 2003): "Hembd failed to state the alleged fraud with sufficient particularity to require an evidentiary hearing on the motion. ... To obtain a hearing ..., the law required Hembd to demonstrate a prima facie case of fraud, not just nibble at the edges of the concept."

See, Myers v. Myers, 652 So.2d 1214, 1216 (Fla. 5th DCA 1995), in which the wife's "vague and conclusory" allegations of fraud were insufficient "to state a cause of action for fraud, and therefore the Wife was not entitled to affirmative relief upon the entry of a default against the Husband."

See, Quittner v. Quittner, 725 So.2d 1168 (Fla. 3d DCA 1998), in which the trial court order granting the former husband's motion to set aside the marital settlement agreement was reversed because the evidence failed to prove the former wife's misrepresentations were material or that he had relied on them when he entered into the agreement.

"Florida Rule of Civil Procedure 1.120 requires that a cause of action for fraud be pled with particularity. The complaint must allege:

> (a) that there was a misrepresentation of a material fact;
>
> (b) that the defendant knew the falsity of the representation;
>
> (c) that the defendant made the representation intending that the plaintiff would rely on it in doing an act desired by the defendant; and
>
> (e) that the plaintiff's reliance caused damage. *Citiation omitted*.

Allegations contained in a pleading are insufficient if they are too general, vague or conclusory. *Citations omitted.* Where the elements of a cause of action are not pled, they may not be inferred from the context of the allegations. *Citations omitted*."

Myers v. Myers, 652 So.2d 1214, 1215 - 1216 (Fla. 5th DCA 1995). (*Paragraphing added.*)

See also Johnson v. Davis, 480 So.2d 625 (Fla. 1985).

Regarding *reliance*, a party's reliance on the misrepresentation must be *justified*. If he knows the statement is false or "*if its falsity is obvious to him*", his reliance is not justified. *Besett v. Basnett*, 389 So.2d 995 (Fla. 1980), at 997 citing s. 541 of the Restatement of Torts (1976). (*Emphasis added*)

Regarding the *materiality* of a misrepresentation, ultimate facts showing a misrepresentation was material to the agreement must be stated. A general allegation of materiality is conclusory and so insufficient.

The foregoing cases state the legal elements of fraud. The ultimate facts of fraud particular to a specific case must be pleaded in a claim for relief.

It is not enough to recite in the claim the foregoing legal elements for pleading and proving fraud. Rather, the pleader must concisely state the particular ultimate facts that amount to fraud. Rule 1.110(b).

The facts of every claim of fraud are unique, while the legal elements of every claim of fraud are the same. The unique, ultimate facts amounting to the legal elements of fraud must be stated before the motion states a cause of action for the relief sought, to set aside a marital settlement agreement or a final judgment.

The unique facts of a particular claim of fraud must be pleaded concisely and plainly. *Id.* If they are not so pleaded, there is no right to a hearing to attempt to prove the unpleaded facts and there is no need for any discovery into the unpleaded facts.

<u>There is no right to discovery until a cause of action for fraud is stated and then discovery is limited to the factual allegations of the motion.</u>

See Carter v. Carter, 3 So.3d 397 (Fla. 4th DCA 2009), in which discovery into the husband's finances was denied because the wife's motion to set aside the agreement had not pleaded "fraud or misrepresentation ... with specificity."

Further, if a legally sufficient motion is filed discovery is limited to the factual basis of the motion, *Carter, supra; Petracca, supra,* and discovery into the parties' general finances is improper.

17. <u>Pleading a Civil Motion for Contempt for the Nonpayment of Support</u>

A motion for civil contempt is governed by under Rule 12.615. That rule is a restatement of the law of civil contempt in *Bowen v. Bowen*, 471 So.2d 1274 (Fla. 1985) and cases citing *Bowen*, of which there are hundreds.

This motion seeks to compel compliance with a prior court order requiring the payment of support.

It is not a motion for an indirect criminal contempt proceeding and a trial under Rule

3.840. *See* the last sentence of Rule 12.615(a): "Contempt sanctions intended to punish an offender or to vindicate the authority of the court are criminal in nature and are governed by Florida Rules of Criminal Procedure 3.830 and 3.840."

A civil contempt motion to compel compliance with a support order, like any other civil contempt motion, "*must recite the essential facts constituting the acts alleged to be contemptuous*." Rule 12.615(b).

So, in a civil motion for failure to pay child support or alimony, the motion must allege the following facts particular to the case:

(1) there was a prior, valid support order entered on a certain date,

(2) the support was not paid at some specific date in the past after that order was entered,

(3) the payor **had** the financial ability to pay the support on the specific date that he failed to pay the support,

(4) therefore, the failure to pay the support on the specific date was willful, and

(5) therefore, the payor willfully violated the prior court order to pay support.

(6) how the payor was given or will be given notice of the motion and hearing.

To prove the third item, a past financial ability to pay on a specific date, the motion may allege the evidentiary presumption of an ability to pay on a specific date, as allowed under §61.14(5)(a) and *Bowen v. Bowen*, 471 So.2d 1274 (Fla. 1985).

An evidentiary presumption is a substitute for proof of an ability to pay when the support payment came due. The evidentiary presumption created by this law says the payor is presumed able to pay the support each month when it comes due.

This evidentiary presumption is so strong that it will make a *prima facie* case against the respondent in an indirect criminal contempt proceeding under Rule 3.840. *See Bowen, supra, and* "Frustrated by a Deadbeat Parent? Try Invoking the Dog Law," Hon. E.H. Eaton, Jr., Circuit Judge (Fla. Bar Journal, March 2000, Volume LXXIV, No. 3)

Rule 12.615(b) also provides that "[n]o civil contempt may be imposed without notice to the alleged contemnor and without providing the alleged contemnor with an opportunity to be heard,..."

Rule 12.615(c) requires the court to make "an express finding that the alleged contemnor had notice of the motion and hearing."

These are the essential allegations for a motion for civil contempt under Rule 12.615(b). Particularly important is the requirement to plead that the payor *had* the ability to pay the support but did not pay it, because the court's order granting a civil contempt motion must make a finding

that the payor "*had* the present ability to pay support." Rule 12.615(d)(1)(*Emphasis supplied*).

The also Rule requires that the court's order on a motion for civil contempt "shall contain a recital of the facts on which these findings are based." Rule 12.615(d)(1).

The court's findings must, of course, be based on evidence in the record at the hearing and the relevant evidence is determined by the facts pled.

So before the court can grant a civil motion for contempt, at the hearing **the movant must present evidence** that proves:

(1) there was a prior, valid support order entered on a certain date,

(2) the support was not paid at some specific date in the past after that order was entered,

(3) the payor had the financial ability to pay the support on the specific date that he failed to pay the support,

(4) therefore, the failure to pay the support on the specific date was willful, and

(5) therefore, the payor willfully violated the prior court order to pay support. As provided in *Bowen v. Bowen*, 471 So.2d 1274 (Fla. 1985) and §61.14(5)(a) the movant may rely on the evidentiary presumption to prove a past ability to pay.

These facts must be alleged in the motion and also proven by the evidence at the hearing so that the court has a record sufficient to support **the factual findings required by the Rule in the court's order** , that is,

(1) there was a prior, valid support order entered on a certain date,
(2) the support was not paid at some specific date in the past after that order was entered,
(3) the payor had the financial ability to pay the support on the specific date that he failed to pay the support,
(4) therefore, the failure to pay the support on the specific date was willful, and
(5) therefore, the payor willfully violated the prior court order to pay support.

These findings in the court order may not be conclusory, just as the facts pled and the facts proven may not be conclusory and general.

The Rule requires that the order **"shall contain a recital of the facts on which these findings are based**." Rule 12.615(d)(1).

Next: what is the relief the movant seeks? The foregoing is what is needed to prove contempt for a prior court order.

See above In Florida, a pleader must

(a) allege facts and
(b) demand the relief sought

This is essential due process of law in Florida civil actions. Rule 1.110(b)

So, the motion must state the relief, that is, the sanction sought that will compel compliance because that is the point of a civil motion for contempt, to compel compliance

The court does not have a burden of proof or the responsibility to come up with a sanction that the movant thinks is appropriate. It is the movant's responsibility to demand the relief sought in the motion.

Note: the court can initiate a 3.840 proceeding and proceed without a prosecutor being appointed and without a jury trial if the sentence will be 180 days or less.

What are sanctions allowed by law?

- a money judgment for past due support;
- some certain hours of community service;
- a fine;
- attorney's fees;
- a job search order;
- incarceration with a purge amount,

etc., etc.

If incarceration with a purge is the relief requested in the motion as a sanction, then

(A) the motion must also allege and the evidence at the hearing must demonstrate that the contemnor

(1) right now has a present and immediate ability at the time of the hearing while standing in front of the judge,

(2) to pay a certain purge amount demanded by the movant,

(3) from a source that is identified in the evidence at the hearing, the evidence at the hearing must create a record that identifies the source from which the contemnor can pay a purge immediately.

(B) **The court's order must make findings from substantial competent evidence at the hearing that the contemnor has the present and immediate ability to pay the purge amount that is ordered and the order must name the source of the funds from which the contemnor can pay the purge immediately**.

See Rule 12.615(e) and *Bowen v. Bowen*, 471 So.2d 1278 (Fla. 1985) and all cases citing *Bowen*.

Note: There is no presumption of a present ability to pay. The presumption in *Bowen* and §61.14(5) applies to the past failure to pay.

So, the movant has the burden to prove the present ability to pay at the hearing with substantial competent evidence, which includes the burden to prove the source from which

the contemnor can immediately pay the purge amount.

As the supreme court said in *Bowen*: "...the purpose of a civil contempt proceeding is to obtain compliance on the part of a person subject to an order of the court. Because incarceration is utilized solely to obtain compliance, it must be used only when the contemnor has the ability to comply. This ability to comply is the contemnor's 'key to his cell.'" *Id*. at 1277.

Finally, note: "There is nothing that requires a trial court to hold a person in contempt; the court's determination in this regard is reviewed for abuse of discretion." *Milton v. Milton*, 113 So.3d 1040 (Fla. 1st DCA 2013), *citing Nunes v. Nunes*, 112 So.3d 696 (Fla. 4th DCA 2013).

(**By the way**, all of these considerations concerning the contemnor's ability to pay also apply in violation of probation hearings in which the charge is that the probationer failed to pay her costs of supervision, court costs, fines or restitution.

See, e.g., Stevens v. State, 823 So.2d 319 (Fla. 2d DCA 2002): "Similarly, the greater weight of the evidence does not support the finding that Stevens violated the condition regarding the payment of financial costs. Revocation of probation for failure to pay costs is improper absent evidence of the probationer's ability to pay. *Manies v. State*, 621 So.2d 679 (Fla. 2d DCA 1993). The testimony at the hearing revealed that, at the time of violation, Stevens was behind in her cost payments. However, the probation officer also testified that Stevens was an unemployed, stay-at-home single mother. The State presented no evidence demonstrating Stevens' ability to pay costs.")

18. Pleading and Proving Attorney's Fees

A party must first plead the factual basis for fees in a petition or a motion

The necessity to plead for fees must not be overlooked. In general, a petition or counter petition must plead the factual basis for any relief, including a request for attorney's fees, costs and suit money, as well as parental responsibility, time-sharing, equitable distribution, alimony, and child support, and any other issue in the case, *e.g.*, relocation of a child. *See* Rule 1.110(b).

Aside from §57.105, **there are three factual bases for fees in family cases**:

(1) The financial need of one party and the ability to pay of the other party, which is the statutory basis for fees under §61.16 or §742.045. Under these provisions, the court is required to "level the playing field" so that each party has the same ability to hire competent counsel and to pay the reasonable and necessary fees and costs of the action. *See, e.g., Martin v. Martin*, 959 So.2d 803 (Fla. 1st DCA 2007).

(2) Nonstatutory bases declared in *Rosen v. Rosen*, 696 So.2d 697 (Fla. 1997); *see, e.g., Dybalski v Dybalski*, 108 So.3d 736 (Fla. 5th DCA 2013), *Elliot v. Elliot*, 867 So.2d 1198 (Fla. 5th DCA 2004), for example, "conduct which causes the opposing party to unreasonably incur fees ..." *Dybalski* at 1201.

See also deLabry v. Sales, 134 So.3d 1110 (Fla. 4th DCA 2014), in which the former wife

pleaded for fees and as the "sole basis" for her fees she "alleged that the former husband's petition was 'frivolous' ... under the authority of *Rosen ...'*", and the appellate court denied her claim for fees on that basis because his action "was not frivolous," the lower court had granted his supplemental petition to modify child support, and the appellate court would "not sua sponte consider other factors for an award under *Rosen."* The DCA denied her claim for fees "pursuant to *Rosen* because she alleged insufficient grounds for such an award." *Id*. at 1117.

See also Wrona v. Wrona, 592 So.2d 694 (Fla. 2d DCA 1991), which held that the trial court must limit a claim for fees to reasonable fees for necessary services and that "avoidable litigation expense" is not recoverable. *Id.* at 698.

(3) a contract allowing the recovery of fees on some basis, such as, a marital settlement agreement with a clause allowing attorney's fees to the "prevailing party." *Stockman v. Downs*, 573 So.2d 835 (Fla. 1991).

Whatever the facts may be that entitle the pleader to the relief sought, *i.e.*, attorney's fees, those ultimate facts must be pleaded in the petition or counter petition or answer or motion.

Rule 1.110(b): "A pleading which sets for a claim for relief," *i.e.*, attorney's fees, "... must state a cause of action and shall contain ... (2) a short, plain statement of the ultimate facts showing that the pleader is entitled to the relief."

So, the ultimate facts showing an entitlement to attorney's fees must be pleaded

- *e.g.*, the pleader "is unable to pay [his or her] fees and the opposing party is able to pay [his or her] fees," or

- *e.g.*, the "opposing party may, has or will engage in conduct that causes the pleader to incur unnecessary and unreasonable fees, costs and suit money," or

- *e.g.*, "the parties signed a contract which has a clause for the prevailing party to be awarded attorney's fees,"

in the petition or counter petition or answer or motion before the party may ask for these in temporary relief or at trial or after trial if the court reserves jurisdiction to consider the issue of fees after the trial.

On matters before the court on a motion, such as a motion to set aside a settlement agreement or motion for contempt, likewise a party must ask for fees and state the factual basis or the court will not have the authority to award fees.

If there is no motion or pleading stating the ultimate facts showing an entitlement to the fees, there is no notice to the other party so due process bars the pleader for asking for something for which no notice was given.

See, e.g., Stockman v. Downs, 573 So.2d 835 (Fla. 1991), in which the court held that the failure to plead the existence of the contract paragraph giving a basis for fees waives the claim for

fees under the contract.

Likewise, a party seeking fees under §61.16 or §742.045 must plead ultimate facts showing the pleader is entitled to fees under that statute. The facts showing a right to an award under that statute are that the pleader does not have an ability to pay a lawyer that is equal to that of the adversary when the court considers the "financial resources of both parties." §61.16 or §742.045.

Likewise, if the basis for fees is the factors in *Rosen*, then ultimate facts must be pleaded, "the respondent may, has or will engage in conduct that causes unnecessary and unreasonable litigation."

See, e.g., Kunsman v. Wall, 125 So.3d 868, 869 (Fla. 4th DCA 2013): "Wall sought sanctions for having to file a motion to enforce the final judgment, but did not pleaded (*sic*) the statute under which he sought fees in his original motion. Although Wall plead (*sic*) sections 57.105 and 61.16 as a basis for his entitlement to fees in his amendment to his motion to enforce, he sought fees only for Kunsman's filing of frivolous motions in the amendment, not for her actions in refusing to sign the deed. The magistrate erred in awarding fees because Wall did not plead the basis for his entitlement to fees in his original motion to enforce. *See Stockman v. Downs*, 573 So.2d 835, 838 (Fla.1991). ... Therefore, we strike the award of attorney's fees."

Must plead and prove need and ability to pay under the statute, §61.16 or §742.045

In general, in order for a party to be entitled to attorney's fees from the other party, in whole or in part, based on §61.16 or §742.045, the party requesting fees must plead and then prove: (1) the party needs financial assistance to pay the fees and costs; and (2) the other party has the ability to pay the fees and costs. *See, e.g., Lopez v. Lopez*, 780 So.2d 164 (Fla. 2d DCA 2001).

If a nonstatutory factual basis, must plead and prove these facts

If the basis for the request for fees is the factors in *Rosen v. Rosen*, 696 So.2d 697 (Fla. 1997) or a "pattern of extensive, expensive and needless litigation" and "inequitable conduct" such as that in *Mettler v. Mettler*, 569 So.2d 496, 498 (Fla. 4th DCA 1990), the facts demonstrating the "pattern" and "conduct" or facts showing the *Rosen* factors must be alleged in the motion and also in the petition.

Under *Rosen*, the court may consider "all the circumstances surrounding the suit" as well as financial need and financial ability to pay under F.S. §61.16 or §742.045. Under those statutes, "the financial resources of the parties are the primary factor to be considered" when deciding a motion for fees. *Rosen* at 700. "However, other relevant circumstances to be considered include factors such as 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." *Id*. "Moreover, in situations where a court finds that an action is frivolous or spurious or was brought primarily to harass the adverse party, we find that the trial court has the discretion to deny a request for attorney's fees to the party bringing the suit. *Id.* at 701.

In general, if there is no pleading of ultimate facts in a petition or motion and no demand for a particular relief, that is, attorney's fees, due process prevents the court from

granting that relief. *See Kunsman, supra.*

In general, if the trial court does not reserve on the issue of fees, costs and suit money for post trial proceedings, these must be proven at the trial like any other issue raised in the pleadings.

Citations are unnecessary. Parties should request or stipulate at trial, at least, that fees, costs and suit money will be heard in post trial proceedings. Otherwise, these issues must be proven at the trial and ruled on in the final judgment.

Summary:

First, give notice in the petition or counter petition or answer or motion of the factual basis for the fees sought, whether need and ability to pay under §61.16 or any nonstatutory considerations, *Rosen,* etc., or both, or a contract clause. *Stockman, supra.*

Next, file and serve a motion for fees and a fee affidavit. Whatever the basis for the fees, the lawyer seeking fees should state in a motion for fees the number of hours reasonably and necessarily required to represent the client and should also file his or her affidavit that avers the hours reasonably and necessarily required to represent the client and the reasonable hourly rate and attaches the detailed hourly billing records of the lawyer and any paralegals.

The motion and affidavit and the lawyer's testimony must show in some detail the hours spent on necessary litigation and the hours spent on unnecessary litigation.

Next, prove the facts. Then these facts raised in the pleading and the motion must be proven by competent substantial evidence at the hearing, which means **the testimony of the lawyer seeking the fee**.

If financial need and ability to pay is the basis, the client's testimony and the testimony of the other party or the court's findings in a final judgment about income and equitable distribution or the parties' financial affidavits may also have to be admitted as evidence.

If the basis for the fee request is unnecessary litigation, then the lawyer's testimony must show in some detail the hours spent on necessary litigation and the hours spent on unnecessary litigation.

If this breakdown of the time spent necessarily and unnecessarily is not testified to by the lawyer, the court has no basis in the record for finding the hours spent on unneeded litigation.

In general, a client is not a competent witness on what is necessary and unnecessary litigation, although he or she may have some competent, relevant evidence about time wasted.

Only reasonable and necessary fees are recoverable, whether sought under the statute or nonstatutory considerations or a contract,

In all events, whether fees are sought under the statute or *Mettler* or *Rosen* or a contract, the party requesting fees "must prove with evidence the reasonableness and necessity of the fee sought." *Chouri v. Chouri*, 2 So.3d 987 (Fla. 2d DCA 2008).

Proving the reasonable and necessary fees:
The hours reasonably and necessarily expended = first step
The reasonable hourly rate = second step

The reasonableness of a fee is proven by proving the reasonable number of hours and the reasonable hourly rate. "The number of hours reasonably expended, determined in the first step, multiplied by a reasonable hourly rate, determined in the second step, produces the lodestar, ..." *Florida Patient's Compensation Fund v. Rowe*, 472 So.2d 1145, 1151 (Fla. 1985).

The lawyer must testify

"The only evidence with regard to the wife's attorney's fees was the wife's testimony that she lacked the ability to pay her own fees ...We point out that there is a difference between establishing a need for fees [and an ability to pay] and establishing what a reasonable fee award should be. The latter requires evidence detailing exactly what services were performed, the hours expended, and the hourly rate. ... Without any evidence of those factors, there is nothing to support an actual award." *Warner v. Warner*, 692 So.2d 266, 267, 268(Fla. 5th DCA 1997), which reversed an attorney fee award to the wife.

An expert witness regarding the hourly rate and number of hours is not required under the statute, §61.16 or §742.045: "... shall not require corroborating expert testimony ..." ;

An "award of attorney's fees requires competent and substantial evidence. ... Competent evidence includes invoices, records and other information detailing the services provided as well as the testimony from the attorney in support of the fee. ... [Here], appellee's attorney did not testify ... Without the attorney's testimony as to the reasonableness of the hours expended and the hourly rate, the evidence does not support the award." *Brewer v. Solovsky*, 945 So.2d 610 (Fla. 4th DCA 2006). (Emphasis supplied)

So, the attorney seeking fees must support the request **with (1) his or her own testimony and (2) corroborating documents**, that is, **"invoices, records and other information detailing the services provided as well as the testimony from the attorney in support of the fee."** *Brewer, supra.*

And regarding the reasonableness of the hourly rate, "the party who seeks the fees carries the burden of establishing the prevailing 'market rate,' *i.e.*, the rate charged in that community by lawyers of reasonably comparable skill, experience and reputation, for similar services." *Florida Patient's Compensation Fund, supra,* at 1151.

Temporary fee request: the pleading and proof is the same

If temporary fees are sought for prospective work, then the lawyer's testimony must establish the total reasonable and necessary number of hours "to be expended" by the attorney and

any associates or paralegals of the attorney and also the reasonable hourly rate of all of these. *Baker v. Baker*, 35 So.3d 76, 77 (Fla. 2d DCA 2010).