Modifications: Like Poltergeist, they're back!

Judge Sarah J. Jones
Magistrate Barbara Kissner

Learning Objectives

- Identify requirements necessary to modify a Parenting Plan and Timesharing
- Identify requirements necessary to modify Child Support
- Identify requirements necessary to modify alimony

WARNING

This is an interactive presentation

For ALL Modifications, start with the basics: Jurisdiction Venue Pleading Service Answer

Hearing?

Once there has been service on the other party, a hearing can be requested to determine if there has been a substantial change in circumstances.

See, § 61.13(3) Fla. Stat.(2021)

Modifying Parenting Plans and Timesharing

A parenting plan may be modified if there is a substantial, material, and *unanticipated* change in circumstances and a determination that the modification is in the best interests of the child. *See, § 61.13(3) Fla. Stat.(2021)*

Hypothetical 1

At hearing on Motion for Contempt, the moving party requests that you modify the timesharing since the opposing party is not exercising their timesharing. What do you do?

A: Allow for testimony and rule on the requested modification.

B. Treat the motion as a Petition for Modification and schedule this portion of the Contempt Motion for a future hearing

C. Rule on the Motion for Contempt and advise the moving party that you are not able to proceed on their request for modification based on their Motion for Contempt.

Answer is C – Rule on Motion for Contempt

TWO REASONS:

A simple request or motion is NOT enough.

If there has been a substantial change, the proper pleading is a supplemental petition (not a motion).

See, Fla. Fam. L.R.P. 12.100.

The court may not change timesharing at a contempt proceeding. See, Duncan v. Brickman, 233 So,3d 477, 482 (Fla. 2d DCA 2017); Berger v. Berger, 795 So. 2d 113 (Fla 5th DCA 2001).

Hypothetical 2:

After the Court denied the request to modify timesharing at the Contempt hearing, the Mother filed a Supplemental Petition for Modification of the Parenting Plan and Timesharing.

The Mother alleges that the Father has not been exercising his timesharing and thus a modification is needed.

What information must the Court have in order to make a ruling on this Petition?

Hypothetical 2:

What does the Court need to know?

Why isn't the Father visiting?

Is this a temporary situation or permanent?

Was this an issue that was addressed in the original proceeding?

Is the modification in the best interest of the children and why?

The moving party MUST show that the circumstances have substantially, materially changed since the original determination

<u>and</u>

that the modification would be in the children's best interest.

Moore v. Wilson, **16 So.3d 222 (Fla. 5th DCA 2009)**

Haas v. Haas**, 686 So. 2d 799 (Fla. 4th DCA 1997)**

McGlamry v. McGlamry**, 608 So. 2d 533, 554-55 (Fla. 4th DCA 1992)**

Mesibov v. Mesibov**, 16 So. 3d 890 (Fla. 5th DCA 2009)**

Trial court has <u>far less authority and discretion to modify</u> timesharing than to make the initial timesharing determination. *See, Dickson v. Dickson*, 169 So.3d 287, (Fla. 5th DCA 2015)

Hypothetical 3

Father alleges that the Mother is not communicating with him regarding the children's education, medical, social and other aspects of the children's lives. Father is requesting that he become the "primary parent" by having the majority of the timesharing and instead of shared parenting that he be able to make ALL the decisions regarding the children.

What information must the Court have in order to make a ruling on this Petition?

Hypothetical 3

What does the Court need to know?

Why isn't the Mother communicating?

If she is not, what evidence supported the lack of communication?

Was this an issue that was addressed in the original proceeding?

Is the modification in the best interest of the children and why?

Hypothetical 3- continued

Are communication failures a ‘substantial change’ in circumstances?

No.

Parties have difficulty communicating and are not getting along, which is not enough to prove a substantial change. *See, Korkmaz v. Korkmaz*, 200 So.3d 263 (Fla. 1st DCA 2016); *see also, Idelson v. Carmer*, 330 So.3d 81 (Fla. 2d DCA 2021)

A party must establish more than an acrimonious relationship and lack of effective communication in order to show a substantial change in circumstances. *See, Sanchez v. Hernandez*, 45 So.3d 57 (Fla. 4th DCA 2010).

***See also, Hutchinson v Hutchinson* 287 So.3d 695 (Fla. 1st DCA 2019)**

What else constitutes a substantial change?

DOMESTIC VIOLENCE?
Yes!

<u>Parents engaging in DV in front of their children</u> constitutes an unanticipated material and substantial change in circumstances.

***See, Meyers v. Meyers*, 295 So.3d 1207 (Fla. 2d DCA 2020)**
***See, P.D.V.-G. v. B.A.V.-G.* 320 So.3d 885, (Fla 2d DCA 2021)**

What else constitutes a substantial change?

DCF Removal?
Yes!

Former Wife's behavior, her relationship with new boyfriend and <u>removal of children during a dependency case</u> is a substantial change in circumstances.
See, P.D.V.-G. v. B.A.V.-G. **320 So.3d 885 (Fla. 2d DCA 2021)**

What else constitutes a substantial change?

Sexual abuse of the child?
Yes!

<u>Sexual abuse of parties' child</u> by mother's husband was a substantial, material and unanticipated change in circumstances. *See, R.S. v. S.K.* 313 So.3d 901 (Fla. 2d DCA 2021)

What else constitutes a substantial change?

Extra room in house?

No!

Availability of an additional room in the house did not constitute a material, substantial and unanticipated change in circumstances. *See, Villalba v. Villalba*, 316 So.3d 366 (Fla. 4th DCA 2021).

What else constitutes a substantial change?

Is a life improvement a substantial change in circumstance?

No.

Parent's mere move or life improvement to an environment more conducive to children is not a substantial, material, and unanticipated change in circumstances to justify modification of timesharing. *See, e.g., Bryan v. Wheels*, 295 So. 3d 889, 891 (Fla. 1st DCA 2020) ("Florida law doesn't consider such a move —by itself and without any showing of how that move impedes the present timesharing plan—to necessarily constitute a substantial and material change in circumstances.")

What else constitutes a substantial change?

Stable home?

No.

The fact that the father now has a relatively stable home environment is, in and of itself, inadequate to constitute a substantial change in circumstances.

***See, Reed v. Reed*, 182 So. 3d 837 (Fla. 4th DCA 2016)**

***See, Bartolotta v. Bartolotta*, 687 So. 2d 1385, 1387 (Fla. 4th DCA 1997)**

What else constitutes a substantial change?

Parent moving a lot?
No!

The fact that Mother has made <u>a few local moves</u> since entry of the final judgment <u>does not</u> establish a substantial change in circumstances. *See, Hutchinson v. Hutchinson*, 287 So.3d 695, 697 (Fla. 1st DCA 2019).

What else constitutes a substantial change?

Messy home and unkempt kids
No!

While the evidence establishes that the former wife's home had at times been poorly kept and that her children were unkempt, these circumstances alone do not constitute a substantial and material change in circumstances.

***See, Garcia v. Guiles*, 254 So.3d 637, 641 (Fla. 1st DCA 2018) *citing* *Boykin v. Boykin*, 843 So.2d 317, 321 (Fla. 1st DCA 2003)**

What else constitutes a substantial change?

Multiple Relationships?

Maybe (NEED findings)

Although former wife had <u>several relationships with men</u>, court made no finding that mother's relationships affected children in any way, or that mother's parenting skills had so deteriorated since marital dissolution that it would be <u>detrimental to children</u> to remain in her care and custody. *See, Kilgore v. Kilgore*, 729 So.2d 402 (Fla. 1st DCA 1998) Trial court reversed.

What else constitutes a substantial change?

Poor moral choices?

Maybe not

Poor moral choices are insufficient grounds to modify custody, absent some impact on the child. *See, Dinkel v. Dinkel*, 322 So.2d 22 (Fla. 1975).

Frequent moves, a less stable lifestyle, even poor relationship choices standing alone may not support a custody modification where the residential parent has moved out of necessity, has subsequently established a stable home, and the child's needs have always been met. *See Jablon v. Jablon*, 579 So.2d 902 (Fla. 2d DCA 1991); *Kelly v. Kelly*, 642 So.2d 800 (Fla. 2d DCA 1994).

What else constitutes a substantial change?

Poor moral choices?
Maybe not… BUT SEE

The mother remained unsettled, without a permanent home, and showed no signs of recognizing or resolving her problems, including the issues of depression and prescription drug use which interfered with her ability to meet her daughter's needs. The record confirmed a significant deterioration of parenting skills post-judgment, which established a substantial change of circumstances, and that the child's best interests would be promoted by living with her father. *See, Bartolotta*, 687 So.2d 1385. *Sullivan v. Sullivan*, 736 So.2d 103 (Fla. 4th DCA 1999)

What else constitutes a substantial change?

Drinking too much?
Yes!

Mother's relapse and admission that she is alcoholic and an incident of putting children into danger (DUI with kids in car), were a substantial change. *See, Allen v. Allen* 787 So.2d 215 (Fla. 5th DCA 2001); *distinguished by Virant v. Bruce*, 899 So.2d 1157 (Fla. 5th DCA 2005)

FYI- Case remanded because trial court abused its discretion by NOT ordering supervised timesharing (only added safety precautions).

What else constitutes a substantial change?

Child's health?

Maybe

The change in circumstances due to the failure to thrive diagnosis supports modification of both timesharing and ultimate healthcare decision-making. *See, Schot v. Schot*, 273 So.3d 48 (Fla. 4th DCA 2019) *citing Kasdorf v. Kasdorf*, 931 So.2d 257, 258-59 (Fla. 4th DCA 2006).

What else constitutes a substantial change?

Inability to agree on school?
Yes!

The parties' <u>inability to agree on which school</u> the children should attend also supports modification of decision-making with respect to the children's education.

See, Schot v. Schot, 273 So.3d 48 (Fla. 4th DCA 2019
See, Watt v. Watt, 966 So.2d 455, 458 (Fla. 4th DCA 2007)
See, Dickson v. Dickson, 169 So.3d 287 (Fla. 5th DCA 2015)

What else constitutes a substantial change?

Inability to agree …

Shared parental responsibility assumes that the parties can come to agreement on the welfare of their children, but where the parties cannot and will not come to agreement, the trial court can determine that such an impasse constitutes a substantial change in circumstance, requiring modification of the final judgment in the best interest of the children.

See, Watt v. Watt **966 So.2d 455 (Fla. 4th DCA 2007)**
See, Sotnick v. Sotnick, **650 So.2d 157, 160 (Fla. 3d DCA 1995)**
See, Hancock v. Hancock**, 915 So.2d 1277 (Fla. 4th DCA 2005)**
See, Vazquez v. Vazquez**, 443 So.2d 313 (Fla. 4th DCA 1983)**

Modification of Child Support

Modification of Child Support

Jurisdiction:

The Court entering a child support order maintains continuing jurisdiction to modify the amount, terms, and conditions of child support payments.

See, § 61.13(1)(a) Fla. Stat. (2021).

Hypothetical 4

Mother's SPTM seeks change in parenting plan, timesharing and "any other relief the court deems just and proper".

Mother is granted sole custody.

Is it OK to modify support?

Is it OK to modify support?

NO!

Must specifically request relief

<u>"any other relief the court deems just and proper"</u> is not specific; the court has no jurisdiction. *See, Voorhees v. Voorhees,* 204 So.3d 75, 77 (Fla. 4th DCA 2016)

***See also, Mason v. Mason*, 317 So.3d 1286 (Fla. 5th DCA 2021)**

Pleading: Must request relief

FW plead for <u>increase</u> in child support.

FH did <u>not</u> seek reduction, argued support should <u>stay the same</u>.

Trial Court reduced child support.

<u>Reversed because neither party plead to reduce</u>.

***See, Cavallaro v. Cavallaro*, 916 So.2d 922 (Fla. 4th DCA 2005) *citing* *Newberry v. Newberry*, 831 So.2d 749 (Fla. 5th DCA 2002)**

What constitutes a substantial change?

The GUIDELINES may provide the basis for proving a substantial change in circumstances upon which a modification of an existing order may be granted.

If the difference between old and new amount is AT LEAST $50.00 OR 15% - WHICHEVER IS GREATER.
See, §61.30(1)(b) Fla. Stat.

Hypothetical 5

SPTM Child Support:
Current amount: $350.00

New guideline: $400.00
Does it qualify?

No.
It is $50.00 but not 15% ($52.50) (must be greater of the two)

If new guideline is $405.00, it qualifies.
It is more than 15% ($52.50) and more than $50

Hypothetical 6

Parties enter Mediated Settlement Agreement in 2018 with parenting plan and agreement for above-guideline child support at $600.00.

In 2023, Dad files Supplemental Petition to Modify Child Support seeking a decrease. New guideline is $400.00.

Can you modify?

No, not unless there is also another change

The 15% or $50 change is not applicable where parties agreed to an above guideline amount unless the party seeking a modification proves there has been a decrease in income AND change in child's needs.

When modification of an existing order of support is sought, the proof required to modify a settlement agreement and the proof required to modify an award established by court order shall be the same. *See, § 61.14(7) Fla. Stat.*

***Ervin v. Chason*, 750 So.2d 148 (Fla. 1st DCA 2000)**
***Turner v. Turner*, 695 So.2d 422 (Fla. 3rd DCA 1997)**
***Simmons v. Simmons,* 922 So.2d 373 (Fla. 4th DCA 2006))**

Modification of Administrative Support Order

Florida Statutes provide that either parent may seek to have the Court address a child support obligation. *See, §409.2563(2)(g), Fla. Stat.(2021)*

Court may only prospectively modify and supersede an Admin CS Order. *See, §409.2563*(10)(c); *see, Faulk v. Dept. of Revenue*, 157 So. 3d 534 (Fla. 1st DCA 2015)

FUN FACT – Modifying and Superceding an Admin Order <u>does NOT require substantial change</u>.

A party can simply ask, at any time, for court to determine amount.
§409.2563 Fla. Stat.

PRO TIP:
Court may NOT <u>retroactively modify</u> by the circuit court
§409.2563(10)(c) Fla. Stat.

<u>Determine Arrears</u> and include in the superseding order.
§409.2563(10)(c) Fla. Stat.

Pleading: Must request relief

Court should read pleading to determine request

Prisoner's pleading requesting to <u>modify Admin Support Order.</u> CSHO/Court denied pleading finding no jurisdiction. Court said he had to go through Administrative process and file <u>Pet for Court to Adopt Admin Order first.</u> First DCA reversed.

<u>Read full pleading and it is apparent he wanted modify CS</u> and <u>no need to file a Pet to Adopt first.</u>

See, Faulk v. State, Dept of Revenue, 157 So.3d 534 (Fla. 1st DCA 2015); ***Sanford v. Davis, 13S So.3d 785 (Fla. 1st DCA 2014)***

Modification of Alimony

PMUSIC

Permanent
Material
Unforeseen
Substantial
Involuntary
Change

BTG – Bridge the Gap

An award of bridge-the-gap alimony shall <u>not be modifiable in amount or duration</u>.
See, §61.08(5) Fla. Stat.

Hypothetical 7
Rehabilitative Alimony

Rehabilitative alimony awarded in amount of $500.00 per month for two years to allow Former Wife to get her nursing degree.

She attends school for 6 months and gets her LPN, then stops.

Is it modifiable?

Rehabilitative Alimony

Yes.
She is no longer compliant with plan.

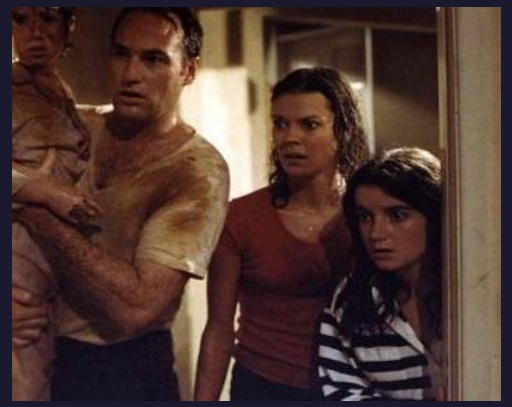
Request to modify MUST be filed BEFORE plan ends.

Rehabilitative Alimony

An award of rehabilitative alimony may be modified or terminated

- **upon a substantial change in circumstances**
- **upon noncompliance with the rehabilitative plan**
- **or**
- **completion of the rehabilitative plan. *See, §61.08(6)(c) Fla. Stat.***

Durational Alimony



Amount – YES
The amount of durational alimony may be modified or terminated based upon a substantial change in circumstances

Length – NO
The length of an award of durational alimony may not be modified except under exceptional circumstances and may not exceed the length of the marriage.

See, § 61.08(6)(c) Fla. Stat.

Permanent Alimony

Permanent alimony may be modified or terminated based upon a substantial change in circumstances or upon the existence of a supportive relationship.

See, § 61.08(6)(c) Fla. Stat.

Permanent Alimony

Supportive relationship:

Must reside together, not be related

Burden on obligor to prove
Standard of proof: Preponderance of evidence
See, § 61.14(b)(1) Fla. Stat.

Permanent Alimony

Supportive relationship: FACTORS
Holding out as married couple (name, mailing address, refer to each other)
Length of time live together
Pooling of assets/financial interdependence and extent of support
Performing valuable services for other or their employer
Work to enhance value of something
Joint purchase of personal or real property
Expressed or implied agreement of support
Conjugal relations not necessary but relevant

See, §61.14(b)(2)(a)-(k), Fla. Stat.

Substantial Change

Increase in housing costs?

No

Damiano v. Damiano, 855 So.2d 708 (Fla. 4th DCA 2003)

8 percent decrease in living expenses?

No

Rahn v. Rahn 768 So. 2d 1102 (Fla. 2d DCA 2000)

38 percent decrease in monthly living expenses?

Yes!

Antepenko v. Antepenko, 824 So.2d 214 (Fla. 2d DCA 2002)

Driggers v. Driggers, 127 So.3d 762 (Fla. 2d DCA 2013) (40%)

Substantial Change

Early retirement (before 65) due to health issues?
Yes!
Tanner v. Tanner, 330 So.3d 567 (Fla. 2d DCA 2021)

The need of one spouse and the ability to pay of the other spouse continue to be the most important factors to consider in modification proceedings.
***See, Albu v. Albu*, 150 So.3d 1226 (Fla. 4th DCA 2014) *citing* *Boone v. Boone*, 3 So.3d 403, 404 (Fla. 2d DCA 2009)**

Relocation
Florida Statute § 61.13001

What is parental relocation with a child?

"Relocation" means a change in the location of the principal residence of a parent ...

at the time of the last order establishing or modifying time-sharing

Change of location must be at least 50 miles from that residence, and for at least 60 consecutive days

Relocation

Two ways that a parent may relocate with their child/ren

BY AGREEMENT

Agreement by:

Parents and persons entitled to access or timesharing with child

SIGN a WRITTEN AGREEMENT which includes

Consent to the relocation

Defines an access or time-sharing schedule for the nonrelocating parent

AND

Describes, if necessary, any transportation arrangements related to access or time-sharing.

BY AGREEMENT

Parties shall seek ratification of the agreement by court order

No evidentiary hearing needed UNLESS requested, in writing, within 10 days after the date the agreement is filed with the court.

If no hearing requested, RELOCATION IS PRESUMED TO BE IN CHILD'S BEST INTEREST

Court may ratify the agreement.

Relocation – NO AGREEMENT

. Petition to Relocate MUST contain (& be verified):

. Location & physical address of new residence

. Mailing address

. Home telephone number

. Date of intended / proposed move

. Statement of reasons / attach written job offer

. Proposed substitute access / TS & Transportation

. Warning Statement: Need to file and serve Objection w/in 20 days after service (ALL CAPS)

Objection to Petition to Relocate

- Must be Timely filed – 20 days after service; and
- Must be Verified; and
- Must contain detailed:
  - Specific factual reasons for prohibiting relocation
  - Personal statement of amount of involvement in child's life

When making a relocation determination, a trial court SHALL consider PARENTING FACTORS IN §61.13001 (7) (a-k): (11 factors)

(k) Any other factor affecting the best interest of the child or as set forth in s. 61.13.

AND

Court SHALL relocation Factors under §61.13 (3) (a-t): (20 factors)

(t) Any other factor that is relevant to the determination of a specific parenting plan, including the time-sharing schedule.

THAT IS OVER 31 FACTORS!!!!!

Determination MUST be supported by competent, substantial evidence. Trial court's "blanket neutrality" as to the statutory factors does NOT satisfy competent, substantial evidence. *See, Miller v. Miller* 277 So.3d 725 (Fla. 1st DCA 2019)

Relocation is for either parent:
Even a NON-custodial parent was required to seek court permission before relocating. *See, Brooks v. Brooks*, 164 So. 3d 162 (Fla. 2d DCA 2015).

The appropriate method of calculating the distance for the 50-mile relocation restriction is a straight line radius method or "as the crow flies".
***See, Tucker v. Liebknecht*, 86 So. 3d 1240 (Fla. 5th DCA 2012).**

HYPOTHETICAL 8

Father moves to relocate 60 miles away. He is moving for a great job opportunity and wants to bring the 2 year old child. His new city has the best Kindergarten in the state.

Is relocation in best interest of child?

HYPOTHETICAL 8- CONTINUED

BEST INTEREST determination CANNOT be a "prospective based"
Best interest MUST be made at the time of the final hearing based on competent substantial evidence

***See, Arthur v. Arthur* 54 So.3d 454 (Fla. 2010)**

Generally, Court must **apply the child's best interests at the time of the final hearing.**

BUT see Rivera v. Purtell, 252 So.3d 283 (Fla. 5th DCA 2018)

Fifth DCA held **that it is OKAY to prospectively determine which parents address is used for school designation, which is an event that is reasonably and objectively certain to occur at an identifiable time in the future.**

Court ordered equal timesharing for parents who lived 50 miles apart but designated dad's address for school…which essentially made him majority time parent in future.

HYPOTHETICAL 9

Mother files a Petition to Relocate and Father files a hand written response with the court on the 15th day after he was served. Father files a timely, but unverified response lacking any facts.

Do you have to hold a temporary hearing?

YES

HYPOTHETICAL 9- CONT'D

- ***See, Pearce v. Boudreaux*, 265 So.3d 712 (Fla. 1st DCA 2019)**
- **Once a party files a timely response objecting to the relocation, there must be at least a temporary hearing before relocation occurs.**

- **It is not a pre-condition to a temporary hearing before relocation that the objection be "flawless." Rather, once an objection is filed timely, a temporary hearing is required before relocation is granted.**

Burden of Proof:

- The petitioner-parent has the burden of proof by a preponderance of the evidence that relocation is in best interest of child

- If that burden of proof is met, the burden shifts to the nonrelocating parent to show by a preponderance of the evidence that the proposed relocation is not in the best interest of child

Hypothetical 10

At time of FJ, parties lived more than 50 miles apart. The child resides with the Mother for the majority of the time. The Father filed Petition to Relocate asking for the child to live primarily with him.

Can the Court grant the Petition to Relocate?
No!

Fla. Stat. §61.13001 does NOT apply to relocation of a child's residence without an accompanying request to change the primary residence of the parent with whom the child lives. *See, Hernandez v. Hernandez*, 335 So. 3d 141 (Fla. 4th DCA 2022).

HELPFUL HINTS – TIME SENSITIVE

- **Absent good cause, the evidentiary hearing on temporary relocation must occur no later than 30 days after the motion is filed.**

- **Absent good cause, the nonjury trial must occur no later than 90 days after the notice is filed.**

Thank You

Judge Sarah Jones sjjones@circuit5.org

GM Barbara Kissner bkissner@circuit5.org

The 80s Hidden Track

Extension/Modification after 18

Child support extends for a dependent person beyond the age of 18 years when such dependency is because of a mental or physical incapacity which began prior to such person reaching majority. *§743.07(2) Fla. Stat.*

Extension/Modification after 18

Extension for mental and physical disabilities
LOOK AT WHEN DISABILITY KNOWN

***Ruiz v. Ruiz*, 783 So. 2d 361 (Fla. 5th DCA 2001) Court retains jurisdiction post-majority to modify the child support for the child adjudicated dependent by reason of mental and physical disabilities prior to reaching age of majority.**

***Hastings v. Hastings*, 841 So. 2d 484 (Fla. 3d DCA 2003), 50-year-old autistic adult child could seek support from his father 29 years after attaining the age of majority because he was first diagnosed at age eight -- pre-majority.**

Extension/Modification after 18

FILE BEFORE 18:

Extension of child support based upon a child's mental incapacity must be before the child reaches the age of majority or subject matter jurisdiction is lost.

***See, Loza v. Marin*, 198 So. 3d 1017 (Fla. 3d DCA 2016)**

***Larwa v. Department of Revenue*, 169 So. 3d 1285 (Fla. 5th DCA 2015)**

Petition to modify child support filed 4 days before child turns 18, for child support into adulthood, for disabilities prior to age 18, court has subject matter jurisdiction. *See, Phagan v. McDuffee*, 296 So. 3d 957 (Fla. 5th DCA 2020)

Extension/Modification after 18

AFTER 18 – INDEPENDENT ACTION BY DEPENDENT PERSON

An independent action may be brought to adjudicate support of a dependent who has reached the age of majority by the dependent person. *See, Fernandez v. Fernandez*, 314 So. 3d 543 (Fla. 3rd DCA 2020)

***Hastings v. Hastings*, 841 So. 2d 484 (Fla. 3d DCA 2003), 50-year-old autistic adult child could seek support from his father 29 years after attaining the age of majority because he was first diagnosed at age eight -- pre-majority.**