

The Four Rs;

Educating Ourselves on Evidence in Domestic Relations Cases

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- Does Florida Statute Section 90 apply to Family Law Cases?

How Do We Know

- Florida Rules of Family Procedure 12.101 (b) says it does.

Exceptions Policy Reasons

- Custody- social investigations (Fla. Stat. Section 61.20)
- Guardian ad Litem (Fla. Stat. Section 61.403)
- Non-testifying Kids (Family Rules 12.407)

The 4 R's

- Is it Required?
- Is it Relevant?
- Is it Reliable?
- Is it Right?

Is it Required?

- If it is not admitted into evidence, cannot be considered.

Not Evidence

- Proposed Order
- Demonstrative aid
- Legal argument
- Assertions in motion

McLeod v. McLeod, 98 So 2d 1255 (1st DCA 2008)

Lilly v. Lilly 5D01-951;5D01-953 (5DCA 2010)

Competent/ Substantial

- Competent = Admissible (not quality).
- Substantial= some real, material, pertinent, relevant evidence (as distinguished from ethereal, metaphysical, speculative, or theoretical).
- Nunez v. Nunez, 5D09-939 (5th DCA March 2010).

Not competent/substantial

- Credits for husband's capital improvements, no receipts nor testimony regarding lack of receipts
- Syverson v. Jones, ?10 So 2d 1123 (1st DCA 2009)

Not competent/ substantial

- Father awarded primary residential based upon “mothers apparent disposition to draw unreasonable and alarming and hysterical inferences from innocuous facts”.
- Fuller v. Fuller 13 So 3d 108 (5th DCA 2009)

Not competent/ substantial Income

- Determination of Parties income must be supported by competent/ substantial evidence.
- Here court could decide between conflicting testimony and financial affidavit.
- **Lin v. Lin 2D08-1808 (2nd DCA June 11 2010)**

Not competent/ substantial Income

- Net income when testimony was “worked 40 hours or less” making \$20 an hour.
- No paycheck stub.
- No testimony as to deductions.
- Galasso v. Gargione 2D09-222 (2nd DCA June 18, 2010)

Competent/ Substantial Burden- valuation

- Beach house- value appreciation. Non-owner spouse has burden of proving value appreciation by proving value of property at marriage, value at dissolution, amount of marital funds used to make mortgage payments, outstanding balance at marriage.
- Leider v. Leider, 5D08-2136 (5th DCA 4/16/10)

Competent/ Substantial Burden- valuation

- Retirement account- Valuation at time of final judgment entered to reflect economic downturn asserted by Husband in motion. Assertions not evidence= error.
- Lilly v. Lilly 5D09-951; 5D09-953 (5th DCA 5/28/10)

Competent/ Substantial Burden- valuation

- Business valuation
- Letter of intent, from defunct company, to purchase without due diligence, binding K, or proof of financial ability not competent/ substantial

Burden- Insurance (alimony and child support)

- **NEED** and **ABILITY**. Eaton v. Eaton, 16 So 2d 289 (4th DCA 2009)
- And availability (Child v. Child, 3D08-3237 (5/5/10))
- And affordability (Jones v. Jones, 2D08-2632 (2/26/10))

Burden- Attorney Fees

- Invoices, records, other information, time in entirety needed .
- Claim without documents= reversal
- Braswell v. Braswell, 4 So 3d 4 (2nd DCA 2009)

Burden-Imputation

Claiming spouse

- Seeker failed “best efforts” to obtain job
Durrand v. Durand 16 So 2d 982 (4th DCA 2009).
- Must be evidence of current job market, seeker recent work history, job qualifications, probable earnings and local prevailing income. Rabbath v. Farid 4 So 3d 778 (1st DCA 2009); Hudson-McCann v. McCann, 8 So 3rd 1228 (5th DCA 2009)

Burden-Imputation Expert

- Without vocational expert, Improper to impute \$50k to wife who has law degree but no proof could become member of the bar. 4D08-5005 (9/8/10)
- Guesses or assumptions of expert not enough. Perez v. Perez, 11 So 2d 470) (2nd DCA 2009).

Competent/ Substantial Burden- valuation

- Judge should not have to guess at value or make best estimate by filling in gaps.
- Pope v. Pope, 4D09-1413 (4th DCA 8/11/10).

If not preserved

- Cannot be basis of new trial. Fl. Stat. 90.104
- Childs v. Childs, 1D09-3385 (1st DCA April 9, 2010)

Fundamental right to Parent

- Temporary custody to Maternal grandparents requires Clear and convincing, not merely “best interest”.
Debois v. Leon 12 So 2d 280 (5th DCA 2009)

Relevant

- 402
- 403
- 404 -not if in conformity but if material then by reputation *

*unless insanity- then specific acts

Relevant Expert opinion

- Underlying reasons- not required to give but adverse party can voir dire. If not sufficient expert opinion stricken.
- Admissible without testifying (GAL?/
Social investigator)
- Court can reject (Nunez v. Nunez
5D09-939 3/12/10)

Relevant Expert opinion

- Permitted to rely on hearsay evidence, yet may not be conduit to present inadmissible evidence. *Hastings v. Rigsby*
- Nor treatise that supports *Liberatore v. Kaufman* 835 So 2d 704 (4th DCA 2003)

Relevant Expert Testimony

- Rule 12.365 encourages using court appointed experts to review financial information to reduce cost. *Tomaino v. Tomaino* 629 So 2d 874 (4th DCA 1993).

Reliable

- Competent
- Authentic
- Judicial Notice
- Hearsay

Competent

- Presumed (90.601)
- Personal Knowledge
- Oath
 - Should not consider testimony where promise to tell truth but would not take oath. *Willis v. Romano*, 972 So 2d 294 (5th DCA 2008)
 - Unsworn allegations by attorney= no factual weight. *Daughtrey v. Daughtrey*, 944 So 2d 1145 (2nd DCA 2006)

Reliable Judicial Notice

- Court can take Judicial notice of court records- however items within must comply with evidence code. Burgess v. State, 831 So 2d 137 (Fla 2002)

Reliable Judicial Notice

- UFC- Court improperly considered evidence from 3 day custody case during injunction case.
- Must follow procedure in 90.204 – inform parties, take judicial notice and make part of the record.
- Coe v. Co 39 So 33d 542 (2nd DCA 2010)

Reliable -Hearsay

- Not just quotes.
- “led to believe” improper Diaz v. State, 890 So 2d 556 (5th DCA 2005)
- When “clear inference” improper Keen v. State, 775 so 2d 263 (Fla 200); Cedillo v. State, 949 So 2d 339 (4th DCA)

Hearsay

- Opening the door is not an exception

Hearsay

90.803(23)

- **Strict standard of reliability** *State v. Townsend*, 635 So 2d 949 (Fla. 1994)
 - Source must indicate trustworthiness.
 - Time content, and circumstances must reflect sufficient safeguards of reliability.

No corroboration, no medical = not reliable is the incorrect standard. *N.W. v M. W.*
2D10-63 (7/30/10)

Is it Right?

- Privileges
- Children testifying
- Social Investigation and GAL Reports

Is it Right Privileges

- Psychologist
 - Wife/ Husband
 - Child
- Sex Assault

Is it Right?

Psychologist Privilege

- Burden on person seeking disclosure to show at least records Likely Contain relevant evidence. State v. Roberson 884 So 2d 976 (5th DCA 2004)
- Includes substance abuse diagnosis and treatment.

Is it Right?

Psychologist Privilege

- Does not apply to alleged perpetrator of child abuse, abandonment or neglect (Fl. Stat. 39.204).
 - Seeker preliminarily show information relevant to neglect/ child abuse.
 - State v Patterson 694 So 2d 55 (5th DCA 2997)
 - Trial Court needs in camera to determine what is protected.
 - Doherty v. Doe 957 So 2d 1267 (4th DCA 2007)

Is it Right?

Psychologist Privilege- Standing

- Patient, including minor when parents involved in custody dispute *Attorney ad Litem* for D.K v. Parents of D.K, 780 So 2d 301 (4th DCA 2001).
- Psychologist – if in best interest. Baron v. Baron 941 So 2d 1233 (2nd DCA 2006).

Is it Right? Psychologist Privilege- Standing

- Parents do not have standing to assert or waive on behalf of child in custody dispute. *Hughes v Schatzberg*, 872 So 2d 996 (4th DCA 2004).

Is it Right?

Psychologist Privilege- custody

- Party, by merely seeking custody, does not place mental condition at issue even though mental health relevant.
Freshwater v. Freshwater, 659 So 2d 12 (3rd DCA 1995)
- Must be “highly relevant” and some credible evidence. Hastings v. Riggsby

Is it right?

Sex Assault privilege

- To obtain in camera review must show that records contained material evidence (Pinder -4DCA) and reasonability probability that contain material information necessary for defense (Familietti- 3DCA) then court should disclose only relevant information to defense (Ritchie-US Sup)

Rule 12.407

Kids Testifying

- May not testify absent good cause and court order. Not applicable to uncontested adoptions.
- Unavailable for purpose of 90.803?

Rule 12.407

Kids Testifying

- Due process considerations require child to be able to testify and transcribed, when only way to get the evidence.
- Can agree to ex parte and lack of record.
- Hickey v. Burlison, 33 So 2d 827 (5th DCA 2010).

Fl. Stat. 61.403

GAL

- May address court: shall provide report which includes recommendation and statements of child.
- Not exception to evidence rules. Hearsay not admissible. *Scaringe v. Herrick*, 711 So 2d 204 (2nd DCA 1998).
- Opinion exception?

Parenting Plan: Fl. Stat. 61.20

- Any action where parenting plan is at issue, court may order Social investigation.
- Recommendations (improper opinion).
- Facts supporting (hearsay).
- Court may consider even though may violate Fl. Stat. 90

Fl. Stat. 61.20

- Family Rules 12.363 implements
- Modified 2009 “time sharing”

Fl. Stat. 61.20

- Does not violate Due process or right to confrontation. *Kern v. Kern*, 333 So 2d 17 (1976).
- Recognizes judicial quest for just and humane results and reliance on professional social workers skill.

Fl. Stat. 61.20
5th DCA

- Recognized- including using hearsay within. Landers v. Landers, 429 So 2d 27 (5th DCA 1983).
- Current Sacks v. Sacks, 991 So 2d 922 (5th DCA 2008) (due process requires time to inspect and rebuttal).

Fl. Stat. 61.20

- Does not apply to parenting coordinator when not acting under the authority of Fl. Stat. 61.20.
- Court relying on Parent Coordinator report, facts almost entirely hearsay, error. *Hastings v. Rigsby*. 875 So 2d 772 (2nd DCA 2004)