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The Illusory Imputation of Income in Marital Settlement Agreements: "The Future Ain't What It Used to Be"

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THE ILLUSORY IMPUTATION OF INCOME IN MARITAL SETTLEMENT AGREEMENTS: “THE FUTURE AIN’T WHAT IT USED TO BE”⁺

TIMOTHY ARCARO*
LAURA MILLER CANCELLA**

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I. INTRODUCTION

Can a Florida trial court lawfully enforce a provision in a marital settlement agreement that imputes future income to one of the spouses for purposes of calculating child support? Consider the following hypothetical: husband and wife were married for three years during which the wife remained out of the workforce to give birth to the parties’ two children. At the time of divorce, the parties entered into a marital settlement agreement,¹ which provided the wife with rehabilitative alimony for a three-year period post divorce. The parties further agreed that at the end of the rehabilitative alimony period, a minimum of \$50,000 income would be imputed to the wife, based on her last date of employment, for the purpose of calculating child support. The imputation would take effect upon the termination of the wife’s rehabilitative alimony—nearly three years after the entry of the final judgment of dissolution and, more significantly, nearly six years since the wife’s last date of employment. In that same period of time, the wife

+ Title attributed to Yogi Berra (1925 –).

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1. Marital Settlement Agreements will be referred to as MSAs for purpose of this article. MSAs are generally referred to as settlement agreements entered into by divorcing spouses at the time of divorce and frequently include complete resolution of all claims arising from the marriage.

changed careers and remained involuntarily unemployed due to unforeseeable economic conditions.

The key issue in the case is the validity of the provision of the MSA that purports to impute income to the wife three years post divorce and six years after her last date of employment. If, at the end of her rehabilitative alimony period, the wife files a Supplemental Petition for Modification of Child Support based upon her involuntary unemployment, will the court enforce the parties' agreement? Is the wife stuck with a "*bad fiscal bargain*" resulting from the imputation of income as set forth in the parties' marital settlement agreement? Is the imputation a bad but, in the husband's view, nonetheless valid and enforceable provision of the MSA? Or, does the executory imputation of income that is now currently unavailable to the wife due to prevailing economic conditions function as a partial waiver of child support in contravention of Florida's strong public policy against such waivers?²

The following analysis will demonstrate that it is improper—and therefore reversible error—for a Florida court to apply principles of pure contract law to enforce an MSA provision that imputes future income to a spouse for purposes of calculating child support. Even where the trial court has ratified an MSA that imputes future income for purposes of calculating child support, the agreed-upon imputation is unenforceable as a matter of public policy and law. Florida trial courts must make findings of fact as to a party's current income or as to that party's underemployment or unemployment in order to impute income pursuant Florida's child support law.³ Using the above hypothetical, Part I of this article will discuss the enforceability of pre and postnuptial agreements presented in divorce proceedings in Florida. Part II of the article will briefly discuss the evolution of child support guidelines in Florida and the influence of federal law in this area. Part III will discuss relevant case law addressing the substantive and procedural considerations to properly impute income for purposes of calculating child support in Florida. Part IV will conclude that agreements as to the future imputation of income for the purpose of calculating child support are not binding, valid or enforceable on the parties because Florida courts retain jurisdiction to review and modify such agreements consistent with the child's best interests and the fair application of the child support guidelines.⁴

2. See *Brock v. Hudson*, 494 So. 2d 285, 286–87 (Fla. 1st Dist. Ct. App. 1986); *Warrick v. Hender*, 198 So. 2d 348, 351 (Fla. 4th Dist Ct. App. 1967).

3. See FLA. STAT. § 61.29 (2010). *Florida Statutes* section 61.29 establishes the principles for creating public policy regarding child support guidelines within the State of Florida

4. See *id.* § 61.29(3).

II. FLORIDA'S APPROACH TO FINANCIAL SETTLEMENT AGREEMENTS IN DISSOLUTION PROCEEDINGS

The desire for private ordering of one's own financial affairs is commonplace in domestic relations cases. The value of personal autonomy when dealing with unique, personal, and sensitive subjects like raising children and ensuring financial stability cannot be understated. A divorcing couple electing to resolve their legal disputes by agreement may generally do so with few obstacles imposed by law. There are three significant areas in dissolution of marriage proceedings where a party's economic interests are directly implicated: equitable distribution, alimony, and child support.⁵ Although each interest is not presented in every case, these interests can individually and collectively provide compelling justifications to motivate and inspire settlement.⁶

In Florida, those settlements may manifest in a variety of circumstances, but they are generally categorized by the timing of the agreement—pre or postmarital.⁷ Section 61.079 of the *Florida Statutes*, also known as the Uniform Premarital Agreement Act (UPAA), governs premarital agreements entered into on or after October 1, 2007.⁸ This statute expressly states that "[t]he right of a child to support may not be adversely affected by a premarital agreement."⁹ The adverse effects cautioned against include a waiver of a party's duty to provide financial support to his or her minor children.¹⁰ Such waivers are void and will not be enforced by Florida courts.¹¹ The standard for setting aside a premarital agreement is also laid out in the UPAA.¹² A party may petition the court to set aside or refuse to enforce a premarital agreement if the party proves procedural unfairness related to the

5. See *Sedell v. Sedell*, 100 So. 2d 639, 642 (Fla. 1st Dist. Ct. App. 1958). This article will focus on post-nuptial agreements to impute future income to a spouse post-divorce for purposes of calculating child support at a future date. Agreements to impute future income to a party for purposes of calculating child support at a future date outside the context of divorce proceedings are treated similarly even though the parties were never married.

6. See *id.*

7. Prenuptial agreements are also referred to as "antenuptial" agreements. See *Conlan v. Conlan*, 43 So. 3d 931 (Fla. 4th Dist. Ct. App. 2010). Antenuptial and prenuptials are agreements entered into prior to the date of the marriage while postnuptial agreements are entered into subsequent to the date of the marriage.

8. FLA. STAT. § 61.079.

9. *Id.* § 61.079(4)(b).

10. *Cronebaugh v. Van Dyke*, 415 So. 2d 738, 741 (Fla. 5th Dist. Ct. App. 1982); *Armour v. Allen*, 377 So. 2d 798, 799–800 (Fla. 1st Dist. Ct. App. 1979).

11. *Id.* at 800.

12. FLA. STAT. § 61.079.

execution of the agreement.¹³ Additionally, the agreement may be set aside where it was unconscionable at the time of execution and there was insufficient disclosure of a party's financial position.¹⁴ Finally, there are circumstances where a specific provision found within the agreement is not enforceable as a matter of law even though the agreement as a whole is valid.¹⁵

By contrast, postnuptial agreements and MSAs are not codified in the *Florida Statutes* per se. However, the *Florida Statutes* contemplate—and indeed presume—that such agreements will be entered into regarding marital assets and liabilities, alimony and child-related issues.¹⁶ Case law is unequivocal that MSAs are to be interpreted and enforced like other contracts.¹⁷ As such, the trial court generally lacks discretion to refuse to enforce the provisions of an MSA.¹⁸ The Supreme Court of Florida made clear in its decision in *Casto v. Casto*¹⁹ that:

13. *Id.* § 61.079(7)(a)(2) (providing that the agreement shall be unenforceable where “[t]he agreement was the product of fraud, duress, coercion, or overreaching”).

14. *Id.* § 61.079(7)(a)(3) (providing that the agreement shall be unenforceable where it was unconscionable at the time of execution, and “a. [The party] was not provided a fair and reasonable disclosure of the [other party’s financial assets and liabilities]; b. Did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and c. Did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.”).

15. See, e.g., *Griffith v. Griffith*, 860 So. 2d 1069, 1073 (Fla. 1st Dist. Ct. App. 2003).

16. For a discussion of equitable distribution, see FLA. STAT. § 61.075(3) (2010). “In any contested dissolution action wherein a *stipulation and agreement* has not been entered and filed, any distribution of marital assets or marital liabilities shall be supported by factual findings in the judgment or order based on competent substantial evidence . . .” *Id.* (emphasis added). For a discussion of mediation of contested issues, see *id.* § 61.183(2). “If an agreement is reached by the parties on the contested issues, a consent order incorporating the agreement shall be prepared by the mediator and submitted to the parties and their attorneys for review.” *Id.* See also *Griffith*, 860 So. 2d at 1073 (holding that marital settlement agreements are highly favored in the law).

17. *Casto v. Casto*, 508 So. 2d 330, 334 (Fla. 1987); *Griffith*, 860 So. 2d at 1073; *Maas v. Maas*, 440 So. 2d 494, 495–96 (Fla. 2d Dist. Ct. App. 1983). The difficulty in reconciling the two differing interests in marital settlement agreements is not a new one, as the Second District Court of Appeal acknowledged. *Mass*, 440 So. 2d at 495–96 (“We run headlong into some troublesome precedents, however, in trying to reconcile the statutory obligation of the trial judge ‘to do equity and justice between the parties’ that is supported by case law, and the principle that property settlement agreements between husband and wife, made in contemplation of dissolution proceedings, should be construed and interpreted as other contracts.”). Perhaps the court, in its focus on fairness between the parties and in contemplation that inadequate support for minor children would provide grounds to invalidate an MSA notwithstanding the voluntary nature of the agreement, resolves this tension by implicitly considering minor or dependent children as unwilling parties to the MSA.

18. *Griffith*, 860 So. 2d at 1073.

19. 508 So. 2d 330 (Fla. 1987).

[T]he fact that one party to the agreement apparently made a *bad bargain* is not a sufficient ground, by itself, to vacate or modify a settlement agreement. . . . A bad fiscal bargain that appears unreasonable can be knowledgeably entered into for reasons other than insufficient knowledge of assets and income. There may be a desire to leave the marriage for reasons unrelated to the parties' fiscal position. If an agreement that is unreasonable is freely entered into, it is enforceable.²⁰

As a result, Florida courts are not empowered to second-guess the wisdom or fairness of a party's MSA when the agreement is centered upon financial issues such as alimony, equitable distribution of marital assets, and liabilities and the payment of attorneys' fees.²¹

Although stipulations entered into by the parties "are generally binding on the parties and the court,"²² Florida law is well established that any child-related provisions of a marital agreement, be it pre or postmarital in timing, are always reviewable by the trial court.²³ The trial court is duty-bound to consider, above all else, the best interests of the child in determining whether the provisions of a marital agreement are enforceable.²⁴ Thus, a dichotomy arises when provisions of a marital agreement regarding collateral issues have a significant impact on child-related issues, particularly child support. Florida law is clear regarding the right of a child to receive financial support from a parent. That right may not be adversely affected by an agreement of the parents.²⁵

20. *Id.* at 334. Although the parties in *Casto* did not have children and consequently no child-related provisions were at issue, the case remains instructive legal authority on the validity and enforcement of MSAs.

21. *Sedell v. Sedell*, 100 So. 2d 639, 642 (Fla. 1st Dist. Ct. App. 1958). *Sedell* set precedent in Florida when the First District Court of Appeal found pre-marital agreements to "be respected by the courts . . . when such agreements are fairly entered into and are not tainted by fraud, overreaching or concealment." *Id.*

22. *Griffith*, 860 So. 2d at 1073.

23. *See, e.g.*, *Feliciano v. Feliciano*, 674 So. 2d 937, 937 (Fla. 4th Dist. Ct. App. 1996) (per curiam); *Kennedy v. Kennedy*, 583 So. 2d 415, 416 (Fla. 5th Dist. Ct. App. 1991).

24. *See, e.g.*, FLA. STAT. § 61.13(2)(c) (2010) ("The court shall determine all matters relating to parenting and time-sharing of each minor child of the parties in accordance with the best interests of the child. . . ."); *see also id.* § 61.13(3) ("For purposes of establishing or modifying parental responsibility and creating, developing, approving, or modifying a parenting plan, including a time-sharing schedule, which governs each parent's relationship with his or her minor child and the relationship between each parent with regard to his or her minor child, the best interest of the child shall be the primary consideration.").

25. *See, e.g., id.* § 61.079(4)(b) ("The right of a child to support may not be adversely affected by a premarital agreement."). Although the statute specifically references premarital

Arguably, any financial provision of an MSA may be construed to have an impact on the parties' minor children, including provisions concerning ostensibly unrelated issues such as equitable distribution and the payment of each party's attorney's fees and costs. Although such provisions are enforceable as a matter of contract law, these provisions also directly impact the financial resources available to each party, which indirectly impacts the parties' available net resources that could otherwise be spent on the support of the minor children.²⁶ In sum, the *Florida Statutes* have only codified premarital agreements, and specifically provide for judicial review of child-related provisions under the best interests standard.²⁷ Although postmarital agreements have not been codified by statute, they also require judicial review of child-related provisions under the best interest standard.²⁸

III. FLORIDA'S CHILD SUPPORT GUIDELINES

Florida's approach to child support has been directly influenced by the encroachment of federal law into an area of concern that historically had been left to state discretion. Federal law regarding the support of minor children has evolved from the Child Support Enforcement Act of 1974,²⁹ the Child Support Enforcement Amendments of 1984,³⁰ and the Family Support Act of 1988,³¹ before resulting in the current statutory framework.³² The Family Support Act of 1988 addressed a number of objectives, among which the most important were to enhance the adequacy of child support orders, to improve the equity of such orders by assuring more comparable treatment for cases with similar circumstances, to increase compliance as a result of the perceived new fairness, and finally, to improve the efficiency of adjudicating child support orders.³³

States currently receive federal funds for the support of children through two related provisions of Title IV of the Social Security Act.³⁴ A state is eligible to receive federal block grants under Part A so long as the state has

agreements, Florida law is consistent in this prohibition whether the agreement was entered into pre- or post-nuptial.

26. See generally *id.* § 61.13.

27. See *Kennedy*, 583 So. 2d at 416.

28. See *id.*

29. Child Support Enforcement Act of 1974, Pub. L. No. 93-647, 88 Stat. 2337 (1974).

30. Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1305 (1984).

31. Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343 (1988).

32. 42 U.S.C. §§ 601-617, 651-669(b) (2006).

33. See Family Support Act of 1988, 102 Stat. 2343, 2343-44.

34. See 42 U.S.C. §§ 601-617, 651-669(b).

adopted measures for the establishment and enforcement of child support in compliance with the provisions of Part D, also known as the Child Support Enforcement Act.³⁵ Under Part D, each state must establish child support guidelines that take into consideration all earnings of the obligor parent and the reasonable needs of the child.³⁶ Federal law provides a rebuttable presumption that the amount of support calculated by the guidelines is correct, while simultaneously allowing for deviations from the guideline amount based on individual circumstances where the strict application of the guidelines would result in an inappropriate level of support.³⁷ Any such deviation must be based on written findings of fact and consider the best interests of the child.³⁸ Although guidelines need not be binding, "properly developed guidelines can have substantial benefits if parents, attorneys and agencies know . . . [they] will be applied in each case, except when [a] court . . . determines that exceptional circumstances warrant deviation."³⁹

Florida child support law has evolved in conjunction with federal law. The child support guidelines found in section 61.30 of the *Florida Statutes* are based on the combined net incomes of both parents, representing the total monthly net income available to support the parties' children subject to *this* order.⁴⁰ Chapter 61 provides the statutory approach for the imputation of income to a parent that is voluntarily unemployed or underemployed.⁴¹ As required by federal law, the statute provides a rebuttable presumption that the amount of support calculated per the guidelines is the proper and necessary amount.⁴² The resulting support obligation is divided between the parents

35. *Id.* § 602(a). Part A is not relevant to this discussion other than as the carrot with which the federal government coerces state implementation of the provisions of part D; therefore, the remainder of this section will focus on Part D.

36. 45 C.F.R. § 302.56(c) (2009).

37. *Id.* § 302.56(f)-(g).

38. *Id.* § 302.56(g).

39. ROBERT G. WILLIAMS, DEVELOPMENT OF GUIDELINES FOR CHILD SUPPORT ORDERS I-6 (1987).

40. FLA. STAT § 61.30(5) (2010); "*This*" order takes into consideration that the parties may in fact have other children not subject to a current calculation. Florida law provides for prioritizing child support obligations so that net income spent by an obligor on a preexisting child support order reduces the obligor's net income available to support subsequent born children. *See id.* § 61.30 (12)(a)-(c).

41. *Id.* § 61.30(2)(a)(14)(b).

42. *Id.* § 61.14(1)(a). Section 61.14 provides the mechanism by which a party may petition the court to enforce or modify child support orders as follows:

When a party is required by court order to make any [support] payments, and the circumstances or the financial ability of either party changes . . . either party may apply . . . for an order decreasing or increasing the amount of support . . . and the court has jurisdiction to make orders as equity requires, with due regard to the changed circumstances or the financial ability

according to each parent's proportionate share of the combined net incomes.⁴³ Deviation from the guidelines is permissible upon factual findings by the trial court to support such a deviation, including an analysis of factors related to the reasonable needs of the child.⁴⁴

Florida child support law is found in three separate statutes of Chapter 61: the first addresses establishment of a child support order,⁴⁵ the second addresses modification of such orders,⁴⁶ and the third addresses the amount of such orders.⁴⁷ In a dissolution of marriage proceeding, "the court may at any time order either or both parents who owe a duty of support to a child to pay support . . . in accordance with the child support guidelines . . . in s[ection] 61.30."⁴⁸ The court shall have continuing jurisdiction to modify the amount and terms and conditions of the child support payments when the modification is found necessary *by the court* in the best interests of the child or when there is a substantial change in the circumstances of the parties.⁴⁹

Florida law provides for the imputation of income to an unemployed or underemployed parent for the purpose of calculating child support.⁵⁰ The statute, effective until January 1, 2011, requires the trial court to impute in-

of the parties or the child, decreasing, increasing, or confirming the amount of separate support, maintenance, or alimony provided for in the . . . order.

43. FLA. STAT. § 61.30(10).

44. *Id.* § 61.30(1)(a), (11)(a). Section 61.30(1)(a) of the *Florida Statutes* (1)(a) states: The trier of fact may order payment of child support which varies, plus or minus 5 percent, from the guideline amount, after considering all relevant factors, including the needs of the child or children, age, station in life, standard of living, and the financial status and ability of each parent. The trier of fact may order payment of child support in an amount which varies more than 5 percent from such guideline amount only upon a written finding explaining why ordering payment of such guideline amount would be unjust or inappropriate.

Id. § 61.30(1)(a).

45. *Id.* § 61.13.

46. *Id.* § 61.14.

47. FLA. STAT. § 61.30.

48. *Id.* § 61.13(1)(a); Section 742.031(1) of the *Florida Statutes* also requires that the child support guidelines in section 61.30 be utilized when court orders for child support arise out of a hearing for a determination of parentage. *Id.* § 742.031 (1)(a). Chapter 61 is also to be used to calculate a child support order if the support order arises from Chapter 39 regarding judicial proceedings that relate to "the care, safety and protection of children." *Id.* § 39.001(1)(a), (16).

49. *Id.* § 61.14(1)(a). Section 61.14 provides the mechanism by which a party may petition the court to enforce or modify child support orders as follows:

[W]hen a party is required by court order to make any [support] payments, and the circumstances or the financial ability of either party changes . . . either party may apply . . . for an order decreasing or increasing the amount of support . . . and the court has jurisdiction to make orders as equity requires, with due regard to the changed circumstances or the financial ability of the parties or the child, decreasing, increasing, or confirming the amount of separate support, maintenance, or alimony provided for in the . . . order.

FLA. STAT. § 61.14(1)(a).

50. *See id.* § 61.30(2)(b).

come to a parent who is unemployed or underemployed when "such unemployment or underemployment is found by the court to be voluntary on that parent's part, absent a finding of fact by the court of physical or mental incapacity or other circumstances over which the parent has no control."⁵¹ In order for the trial court to impute income the court must make a finding of fact "that the parent is not currently using his or her best efforts to obtain employment."⁵² Incorporated into this concept is the finding that the party not only has chosen to earn less money, but also has the ability to remedy his or her situation by obtaining employment at a higher rate of pay.⁵³ Following such a determination, the trial court must examine "the employment potential and probable earnings level of the parent . . . based upon his or her recent work history, occupational qualifications, and prevailing earnings level in the community."⁵⁴

As previously noted, the Florida Legislature has crafted a new child support statute which takes effect January 1, 2011 and codifies much of Florida's recent common law regarding the methodology of imputing income.⁵⁵ The statute further provides a rebuttable presumption that the appropriate level of income to impute is the "income equivalent to the median income of year-round full-time workers."⁵⁶ Arguably, the most significant statutory change impacts the use of stale employment records and unreasonable assumptions regarding employment opportunities. Florida courts are now prohibited from imputing income based upon:

[i]ncome records that are more than [five] years old at the time of the hearing or trial at which imputation is sought; or [i]ncome at a level that a party has never earned in the past, unless recently degreed, licensed, certified, relicensed, or recertified and thus qualified for, subject to geographic location, with due consideration of the parties' existing time-sharing schedule and their historical exercise of the time-sharing provided in the parenting plan or relevant order.⁵⁷

51. *Id.*

52. *Wendel v. Wendel*, 852 So. 2d 277, 283 (Fla. 2d Dist. Ct. App. 2003); *Desilets v. Desilets*, 377 So. 2d 761, 764 (Fla. 2d Dist. Ct. App. 1979).

53. *Greene v. Greene*, 547 So. 2d 1302, 1303 (Fla. 2d Dist. Ct. App. 1989).

54. FLA. STAT. § 61.30(2)(b).

55. Act effective Jan. 1, 2011, ch. 2010-199, 2010 Fla. Laws 2405.

56. *Id.* at ch. 2010-199, § 5(2)(b), 2010 Fla. Laws 2405, 2410.

57. *Id.* at ch. 2010-199, § 5(2)(b)(2)(a.)–(b.), 2010 Fla. Laws 2405, 2411.

The trial court must support any order of income imputation with a finding of competent substantial evidence.⁵⁸ The burden of proof is on the party arguing in favor of income imputation⁵⁹ to present sufficient evidence at trial to provide a realistic basis for imputing income to the unemployed or underemployed parent.⁶⁰ Likewise, the party arguing for the imputation of income must demonstrate that such employment is currently available to the other parent at that rate of pay, considering his or her age, work history, and other qualifications.⁶¹ Income cannot be imputed to a party at a level he or she has never earned.⁶² Importantly, the new statute also provides the trial court with authority to impute income to a parent who fails to provide adequate financial information in a child support proceeding.⁶³ This approach creates incentives for full participation from both parents given the rebuttable presumption that the imputed income is available to the parent who is unemployed or underemployed.⁶⁴ This legislative evolution reflects the trial court's important role as the primary authority in determining the propriety of imputing income to a party in child support proceedings.⁶⁵

58. See *Sallaberry v. Sallaberry*, 27 So. 3d 234, 236 (Fla. 4th Dist. Ct. App. 2010) (per curiam) (“The trial court’s imputation of income must be supported by competent, substantial evidence.”).

59. See *Zarycki-Weig v. Weig*, 25 So. 3d 573, 575 (Fla. 4th Dist. Ct. App. 2009) (per curiam) (“The spouse claiming that the other spouse is voluntarily unemployed bears the burden of proof.”).

60. See, e.g., *Heidisch v. Heidisch*, 992 So. 2d 835, 837 (Fla. 4th Dist. Ct. App. 2008) (“[T]here must be some realistic basis in the evidence to support the concept that the former spouse can earn the sums imputed.” *Id.* (alterations in original) (quoting *Greene v. Greene*, 895 So. 2d 503, 512 (Fla. 5th Dist. Ct. App. 2005), *overruled on other grounds by*, *Price v. Price*, 951 So. 2d 55 (Fla. 5th Dist. Ct. App. 2007)); *Schlagel v. Schlagel*, 973 So. 2d 672, 674–75 (Fla. 2d Dist. Ct. App. 2008) (finding that vocational expert’s report contained competent, substantial evidence that employment as a legal assistant, legal recruiter and paralegal was available in the local market for the former wife who had her law degree but unsuccessfully attempted the Florida Bar exam four times and gave up on the idea of being a lawyer).

61. *Lee v. Lee*, 751 So. 2d 741, 744 (Fla. 1st Dist. Ct. App. 2000) (per curiam) (reversing imputation of income where the former husband was terminated from his most recent job; although he was interviewing for new employment, his efforts had not resulted in new employment); *Gildea v. Gildea*, 593 So. 2d 1212, 1213 (Fla. 2d Dist. Ct. App. 1992) (per curiam); *Ensley v. Ensley*, 578 So. 2d 497, 498 (Fla. 5th Dist. Ct. App. 1991).

62. *Stein v. Stein*, 701 So. 2d 381, 381 (Fla. 4th Dist. Ct. App. 1997) (“[I]ncome may not be imputed at a level which the former spouse has never earned, absent special circumstances.”).

63. FLA. STAT. § 61.30 (2)(b) (2010). “If the information concerning a parent’s income is unavailable, a parent fails to participate in a child support proceeding or a parent fails to supply adequate financial information, . . . income shall be automatically imputed to the parent, and there is a rebuttable presumption that the parent has [the] income” *Id.*

64. *Id.*

65. *Id.* §§ 61.29, .30.

Determining the proper amount of income to impute is particularly difficult for the trial court when a parent has been out of the workforce for a long period of time in order to stay home to care for young children or when a parent has voluntarily left the workforce to obtain education or training for a different career.⁶⁶ These cases are problematic, due to the parent's absence from the workforce for extended periods of time.⁶⁷ Although the trial court is required to assess the parent's recent work history and occupational qualifications, the parent may not have any recent work history to assess.⁶⁸ Alternatively, the parent's occupational qualifications may be outdated due to circumstances beyond that parent's control.⁶⁹

Florida law requires that the child support order include a schedule of income "based on the record existing at the time of the order."⁷⁰ Because the statute requires the income used for calculating child support be factually supported by the trial record, it is reversible error for the court to impute income to a parent using outdated income figures.⁷¹ The statutory factors that the court must consider in imputing current income may change significantly over time.⁷² Therefore, any agreement imputing future income to a party must necessarily bow to the statutory dictates of section 61.16 and the court's required consideration of the best interests of the child whose financial support is based on the imputed income.⁷³ Supporting this rationale is *Eaton v. Eaton*,⁷⁴ where the Fourth District Court of Appeal held that child support orders "are, by their very nature, impermanent in character and hence are res judicata of the issues only so long as the facts and circumstances of the parties remain the same as when the decree was rendered."⁷⁵

66. See *Schlagel v. Schlagel*, 973 So. 2d 672, 674–76 (Fla. 2d Dist. Ct. App. 2008); *Cushman v. Cushman*, 585 So. 2d 485, 486 (Fla. 2d Dist. Ct. App. 1991) (per curiam).

67. *Stein*, 701 So. 2d at 381–82.

68. *Id.* at 381.

69. See *Schlagel*, 973 So. 2d at 674.

70. FLA. STAT. § 61.13(1)(a)(1)(b).

71. See generally *Wendel v. Wendel*, 852 So. 2d 277 (Fla. 2d Dist. Ct. App. 2003); *Mitchell v. Mitchell*, 841 So. 2d 564 (Fla. 2d Dist. Ct. App. 2003); *Hanley v. Hanley*, 734 So. 2d 529 (Fla. 4th Dist. Ct. App. 1999); see also *Cushman*, 585 So. 2d at 486.

72. *Rosen v. Rosen*, 696 So. 2d 697, 700 (Fla. 1997) (per curiam).

73. *Id.*

74. 238 So. 2d 166 (Fla. 4th Dist. Ct. App. 1970).

75. *Id.* at 168 (holding that a substantial change in circumstances, whether it be the needs of the child or the obligor's ability to pay, is sufficient justification to modify a child support order regardless of the provisions of the MSA).

IV. IMPUTING INCOME FOR PURPOSES OF CALCULATING CHILD SUPPORT IN FLORIDA

Imputing future income to a parent is precisely what the parties agreed to in the hypothetical used in this article. The hypothetical MSA can be said to fairly reflect the parties' intent and aspirations for the future income earning capacity of the wife. The parties endeavored to predict the future, but their prediction was wrong. Is it the wife's error for which she must now bear the responsibility of her *bad fiscal bargain*? Must the husband now prove the wife's current income earning capacity when the parties' agreement clearly reflects the wife's imputed earnings? Most importantly, must the children receive less child support because the parties' prediction of the wife's future income level was overstated?

Florida law requires child support orders be based upon a finding of *present* facts regarding current income earning capacity of the parties.⁷⁶ Using a party's outdated earnings records from past employment when such income levels are no longer available to the party violates the mandate that the imputed income be presently available.⁷⁷ Florida appellate courts will reject a trial court's findings as to imputed income when such findings are not supported by substantial competent evidence.⁷⁸ While it may seem obvious that using employment records from eight years prior to the date of the child support hearing was impermissible,⁷⁹ even employment records from one year prior to the date of the hearing may be outdated and unreliable.⁸⁰ Courts must closely examine past employment records to ensure they are both probative of a party's earning capacity and reliable in representing a party's current employability.⁸¹ Imputation in every case will be fact specific and unique to the circumstances of those particular parties.

An evidentiary record supporting the court's findings of fact must exist in order for a judicial imputation of income to withstand appellate court scru-

76. FLA. STAT. § 61.13(1)(a)(1)(b) (2010).

77. *Wendel v. Wendel*, 852 So. 2d 277, 285 (Fla. 2d Dist. Ct. App. 2003). In *Wendel*, it was reversible error for the court to impute income based on the former husband's income from a period of time eight years prior to the child support hearing, even though the husband's maximum income never again reached such a level. *Id.* at 283–84.

78. *Id.* at 285.

79. *Id.*

80. *Mitchell v. Mitchell*, 841 So. 2d 564, 570 (Fla. 2d Dist. Ct. App. 2003). In *Mitchell*, the trial court's use of income data from just one year prior to the date of the child support hearing was reversible error where the party's actual income was rising well above the income level utilized by the court. *See id.* at 569–71; *see also* *Hanley v. Hanley*, 734 So. 2d 529, 530 (Fla. 4th Dist. Ct. App. 1999).

81. *See Mitchell*, 841 So. 2d at 571.

tiny. For example, in *Mitchell v. Mitchell*,⁸² the Second District Court of Appeal noted that the trial court found the wife was capable of earning \$40,000 per year, based on her recent training and work history.⁸³ However, the court imputed only "the more likely figure" of \$25,000 per year.⁸⁴ The Second District reversed the trial court's imputation of only \$25,000 when the record showed the wife was capable of earning \$40,000 due to the trial court's failure to make appropriate findings of fact.⁸⁵ The trial court's findings of fact as to the parties' incomes are necessary to ensure the proper application of the child support guideline calculations.⁸⁶ A court's failure to include such findings for purposes of child support calculations renders a final judgment facially erroneous.⁸⁷

In some cases, it is simply unrealistic to impute income that was earned in a former career. In *Shafer v. Shafer*,⁸⁸ the wife had practiced as an attorney for six years before moving to Florida.⁸⁹ However, when she moved to Florida, she failed to pass the bar exam and worked instead for her husband as a paralegal.⁹⁰ This occupation lasted sixteen years, until the parties divorced.⁹¹ In calculating child support for the parties' minor children, the trial court imputed income to the wife at a level earned by a practicing lawyer even though she had not passed the Florida Bar exam.⁹² On appeal, the Fourth District Court of Appeal found that no competent substantial evidence was presented regarding the wife's ability to pass the bar exam and practice law.⁹³ "[T]here must be some realistic basis in the evidence to support the concept that the former spouse can earn the sums imputed."⁹⁴ The court reasoned that it was *unrealistic* to expect the wife to pass the bar exam when she had been out of the profession for sixteen years.⁹⁵ The wife's limited abilities in the family law practice were not useful in this respect.⁹⁶ However, the court held that the case presented *special circumstances* which justi-

82. 841 So. 2d 564 (Fla. 2d Dist. Ct. App. 2003).

83. *Id.* at 570.

84. *Id.* at 571.

85. *Id.*

86. *Id.*

87. *See Mitchell*, 841 So. 2d at 571.

88. 45 So. 3d 494 (Fla. 4th Dist. Ct. App. 2010).

89. *Id.* at 495.

90. *Id.* at 497.

91. *Id.*

92. *Id.* at 498.

93. *Shafer*, 45 So. 3d at 497.

94. *Id.* (emphasis omitted) (quoting *Heidisch v. Heidisch*, 992 So. 2d 835, 837 (Fla. 4th Dist. Ct. App. 2008)).

95. *Id.*

96. *Id.* at 498.

fied an imputation of income equal to that of equivalent occupations in the community and different from the previous income.⁹⁷ The wife was not protected by the fact that she had accepted a below market salary in working with her husband.⁹⁸

Child support modification petitions are subject to the same basic analysis required for establishing support orders that impute income to one parent even though the parties agreed to an amount of child support in an MSA.⁹⁹ The court must first determine the net income of each party; if one party is unemployed or underemployed, the court must then determine whether the reduction in earnings is voluntary in nature.¹⁰⁰ It is not enough to simply plead that a parent's substantial change in circumstances necessitates a modification of child support; rather, Florida courts require that such a change be involuntary.¹⁰¹ Voluntary changes that would result in reduced child support obligations will rarely satisfy the legal threshold for modification. Determining the "voluntariness" of a party's actions has developed as a safeguard in part to ensure that the duty to furnish adequate child support is not deliberately avoided.¹⁰²

Settlement agreements that include provisions for automatic modifications of child support obligations based on future conditions are equally problematic. In *Penkoski v. Patterson*,¹⁰³ the parent's child support obligation increased automatically with the age of the child.¹⁰⁴ The court first noted that such automatic changes are disfavored by the law.¹⁰⁵ The increase in support occurred regardless of any external circumstances, in contravention of "the principle that support should be based upon need and ability to pay."¹⁰⁶ "[A]ny standard which could force a party to accept a decree based on clairvoyance of the trial judge would be [inferior to] one which enables the judge to make a decision based on present conditions."¹⁰⁷

97. *Id.*

98. *Shafer*, 45 So. 3d at 498. The court reasoned is that it is impossible to make a finding of facts regarding child support based on evidence that is not available as of this date. *Id.*

99. *Overbey v. Overbey*, 698 So. 2d 811, 812-14 (Fla. 1997).

100. *Id.* at 814.

101. *Id.*; see also *Tietig v. Boggs*, 602 So. 2d 1250, 1250-51 (Fla. 1992) (McDonald, J., specially concurring); *Chastain v. Chastain*, 73 So. 2d 66, 68 (Fla. 1954); *Deatherage v. Deatherage*, 395 So. 2d 1169, 1170 (Fla. 5th Dist. Ct. App. 1981), *dismissed*, 402 So. 2d 609 (Fla. 1981); *In re Marriage of Johnson*, 352 So. 2d 140, 141 (Fla. 1st Dist. Ct. App. 1977).

102. *Overbey*, 698 So. 2d at 814.

103. 440 So. 2d 45 (Fla. 1st Dist. Ct. App. 1983) (per curiam).

104. *Id.* at 46.

105. *Id.*

106. *Id.*

107. *Id.*

A corollary to the MSA child support imputation cases is when a court is called on to impute income to a parent who is incarcerated and unable to earn income at his or her previous level.¹⁰⁸ The incarceration cases provide insight into the tension that exists when imputation of income is not supported by the factual reality of the parties' situation. These cases generally arise when a party is seeking to modify an existing child support order.¹⁰⁹ Florida trial courts have continuing jurisdiction to modify original child support orders as necessary in the best interests of the child or based on a party's substantial change in circumstances.¹¹⁰

The Supreme Court of Florida, in *Department of Revenue v. Jackson*,¹¹¹ recognized the conflict inherent in the statute:

The instant action requires that this Court consider and address a purported internal conceptual conflict between the provisions in section 61.13 that provide a basis for the trial court to modify a child support decree when it is necessary to the child's best interests, and those which allow modification when there is a substantial change in the parties' circumstances. It is abundantly clear that a substantial change in circumstances, such as the incarceration of an obligor, certainly may not produce a result that is in a child's best interests. Although the public policy considerations underpinning the arguments on either side have some compelling components, in the instant situation we believe that the child's interest in receiving his or her support monies must generally supersede the obligor parent's substantial change in circumstance resulting from incarceration. The full and timely remitting of child support payments is certainly in the best interests of the supported child. Therefore, any abatement or waiver of support payments owed to the child would certainly harm the interests of the child.¹¹²

The Court resolved this conflict by refusing to impute an income the incarcerated parent could not earn, while simultaneously refusing to eliminate the parent's support obligation.¹¹³ Instead, the trial court was instructed to reserve judgment on the petition for modification until the parent's release from custody.¹¹⁴ At that time, the trial court should consider the petition for

108. See e.g., *Dep't of Revenue v. Jackson*, 846 So. 2d 486 (Fla. 2003).

109. *Id.* at 488.

110. FLA. STAT. § 61.13(1)(a) (2010); see also *Jackson*, 846 So. 2d at 489.

111. 846 So. 2d 486 (Fla. 2003).

112. *Id.* at 490 (citing *Imami v. Imami*, 584 So. 2d 596, 598 (Fla. 1st Dist. Ct. App. 1991)).

113. See *id.* at 491.

114. *Id.*

modification "in light of the *contemporary circumstances* of all the parties involved and enter a judgment appropriate."¹¹⁵

Similarly, in *McCall v. Martin*,¹¹⁶ the trial court also declined to impute an income not earnable to an incarcerated parent for the purpose of calculating his child support obligation during his incarceration.¹¹⁷ However, the appellate court held that it was reversible error not to impute some income because the child's best interests are served by imputing income and establishing a support obligation that will be paid upon the father's release.¹¹⁸ The court noted that the income is imputed for the father's current obligation and not for the purpose of establishing his future obligations.¹¹⁹ The court is duty-bound to make a determination of fact as to the present situation of the parties; executory finding of facts are forbidden.¹²⁰

Similar prohibitions exist in regards to predicting income levels at a future point in time for purposes of calculating alimony obligations.¹²¹ In *Hamilton v. Hamilton*,¹²² the court concluded that it was reversible error for the trial court to assign for alimony a future percentage of one party's special bonuses.¹²³ The court expressed the view that such a proposition was neither new, nor isolate.¹²⁴ Above all, the court expressed the view that what was valid for alimony was clearly valid for child support as well:

The invalidity of this provision is further supported by this court's statement in *Penkoski v. Patterson*, that "[j]udgments providing for automatic changes in support payments are generally disfavored as there is no evidentiary basis for the determination of future events, and there exists an adequate procedure for modification when changes in the circumstances of the parties do occur."¹²⁵

115. *Id.* at 491 (citing *Halliwell v. Halliwell*, 741 A.2d 638, 646 (N.J. Super. Ct. App. Div. 1999)) (emphasis added).

116. 34 So. 3d 121 (Fla. 4th Dist. Ct. App. 2010).

117. *Id.* at 122.

118. *Id.* at 123.

119. *Id.* (citing *Jackson*, 846 So. 2d at 493).

120. *See id.*; *Jackson*, 846 So. 2d at 493.

121. *See e.g.*, *Hamilton v. Hamilton*, 552 So. 2d 929, 931 (Fla. 1st Dist. Ct. App. 1989).

122. 552 So. 2d 929 (Fla. 1st Dist. Ct. App. 1989).

123. *Id.* at 932.

124. *Id.* at 931; *see also Davidson v. Davidson*, 410 So. 2d 943, 944 (Fla. 4th Dist. Ct. App. 1982) (finding that "change or termination of permanent or periodic alimony based on the anticipated occurrence of an uncertain future event" is error).

125. *Hamilton*, 552 So. 2d at 931 (quoting *Penkoski v. Patterson*, 440 So. 2d 45, 46 (Fla. 1st Dist. Ct. App. 1983) (per curiam)).

V. CONCLUSION

It is clear that Florida law not only permits but also "encourage[s] fair and efficient settlement of support issues between parents and minimizes the need for litigation."¹²⁶ However, Florida law is equally clear that the duty to support one's minor children is a legally imposed obligation that cannot be bargained away by the parties to an MSA.¹²⁷ It is because of this juxtaposition that principles of pure contract law cannot apply to the enforcement of an MSA that infringes upon a child's guaranteed right to support.

Applying Florida law to our hypothetical MSA, the court would be required to set aside the provision imputing income in order to provide the necessary support for the minor children. At the time of execution of the MSA, the former wife agreed to an imputation of \$50,000 to her, based upon her most recent earnings. If, however, she can earn only \$25,000 with her best efforts, imputing the full \$50,000 essentially waives the difference in the child support that would be calculated according to the guidelines based upon the combined incomes of the former husband and former wife. Such a waiver of support directly contravenes Florida's public policy against waivers of child support as found in the Uniform Premarital Agreement Act.¹²⁸ Finally, the court must make written findings of fact when calculating child support; the court's failure to do so is reversible error.¹²⁹

An agreement that imputes future income to a party for purposes of calculating child support is not enforceable through contract law in Florida. Pursuant to Chapter 61 of the *Florida Statutes*, there are exceptions to basic contract law principles that exist so as to ensure the well-being of children and families.¹³⁰ Florida law relieves a party from a bad fiscal bargain when that bargain is centered on the imputation of future income for purposes of calculating child support.

126. FLA. STAT. § 61.29 (2010).

127. See *Cronebaugh v. Van Dyke*, 415 So. 2d 738, 741 (Fla. 5th Dist. Ct. App. 1982); *Armour v. Allen*, 377 So. 2d 798, 799–800 (Fla. 1st Dist. Ct. App. 1979).

128. FLA. STAT. § 61.079; see also *Wilkes v. Wilkes*, 768 So. 2d 1150, 1151 (Fla. 2d Dist. Ct. App. 2000) (finding that the husband's false financial affidavit resulted in the children receiving a lower amount of financial support; although the wife's counsel failed to conduct any discovery, thereby acquiescing to the husband's financial misstatements, "[t]he wife simply could not 'contract' away an amount of the children's support.").

129. *MacRae-Billewicz v. Billewicz*, 35 Fla. L. Weekly D1898, 1899 (2d Dist. Ct. App. Aug. 20, 2010) (holding that such findings of fact are necessary for calculating child support pursuant to the guidelines). Implicit in this decision is the principle that parties cannot simply agree as to their incomes without presenting competent substantial evidence to the court in support of their assertions. *Id.*

130. See FLA. STAT. § 61.30(2)(b); *Nelson v. Nelson*, 651 So. 2d 1252, 1254 (Fla. 1st Dist. Ct. App. 1995).

