

Sample Essay (Disestablishment of Paternity) – Question

Sindy and Billy Joe were married in 1997 and are residents of Pinellas County, Florida. Sindy gave birth to a little girl named Hope in 2000. Billy Joe had no reason to believe he was not the biological Father of Hope and he was named as Hope's father on her birth certificate.

Billy Joe did not know that Hope was conceived when Sindy, had a fling with Bob, the pool boy, while the couple vacationed at Club-Red in Alabama.

Sindy filed a petition for dissolution of marriage in 2003 and sought the Court designate her as primary residential parent of Hope and to award her child support.

Billy Joe filed a verified answer and counter-petition acknowledging Hope was the parties' child, and sought sole parental responsibility of Hope, alleging Sindy was "an alcoholic" and "prone to blackouts during the marriage".

After Billy Joe's answer / counter-petition was filed, Bob, the pool boy, attempts to intervene in the suit claiming he is the biological father of Hope. The Court granted the Wife's motion to dismiss Bob, the pool boy, from the suit and denied Bob's claims and ruled "Billy Joe is the subject child's legal father, based on Florida's presumption of legitimacy. As such, Bob had no standing to seek parental rights to a child born during an intact marriage".

After more contentious litigation, the Court acknowledged that the Wife was habitually addicted to alcohol, but reasoned that Sindy had shielded Hope from the consequences of her alcohol addiction, and that despite Sindy's shortcomings, she was the better of two bad choices to care for this child. As a result, the trial court entered a final judgment on February 14, 2006 granting Sindy and Billy Joe shared parental responsibility of Hope, designated Sindy as primary residential parent, and required Billy Joe to pay Sindy \$1,000 per month in child support consistent with Florida Child Support Guideline No party, including Bob, the pool boy, sought appellate review of the final judgment.

A few months after Billy Joe received the final judgment, he had an exchange with an intoxicated Sindy who blabbed about the affair with Bob and bragged Billy Jo got "stuck paying for a child that is not his".

It finally dawns on Billy Joe that Hope may not be his child. Billy Joe fails to take immediate action on his hunch until he comes to you for a consultation on February 13, 2007 and states his case and also tells you that 6 months ago he obtained a paternity test confirming his suspicion that he is not the biological Father of Hope.

During the consultation, Billy Joe states he is not current in his child support, but that "there are reasons for that".

Billy Joe is very frustrated that he has been duped and does not want to pay the child support that is owed. Billy Joe wants a rebate of the child support he has paid and wants to stop all future child support payments. He also wants to maintain his relationship with Hope and have visitation with her based on the relationship he has developed under the "false pretense" (as he describes) that he was Hope's biological Father.

Billy Joe is also concerned about Bob the pool boy and what kind of trouble Bob can cause for him in the future.

UNDER THE FOREGOING FACT PATTERN, WHAT ADVICE WOULD YOU GIVE THE MOTHER ABOUT HER LEGAL OPTIONS. THERE IS NO CORRECT ANSWER; RATHER, YOU WILL BE GRADED ON YOUR RECOGNITION OF THE LEGAL AND FACTUAL ISSUES RAISED BY THE MOTHER'S PREDICAMENT; AND YOUR ABILITY TO ANALYZE THOSE ISSUES TO A REASONED CONCLUSION. The citation of specific authority is not required; however, you must demonstrate a knowledge of an ability to apply the appropriate legal concepts arising from statute and case law.

Sample Essay (Disestablishment of Paternity) – Answer

The question involves the new “Disestablishment of paternity or termination of child support obligation” statute. *Florida Statutes, Chapter 742.*

This section establishes circumstances under which a male may disestablish paternity or terminate a child support obligation when the male is not the biological father of the child.

To disestablish paternity or terminate a child support obligation, the male must file a petition in the circuit court having jurisdiction over the child support obligation. The petition must be served on the mother or other legal guardian or custodian of the child.

In this case, the child support obligation was NOT determined administratively so the petition DOES NOT have to be filed in the circuit court where the mother resides and need not be served on the Department of Revenue. However, it must be filed in a court that has jurisdiction over the child. In the case at hand, the only county where the case could be filed is Pinellas County.

The petition must include:

- (a) An affidavit executed by the petitioner that newly discovered evidence relating to the paternity of the child has come to the petitioner's knowledge since the initial paternity determination or establishment of a child support obligation.

In the case at hand, it could be argued that Billy Joe had reason to know Hope was not his biological child based upon Bob the pool boy's attempt to intervene. Billy Joe will argue of course that it wasn't until Sindy's post-judgment drunken admission. This is an evidentiary matter that will have to be decided by the Court.

- (b) The results of scientific tests that are generally acceptable within the scientific community to show a probability of paternity, administered within 90 days prior to the filing of such petition, which results indicate that the male ordered to pay such child support cannot be the father of the child for whom support is required, or an affidavit executed by the petitioner stating that he did not have access to the child to have scientific testing performed prior to the filing of the petition.

In the case at hand, Billy Joe's paternity test is over 90 days old. He will either need a new test if he has access to the child or request the Court to order the test if he does not have access.

- (c) An affidavit executed by the petitioner stating that the petitioner is current on all child support payments for the child for whom relief is sought or that he has substantially complied with his child support obligation for the applicable child and that any delinquency in his child support obligation for that child arose from his inability for just cause to pay the delinquent child support when the delinquent child support became due.

In the case at hand, Billy Joe is not current with his child support obligation. During the consultation the reason for the arrearage must be determined. If it's due to Billy Joe's inability, the case

may proceed. If not, he has to bring the support current.

The law provides, the male ordered to pay child support did not act to prevent the biological father of the child from asserting his paternal rights with respect to the child.

In the case at hand, Bob the pool boy attempted to intervene in the original pleadings. However, Billy Joe did nothing to prevent him from asserting his parental rights. The motion to dismiss Bob the pool boy was filed by Sindy.

The law provides a court shall not set aside the paternity determination or child support order if the male engaged in the following conduct after learning that he is not the biological father of the child:

Exceptions that would preclude the disestablishment of paternity (however, none of them apply to the case at hand).

“In the event relief is granted pursuant to this section, relief shall be limited to the issues of prospective child support payments and termination of parental rights, custody, and visitation rights. The male's previous status as father continues to be in existence until the order granting relief is rendered. All previous lawful actions taken based on reliance on that status are confirmed retroactively but not prospectively. This section shall not be construed to create a cause of action to recover child support that was previously paid.” *Florida Statutes, Section 742.18(6)* provides “The duty to pay child support and other legal obligations for the child shall not be suspended while the petition is pending except for good cause shown. However, the court may order the child support to be held in the registry of the court until final determination of paternity has been made.”

In the case at hand Billy Joe is not entitled to recoup back child support as it will only provide relief as to “prospective child support payments”. Depending on Billy Joe’s current financial or other circumstances, he can petition for temporary child support abatement pending final hearing.

It should be noted if the petition is denied, the court shall assess the costs of the action and attorney's fees against the petitioner.

As for Billy Joe wanting to continue a relationship with Hope, if he disestablishes paternity, he will lose all parental responsibilities and rights of visitation. If he wants to ensure visitation, he must not proceed with this action.

As for trouble that can be caused by Bob the pool boy, not much. Apparently, Bob the pool boy attempted to intervene and was denied. See *HRS v. Privette, 617 So.2d 305 (Fla. 1993)* and *Lander v. Smith, 906 So.2d 1130 (Fla. 2005)*. Since Bob, the pool boy, did not seek appellate review, the trial court’s finding “Billy Joe was the subject child's legal father, based on Florida's presumption of legitimacy. As such, Bob had no standing to seek parental rights to a child born during an intact marriage” is now the rule of the case. If paternity is disestablished by Billy Joe, it is still unclear whether Bob the Pool Boy could come back to Court as *Florida Statutes, Section 742.18(9)* provides: “The rendition of an order granting a petition filed pursuant to this section shall not affect the legitimacy of a child born during a lawful marriage.”

The only time limitation in an action for disestablishment is that it must be filed before the child's 18th birthday. So, for the most part, the dates and the fact that Billy Joe seeks a consultation 1 day before the judgment turns a year old is irrelevant. Aside from a proceeding under *Florida Statutes, Chapter 742*, Billy Joe could file seeking relief from final judgment under *Florida Rules Civil Procedure, Rule 1.540* based upon fraud. However, the most appropriate way for Billy Joe to seek disestablishment is an action pursuant to *Florida Statutes, Section 742.18*.

Multiple Choice Sample Questions

1. In determining the payee's need in an alimony modification proceeding, the Court may **NOT** consider which of the following?
- A. Recurring voluntary withdrawals from retirement accounts prior to the payee reaching age 65.
 - B. Income the payee receives from retirement accounts that were equally divided in equitable distribution, unless the payor is also receiving like distributions.
 - C. Withdrawals the payee takes from retirement accounts at normal retirement age if the withdrawals invade principal.
 - D. Withdrawals the payee takes from retirement accounts at any age if the parties contemplated such withdrawals in determining the original alimony amount.

Answer: D, Brydger 43 FLW D1243a

A, B and C are all incorrect as all are income which may be considered for alimony modification purposes.

2. Which statement is **FALSE** regarding a social investigation?
- A. A copy of the report shall be furnished directly to the court by the social investigator.
 - B. An attorney licensed by the Florida Bar for a minimum of 5 years and in good standing may serve as a Social Investigator.
 - C. The technical rules of evidence do not exclude the study from consideration by the court.
 - D. The Department of Children and Families may conduct the investigation if an Affidavit of indigence is filed with the court and qualified court staff is not available.

Answer: B. See F.S. 61.20.

3. Husband hired lawyer to represent him in his divorce. Lawyer and Husband enter into a retainer agreement, regarding payment of the lawyer's fees. The agreement provides the Husband is obligated to pay the lawyer's fees. The agreement does not contain any language regarding the issuance and entry of charging liens. At the termination of the case, the Husband failed to pay his lawyer and disputed the amount the fees. The lawyer filed a timely notice of charging lien. After a hearing, the Court found that the lawyer was entitled to a charging lien, enabling the lawyer to collect the balance of the fees owed to her, from the Husband.

Given the facts as provided above, which asset can the court properly impose a charging lien against?

- A. Husband's permanent periodic alimony payments that he was awarded as part of the divorce, which alimony payments only meet the basic needs of the Husband.
- B. A rental condominium owned by the parties during the marriage that was awarded to Husband.
- C. The Wife's diamond ring (that she claimed was non-marital) that was awarded to the Husband, as part of equitable distribution.
- D. The marital residence, awarded to the Husband, which is his homestead.

Answer is "c". See *Riveiro v. J. Cheney Mason*, 82 So.3d 1094 (Fla. 2nd DCA 2012).

Charging liens can't attach to support payments that provide only the "minima necessities of life". *Jaeger v. Jaeger*, 182 So.3d 697 (Fla. 4th DCA 2015); *Dyer v. Dyer*, 438 So.2d 955 Fla. 4th DCA 1983);

Charging lien can't attach to real property without a specific agreement regarding same. See *Riveiro v. J. Cheney Mason*, 82 So.3d 1094 (Fla. 2nd DCA 2012); *Sass v. Sass*, 988 So.2d 1135 (Fla. 4th DCA 2008);

Charging lien can't attach to homestead property. *Chames v. DeMayo*, 972 So2d 850 (Fla. 2007).

4. **Which statement is not true about a request for interim partial equitable distribution, pursuant to the statute regarding interim equitable distribution?**

- A. Moving party must show good cause in support of the request.
- B. Must be proven by clear and convincing evidence.
- C. Moving party must prove exceptional circumstances in support of the request.
- D. Motion for interim partial equitable distribution must be verified.

Answer: B. Burden of proof is by preponderance of the evidence. All other factors in F.S. 61.075(5)

5. **Q: In which of the following actions does the court NOT have the authority to grant attorney's fees, pursuant to the statute related to sanctions for raising unsupported claims or defenses (F.S. 57.105)?**

- A. Dating Violence
- B. Sexual Violence
- C. Domestic Violence
- D. Repeat Violence.

Answer: C. Domestic Violence cases (brought pursuant to F.S. 741.03). See *Lopez v. Hall* 233 So.2d 451 (Fla. 2018); *Sager v. Holgren* 43 FLW D1494. 57.105 fees are available in cases brought under F.S. 784.046 (repeat violence, dating violence and sexual violence), but not under 741.30, Domestic Violence.

6. The Former Husband filed a petition to terminate his alimony obligation on grounds that the Former Wife was in a supportive relationship. The parties' Marital Settlement Agreement provided that the Former Husband's "alimony shall be non-modifiable by the parties, in either amount or duration, regardless of any change in circumstances of either party. This alimony shall terminate on the Husband's death, the Wife's death, or the Wife's remarriage, whichever shall first occur." The Former Wife filed a Motion for Judgment on the Pleadings. Her Motion should be:

- A. granted. The parties' agreement unambiguously provided that all alimony was non-modifiable and would only cease upon death or remarriage.
- B. denied. The parties' agreement provided that the alimony was nonmodifiable in amount, it did not preclude termination of alimony.
- C. denied. The Former Wife was not entitled to Judgment on the Pleadings. Procedurally, the Former Wife should have filed a Motion for Summary Judgment alleging the lack of dispute of any material fact.
- D. denied. Under Fla. Stat. § 61.14, the Former Husband was entitled to prove by a preponderance of the evidence that a supportive relationship exists. The supportive relationship issue was not specifically addressed in the Marital Settlement Agreement. The Former Husband could not waive his statutory right without a specific waiver.

ANSWER: A *Smith v. Smith*, 110 So. 3rd 108 (Fla. 4th DCA 2013).

7. In a child support modification action, Father seeks to compel Mother's production of her Federal Income Tax return for the prior year, which was filed jointly with her new husband. Mother produces the joint return, but redacts all financial information pertaining to her husband. The court compels unredacted production. Which of the following statements is true?

- A. The court's ruling is correct because Mother's tax return is relevant to the determination of child support and her husband assumed the risk of potential disclosure when he filed a joint return.
- B. The court's ruling is incorrect unless the court also conducted an evidentiary hearing and determined that Mother's husband's financial information is relevant to the litigation.
- C. The court's ruling is incorrect, but Mother must wait to appeal the court's ruling until the conclusion of the case.
- D. The Court's ruling is correct, unless Mother's husband can prove that he keeps his personal finances secret.

Answer: B. McFall v. McFall, 44 FLW D2608-The Florida Constitution protects the disclosure of financial information of private persons if there is no relevant or compelling reason to require disclosure because personal finances are among those private matters kept secret by most people.

A is just false. C is just false, can be appealed by petition for certiorari. D is incorrect because the burden is on the party seeking the production.

8. Which of the following is NOT true about the Daubert standard for admissibility of expert testimony in Florida?

- A. The expert's testimony is the product of reliable principles and methods.
- B. The expert's theory or technique has been subject to both peer review and publication.
- C. The expert's testimony is based upon sufficient facts or data.
- D. The expert has applied the principles and methods reliably to the facts of the case.

Answer: B. This factor comes from Frye. The remainder are in Section 90.702, which has codified Daubert.

9. The trial court overruled Husband's objection to certain of Wife's discovery requests in which he claimed the responses required the disclosure of privileged information. The correct method for Husband to seek appellate review is:

- A. interlocutory appeal of a Non-Final Order.
- B. petition for Writ of Prohibition.
- C. petition for Writ of Mandamus.
- D. petition for Writ of Certiorari.

Answer: D, see Rule 9.130(a).1, Florida Rules of Appellate Procedure.

10. A parent seeking to relocate with a minor child pursuant to Section 61.13001 must:

- A. prove by clear and convincing evidence the relocation is in the best interest of the minor child and, if that occurs, the burden shifts to the non-relocating parent to prove by greater weight of the evidence the relocation is not in the child's best interests.
- B. prove by a preponderance of the evidence the relocation is in the best interests of the minor child and, if that occurs, the burden shifts to the non-relocating parent to prove by the greater weight of the evidence the relocation is not in the best interests of the child.
- C. prove by a preponderance of the evidence the relocation is in the best interests of the child and, if that occurs, the burden shifts to the non-relocating parent to prove by a preponderance of the evidence the relocation is not in the best interests of the child.
- D. prove by a preponderance of the evidence the relocation is in the best interests of the child and, if that occurs, the burden shifts to the non-relocating parent to prove there is no substantial competent evidence to support relocation.

Answer: C. *Buschor v. Buschor*, 43 FLW D 1775 (1st DCA Aug 1 2018)

SHORT ANSWER QUESTIONS

1. Husband and Wife stipulate that Wife is entitled to permanent alimony, but they disagree on the amount. All other issues in the divorce are settled. Both parties are 55 years of age. As part of the settlement, but prior to the hearing on alimony, Wife received \$500,000 in an individual retirement account (IRA).

At the hearing regarding the amount of alimony, should the court consider Wife's \$500,000 IRA account? Please explain.

Answer: Yes. The court should consider the income generated by the \$500,000 (interest income that would be reinvested) which is available to Wife. The court should not discount income by any penalties for early withdraw, but should consider the taxes on the interest income. IRC §72(t) provides Wife a way to withdraw monies without penalty from an IRA by allowing substantially equal payments over a period of time of at least 5 years based on life expectancy and a reasonable rate of return. Wife is 55 years of age and can withdraw the interest earned on the IRA for 6 ½ years (once she turns 63 ½ years old there is no penalty) without penalty. Failure to include the income from the IRA would require Husband to pay additional alimony and would constitute an impermissible “savings component” in the alimony awarded. *See Kleinman v. Niederman*, 60 So. 3d 544 (Fla. 4th DCA 2011).

