

OSCA/OCI'S FAMILY COURT CASE LAW UPDATE
April 2010

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Dependency Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

L.J. v. Department of Children and Families ___ So.3d ____, 2010 WL 1609955 (Fla. 1st DCA 2010). [COURT DECLINES INVITATION TO EXTEND APPLICABILITY OF PRIOR CASELAW.](#)

The First District Court of Appeal affirmed termination of the mother's parental right to her two children but wrote to address the mother's argument as to the applicability of the court's decision in M.H. v. Department of Children and Families, 866 So.2d 220 (Fla. 1st DCA 2004)(on clarification). The children had originally been sheltered after having been left unattended for an unknown period that exceeded four hours. The mother insisted she had only been missing for twenty minutes, but had beer in her purse, and tested positive for marijuana. The mother signed a mediation agreement and entered into a case plan, which was eventually extended beyond its initial goal date. After the Department filed its termination of parental rights petition, the trial court granted the petition terminated parental rights under section 39.806(1)(e), Florida Statutes, finding that termination was in the children's manifest best interests and was the least restrictive means. On appeal, the mother relied on the First District's decision in M.H. in arguing that the trial court terminated her rights without clear and convincing evidence that there was no reasonable basis to believe she would improve in her efforts to overcome her alcohol and drug addiction. In rejecting the mother's argument, the court noted that in M.H. the Department sought to terminate the mother's rights solely due to her drug addiction. Therefore the court in M.H. reiterated that parental rights could not be terminated based on drug addiction alone and that under section 39.806(1)(c), the Department must prove both that continued interaction with the parent would threaten the child's life, safety, or health regardless of the provision of services and that there is no reasonable basis to believe the parent will improve. The court further noted favorable factors in the M.H. record relating to the mother in that case. The court therefore declined to extend the holding of M.H. to apply to termination of parental rights under section 39.806(1)(e), Florida Statutes, observing that substance abuse was not the sole basis for the appellant/mother's termination. Not only did the mother continue to use drug and alcohol despite the provision of services (testing positive several times, used marijuana with a couple of months of the TPR hearing, consumed alcohol before the hearing, appeared drunk at the hearing with slurred speech, and missed substance abuse counseling sessions, but she also did not attend relationship counseling despite being in a relationship with the children's father, missed about half of the scheduled visits with her children, and failed to maintain stable housing and income. The court further noted the record did not demonstrate the mother's potential to improve and similarly distinguished the other cases cited by the mother in support of her argument. Noting that the record contained competent, substantial evidence supporting the TPR, the court affirmed the trial court's order.

<http://opinions.1dca.org/written/opinions2010/04-22-2010/09-6445.pdf> (April 22, 2010).

K.J. v. Department of Children and Families ___ So. 3d ____, 2010 WL 1477567, (Fla. 1st DCA 2010). **MOTHER'S CLAIMS NOT PRESERVED FOR APPEAL; CONFLICT CERTIFIED.**

The First District Court of Appeal affirmed termination of the mother's rights because she had not preserved her claims for appellate review. The mother's daughter had already been removed from her care twice by the time she was removed in September 2008, three months after having been reunified with the mother. Following the third removal, the Guardian ad Litem program filed a termination of parental rights petition under sections 39.806(1)(c) and 39.806(1)(l), Florida Statutes. Section 39.806(1)(l) permits termination of parental rights if the child or another child of the parents has been placed in out-of-home care under Chapter 39 and the conditions that led to the out-of-home placement were caused by the parent. At trial, the mother's counsel did not move for judgment of dismissal at the conclusion of the Guardian ad Litem's case. In her written closing, the mother, *inter alia*, noted section 39.806(1)(l) and conceded that her child had been sheltered on three separate occasions but asked that the court consider the circumstances in each of the three removals. The trial court terminated the mother's parental rights based on both grounds. On appeal the mother argued that termination under section 39.806(1)(l) was an improper retroactive application of the statute because two of her daughter's removals were prior to the statute's effective date. The mother also argued that the evidence did not support termination under section 39.806(1)(c). The First District Court of Appeal held that because neither issue was raised in the trial court, the issues were not preserved for appellate review. The court further held that the mother effectively waived her claim as to 39.806(1)(l) in light of her closing argument. The court held that the mother's claims were not preserved because she had not filed a motion for judgment of dismissal at the close of the Guardian ad Litem's case. Finally, the court noted that the Fourth District Court of Appeal held differently in H.D. v. Department of Children and Families, 964 So.2d 818, 819 (Fla. 4th DCA 2007), *rev. dismissed*, 985 So.2d d 1059 (Fla. 2008) and certified conflict. Chief Judge Hawkes concurred but wrote separately to opine that under no circumstances could the mother's argument about 39.806(1)(l)'s retroactive application be valid.

<http://opinions.1dca.org/written/opinions2010/04-12-2010/09-5598.pdf> (April 12, 2010).

Second District Court of Appeal

Justice Administrative Commission v. Goettel, ___ So. 3d ____, 2010 WL 1728924 (Fla. 2d DCA 2010). **CERTIORARI GRANTED TO QUASH ORDER FOR JUSTICE ADMINISTRATIVE COMMISSION TO PAY FOR COURT APPOINTED COUNSEL.**

The Justice Administrative Commission (JAC) sought review by certiorari of an order to pay Mark Goettel for his representation of a mother in a termination of parental rights case in which the mother executed a written surrender of her parental rights. The mother was appointed counsel at the start of dependency proceedings and executed a written surrender sixteen (16) months later. The trial court had continued the attorney appointment for the mother through the termination of parental rights proceeding. Although the JAC paid Goettel for representation during the dependency proceedings, it declined to do so for the termination

of parental rights case. The JAC was ordered by the trial court to pay for representation. On appeal, the court noted that although indigent parents are entitled to court-appointed counsel in termination of parental rights proceedings, by statute the right does not apply to any parent who has voluntarily executed a written surrender of parental rights. Therefore the mother had no right to court-appointed counsel for her case. The court cited a ruling from the Fifth District Court of Appeal to the effect that certiorari is proper to review an order erroneously requiring the JAC to pay for improperly appointed counsel. Thus, the court quashed the order and granted the writ.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2010/April/April%2030,%202010/2D09-5162.pdf (April 30, 2010).

S.K. v. Department of Children and Families, Guardian ad Litem Program, and M.F., ___ So. 3d ___, 2010 WL 1688459 (Fla. 2d DCA 2010). **CITATION OPINION; CONFLICT CERTIFIED.**

The Second District Court of Appeal withdrew its previous table decision and issued a new opinion in its place that certified conflict on the issue of ineffective assistance of counsel and the procedure to pursue such a claim. The father appealed the trial court's denial of his motion to set aside the judgment terminating his parental rights. On appeal, the court affirmed but wrote to discuss the problems facing parents seeking to raise the issue of ineffective assistance of counsel arising out of termination of parental rights proceedings. Subsequent to the court affirming the order terminating the father's rights, the father filed a pro se motion for relief from judgment or orders under Florida Rule of Juvenile Procedure 8.270(b) which asked the trial court to set aside the order of termination based on alleged ineffective assistance of trial counsel. While the father's motion was pending, the trial court entered a final judgment of adoption of the child who was the subject of the termination proceeding. The trial court denied the father's motion finding that Rule 8.270(b) was not a proper mechanism to raise ineffective assistance of counsel (IAC). On appeal, the court agreed that Rule 8.270 is not the proper mechanism for a parent to present an IAC claim in a TPR case. Because the father's claims all related to procedural and evidentiary problems in the original TPR proceeding, they did not present a basis for relief under Rule 8.270. The court wrote, however, to highlight that the father has a right to effective counsel but has no means to enforce that right. The court recounted the history of the IAC claims in Florida, noting that although the Florida Supreme Court has not explicitly stated, it appears that a parent is entitled to the *effective* assistance of counsel. The court noted three possible means by which a claim could be raised: direct appeal, post-trial motion authorized by rule, or a petition for a writ of habeas corpus. The court discussed these methods and observed that in 2007, the Florida Supreme Court had declined to address certified questions on the issue and instead referred IAC to the Juvenile Court Rules Committee and Appellate Court Rules Committee to consider a rule to address IAC claims. Subsequently, the Fifth District Court of Appeal affirmed the denial of a mother's IAC claims but recognized the lack of an effective mechanism for parents on the issue. The Supreme Court denied review of the questions certified by the Fifth District. On December 19, 2009, the Supreme Court adopted amendments to the rules of juvenile procedure that did not include any mechanism for addressing IAC claims in TPR cases. In re: Amendments to the Florida Rules of Juvenile Procedure, 26 So.3d 552 (Fla. 2009). The juvenile rules committee did not present a

proposal on IAC because it felt the issue to be outside the scope of its purview. Finally, the Second District conceded that it was required to affirm the denial of the father's motion even as it acknowledged the unfairness of the father having a right with no remedy. The court certified as questions of great public importance: 1) does Florida recognize a claim of IAC from a lawyer's representation of a parent in a proceeding for the termination of parental rights?; and 2) if so, what procedure must be followed to pursue a claim of IAC?

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2010/April/April%2028,%202010/2D09-3487rh.pdf (April 28, 2010).

Third District Court of Appeal

A.C. v. Department of Children and Family Services the Guardian ad Litem Program, ___ So. 3d ____, 2010 WL 1460207, (Fla. 3d DCA 2010). **TRIAL COURT CORRECTLY DENIED MOTHER'S MOTION TO WITHDRAW CONSENT TO TERMINATION OF PARENAL RIGHTS.**

The court affirmed the trial court's denial of a mother's motion to withdraw her consent to termination of parental rights. The mother had signed a voluntary surrender of her parental rights at which time the trial court inquired extensively as to the mother's voluntariness. The trial court terminated the mother's parental rights. The mother subsequently sought to withdraw her consent, alleging a change in the adoptive parent and fraud, duress, and undue influence. After an evidentiary hearing at which the trial court found no fraud, duress, or undue influence, the trial court denied the mother's motion. On appeal, the court affirmed the trial court's decision.

<http://www.3dca.flcourts.org/Opinions/3D09-1113.pdf> (April 14, 2010).

J.L. v. Department of Children and Families, 30 So. 3d 721, 2010 WL 1239346, 35 Fla.L.Weekly D758 (Fla. 3d DCA 2010). **ADJUDICATION OF DEPENDENCY REVERSED AS UNSUPPORTED BY EVIDENCE.**

The Third District Court of Appeal reversed an adjudication of dependency and remanded the case for further proceedings because the findings of fact referencing the father as an offending parent were unsupported by evidence. In addition, the Department had confessed error, a position adopted by the Guardian ad Litem.

<http://www.3dca.flcourts.org/Opinions/3D10-0142.pdf> (April 1, 2010).

Fourth District Court of Appeal

G.O. v. Department of Children and Families and Guardian ad Litem Program, ___ So. 3d ____, 2010 WL 1329746, 35 Fla.L.Weekly D791 (Fla. 4th DCA 2010). **CONCESSION OF ERROR.**

Based on concession of error by both the Department and Guardian ad Litem, the court reversed the order on appeal and remanded the case for further proceedings.

<http://www.4dca.org/opinions/Apr%202010/04-07-10/4D09-4683.op.pdf> (April 7, 2010).

W.S. v. Department of Children and Families, ___ So. 3d ____, 2010 WL 1329709, 35 Fla.L.Weekly D779 (Fla. 4th DCA 2010). [TERMINATION OF PARENTAL RIGHTS AFFIRMED](#). The Fourth District Court of Appeal affirmed termination of parental rights of a father who had been convicted and sentenced for child neglect and causing great bodily harm to his son. The court held that the trial court did not abuse its discretion in not having the child present to testify, noting that the father did not invoke Florida Rule of Juvenile Procedure 8.255(b) and that the trial court made specific findings supporting its determination. The court also held that the trial court did not base its ruling to terminate parental rights solely on the fact that father was incarcerated. Although the trial court noted the incarceration, “there were many, many reasons that termination was appropriate, all supported by clear and convincing evidence.” The court also declined to accept the father’s argument that he was entitled to a jury trial as in a criminal case, agreeing with the Supreme Court in S.B. v. Department of Children and Families, 851 So.2d 689, 693 (Fla. 2003), that termination cases do not require all the protections of a criminal trial.
<http://www.4dca.org/opinions/Apr%202010/04-07-10/4D09-4625.op.pdf> (April 7, 2010).

Fifth District Court of Appeal

Justice Administrative Commission v. Biecker, ___ So. 3d ____, 2010 WL 1726303 (Fla. 5th DCA 2010). [ORDER FOR JUSTICE ADMINISTRATIVE COMMISSION TO PAY COURT-APPOINTED COUNSEL QUASHED](#). The mother in a termination of parental rights proceeding was appointed private counsel and, having failed to appear at her advisory hearing, her parental rights were terminated based on her consent for failure to appear. Relying on earlier precedent, the Fifth District Court of Appeal quashed the trial court’s order for the Justice Administrative Commission to pay for the mother’s counsel.
<http://www.5dca.org/Opinions/Opin2010/042610/5D10-138.op.pdf> (April 30, 2010).

C.B. v. Department of Children and Families, ___ So. 3d ____, 2010 WL 1626452 (Fla. 5th DCA 2010). [TERMINATION OF PARENTAL RIGHTS AFFIRMED](#). A mother appealed termination of her parental rights which had been based on multiple grounds. On appeal, the Fifth District Court of Appeal ordered that the Trial court strike the finding that based termination on section 39.806(1)(I), Florida Statutes (2008), since that ground had not been pled in the Department’s petition and the Department did not amend the petition to include it, as the Department conceded. However, the court also held that the trial court properly terminated the mother’s rights as to all five of the children at issue because other grounds supporting termination had been established. Other than striking the one finding, the court affirmed termination of parental rights.
<http://www.5dca.org/Opinions/Opin2010/041910/5D09-2485.op.pdf> (April 20, 2010).

D.M. v. Department of Children and Families, ___ So. 3d ____, 2010 WL 1404087 (Fla. 5th DCA 2010). [COMPLIANCE WITH SECTION 39.803, FLORIDA STATUTES REQUIRED](#). The mother appealed termination of her parental rights on the basis of lack of compliance with section 39.803, Florida Statutes. On appeal, the court tersely noted that statutory formalities

must be observed to prevent the risk of unnecessary judicial labor and delay in the child's permanent placement. The court therefore reversed the order terminating parental rights and remanded the case.

<http://www.5dca.org/Opinions/Opin2010/040510/5D09-3608.op.pdf> (April 8, 2010).

R.A. v. Department of Children and Families, 30 So. 3d 722, 2010 WL 1240978, 35 Fla.L.Weekly D759 (Fla. 5th DCA 2010). **TERMINATION OF PARENTAL RIGHTS REVERSED.**

The Fifth District Court of Appeal reversed the trial court's termination of the father's parental rights and ordered reinstatement of his case plan. The appellant's daughter had been born while the mother was incarcerated and the child was sheltered three days later due to the mother's incarceration and the father's inability to provide the child with adequate care. She was eventually placed in non-relative pre-adoptive placement with her foster parents. Seven months after the trial court accepted an amended case plan, the Department filed a petition for termination of parental rights under sections 39.806(1)(c) and 39.806(1)(e), Florida Statutes. The trial court granted termination under section 39.806(1)(e) and found that termination was in the child's manifest best interests and was the least restrictive means of preventing harm to the child. The trial court made a finding that no evidence was submitted that the father was currently engaged in conduct that threatened the child's life, safety, well-being, or physical, mental, or emotional health. The Trial court also found that the father had custody of an older child who had not been removed from his care since reunification and that the father was making an effort in substance abuse treatment. On appeal, the court quoted the ground for termination in 39.806(1)(e) and the definition of statutory compliance. (Note that the version of ground (1)(e) relied upon in the case was based on the failure of substantial compliance within twelve months after the child's adjudication of dependency although the statute has been amended and the twelve month requirement has been replaced with nine months.) The court held that the trial court erred in finding clear and convincing evidence for terminating the father's parental rights, concluding that the Department failed to prove that the father's actions harmed his child and noted that the trial court itself found that any evidence of prospective harm was speculative at best. The court noted that the requirements that termination be the least restrictive means of protecting the child and that termination be in the child's manifest best interests were both lacking. The court therefore reversed the order on appeal and remanded the case for reinstatement of the case plan and its goal of reunification.

<http://www.5dca.org/Opinions/Opin2010/032910/5D09-2687.op.pdf> (April 1, 2010).

Delinquency Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

No new opinions for this reporting period.

Second District Court of Appeal

C.P. v. State, __ So.3d __, 2010 WL 1565449 (Fla. 2d DCA 2010). **IMPOSITION OF A \$250 PUBLIC DEFENDER FEE WAS REMANDED BECAUSE THE JUVENILE WAS NOT GIVEN NOTICE AND AN OPPORTUNITY TO BE HEARD.** The juvenile was adjudicated delinquent for throwing a deadly missile into an occupied vehicle. On appeal, the juvenile argued that the trial court erred in imposing a \$250 public defender fee without giving him notice and an opportunity to be heard. The State conceded error. The Second District Court of Appeal reversed the imposition of the \$250 public defender fee and remanded to the trial court to strike it. The Second District noted that the trial court could reimpose the fee only if it provided the juvenile with notice and the opportunity to be heard at a hearing on the matter.
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2010/April/April%2021,%202010/2D09-707.pdf (April 21, 2010).

W.S.G. v. State, __ So.3d __, 2010 WL 1404373 (Fla. 2d DCA 2010). **DISPOSITION ORDER WAS REVERSED AND REMANDED FOR FAILURE TO COMPORT WITH THE ORAL PRONOUNCEMENT AND SEPARATE DISPOSITION ORDERS WERE REQUIRED FOR EACH SEPARATE CASE.** The juvenile appealed the disposition order committing him to the Department of Juvenile Justice (DJJ) for a domestic battery adjudication and for violating his probation from an earlier battery offense. During the pendency of the appeal, the juvenile filed a motion to correct disposition error under Florida Rule of Juvenile Procedure 8.135(b) (2). The juvenile court failed to rule on the motion within thirty days; thus, the motion was deemed denied. In his motion, the juvenile argued that the disposition order failed to comport with its oral pronouncement, which stated his commitment to the DJJ was to run consecutively to his underlying probation. The juvenile also contended that the juvenile court erred by entering one order of commitment for two separate cases. The Second District Court of Appeal agreed with both of the juvenile's arguments. Accordingly, the original disposition order was reversed and remanded for the entry of new, separate disposition orders in each case that properly reflected the juvenile court's oral pronouncement.
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2010/April/April%2009,%202010/2D08-5251.pdf (April 9, 2010).

Third District Court of Appeal

M.F. v. State, __ So.3d __, 2010 WL 1576744 (Fla. 3d DCA 2010). **THE TRIAL COURT'S RELEASE OF THE JUVENILE RENDERED THE WRIT OF HABEAS CORPUS PETITION MOOT.** The juvenile filed an Emergency Petition for Writ of Habeas Corpus alleging that the trial judge ordered the uncooperative juvenile into secure detention contrary to law. The Third District Court of Appeal found that the statutory authority for holding the juvenile in secure detention emanated from s. 985.255(1)(i), F.S. (2009), which limited to seventy-two hours the power to hold a juvenile after quashing a pick-up order. Before the Third District could issue their decision, the trial court released the juvenile, rendering the petition moot. The petition was dismissed as moot.

The Third District wrote an opinion to remind the new judges in the juvenile division that while they may be acting from the best of motives, they must follow legislative mandates. Section 985.255 establishes the criteria for detaining a child, pending the outcome of a juvenile delinquency case. A decision to detain a child must be made according to the statutory criteria. <http://www.3dca.flcourts.org/Opinions/3D10-0871.pdf> (April 21, 2010).

R.T. v. State, __ So.3d __, 2010 WL 1565504 (Fla. 3d DCA 2010). **DENIAL OF MOTION FOR JUDGMENT OF DISMISSAL REVERSED WHERE THE RECORD WAS DEVOID OF ANY EVIDENCE THAT THE ALLEGED THREAT WAS IN RETALIATION FOR THE WITNESS' PARTICIPATION IN AN OFFICIAL PROCEEDING.** The juvenile appealed the trial court's denial of his motion for judgment of dismissal and the subsequent order entered by the trial court withholding adjudication of delinquency and placing the juvenile on probation. The juvenile was charged with retaliating against a witness in violation of s. 914.23(1), F.S. (2008). The Third District Court of Appeal found that to prove a violation of s. 914.23(1), the State was required to demonstrate that the juvenile knowingly engaged in conduct threatening to cause bodily injury to another person with the intent to retaliate against that person for his testimony as a witness in an official proceeding. The Third District held that, although the evidence supported a finding that the juvenile did threaten the witness, the record is devoid of any evidence that the alleged threat was in retaliation for the witness' participation in an official proceeding. In fact, the alleged threat was made prior to any official proceeding taking place. Therefore, the threat was clearly not made in retaliation of the witness' testimony at an official proceeding. Accordingly, the orders withholding adjudication and denying the motion for judgment of dismissal are reversed and remand with instructions to enter an order granting the motion for judgment of dismissal. <http://www.3dca.flcourts.org/Opinions/3D09-0987.pdf> (April 21, 2010).

M.R. v. State, __ So.3d __, 2010 WL 1565545 (Fla. 3d DCA 2010). **ADJUDICATION FOR RESISTING AN OFFICER WAS REVERSED WHERE THE JUVENILE'S CONDUCT DID NOT GIVE RISE TO THE FOUNDED OR ARTICULABLE SUSPICION OF UNLAWFUL ACTIVITY NECESSARY TO JUSTIFY A TERRY STOP.** The juvenile, a sixteen-year-old female, was walking down the street in a "high prostitution area" at 9:30 in the evening. After engaging in a consensual and uneventful conversation, the police placed her in their patrol car pending a "record search." After the search showed that she was a "runaway," she exclaimed "I'm not going to go back" and attempted to leave the vehicle. The juvenile was adjudicated delinquent for resisting an officer. The Third District Court of Appeal found that the juvenile's conduct did not give rise to the founded or articulable suspicion of unlawful activity necessary to justify the Terry stop. See Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Thus, the police were not then acting in the lawful execution of their duties as s. 843.02; F.S. (2008) requires to support a charge of obstructing or resisting an officer. Therefore, the juvenile was not guilty, as a matter of law, of resisting an officer under that statute by trying to escape the confinement. The Third District also noted that the fact that the juvenile was known to one of the officers as having been involved in prostitution on a previous occasion does not affect the issue of whether her conduct at the time of the arrest justified the stop. Therefore, the adjudication was reversed and remanded with directions to dismiss the delinquency petition. <http://www.3dca.flcourts.org/Opinions/3D09-1074.pdf> (April 21, 2010).

W.M. v. State, __ So.3d __, 2010 WL 1576453 (Fla. 3d DCA 2010). **THE EVIDENCE PRESENTED FOR CHARGE OF BATTERY ON A SCHOOL EMPLOYEE WAS FOUND SUFFICIENT TO SURVIVE A MOTION FOR DISMISSAL.** The juvenile appealed his conviction for battery on a school employee. The juvenile argued the evidence of intent was insufficient to survive his motion for judgment of dismissal. The Third District Court of Appeal found that the evidence presented below that the juvenile, who was late for class, pushed aside a teacher who was blocking a doorway to prevent his entry into a classroom, after repeatedly having been denied entry and told to report to the behavior management teacher's office, was sufficient to survive his motion for a judgment of dismissal. The conviction for battery on a school employee was affirmed. <http://www.3dca.flcourts.org/Opinions/3D09-1715.pdf> (April 21, 2010).

S.R. v. State, __ So.3d __, 2010 WL 1460222 (Fla. 3d DCA 2010). **THE RESTITUTION ORDER WAS AFFIRMED WHERE NO OBJECTION WAS RAISED BELOW.** The Third District Court of Appeal found that no objection to the restitution order was raised below and cannot now be raised on appeal. In support the court cited J.S. v. State, 717 So.2d 175, 177 (Fla. 4th DCA 1998) (“When the trial court questioned the attorneys about the propriety of restitution for lost wages, both attorneys agreed that lost wages were recoverable. Having failed to object to this restitution issue at the hearing, appellant failed to preserve this issue for appellate review.”) and the Florida Rules of Appellate Procedure 9.140(e) (“a sentencing error may not be raised on appeal unless the alleged error has first been brought to the attention of the lower tribunal: (1) at the time of sentencing; or (2) by motion pursuant to [rule] 3 .800(b)”). Accordingly, the disposition was affirmed. <http://www.3dca.flcourts.org/Opinions/3D09-1964.pdf> (April 14, 2010).

K.C. v. State, __ So.3d __, 2010 WL 1330321 (Fla. 3d DCA 2010). **DENIAL OF MOTION TO SUPPRESS WAS AFFIRMED BECAUSE THE OFFICER HAD A REASONABLE SUSPICION TO STOP THE JUVENILE.** The juvenile appealed the denial of his motion to suppress. The juvenile was arrested on suspicion of loitering and prowling. A post-Miranda search of the juvenile’s backpack revealed items stolen from a house earlier that morning. The juvenile was charged by delinquency petition with burglary of an unoccupied dwelling and grand theft. On the motion to suppress, the defense argued that there was no probable cause to arrest the juvenile for loitering or prowling. The arresting officer testified that because the juvenile was found jumping a fence and running from a backyard that was not his, in a high crime area that was currently under intense police scrutiny, the juvenile’s flight was suspicious enough to warrant stopping him. The officer testified that he also stopped the juvenile because he appeared to be a juvenile and should have been in school at that time of day. The trial court denied the juvenile’s motion to suppress. At the motion to suppress hearing, the State relied heavily on Illinois v. Wardlow, 528 U.S. 119, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000), which held that unprovoked flight in a high-crime area constitutes grounds for a “reasonable, articulable suspicion that criminal activity is afoot,” for purposes of a Terry stop. See Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The Third District Court of Appeal found that flight is one factor of many that contributes to an officer's reasonable suspicion of criminal activity. To determine whether an officer had a reasonable suspicion of criminal activity, the court must

consider the totality of the circumstances. The Third District found that in the instant case, the totality of the circumstances gave the officer reasonable suspicion to stop the juvenile. Accordingly, the trial court's denial of the juvenile's motion to suppress was affirmed. <http://www.3dca.flcourts.org/Opinions/3D09-0926.pdf> (April 7, 2010).

Fourth District Court of Appeal

J.C. v. State, __ So.3d __, 2010 1563681WL (Fla. 4th DCA 2010). **IMPOSITION OF COURT COSTS PURSUANT TO S. 775.083(2), F.S. (2008) REQUIRED AN ADJUDICATION OF DELINQUENCY.** The Fourth District Court of Appeal found that a trial court may only impose court costs on a juvenile under s. 775.083(2), F.S. (2008) if the juvenile is adjudicated delinquent. In the instant case, the trial court had withheld adjudication. Therefore, the case was reversed and remanded for the trial court to strike the \$50 court cost assessment against the juvenile under s. 775.083(2). The State had conceded error, but argued that a \$50 statutorily-mandated cost for the Crimes Compensation Trust Fund should have been imposed under s. 938.03(1), F.S. (2008). The Fourth District did not address this issue because the State had failed to raise this argument on cross appeal, or in a motion to correct disposition or commitment error under Florida Rule of Juvenile Procedure 8.135(b) filed prior to or pending the instant appeal. <http://www.4dca.org/opinions/Apr%202010/04-21-10/4D09-392.op.pdf> (April 21, 2010).

E.L.F. v. State, __ So.3d __, 2010 WL 1564040 (Fla. 4th DCA 2010). **STATE FAILED TO PRESENT REBUTTAL EVIDENCE DISPROVING SELF DEFENSE BEYOND A REASONABLE DOUBT.** A traffic altercation between two drivers led to a third party, the juvenile, being charged with criminal battery. The issue was whether the juvenile was acting as a good Samaritan defending himself. A male driver cut off a female driver in traffic. The female driver pursued the male driver eventually blocking him at a traffic light. Both drivers emerged from their cars and some tussling took place between them. At that point, the juvenile, who was riding in another car with his mother, got out and confronted the male driver. The male driver claimed that the juvenile attacked him. The juvenile claimed he was acting in self-defense. The State rested at that point and the juvenile moved for a judgment of acquittal. The motion was denied. The Fourth District Court of Appeal found that the State has the burden of proving guilt beyond a reasonable doubt, and when defendant presents a prima facie case of self-defense, it has the burden of proving defendant did not act in self-defense beyond a reasonable doubt. When the State's evidence is legally insufficient to rebut the juvenile's testimony establishing self-defense, the court must grant a motion for judgment of acquittal. The Fourth District found that the testimony of the female driver, the mother and the juvenile presented prima facie evidence of self-defense. Their testimony was that he did not initiate the fight with the male driver and that he acted to defend the female driver. Therefore, it was necessary for the State to present rebuttal evidence disproving self-defense beyond a reasonable doubt. The State's failure to do so required a judgment of acquittal. Accordingly, the denial of the motion for judgment of acquittal was reversed. <http://www.4dca.org/opinions/Apr%202010/04-21-10/4D09-703.op.pdf> (April 21, 2010).

S.D.T. v. State, __ So.3d __, 2010 WL 1564584 (Fla. 4th DCA 2010). **NON-HEARSAY USE OF BOLO**

DISPATCH WAS ADMISSIBLE TO ESTABLISH AN ELEMENT OF THE CRIME OF RESISTING AN OFFICER WITHOUT VIOLENCE. The Fourth District Court of Appeal held that the contents of a BOLO dispatch was non-hearsay and admissible to establish an element of the crime of resisting an officer without violence. The trial judge had relied on a BOLO (Be On the Look Out) dispatch received by the arresting officer, which described two theft suspects at a Wal-Mart. The officer saw two persons leaving the Wal-Mart who matched the description in the BOLO. The officer approached and said that he wanted to talk to them. One of the suspects was the juvenile, who fled in spite of the officer's command to stop. The juvenile was apprehended. The juvenile argued that because the content of the BOLO dispatch was hearsay, the trial court was precluded from relying on it to find him guilty. The Fourth District found that the dispatch was not hearsay, because the state did not offer it for the truth of its contents. One of the elements of resisting an officer without violence is that, at the time of the resisting, the officer was engaged in the lawful execution of a legal duty. If an officer has reasonable suspicion to make an investigatory stop, then an officer is engaged in the lawful execution of a legal duty. To be guilty of unlawfully resisting an officer, an individual who flees must know of the officer's intent to detain him, and the officer must be justified in making the stop at the point when the command to stop is issued. The state offered the BOLO not to prove the truth of its contents that the suspects had committed a theft, but to establish that the arresting officer was engaged in the lawful execution of a legal duty at the time of the stop. Regardless of the truth of the statements in the BOLO, the officer was justified in relying on it to make an investigatory stop. This non-hearsay use of the BOLO to establish an element of the crime of resisting without violence distinguishes this case from those cases which have held that the contents of a BOLO are inadmissible hearsay. Without regard to the truth of the matters asserted in the BOLO, the fact that the dispatch was received by the arresting officer went to prove an element of the crime, that when the juvenile fled, the officer was engaged in the lawful execution of a legal duty. The judgment of the trial court was affirmed.

<http://www.4dca.org/opinions/Apr%202010/04-21-10/4D09-1955.op.pdf> (April 21, 2010).

S.B. v. State, ___ So.3d ___, 2010 WL 1460231 (Fla. 4th DCA 2010). **JUDGMENT OF DISMISSAL FOR RESISTING AN OFFICER WITHOUT VIOLENCE GRANTED WHERE THE STATE FAILED TO PRESENT EVIDENCE THAT THE JUVENILE KNEW OF THE OFFICERS' INTENT TO DETAIN HIM.** The juvenile appealed from a finding and withhold of adjudication for resisting an officer without violence. The juvenile argued that the trial court should have granted his motion for judgment of dismissal because the State presented no evidence that he knew of the officers' intent to detain him. The evidence presented was that two officers observed two youths, one of whom was the juvenile, walking though an apartment complex. The youths were looking around and appeared to be scanning. The youths then walked over to a car. At that point, one of the officers tried to get out of his car quietly, but apparently the youths heard the car door close and they looked up and took off running. The officer testified that he followed the juveniles, who did not see him in pursuit. The youths were subsequently taken into custody. The juvenile had moved for a judgment of dismissal, arguing that the State did not meet its burden to prove the case of resisting an officer without violence. The trial court denied the motion and the renewed motion after the defense rested. The juvenile appealed the denials arguing that the officers did not issue an order for him to stop and, thus, there was no evidence that he knew of

the officers' intent to detain him. The Fourth District Court of Appeal found that in order to support a conviction for obstruction without violence, the State must prove: (1) the officer was engaged in the lawful execution of a legal duty; and (2) the defendant's action, by his words, conduct, or a combination thereof, constituted obstruction or resistance of that lawful duty. To be guilty of unlawfully resisting an officer, an individual who flees must know of the officer's intent to detain. Although the juvenile fled upon seeing the officers, there was no command to stop by the officers at the time the juvenile began to flee. Further, one of the officers testified that he did not think that the juvenile even knew he was being pursued. Thus, although the evidence reflected that the juvenile was aware that he had caught the officers' attention when he began to flee, it does not prove that he had knowledge of the officer's intent to detain him. Accordingly, the case was reversed and remanded for entry of judgment of dismissal.

<http://www.4dca.org/opinions/Apr%202010/04-14-10/4D09-1837.op.pdf> (April 14, 2010).

E.D. v. State, __ So.3d __, 2010 WL 1329411 (Fla. 4th DCA 2010). **EVIDENCE FAILED TO SUPPORT A CONVICTION FOR CRIMINAL MISCHIEF.** Upon the State's concession of error, the Fourth District Court of Appeal reversed and remanded for a judgment of dismissal of a conviction for criminal mischief. The Fourth District found there was no evidence that, in striking the vehicle of another while backing from a parking space, defendant acted willfully or maliciously. The only thing proven was the negligent operation of a motor vehicle.

<http://www.4dca.org/opinions/Apr%202010/04-07-10/4D09-516.op.pdf> (April 7, 2010).

R.N. v. State, __ So.3d __, 2010 WL 1329914 (Fla. 4th DCA 2010). **PETITION FOR WRIT OF HABEAS CORPUS GRANTED BECAUSE THE TRIAL COURT IS REQUIRED TO CONDUCT A SEPARATE INQUIRY CONCERNING THE NEED FOR CONTINUED DETENTION.** The juvenile filed a petition for writ of habeas corpus seeking his immediate release from secure detention. The juvenile was placed in secure detention following the State's filing of a petition for delinquency in December 2009. The juvenile was charged with several counts of sexual battery and lewd and lascivious conduct. His secure detention had been continued since then because of the "good cause" demonstrated for continuances of his adjudicatory hearing. The Fourth District Court of Appeal granted the juvenile's first petition and directed the trial court to immediately conduct the hearing required by s. 985.26(4), F.S. to determine if there is still a need for continued detention. The Fourth District noted that the need for further continuance of the proceedings is a separate inquiry apart from the need for continued detention. Following a hearing, the trial court continued the secure detention, again referencing only the need for the further continuance. The Fourth District granted the instant petition based upon s. 985.26, F.S. The Fourth District found that once detained for thirty days, the trial court shall hold a hearing at the end of each 72 hour period to determine the need for continued detention of the child and the need for further continuance of proceedings for the child or the state. In this case, thirty days is the applicable time period because it involves an offense that would be, if committed by an adult, a capital felony, a life felony, a felony of the first degree, or a felony of the second degree involving violence against any individual. The Fourth District recognized that subsection (4) provides that the time limits in subsections (2) and (3) do not include periods of delay resulting from a continuance granted by the court for cause on motion of the child or the state. However, the remaining language of that section requires the trial court to conduct a hearing at

the end of each 72 hour period to determine the need for continued detention of the child and the need for further continuance of proceedings for the child or the state. In this case the trial court has only determined the need for further continuance, not the separate inquiry concerning the continued need for detention. Thus, the petition was granted and the trial court directed to immediately conduct a hearing to consider the need for continued detention, apart from the need for a further continuance.

<http://www.4dca.org/opinions/Apr%202010/04-07-10/4D10-1194.op.pdf> (April 7, 2010).

Fifth District Court of Appeal

W.Z. v. State, __ So.3d __, 2010 WL 1507010 (Fla. 5th DCA 2009). **IMPOSITION OF ATTORNEY'S FEES AFFIRMED, BUT ASSESSMENT OF COSTS FOR THE COMPETENCY EVALUATIONS REVERSED.**

The juvenile was adjudicated delinquent for simple battery. As a part of the disposition order, the trial court ordered the juvenile and his parents to pay an attorney's fee of \$50.00 for services rendered by the public defender's office. The juvenile and his parents were also ordered to pay the costs of two mental competency evaluations which, upon motion by the public defender's office, had been ordered by the trial court. The juvenile challenged the assessment of these fees and costs on the grounds that they were not authorized by statute. The Fifth District Court of Appeal found that the Legislature had authorized the assessment of attorney's fees against a child who has been found guilty of committing a criminal act and who received the assistance of the public defender's office. Section 985.033(1), F.S.(2009), provides that a child is entitled to representation by legal counsel at all stages of delinquency court proceedings and if the child and the parents (or other legal guardian) are unable to employ private counsel, the court is required to appoint counsel to represent the child. Section 985.033(1) expressly provides that the costs of representation provisions set forth in s. 938.29 are applicable to juvenile delinquency proceedings. The court is required to impose the attorney's fees notwithstanding the defendant's present ability to pay. And the court is authorized to make payment of attorney's fees a condition of probation. The obligation to pay the child's attorney's fees may also be placed on the child's parents or legal guardian. By contrast, the Fifth District found that the Legislature did not authorize a trial court to assess the costs for mental competency evaluations against an indigent child. Mental competency evaluations in juvenile delinquency proceedings are governed by s. 985.19. The State relied on the final sentence in s. 985.19(1)(b) to support its contention that the costs for the competency evaluation were properly assessed against the juvenile and his parents. However, this sentence does not specify against whom (or what entity) these fees are to be taxed. The term "taxed as costs in the case," does not, by itself, lay responsibility for payment on the child and/or his parents. The Fifth District concluded that s. 985.19(1)(b) failed to expressly authorize the assessment of competency evaluation costs against an indigent juvenile. The State argued that s. 938.29 supports the assessment of these costs. The Fifth District found that unless the Legislature expressly makes a cost or surcharge imposed by Chapter 938 applicable to juvenile delinquency cases, such cost or surcharge may not be imposed in a delinquency proceeding. In the instant case, the Legislature had not done so. Finally, the State argued that the juvenile is obligated to pay the costs of the evaluations because he is the party who requested them. The Fifth District also denied this argument and reversed the assessment of the competency

evaluation costs. <http://www.5dca.org/Opinions/Opin2010/041210/5D09-1656.op.pdf> (April 16, 2010).

N.J.M. v. State, __ So.3d __, 2010 WL 1507019 (Fla. 5th DCA 2009). **SECTION 985.47(1), F.S. (2008) PERMITS A SERIOUS OR HABITUAL JUVENILE OFFENDER DESIGNATION ONLY WHEN MADE IN CONJUNCTION WITH A COMMITMENT TO A RESIDENTIAL FACILITY.** The juvenile was adjudicated guilty of three counts of sexual battery on a child under twelve years of age by a person under eighteen years of age. The juvenile was not committed to a residential program but, instead, placed on probation until his nineteenth birthday. Over objection, the trial court designated the juvenile as a “serious or habitual juvenile offender” (SHO). On appeal, the juvenile argued that s. 985.47(1), F.S. (2008) permits a SHO designation only when made in conjunction with a commitment to a residential facility. The State conceded error. The Fifth District Court of Appeal agreed with the juvenile and remanded with instructions for the trial court to strike the SHO designation. REVERSED and REMANDED. <http://www.5dca.org/Opinions/Opin2010/041210/5D09-2249.op.pdf> (April 16, 2010)

Dissolution Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

MacKoul v. MacKoul, __ So.3rd __, 2010 WL 154264, (Fla. 1st DCA 2010).

TRIAL COURT DID NOT ABUSE ITS DISCRETION IN IMPOSING LIEN TO SECURE PAYMENT OF CHILD SUPPORT AND ALIMONY BUT ERRED IN FAILING TO SET FORTH SPECIFIC FINDINGS.

Former husband appealed final judgment of dissolution of marriage which imposed a lien on pre-marital real property to secure payment of child support and permanent periodic alimony. Appellate court held trial court had erred by failing to specify whether the lien only secured arrearages at the time of former husband’s death or whether it was intended to secure future payments as well. Appellate court reiterated that if a trial court feels it is necessary to secure an award either to satisfy arrearages or to ensure a family’s financial wellbeing, it must set forth the specific findings of the special circumstances necessitating imposing the requirement. The trial court must also determine the payor spouse’s ability to afford the security and whether the security exists only for arrearages or is payable to the surviving family in the event of death of the payor spouse. (Former husband in this case was 77 and in poor health.) Appellate court held that the trial court did not abuse its discretion in imposing the lien; its error was in not making the specific findings.

<http://opinions.1dca.org/written/opinions2010/04-20-2010/09-2439.pdf> (April 20, 2010).

Davis v. Davis, __ So.3rd __, 2010 WL 1542649, (Fla. 1st DCA 2010).

TRIAL COURT ERRED IN FINDING THAT SPOUSE HAD SPECIAL EQUITY IN MARITAL HOME.

Former husband appealed finding of special equity in marital home, formerly held by the spouses as tenants by the entirety; appellate court reversed and remanded for equitable

distribution. The appellate court stated that under Section 61.075(5)(a), Florida Statutes, it was presumed that real property held as tenants by the entireties was a marital asset even when the property originated as the sole property of one of the spouses. Prior to amendment of Chapter 61, Florida Statutes, to abolish special equity, the burden was on the party claiming special equity to prove, in the words of the appellate court, “an absence of donative intent in the event of an interspousal conveyance.” Appellate court held that presumption had not been overcome in this case. Finding that the trial court’s reliance on special equity was misplaced and that there were no other factors to justify unequal distribution, the appellate court reversed and remanded with instructions to treat the entire marital home as marital property. <http://opinions.1dca.org/written/opinions2010/04-20-2010/09-4477.pdf> (April 20, 2010).

Kelly v. Colston, __So.3rd__, 2010 WL 1445180, (Fla. 1st DCA 2010).

TRIAL COURT ERRED IN PLACING RESTRICTIONS ON VISITATION WITHOUT FACTUAL FINDINGS.

Former husband argued that the trial court had erred in placing restrictions on his visitation without having given appropriate factual findings; appellate court agreed and reversed. Appellate court held that while a trial court need not address all factors under Section 61.13(2)(c) and (3), Florida Statutes, independently, it must make a finding that the time-sharing schedule is in the child’s best interest. Although the trial court’s order appeared to grant liberal time-sharing, in actuality, the limitation of visitation to times when former husband was not working and thus personally able to be with the child was overly restrictive. <http://opinions.1dca.org/written/opinions2010/04-13-2010/09-4853.pdf> (April 13, 2010).

Childs v. Childs, __So.3rd__, 2010 WL 1407378, (Fla. 1st DCA 2010).

FAILING TO OBJECT DURING CONTEMPT PROCEEDINGS RESULTED IN WAIVER.

Former wife argued trial court had erred in conducting proceedings on her motion as if civil contempt rather than indirect criminal contempt was being sought. Appellate court held that because former wife’s counsel did not object to the course of the proceedings and her prayer for relief included remedies consistent with civil contempt, that she had waived any complaint to the proceedings. <http://opinions.1dca.org/written/opinions2010/04-09-2010/09-3385.pdf> (April 9, 2010).

Brown v. Holmes, __So.3rd__, 2010 WL 1407379, (Fla. 1st DCA 2010).

TRIAL COURT ERRED IN FAILING TO CREDIT FORMER WIFE FOR DEBTS AND FOR MODIFYING CHILD SUPPORT WITHOUT GIVING HER EITHER NOTICE OR OPPORTUNITY TO BE HEARD.

Former wife appealed post-dissolution orders. Appellate court affirmed in part, but found that the trial court had erred in 1) failing to credit former wife for debts she was assigned to pay, and 2) modifying child support without having given her either appropriate notice or an opportunity to defend against reduction. <http://opinions.1dca.org/written/opinions2010/04-09-2010/09-3718.pdf> (April 9, 2010).

Second District Court of Appeal

Stollmack v. Stollmack, __So.3rd__, 2010 WL 1628779, (Fla. 2d DCA 2010).

DELETION OF A SENTENCE IN A PROPERTY SETTLEMENT REGARDING A SPOUSE'S RIGHT TO RECEIVE PAYMENTS AFTER DEATH OF OTHER SPOUSE DOES NOT EQUAL A WAIVER OF RIGHTS.

Former wife appealed an order compelling her to execute a release of all her rights in an annuity and imposing sanctions on her; appellate court reversed. During the marriage, a settlement was reached following an injury to former husband. Pursuant to its terms, the former couple would be paid jointly from an annuity; thereafter, the surviving spouse would receive payment for the remainder of his or her life. As part of the property settlement during the dissolution proceedings, former husband agreed to waive his interest in former wife's pensions and stocks and former wife agreed to give up her interest in all joint annuity payments she was entitled to receive during her lifetime. A sentence in the settlement agreement regarding former wife's entitlement to payments after former husband's death was deleted; however, no language was added that former wife was giving up her rights to annuity payments after former husband's death. When former husband demanded that former wife sign a release giving up her rights to annuity payments after his death, she refused. At hearing, the former spouses agreed that the sentence had been removed, but disagreed as to whether that meant that former wife had waived her right to receive the benefits after former husband's death. The trial court ruled that by agreeing to remove the sentence regarding her beneficiary rights under the annuity, she had waived them; however, the appellate court held that she had only waived her claim to any payments during former husband's lifetime. Absent any similar provision waiving her right to payments after former husband's death, that right remained intact.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2010/April/April%2023,%202010/2D08-5513.pdf (April 23, 2010).

Wilson v. Wilson, __ So.3rd __, 2010 WL 1566336, (Fla. 2d DCA 2010).

TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING CHANGED CIRCUMSTANCES JUSTIFIED A REDUCTION IN ALIMONY AGREED TO BY SPOUSE IN SETTLEMENT AGREEMENT.

Former wife appealed trial court's order modifying former husband's alimony obligation. Appellate court concluded trial court did not abuse its discretion by finding changed circumstances justifying a reduction; and accordingly, affirmed. Although the final judgment of dissolution of the former couple's 28 year marriage had approved a marital settlement agreement in which former husband agreed to pay \$11,000 per month as taxable permanent alimony to former wife, substantial changes in his veterinary practice prompted his request for a downward modification. Commenting that, "There is no quarrel that an unanticipated, substantial change in circumstances occurred" which was "material and sufficient" and finding "no evidence that former husband manipulated his finances to deprive the former wife of support," the appellate court affirmed the trial court's finding that former wife no longer needed a monthly alimony award in that amount.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2010/April/April%2021,%202010/2D08-3184.pdf (April 21, 2010).

Tillotson v. Tillotson, __ So.3rd __, 2010 WL 1461575, (Fla. 2d DCA 2010).

IN ABSENCE OF A TRANSCRIPT, TRIAL COURT'S ORDER MUST BE HELD TO THE EXTENT IT IS NOT ERRONEOUS AS A MATTER OF LAW; TRIAL COURT ERRED IN TREATING ADULT SON AS MINOR.

Former wife appealed trial court's denial of her request to relocate while granting former husband's request. Appellate court held that it was unable, in absence of a transcript of the relocation hearing, to determine whether the trial court's order was supported by competent, substantial evidence. Accordingly, the appellate court concluded that the order must be upheld to the extent that it was not erroneous as a matter of law; the appellate court held that the trial court had erred in its order with regard to the parties' minor son who was no longer a minor at the time of the hearing.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2010/April/April%2014,%202010/2D09-4288.pdf (April 14, 2010).

Coe v. Coe, __So.3rd__, 2010 WL 1461580, (Fla. 2d DCA 2010).

TRIAL JUDGES IN INTERRELATED CASES MUST ENSURE RULINGS ARE SUPPORTED BY RECORD.

Appeal by former husband to final injunction for protection against domestic violence in which the appellate court cautioned that trial judges who handle interrelated cases for petitions for dissolution of marriage to exercise care in ensuring their rulings are supported by the record.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2010/April/April%2014,%202010/2D09-92.pdf (April 14, 2010).

Third District Court of Appeal

Aburos v. Aburos, __So.3rd__, 2010 WL 156545, (Fla. 3d DCA 2010).

IN CONTEMPT PROCEEDINGS, TRIAL COURT MUST DETERMINE THAT THERE IS WILLFULL VIOLATION OF COURT ORDER; INCARCERATION REQUIRES A SEPARATE FINDING THAT DEFAULTING PARTY HAS PRESENT ABILITY TO PAY THE PURGE.

Former husband appealed civil contempt and incarceration order entered against him for failure to pay alimony and child support. Concluding that there was no competent, substantial evidence supporting the trial court's finding that former husband had present ability to pay the purge amount, appellate court reversed. The appellate court reiterated that the trial court must determine whether the defaulting party has willfully violated a court order before determining the appropriate remedy; if incarceration is ordered, the trial court must make a separate finding that the party has the present ability to pay the purge. The appellate court held that there was no evidence to support this finding, nor did the record reflect the presence of circumstances in which a third party's assets could be considered. The appellate court also noted that the magistrate's finding that former husband's testimony was not credible did not excuse the requirement to identify an appropriate source of funds from which former husband could pay the purge amount. <http://www.3dca.flcourts.org/Opinions/3D08-2808.pdf> (April 21, 2010).

Boggess v. Boggess, __So.3rd__, 2010 WL 1460272, (Fla. 3d DCA 2010).

FUNDS RECEIVED FROM REVERSE MORTGAGES SHOULD NOT BE IMPUTED AS INCOME.

Former husband argued that the trial court erred in its order decreasing his alimony obligation by not having terminated it altogether and in its calculation of the reduction. Appellate court agreed that the trial court had erred in that its calculation appeared to have improperly included annuity payments as income to former husband while failing to include investment

income to former wife. The appellate court instructed the trial court on remand to include consideration of income received both parties and to exclude principal payments received by either party. The appellate court also clarified that no amounts from reverse mortgages were to be imputed as income to either party because a reverse mortgage is not income, but a loan. <http://www.3dca.flcourts.org/Opinions/3D09-0083.pdf> (April 14, 2010).

Rottan v. Rottan, __So.3rd__, 2010 WL 1460216, (Fla. 3d DCA 2010).

TRIAL COURT ERRED IN GRANTING RELIEF THAT WAS NEITHER PLEAD NOR JUSTIFIED; AWARD FOR FEES AGAINST SPOUSE MUST BE SUPPORTED BY THE EVIDENCE.

Appellate court vacated portion of final judgment of dissolution of marriage returning to former husband an amount he had paid to former wife to reduce her debt because that relief was neither plead nor justified. Appellate court also found the award of guardian ad litem fees against former wife was not supported by the evidence and that she was entitled to prejudgment interest on the fixed obligations owed to her by former husband.

<http://www.3dca.flcourts.org/Opinions/3D09-1836.pdf> (April 14, 2010).

Fourth District Court of Appeal

Vitale v. Vitale, __So.3rd__, 2010 WL 1460200, (Fla. 4th DCA 2010).

PREVAILING PARTY PROVISION IN MSA REFERRED TO ACTIONS BROUGHT FOR BREACH OF THE AGREEMENT; TRIAL COURT ERRED IN APPLYING PROVISION TO MODIFICATION OF VISITATION.

Former husband appealed award of attorney's fees and costs to former wife following post-dissolution proceedings; appellate court affirmed in part and reversed in part. Pursuant to the marital settlement agreement, incorporated into the final judgment of dissolution, the prevailing party in enforcement proceedings would be entitled to fees and costs. Noting that the prevailing party provision in this case applied only to actions brought in the event of breach of the agreement, the appellate court held that the trial court had erred in applying the provision to denial of former husband's petition for a one-day modification of the Christmas visitation schedule. Accordingly, the appellate court reversed the portion of the order awarding fees to former wife.

<http://www.4dca.org/opinions/Apr%202010/04-14-10/4D08-3646.op.pdf> (April 21, 2010).

McCall v. Martin, __So.3rd__, 2010 WL 1560913, (Fla. 4th DCA 2010).

TRIAL COURT SHOULD IMPUTE INCOME TO INCARCERATED PARENT; CHILD'S BEST INTEREST IS NOT SERVED BY COURT'S REFUSAL TO SET AN INITIAL AMOUNT OF SUPPORT.

Issue on appeal was whether a trial court is in error when it declines to set a specific amount of child support due from an incarcerated parent who is without current income or assets while imprisoned. Citing its opinion in Mascola v. Lusskin, 727 So.2d 328, (Fla. 4th DCA, 1999), that child support obligations could not be modified where the decrease in income resulted from payor's conviction for attempting to kill the mother, and the Supreme Court's opinion in Dept. of Revenue v. Jackson, 846 So.2d 486 (Fla. 2003), the appellate court stated that a child's best interest is not served by a court's refusal to set an initial amount of support based on imputed income for a parent about to be imprisoned. The appellate court held that income in this case should be imputed to the father so that arrearages could accumulate until he is able to earn an

income; accordingly, it remanded for the trial court to recalculate child support to reflect the father's obligation for support by imputing income.

<http://www.4dca.org/opinions/Apr%202010/04-21-10/4D08-3912.op.pdf> (April 21, 2010).

Fifth District Court of Appeal

Leider v. Leider, __So.3rd__, 2010 WL 1506985, (Fla. 5th DCA 2010).

EACH SPOUSE SHOULD BE CREDITED WITH ONE-HALF OF MARITAL FUNDS USED TO PAY MORTGAGE; THERE IS A CORRELATION BETWEEN THE VALUE APPRECIATION OF A NONMARITAL ASSET AND THE PERCENTAGE OF ITS MORTGAGE PAID BY MARITAL FUNDS.

Former wife appealed final judgment of dissolution, arguing that the trial court erred in failing to include appreciation of beach house, owned by former husband, in its scheme of equitable distribution. Issue was whether expenditure of marital funds on the house—regardless of amount—converted the entire appreciated value to a marital asset. The appellate court found that the trial court's conclusion that the expenditure of marital funds and labor went to repairs rather than improvements and thus, did not contribute to appreciation in value was based on competent, substantial evidence; accordingly, that portion of the order was affirmed. Stating that Section 61.075(5)(a)2, Florida Statutes, when correctly applied, leads to a direct correlation between the amount of value appreciation of the asset during the marriage and the percentage of the mortgage (both principal and interest) paid with marital funds during the marriage, the appellate court held that the non-owner spouse has the burden of establishing: 1) the value appreciation, by presenting the value of the asset at the time of the marriage and the time of the dissolution; and 2) the amount of marital funds used to make mortgage payments and the outstanding balance at the time of the marriage. The appellate court noted that each spouse should be given credit for one-half of the actual amount of marital funds expended to pay the mortgage. The appellate court remanded with instructions to the trial court to determine whether part of the value appreciation of the beach house that occurred during the marriage should be awarded to former wife based on the mortgage payments made with marital funds.

<http://www.5dca.org/Opinions/Opin2010/041210/5D08-2136.op.pdf> (April 16, 2010).

Rickenbach v. Kosinski, __So.3rd__, 2010 WL 1508201, (Fla. 5th DCA 2010).

TRIAL COURT ERRED IN NOT GRANTED REHEARING ONCE PARTIES STIPULATION RE REQUESTED RELIEF WAS BROUGHT TO HIS ATTENTION; REHABILITATIVE ALIMONY MAY BE CONVERTED TO PERMANENT IF EVENTS OCCURRING AFTER AWARD THWART SPOUSE'S REHABILITATION.

In what it termed a "troubling case" due to the parties' failure, until rehearing, to advise the trial judge of their stipulation to withdraw extension of rehabilitative alimony from his consideration, the appellate court concluded that the trial court had erred in not having granted the parties' motions for rehearing. Pursuant to the stipulation, former wife sought conversion of the rehabilitative alimony awarded in the final judgment to permanent instead of extension; however, the trial judge, believing himself to be precluded by res judicata from ordering permanent and unaware of the stipulation between the parties, ordered extension. On appeal, both parties contended that the trial court had abused its discretion by not recognizing the stipulation. Noting that the parties should have brought the stipulation to the court's attention at trial, the appellate court held that upon being advised of the stipulation,

the trial court should have granted rehearing. The appellate court also concluded that the trial court had erred in finding, as a matter of law, that rehabilitative alimony could not be converted to permanent; entitlement to conversion is based primarily on events occurring after the initial award of rehabilitative that thwarted the spouse from having become rehabilitated as envisioned at the entry of the final judgment.

<http://www.5dca.org/Opinions/Opin2010/041210/5D08-1877.op.pdf> (April 16, 2010).

Domestic Violence Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

No new opinions for this reporting period.

Second District Court of Appeal

Coe v. Coe, --- So.3d ----, 2010 WL 1461580 (Fla. 2d DCA 2010) **INJUNCTION AGAINST DOMESTIC VIOLENCE REVERSED**. The petitioner appealed a final judgment of injunction for protection against domestic violence entered in favor of his former wife. The parties were also involved in a divorce and custody dispute being heard by the same judge. The appellate court reversed the order granting the petition because it was entered based on evidence from the custody hearing that was not a part of the injunction hearing record. In essence, the court's decision was based on impermissible extrajudicial knowledge. This case demonstrated that trial judges assigned to dissolution proceedings who also handle interrelated petitions for domestic violence must exercise care in ensuring that their rulings are supported by an adequate record. The court also noted that there is considerable merit in having the judge assigned to a dissolution proceeding also handle claims of domestic violence that arise during the pendency of those proceedings. The court also stated that it is likely that a judge handling a dissolution will have a better sense of whether a domestic violence injunction is actually necessary, whether the petition has been filed for genuine reasons or primarily as a tactic within the divorce, and whether matters that could be resolved in one case or the other are better decided in the dissolution proceeding.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2010/April/April%2014,%202010/2D09-92.pdf (April 14, 2010).

Jones v. Jones, --- So.3d ----, 2010 WL 1728707 (Fla. 2d DCA 2010) **INJUNCTION AGAINST DOMESTIC VIOLENCE REVERSED**. The respondent appealed the trial court's order granting a final injunction for protection against domestic violence. Because the petitioner did not present competent, substantial evidence to support a finding that she possessed an objectively reasonable fear of imminent domestic violence, the appellate court reversed. The petitioner's primary basis for requesting the injunction was a circumstance in which the respondent had sought items to which he was ensured access under the divorce decree. Viewed in the context of the parties' relationship, the respondent's appearance at the petitioner's place of employment--following his custody visit--could not be reasonably be interpreted as a threat of

violence. These circumstances did not involve any violence or any threat of violence against the petitioner or the parties' daughter.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2010/April/April%2030,%202010/2D09-351.pdf (April 30, 2010).

Third District Court of Appeal

No new opinions for this reporting period.

Fourth District Court of Appeal

McCall, V. Martin, --- So.3d ----, 2010 WL 1560913 (Fla. 4th DCA 2010) **CHILD SUPPORT ORDERED**. The father was convicted of domestic violence against his wife and sentenced to prison, however, the court declined to make any provision in the final judgment of dissolution of marriage for the father's share of child support, stating he would have no monthly income while incarcerated. The appellate court reversed, stating that the father's criminal conviction and resulting incarceration was not a valid reason to deny setting an amount of support attributable to him based on imputed income. The court also noted that a child's best interest is not served by refusing to set an initial amount of support based on imputed income for a parent about to be imprisoned. The court held that income should have been imputed to the father so that the arrearages can accumulate until he is able to earn an income. When release occurs, the court should establish a payment plan to reduce arrearages according to his earning ability and set a payment plan. <http://www.4dca.org/opinions/Apr%202010/04-21-10/4D08-3912.op.pdf> (April 21, 2010).

Fifth District Court of Appeal

No new opinions for this reporting period.