

**OSCA/OCI'S FAMILY COURT CASE LAW UPDATE**  
**April 2011**

**Table of Contents**

Delinquency Case Law .....	2
Florida Supreme Court.....	2
First District Court of Appeal .....	2
Second District Court of Appeal.....	2
Third District Court of Appeal.....	3
Fourth District Court of Appeal.....	4
Fifth District Court of Appeal.....	4
Dependency Case Law.....	5
Florida Supreme Court.....	5
First District Court of Appeal .....	5
Second District Court of Appeal.....	6
Third District Court of Appeal.....	6
Fourth District Court of Appeal.....	6
Fifth District Court of Appeal.....	7
Dissolution Case Law .....	7
Florida Supreme Court.....	7
First District Court of Appeal .....	7
Second District Court of Appeal.....	9
Third District Court of Appeal.....	12
Fourth District Court of Appeal.....	12
Fifth District Court of Appeal.....	13
Domestic Violence Case Law.....	15
Florida Supreme Court.....	15
First District Court of Appeal .....	15
Second District Court of Appeal.....	16
Third District Court of Appeal.....	16
Fourth District Court of Appeal.....	16
Fifth District Court of Appeal.....	16

## Delinquency Case Law

### ***Florida Supreme Court***

No new opinions for this reporting period.

### ***First District Court of Appeal***

C.R. v. State, \_\_ So. 3d \_\_, 2011 WL 1449652 (Fla. 1st DCA 2011). **DISPOSITION REVERSED WHERE THE TRIAL COURT DID NOT COMPLY WITH THE REQUIREMENTS SET OUT IN E.A.R. V. STATE, 4 SO. 3D 614 (FLA. 2009)**. The Department of Juvenile Justice (DJJ) recommended commitment to a moderate-risk facility. The trial court departed from the DJJ's recommendation and instead committed the juvenile to a high-risk facility. The First District Court of Appeal found that the trial court failed to comply with the requirements enunciated in E.A.R. v. State, 4 So. 3d 614 (Fla. 2009). The First District reversed the placement and remanded for further proceedings.

<http://opinions.1dca.org/written/opinions2011/04-15-2011/10-5360.pdf> (April 15, 2011).

M.W. v. State, \_\_ So. 3d \_\_, 2011 WL 1167211 (Fla. 1st DCA 2011). **DISPOSITION REVERSED WHERE THE TRIAL COURT DID NOT COMPLY WITH THE REQUIREMENTS SET OUT IN E.A.R. V. STATE, 4 SO. 3D 614 (FLA. 2009)**. The Department of Juvenile Justice (DJJ) recommended probation. The trial court departed from the DJJ's recommendation and instead committed the juvenile to a moderate-risk facility. The First District Court of Appeal found that the trial court failed to address why a moderate-risk commitment was more suitable to address juvenile's rehabilitative needs. The trial court's reasons for disagreement were merely a restatement of facts already known to the DJJ with no explanation as to why it came to a different conclusion. The First District held that the trial court did not comply with the requirements set out in E.A.R. v. State, 4 So. 3d 614 (Fla. 2009). Accordingly, the case was reversed and remanded to provide the trial court an opportunity to enter an order in compliance with E.A.R., or impose the probation recommended by the DJJ.

<http://opinions.1dca.org/written/opinions2011/03-31-2011/10-4569.pdf> (March 31, 2011).

### ***Second District Court of Appeal***

L.A.G. v. State, \_\_ So. 3d \_\_, 2011 WL 1377050 (Fla. 2d DCA 2011). **DISPOSITION REVERSED WHERE THE TRIAL COURT DID NOT COMPLY WITH THE REQUIREMENTS SET OUT IN E.A.R. V. STATE, 4 SO. 3D 614 (FLA. 2009)**. The Department of Juvenile Justice (DJJ) recommended probation. The trial court departed from the DJJ's recommendation and instead committed the juvenile to a moderate-risk program. On appeal, the juvenile challenged the disposition but not the adjudication of delinquency. The juvenile pled no contest to selling marijuana within 1000 feet of a school, possession of marijuana with intent to sell, possession of oxycodone, and possession of drug paraphernalia. The Second District Court of Appeal found that the trial court departed upward from the DJJ's recommended disposition without providing adequate reasons for the restrictiveness level imposed as required by E.A.R. v. State, 4 So. 3d 614 (Fla. 2009). The

reasons offered by the trial court for departing upward from the DJJ's recommendation focused on the nature of the charges against the juvenile. The Second District affirmed the adjudication and remanded the disposition with instructions that the trial court not depart from the DJJ's recommendation unless it could logically and persuasively explain why, in light of the differing characteristics of the various restrictiveness levels, one level was better suited to serving both the rehabilitative needs of the juvenile—in the least restrictive setting—and maintaining the ability of the State to protect the public from further acts of delinquency. The Second District held that, on remand, the juvenile would be entitled to request a new disposition hearing if such a hearing would benefit the juvenile. Affirmed in part, reversed in part, and remanded. [http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2011/April/April%2013,%202011/2D09-5873.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/April/April%2013,%202011/2D09-5873.pdf) (April 13, 2011).

*J.W.E. v. State*, \_\_\_ So. 3d \_\_\_, 2011 WL 1327645 (Fla. 2d DCA 2011). **WITHHOLD OF ADJUDICATION REVERSED WHERE OFFICER'S TESTIMONY DID NOT UNEQUIVOCALLY ESTABLISH THAT THE JUVENILE CONSENTED TO THE WARRANTLESS SEARCH.** The juvenile appealed his disposition order withholding adjudication and placing him on probation for possession of not more than 20 grams of marijuana. The juvenile was riding his bicycle during the early evening when he was stopped by law enforcement because his bicycle did not have lights. During the stop, the officer sought consent to search. Apparently believing he had obtained consent, the officer conducted a search of the juvenile's person. The search revealed marijuana. The juvenile filed a motion to suppress the physical evidence obtained during the search, arguing that he had been illegally detained and searched. At the hearing on the motion to suppress, the officer who searched the juvenile initially testified that he asked, "Do you mind if I search you?" and the juvenile replied "yes." The court denied the motion to suppress. The juvenile then entered a plea, reserving the right to appeal the dispositive ruling. The Second District Court of Appeal found that the officer's testimony did not unequivocally establish that the juvenile consented to the warrantless search. Indeed, the officer's testimony that the juvenile answered "yes" when asked "Do you mind if I search you," tended to establish that the juvenile did not consent. The Second District held that, because the evidence did not unequivocally establish the juvenile's consent, the motion to suppress should have been granted. The case was reversed. [http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2011/April/April%2008,%202011/2D10-1171.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/April/April%2008,%202011/2D10-1171.pdf) (April 8, 2011).

### ***Third District Court of Appeal***

*W.A. v. State*, \_\_\_ So. 3d \_\_\_, 2011 WL 1563608 (Fla. 3d DCA 2011). **ADJUDICATION AFFIRMED AND CERTAIN ASSESSED COSTS WERE STRICKEN.** The Third District Court of Appeal affirmed the adjudication and found that the costs of \$3 for teen courts pursuant to s. 939.90, F.S., \$65 additional court costs and \$85 temporary criminal surcharge pursuant to s. 939.185(1)(a)-(b), F.S., and \$50 for a crimes prevention program pursuant to s. 775.083(2)(a), F.S., were unauthorized. Adjudication was affirmed and costs stricken. <http://www.3dca.flcourts.org/Opinions/3D09-2706.pdf> (April 27, 2011).

*L.A. v. State*, \_\_\_ So. 3d \_\_\_, 2011 WL 1564004 (Fla. 3d DCA 2011). **PURSUANT TO AN ANDERS V.**

[CALIFORNIA, 386 U.S. 738 \(1967\), APPEAL, JUDGMENT AFFIRMED, BUT REMANDED WITH DIRECTIONS TO CORRECT ORDER.](#) The Third District Court of Appeal affirmed the judgment, but remanded with directions that the trial court correct the adjudicatory order to conform with its oral pronouncement and the notes reflected in the Case History.  
<http://www.3dca.flcourts.org/Opinions/3D10-2885.pdf> (April 27, 2011).

[B.C. v. State, \\_\\_\\_ So. 3d \\_\\_\\_, 2011 WL 1485986 \(Fla. 3d DCA 2011\).](#) [ADJUDICATION AFFIRMED BECAUSE SEARCH OF PERSON WAS PROPERLY CONDUCTED INCIDENT TO ARREST.](#) The juvenile was adjudicated for possession of marijuana. The juvenile argued that the search of his person that revealed the contraband was improper. The Third District Court of Appeal held that the search of his person was properly conducted incident to an arrest based upon probable cause that, as a passenger in a vehicle which was the site of a drug transaction observed by a fellow officer, the juvenile had committed a felony offense. See [Maryland v. Pringle, 540 U.S. 366, 124 S. Ct. 795, 157 L.Ed. 2d 769 \(2003\)](#); [Arizona v. Johnson, 555 U.S. 323, 129 S. Ct. 781, 172 L.Ed.2d 694 \(2009\)](#); and [State v. Bagley, 844 So. 2d 688, 690 \(Fla. 3d DCA 2003\)](#) (“The fellow officer rule allows an arresting officer to assume probable cause to arrest a suspect from information supplied by other officers.” (quoting [Voorhees v. State, 699 So. 2d 602, 609 \(Fla. 1997\)](#))).  
<http://www.3dca.flcourts.org/Opinions/3D09-2706.pdf> (April 20, 2011).

### ***Fourth District Court of Appeal***

No new opinions for this reporting period.

### ***Fifth District Court of Appeal***

[A.D.C. v. State, \\_\\_\\_ So. 3d \\_\\_\\_, 2011 WL 1597675 \(Fla. 5th DCA 2011\).](#) [RESTITUTION ORDER WAS REVERSED AND REMANDED WHERE THE TRIAL COURT’S DENIAL OF THE STATE’S MOTION TO CONTINUE WAS AN ABUSE OF DISCRETION.](#) The State appealed from an order denying its motion to continue a restitution hearing and setting restitution at zero, when the State did not have a necessary witness present for the hearing. The Fifth District Court of Appeal held that the trial court abused its discretion by not granting the requested continuance. The State charged the juvenile with battery and criminal mischief, alleging that the juvenile struck his ex-girlfriend and damaged her car in a fit of rage following their break-up. The juvenile pled no contest to both charges, and agreed to pay restitution in an amount to be proven at a later date. At the time of the juvenile’s plea, the restitution hearing was set with no prior opportunity given to the State to confirm that its witnesses would be available on that date. Several days before the scheduled hearing, the State filed a motion to reset the hearing on the grounds that a necessary witness—a car repair or “body shop” expert who would testify as to the cost of repairing the damage caused by the juvenile—was unavailable. The Fifth District found that the State was diligent in its attempt to prepare for the hearing and secure the attendance of its necessary witnesses. It had not sought a prior continuance of this matter, and the juvenile did not establish that he would suffer any prejudice as a result of resetting the hearing to a date and time when the State’s witnesses would be available. Under these

circumstances, it was an abuse of discretion to deny the State's motion to continue the hearing. Accordingly, the restitution order was reversed and remanded with instructions that the trial court reset the restitution hearing. <http://www.5dca.org/Opinions/Opin2011/042511/5D10-1993.op.pdf> (April 29, 2011).

*S.M.M. v. State*, \_\_ So. 3d \_\_, 2011 WL 1597676 (Fla. 5th DCA 2011). **DISMISSAL OF CHARGES AFFIRMED WHERE THERE WAS NO ABUSE OF DISCRETION.** The State appealed an order dismissing its delinquency petition. The State did not have witnesses present at a duly noticed hearing, and the trial judge declined to continue the hearing. The Fifth District Court of Appeal found no abuse of discretion and affirmed the dismissal. The trial court had initially placed the juvenile into a pretrial diversion drug court program. However, the juvenile was discharged from the program and was ultimately placed back on the trial court's active docket upon motion by the State. The adjudicatory hearing was initially set and then rescheduled. On the day of trial, the State moved to continue on grounds that it was "not sufficiently prepared for trial." The trial court granted the State's motion to continue, and reset the trial. When the case was called, neither of the State's two witnesses were present at the courthouse. There was no indication in the record as to exactly when the prosecutor expected either witness to be present in court. The trial judge noted for the record that the witnesses should have been present at 8:00 a.m., almost three hours earlier. The judge had the halls called for both witnesses, with no response, and then asked the prosecutor how he wished to proceed. The prosecutor replied that he was ready for trial. Although questioning how the State could claim to be ready for trial when it had no witnesses present, the judge allowed the State to present its opening statement. After opening statements, with no witness present to place on the stand, the prosecutor moved for a continuance to check on the status of the State's witnesses. The trial court denied the motion and dismissed the case. The Fifth District found that if this had been an isolated incident the result might be different. But, it was apparent from the record—and from the other cases before the Fifth District—that the court was dealing with a systemic problem involving a pattern of repeated failures by the State to produce witnesses for properly noticed trials or other evidentiary hearings. The Fifth District found no abuse of discretion in the dismissal of this case. The dismissal of the delinquency petition was affirmed. <http://www.5dca.org/Opinions/Opin2011/042511/5D10-2919.op.pdf> (April 29, 2011).

## **Dependency Case Law**

### ***Florida Supreme Court***

No new opinions for this reporting period.

### ***First District Court of Appeal***

*C.J. v. State of Florida*, \_\_ So. 3d \_\_\_\_, 2011 WL 1376688 (Fla. 1st DCA 2011). **DEPENDENCY PETITION DISMISSAL REVERSED.**

The First District Court of Appeal reversed an order dismissing a dependency petition. The court held that the allegations contained within the four corners of the petition were legally sufficient to prove dependency under section 39.01(15), Florida Statutes. By footnote, the court speculated that a sworn motion filed under Florida Rule of Juvenile Procedure 8.235(c) may have yielded a different result.

<http://opinions.1dca.org/written/opinions2011/04-13-2011/10-5174.pdf> (April 13, 2011).

### ***Second District Court of Appeal***

No new opinions for this reporting period.

### ***Third District Court of Appeal***

In the Interests of T.J., a minor child, \_\_\_ So. 3d \_\_\_, 2011 WL 1485994 (Fla. 3d DCA 2011).

#### **SUMMARY DENIAL OF DEPENDENCY FOR IMMIGRANT YOUTH REVERSED.**

In a case generating three opinions, the Third District Court Appeal reversed an order denying an adjudication of dependency of a minor who was an immigrant child. The youth was born in Turks and Caicos and had resided in Florida since she was four months old. Her mother was deceased, her father subsequently left her and her mother, and she had been cared for by a volunteer with no legally-determined custody. She will turn 18 on August 2, 2011. After her mother's death, her aunt gave her a place to stay even though she was not a court-ordered custodian or guardian. The trial court held that a family court petition by the aunt to become the child's legal custodian was appropriate and therefore denied the amended dependency petition that had been filed on the child's behalf by the Immigrant Children's Justice Clinic. In addition, the father had not been served. The trial court did not address two affidavits of diligent search. On appeal, the court reviewed the Chapter 39 definitions of "abandonment," "caregiver," "child who is found to be dependent," "diligent search," "legal custody," and "other person responsible for a child's welfare." The court also reviewed case law from other District Courts of Appeal. After doing so, a majority of the three judge panel concluded that, because there was a prima facie case for dependency, the trial court should not have summarily denied the amended petition. The majority noted that a finding of dependency will permit the child to pursue special immigrant juvenile status through the federal government, which can assist her with work and higher education. Similarly, a (separate) majority of the judges held that the diligent search affidavits in the case were legally insufficient. The Department of Children and Families did not conduct a diligent search and the affidavits filed by the Immigrant Children's Justice Clinic did not meet even the minimum requirements of Chapter 39. The case was remanded for further proceedings with the note that the youth was not entitled to an adjudication of dependency until a diligent search that met the express provisions of Chapter 39 was conducted. If the youth's father were to be located, she would have to establish that she was dependent as defined in Chapter 39.

<http://www.3dca.flcourts.org/Opinions/3D10-1111.pdf> (April 20, 2011).

### ***Fourth District Court of Appeal***

No new opinions for this reporting period.

### ***Fifth District Court of Appeal***

D.F. v. Department of Children and Families, \_\_\_ So. 3d \_\_\_\_, 2011 WL 1597680 (Fla. 5th DCA 2011). **CONCESSION OF ERROR.**

The Fifth District Court of Appeal reversed an order terminating a father's parental rights based on the Department's concession of insufficient evidence to support the decision.

<http://www.5dca.org/Opinions/Opin2011/042511/5D10-3721.op.pdf> (April 26, 2011).

Justice Administrative Commission v. McNeilly, \_\_ So. 3d \_\_\_\_, 2011 WL 1431535 (Fla. 5th DCA 2011). **ORDER TO PAY ATTORNEY'S FEES QUASHED.**

The Fifth District Court of Appeal reversed an order for payment of attorney's fees to the mother's counsel in a TPR case. The mother was appointed counsel after she had voluntarily surrendered her parental rights. Under section 39.807(1), Florida Statutes, she was not entitled to public-funded counsel, and the Justice Administrative Commission was not required to pay attorney's fees. Because the District Court concluded that the trial had departed from the essential requirements of the law, it quashed the order to pay attorney's fees.

<http://www.5dca.org/Opinions/Opin2011/041111/5D11-83.op.pdf> (April 15, 2011).

## **Dissolution Case Law**

### ***Florida Supreme Court***

In Re: Amendments to the Florida Supreme Court Approved Family Law Forms, \_\_ So. 3d \_\_\_\_, 2011 WL 1305182, (Fla. 2011).

**ADOPTION OF SIX NEW FORMS ON TEMPORARY AND CONCURRENT CUSTODY.**

The Supreme Court adopted six new forms pertaining to petitions for temporary or concurrent custody designed to implement Chapter 751, Florida Statutes, as amended by Chapter 2010-30, Laws of Florida. The new forms, numbered 12.970(a)-(f), may be downloaded from the Court's website: [www.flcourts.org\\_public/family/forms\\_rules/index.shtml](http://www.flcourts.org_public/family/forms_rules/index.shtml). The Court also directed that the new forms be published for comment and provided a 60-day period, running from the date of the opinion, for interested persons to file comments regarding the new forms with the Court.

<http://www.floridasupremecourt.org/decisions/2011/sc10-2344.pdf> (April 7, 2011).

### ***First District Court of Appeal***

Raulerson v. Wright, \_\_ So. 3d \_\_\_\_, 2011 WL 1451762, (Fla. 1st DCA 2011).

**TRIAL COURT ABUSED ITS DISCRETION IN PERMITTING RELOCATION.**

Stating that, "The courts of this state are bound to apply the laws of this state," the appellate court found that the trial court's decision to grant the mother permission to relocate was an abuse of discretion. The appellate court concluded that she had failed to comply with Section 61.13001, Florida Statutes, and that the trial court had not given effect to a "clear statutory mandate". The appellate court held that the trial court had erred in determining that the mother's hand-delivery to the father of her "Notice of Intent to Relocate with Child" satisfied the requirements of that section. The appellate court held that to grant a temporary order

permitting relocation pending a final hearing, a trial court must find: 1) that the petition to relocate was properly filed and complies with the statute; and 2) that, based on the evidence presented at the preliminary hearing, there is a likelihood that the court will approve relocation at the final hearing.

<http://opinions.1dca.org/written/opinions2011/04-15-2011/10-3309.pdf> (April 15, 2011).

Grimm v. Grimm, \_\_So. 3d\_\_, 2011 WL 1451755, (Fla. 1st DCA 2011).

**TRIAL COURT ERRED IN 1) FAILING TO CONSIDER NONMARITAL ASSETS IN DETERMINING ALIMONY AND 2) TREATING SOCIAL SECURITY BENEFITS AS MARITAL ASSET.**

The appellate court concluded that the trial court had erred: 1) in failing to consider former wife's nonmarital assets when determining alimony; and 2) in treating former husband's social security benefits as a marital asset. The trial court evaluated monthly income from the spouses' retirement plans and marital assets, but omitted former wife's nonmarital assets from consideration; appellate court held this was error. As to the second issue, the appellate court cited Johnson v. Johnson, 726 So. 2d 393 (Fla. 1st DCA 1999), for its ruling that although benefits from a social security replacement plan are marital assets subject to distribution, social security benefits are not. The appellate court also stated that a trial court is not permitted to award the nonparticipating spouse other marital property as an offset to counterbalance the participating spouse's social security benefits. Remanded for trial court to revisit equitable distribution.

<http://opinions.1dca.org/written/opinions2011/04-15-2011/10-5176.pdf> (April 15, 2011).

Lacoste v. Lacoste, \_\_So. 3d\_\_, 2011 WL 1414140, (Fla. 1st DCA 2011).

**ISSUE MUST BE PRESENTED BELOW TO BE PRESERVED FOR APPELLATE REVIEW.**

Former wife appealed the final judgment of dissolution of marriage, arguing that the trial court had erred in classifying a tract of land owned by former husband prior to the marriage as a marital asset, and in then distributing the tract entirely to him instead of distributing it equally. On appeal, she argued that because former husband had given her one-half interest in the land by quitclaim deed after she filed the petition for dissolution, her interest was nonmarital; however, her argument below had been that the land became a marital asset when former husband conveyed it to the parties jointly. (Former husband had testified that he had conveyed the land to both of them a month after she filed the petition based on their discussions of a possible reconciliation.) Citing its decision in Quinnell v. Platt, 23 So.3d 746 (Fla. 1st DCA 2009), the appellate court stated that in order for an issue to be preserved for further review, it must be presented to the lower court. Concluding from the record that former wife had not done so, the appellate court held that she had "failed to preserve the asserted error for appellate review." The appellate court concluded that the trial court's findings regarding the unequal distribution were in accordance with Section 61.075, Florida Statutes, and that it had not abused its discretion in distributing the tract entirely to former husband. The appellate court also concluded that the trial court had not abused its discretion in setting the child support obligation.

<http://opinions.1dca.org/written/opinions2011/04-14-2011/10-3129.pdf> (April 14, 2011).

Brathwaite v. Brathwaite, \_\_So. 3d\_\_, 2011 WL 1413319, (Fla. 1st DCA 2011).

### **ONLY PORTION OF RETIREMENT ACCRUING DURING MARRIAGE IS MARITAL.**

The appellate court agreed with former husband that the trial court had erred in equally distributing his military retirement benefits and in calculating the income and expenses of each spouse in considering whether to award alimony; accordingly, it reversed and remanded to the trial court for reconsideration. The appellate court reiterated that an asset is marital if it is either acquired during the marriage or is a product of the efforts or earnings of one or both spouses. Stating that premarital contributions to retirement pensions should be excluded from distribution of marital assets, the appellate court held that when a trial court distributes the value of such pensions upon dissolution, only the marital portion may be equally distributed. Here, the portion of former husband's retirement that accrued during the marriage was a marital asset subject to equitable distribution; the portion which accrued prior to the marriage should have been allocated to him as a nonmarital asset. The appellate court also found that the trial court had erred in considering the mortgage payment on the marital home as part of former wife's expenses in light of former husband having been ordered to make the payments and the fact that they were sharing the home until it could be sold. The appellate court found this error was not harmless; it had a domino effect. In contributing to an artificial inflation of former wife's expenses, the error became an element in the trial court's determination of her need for alimony and the amount to be awarded. The appellate court also agreed with former husband that the trial court erred in finding a 14-year marriage to be long-term as a marriage of that length falls into the gray area; however, it found this error to be harmless because the final judgment did not indicate that the trial court had applied the presumption in favor of alimony. <http://opinions.1dca.org/written/opinions2011/04-14-2011/10-5352.pdf> (April 14, 2011).

### ***Second District Court of Appeal***

Fuentes v. Fuentes, \_\_ So. 3d \_\_, 2011 WL 1565453, (Fla. 2d DCA 2011).

### **TRIAL COURT'S UNEQUAL DISTRIBUTION EITHER RESULT OF MISCALCULATION OR INTENTIONAL BUT UNJUSTIFIED; EITHER REQUIRED REVERSAL.**

Former husband appealed the final judgment in dissolution of 29-year marriage. Based on errors on the face of the final judgment and on a lack of findings, the appellate court reversed and remanded. Concluding that the trial court appeared to have counted certain funds twice, the appellate court held that if the trial court's unequal distribution was due to its miscalculation of marital assets, reversal and remand were necessary for recalculation; however, if the unequal distribution was intended, reversal was required because the trial court did not articulate any specific findings to justify it. The appellate court reiterated that when a spouse depletes marital assets during the dissolution proceedings, it is error to include those assets in the scheme for equitable distribution; however, the trial court appeared to have failed to address this issue. In addition, the appellate court held that some of the trial court's valuations of assets and liabilities were not supported by competent, substantial evidence. [http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2011/April/April%2027,%202011/2D09-617.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/April/April%2027,%202011/2D09-617.pdf) (April 27, 2011).

Fortune v. Fortune, \_\_ So. 3d \_\_, 2011 WL 1565451, (Fla. 2d DCA 2011).

**TRIAL COURT ERRED IN 1) ADMITTING AFFIDAVIT INSTEAD OF CALLING WITNESS; 2) NOT AWARDING NOMINAL PERMANENT ALIMONY UNDER FACTS; 3) TRANSFERRING TAX EXEMPTIONS DIRECTLY AND NOT CONDITIONING THEM ON BEING CURRENT; 4) DENYING WIFE'S REQUEST TO REASSUME MAIDEN NAME.**

Former wife appealed the final judgment of dissolution of marriage on numerous grounds. The appellate court found trial court error on four issues; accordingly, it reversed and remanded. 1) The appellate court held that the trial court abused its discretion in admitting the affidavit of the co-owner of former husband's financial planning business rather than calling him as a witness; former wife was not able to cross-examine the only witness who could corroborate former husband's testimony regarding a substantial loan that was, in the appellate court's words, "a critical piece of the equitable distribution scheme." Other evidence did not support former husband's claim that the loan was incurred prior to filing of the petition for dissolution or that it was used for marital expenses or obligations; therefore, the trial court erred in classifying the entire amount of the loan as marital debt. 2) Concluding that the facts rendered it a "classic" case for an award of permanent alimony, the appellate court found that the trial court had abused its discretion in finding that not only was former husband without currently ability to pay alimony but that he would be unable to pay alimony in the future; former husband's own testimony reflected his optimism about his future earning potential. The appellate court reiterated that when one spouse is entitled to permanent periodic alimony but the other is without current ability to pay, the trial court should award a nominal sum to preserve jurisdiction in the event the parties' financial circumstances change. 3) The appellate court agreed with former wife that the trial court erred by transferring tax exemptions to former husband directly and in not conditioning the exemptions on former husband being current in his child support obligations. 4) The appellate court held that it was well established that a wife in a dissolution proceeding has the right to reassume her maiden name; it was error for the trial court to deny this request.

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2011/April/April%2027,%202011/2D09-5564.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/April/April%2027,%202011/2D09-5564.pdf) (April 27, 2011).

Liebrecht v. Liebrecht, \_\_So. 3d\_\_, 2011 WL 1434902, (Fla. 2d DCA 2011).

**TRIAL COURT ABUSED ITS DISCRETION IN NOT AWARDING NOMINAL AMOUNT OF PERMANENT ALIMONY; NO ABUSE OF DISCRETION IN BRIDGE-THE-GAP.**

In another case involving a marriage in the gray area, the appellate court concluded that the trial court had abused its discretion by not having awarded former wife a nominal amount of permanent alimony under the facts presented to preserve her right to seek a larger award; it found no abuse of discretion in the trial court having awarded bridge-the-gap alimony to her. Noting that bridge-the-gap requires sufficient evidence to show that the "gap" will be "bridged" during the time that alimony is received, the appellate court held that, based upon the evidence, the trial court might have been overly optimistic in how quickly former wife might bridge-the-gap. In addition, the appellate court held that the length of the marriage, the parties' historic incomes, and former wife's future needs "would normally dictate an award of permanent alimony;" thus, it was an abuse of discretion not to award it.

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2011/April/April%2015,%202011/2D10-2133.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/April/April%2015,%202011/2D10-2133.pdf) (April 15, 2011).

Kennedy v. Kennedy, \_\_ So. 3d \_\_, 2011 WL 1376621, (Fla. 2d DCA 2011).

**GRAY AREA MEANS NO PRESUMPTION FOR OR AGAINST PERMANENT ALIMONY; TRIAL COURT'S DISCRETION IS AT ITS BROADEST WITH GRAY AREA MARRIAGES.**

Former wife appealed the property distribution and alimony components of a final judgment of dissolution of marriage. The appellate court affirmed the property distribution as it was in accordance with a prenuptial agreement; however, it reversed and remanded the denial of alimony. The appellate court enumerated the factors a trial court is required to consider under Section 61.08(2), Florida Statutes, in determining alimony; it concluded that the trial court had been silent on most of them. Citing what it referred to as an “unfortunate tendency among many courts” to treat a gray area marriage as justification for denial of alimony, the appellate court stated that the recognition that a marriage falls in the gray area means that there is no presumption for or against awarding permanent alimony. The appellate court reasoned that because a trial court’s discretion is at its broadest with marriages that fall in the gray area, its consideration of the statutory factors is vitally important. It held here that the trial court’s decision was not based on a thorough consideration of the applicable statutory factors; therefore, it was unreasonable and an abuse of discretion.

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2011/April/April%2013,%202011/2D09-797.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/April/April%2013,%202011/2D09-797.pdf) (April 13, 2011).

Orloff v. Orloff, \_\_ So. 3d \_\_, 2011 WL 1327633, (Fla. 2d DCA 2011).

**CONTEMPT AND MONEY JUDGMENT REVERSED; NO CONTEMPTUOUS CONDUCT.**

Former husband appealed a trial court order finding him in contempt and awarding a monetary judgment to former wife stemming from his failure to transfer certain assets that she received through equitable distribution. Based upon its conclusion that the facts proven by former wife did not amount to contemptuous conduct and the fact that it had reversed the scheme of equitable distribution in a related appeal, the appellate court reversed both the finding of contempt and the monetary judgment. (See Orloff v. Orloff, 2011 WL 1136434, (Fla. 2d DCA 2011).

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2011/April/April%2008,%202011/2D09-5513.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/April/April%2008,%202011/2D09-5513.pdf) (April 8, 2011).

Straney v. Floethe, \_\_ So. 3d \_\_, 2011 WL 1327638, (Fla. 2d DCA 2011).

**TRIAL COURT APPLIED WRONG LAW; FAILED TO REQUIRE PROOF OF SUBSTANTIAL AND MATERIAL CHANGES IN CIRCUMSTANCES IN MODIFICATION.**

Former wife appealed a supplemental final judgment of dissolution of marriage which the appellate court termed a post-judgment order modifying child custody. Concluding that the trial court had applied the wrong law and had not required former husband to prove substantial and material changes in circumstances, the appellate court reversed. The Appellate court reiterated that an order modifying child custody must be based in part upon a determination that there has been a substantial and material change in circumstances since entry of the final judgment. Here, the trial court failed to make an express finding that a substantial, material, and unanticipated change in circumstances had occurred; the appellate court found that the record did not permit it to conclude that the finding was implicit in the order. Accordingly, the

appellate court reversed and remanded for further proceedings. It commented that the trial court would be able to rely on evidence already received and in its discretion could determine whether additional evidence would be needed. The appellate court also commented that when a rehearing is requested and the case involves sensitive issues such as religion, additional findings may help both the parties and the appellate court understand the reasoning behind the trial court's decision.

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2011/April/April%2008,%202011/2D10-121.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/April/April%2008,%202011/2D10-121.pdf) (April 8, 2011).

*Brend v. Brend*, \_\_ So. 3d \_\_, 2011 WL 1197663, (Fla. 2d DCA 2011).

**ERROR TO USE GROSS INCOME NOT NET IN CALCULATING CHILD SUPPORT.**

Both spouses appealed the final judgment of dissolution of marriage. The appellate court found that the trial court had erred in having calculated the amount of former husband's child support obligation based on the parties' gross incomes rather than their net incomes. Accordingly, the appellate court reversed and remanded for recalculation of child support, review of the child's uncovered medical and dental expenses, and determination of the tax deduction.

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2011/April/April%2001,%202011/2D09-4268.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/April/April%2001,%202011/2D09-4268.pdf) (April 1, 2011).

### ***Third District Court of Appeal***

*Moreno v. Moreno*, \_\_ So. 3d \_\_, 2011 WL 1262142, (Fla. 3d DCA 2011).

**TRIAL COURT WAS WITHOUT DISCRETION TO DENY MOTION FOR CONTEMPT DUE TO LANGUAGE IN AGREED ORDER FOR NON-HARASSMENT.**

Former husband appealed from a post-dissolution order denying his motion for civil contempt. Approximately six months after the parties' dissolution, the trial court entered an agreed order for non-harassment, part of which was designed to prevent either spouse from harassing the other or making disparaging statements about the other to their children, employers, or third parties; violation of this provision would subject the offending spouse to judicial sanctions. Some six years after entry of this order, former wife released a book which purported to tell the real story of the parties' break-up; prior to the book release, she appeared on TV and gave interviews to print media. In response, former husband moved for contempt. The appellate court concluded that, based upon the language in the agreed order, the trial court was without discretion to deny former husband's motion; accordingly, it reversed and remanded with instructions to the trial court to find former wife in contempt of the agreed order and to impose sanctions.

<http://www.3dca.flcourts.org/Opinions/3D10-0935.pdf> (April 6, 2011).

### ***Fourth District Court of Appeal***

*Elliot v. Bradshaw*, \_\_ So. 3d \_\_, 2011 WL 1346902, (Fla. 4th DCA 2011).

**CIVIL CONTEMPT REQUIRES FINDING OF PRESENT ABILITY TO PAY THE PURGE; EQUITY IN A HOME THAT HAS NOT SOLD DOES NOT EQUAL PRESENT ABILITY.**

Former husband sought to quash a commitment order entered after a finding of civil contempt. Finding the trial court's conclusion that former husband had the present ability to pay speculative and unsupported by competent, substantial evidence, the appellate court granted his petition. Citing Bowen v. Bowen, 471 So. 2d 1274, 1277 (Fla. 1985), the appellate court reiterated that civil contempt is not intended to punish and that the contemnor must have the present ability to comply with a court order--what the Bowen court referred to as the "key to his or her cell." Before ordering a party jailed to compel payment of court-ordered support, a trial court must affirmatively find that the party has the present ability to pay the purge. "Without the present ability to pay from some available asset, the contemnor holds no key to the jailhouse door." (Bowen 471 So. 2d at 1277). The trial court had found that former husband had the ability to pay the purge through equity in his home; the appellate court concluded that because his ability to pay depended on the future potential sale of the property, there was no present ability. Commenting that its holding was limited to the issue of whether the equity in his home gave former husband the present ability to pay, the appellate court stated that its opinion would not preclude further proceedings regarding present ability to pay or the initiation of indirect criminal contempt proceedings; nor should its opinion be construed as limiting the trial court's ability to establish a different purge provision, such as reducing the listing price of the house. The appellate court noted that criminal contempt proceedings are appropriate where a party has either willfully neglected court-ordered support obligations or has affirmatively divested himself or herself of assets and property; however, it cautioned that a finding that a party has divested themselves of assets does not substitute for a finding of present ability to pay. <http://www.4dca.org/opinions/Apr%202011/04-11-11/4D11-828.op.pdf> (April 11, 2011).

Flores v. Flores, \_\_ So. 3d \_\_, 2011 WL 1261157, (Fla. 4th DCA 2011).

#### **TRIAL COURT ERRED IN FAILING TO ADDRESS REQUEST FOR ATTORNEY'S FEES.**

Former wife appealed an order denying her motion for rehearing or to amend a final judgment, arguing that the trial court had erred in failing to retain jurisdiction to award attorney's fees in connection with former husband's petition for change of custody. Former wife had requested fees both in her response to the petition and in her written arguments after trial. The appellate court held that where a trial court fails to address a request for fees and costs or to reserve jurisdiction to consider the issue, the final judgment should be reversed and remanded for entry of a corrected one which reserves jurisdiction to address the request. The appellate court cited Harbin v. Harbin, 762 So. 2d 561 (Fla. 5th DCA 2000), for its holding that a trial court has jurisdiction to amend a final judgment when a motion for rehearing on the issue of attorney's fees is timely filed even though it may have failed to reserve jurisdiction on that issue in its final judgment.

<http://www.4dca.org/opinions/Apr%202011/04-06-11/4D09-3743.op.pdf> (April 6, 2011).

### ***Fifth District Court of Appeal***

Grover v. Grover, \_\_ So. 3d \_\_, 2011 WL 1496017, (Fla. 5th DCA 2011).

**ISSUE NOT WHETHER THERE IS NEED FOR PARTY TO HAVE MORE THAN ONE ATTORNEY BUT WHETHER THE ATTORNEYS ENGAGED IN DUPLICATIVE BILLING.**

Former wife appealed an order granting former husband's petition for modification and partially granting her request for fees. The appellate court found that the magistrate had correctly determined that former wife was entitled to fees due to the parties' disparate incomes but reversed for reconsideration of the fee award. The magistrate had determined that the fee of former wife's primary attorney be reduced and that no fees be awarded for the second attorney because those fees had not been expressly requested in either an affidavit or at trial. The trial court adopted the magistrate's recommendation to reduce the fee award of the primary attorney and to deny a fee award for a second attorney; however, it based its denial on the absence of any evidence presented by former wife showing a need for more than one attorney. Recognizing that in accordance with Osherow v. Osherow, 785 So. 2d 743 (Fla. 4th DCA 2001), a court should not award fees for multiple lawyers unless it concludes that there is a need for more than one, the appellate court noted that the trial court had cited Tomaino v. Tomaino, 629 So. 2d 874 (Fla. 4th DCA 1993), which held that a trial court should reduce a party's request for fees when multiple attorneys bill for duplicative work. According to the appellate court, the issue was not whether there was a need for more than one attorney but whether the attorneys engaged in duplicative billing. It held that a requesting party need not present evidence justifying use of a second lawyer. Appellate court concluded that although there did not appear to be any evidence that the work performed by the two attorneys was duplicative, that issue may not have been considered by the trial court; therefore, the case was remanded for reconsideration of the entire award.

<http://www.5dca.org/Opinions/Opin2011/041811/5D10-2861.op.pdf> (April 21, 2011).

McMillen v. Natali, \_\_ So. 3d \_\_, 2011 WL 1431523, (Fla. 5th DCA 2011).

**ABSENCE OF RECORD LEAVES APPELLATE COURT UNABLE TO FIND ERROR.**

Short opinion in which the appellate court concluded that although former husband's arguments may have had substance, the absence of a record left it unable to determine whether the trial court had erred.

<http://www.5dca.org/Opinions/Opin2011/041111/5D10-1030.op.pdf> (April 15, 2011).

Hughes v. Krueger, \_\_ So. 3d \_\_, 2011 WL 1195794, (Fla. 5th DCA 2011).

**TRIAL COURT ERRED IN COMBINING TWO PARCELS IN ITS ACCOUNTING.**

Both former spouses argued trial court error in the accounting of two pieces of commercial property which they owned as tenants in common. One parcel was used by former husband to operate the business he was awarded in the final judgment; the other was rented. The final judgment had awarded former husband 75% ownership and former wife 25% with rental income from the properties to be apportioned accordingly. Former husband paid former wife her share of the rent received on the piece of property not used by his business; however, no rent was collected on the piece occupied by the business. In its accounting, the trial court used the actual rent income for the parcel not occupied by the business and the fair rental value and actual expenses for the parcel that was used by the business. The latter was partially reduced because their son used it for his business as well. Former wife was aware of that use and the son was not asked to pay rent. The appellate court concluded that the problem with the trial

court's decision to combine the two parcels in the accounting was that different legal principles applied to each. It held that former husband was deemed to occupy the piece of property which housed his business on behalf of both parties and that former wife was not entitled to rent except as an offset against any claim he might make for contribution towards property expenses. The appellate court found that on the other piece of property, former wife was entitled to her proportionate share of actual rental income less her share of necessary expenses. It concluded that her share was less than one-half of what she had actually received from former husband since their dissolution 19 years before; thus, she owed the excess to former husband.

<http://www.5dca.org/Opinions/Opin2011/032811/5D09-1371.op.pdf> (April 1, 2011).

Kight v. Kight, \_\_ So. 3d \_\_, 2011 WL 1195801, (Fla. 5th DCA 2011).

**DEPOSIT INTO MARITAL ACCOUNT AFTER DATE OF FILING OF DISSOLUTION OF MARRIAGE PETITION NONMARITAL; NOMINAL PERMANENT ALIMONY SHOULD HAVE BEEN AWARDED TO PRESERVE THE ISSUE FOR FUTURE CONSIDERATION.**

The appellate court affirmed the final judgment of dissolution of marriage with two exceptions: 1) a deposit by former wife into an IRA that was correctly classified by the trial court as a marital asset, made after the filing of the petition for dissolution, was nonmarital; and 2) the trial court should have awarded at least nominal permanent alimony to former wife to preserve the issue for future consideration. <http://www.5dca.org/Opinions/Opin2011/032811/5D09-4254.op.pdf> (April 1, 2011).

## **Domestic Violence Case Law**

### ***Florida Supreme Court***

No new opinions for this reporting period.

### ***First District Court of Appeal***

Power v. Boyle, --- So. 3d ----, 2011 WL 1501049 (Fla. 1st DCA 2011) **REPEAT VIOLENCE INJUNCTIONS VACATED**. These consolidated cases involved permanent injunctions against repeat violence between arguing neighbors. The trial court granted temporary injunctions and entered four separate permanent injunctions. In explaining its decision to enter the injunctions, the trial court recognized that "this case does not fall within the purview of our most ordinary uses of §784.046," but the court reasoned that an injunction was necessary "to keep the peace" between the parties and that the circumstances of this case "fall within the broader purview of the statute" because of the harassing nature of the incidents. The respondents argued that the evidence presented at the hearing was legally insufficient to support the injunctions. The appellate court noted that two incidents of violence or stalking are required for an injunction under §784.046, Florida Statutes, and the incidents must be supported by competent substantial evidence. In this case, the incidents described by the petitioners were legally insufficient because the incidents did not rise to the level of violence or stalking under §784.046, and as to one of the respondents, did not even establish the existence of two incidents as required by the statute. The appellate court therefore reversed and remanded the

case for the trial court to vacate the injunctions.

<http://opinions.1dca.org/written/opinions2011/04-21-2011/10-6437.pdf> (April 21, 2011).

### ***Second District Court of Appeal***

No new opinions for this reporting period.

### ***Third District Court of Appeal***

No new opinions for this reporting period.

### ***Fourth District Court of Appeal***

Cox v. Deacon, --- So. 3d ----, 2011 WL 1261104 (Fla. 4th DCA 2011) **MOTION TO DISSOLVE INJUNCTION DENIED**. The appellant filed a motion to dissolve a final judgment of injunction for protection against domestic violence and claimed that he did not have notice and an opportunity to be heard on the motion. The trial court denied the motion and the appellate court affirmed because the record showed that the respondent (appellant) was given notice of the final hearing and was handed a copy of the final judgment in court, for which he signed a receipt. The appellant also argued that the permanent injunction was improper because it was for a period of more than one year. Although at one time there was a statutory provision that limited permanent injunctions to a period of one year, that provision was removed by the legislature in 1997. The court noted that the current statute as amended provides for an injunction to "remain in effect until modified or dissolved."

<http://www.4dca.org/opinions/Apr%202011/04-06-11/4D09-4993.op.pdf> (April 6, 2011).

### ***Fifth District Court of Appeal***

No new opinions for this reporting period.