

# OSCA/OCI'S FAMILY COURT CASE LAW UPDATE APRIL-MAY 2013

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## **Baker Act/Marchman Act 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***

No new opinions for this reporting period.

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

No new opinions for this reporting period.

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

No new opinions for this reporting period.

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

No new opinions for this reporting period.

## **Delinquency Case Law**

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

In re Amendments to Florida Rules of Juvenile Procedure, \_\_\_ So.3d \_\_\_, 2013 WL 2248756 (Fla. 2013). [THE FLORIDA SUPREME COURT AMENDED AND ADOPTED A NUMBER OF RULES AND FORMS FOR THE FLORIDA RULES OF JUVENILE PROCEDURE](#). As pertaining to delinquency, the Court adopted amendments to Rules 8.035 (Petitions for Delinquency), 8.070 (Arraignments), 8.075 (Pleas), and 8.115 (Disposition Hearing) in order to conform the language of those rules more closely with their adult criminal rule counterparts. Rule 8.080 (Acceptance of Guilty or Nolo Contendere Plea) was amended to: 1.) add new subdivision (b) requiring that “All pleas shall be taken in open court, except the hearing may be closed as provided by law”; 2.) add new subdivision (c)(8) requiring that before entering a plea, the child must be advised that the plea may require the child to register as a sexual offender; 3.) add new subdivision (c)(10) requiring that before entering a plea, the child must be advised that the plea may have deportation and immigration consequences; and 4.) amend current subdivision (e) (now redesignated as (f)) to state that the parties must advise the court of any plea agreement and may advise the court of the reasons for it, and to state that the court must advise the parties whether it accepts or rejects the plea agreement and may state its reasons. Form 8.947 (Disposition Order—Delinquency) was amended to include the specific statutory authority for costs and fees

imposed on the child by the court and to correct the reference to the statutory basis for collection of a DNA sample at disposition. New Form 8.952 (Findings for Juvenile Sexual Offender Registration) was adopted and provides the court with the necessary factual findings required under s. 943.0435(1)(a)1.d., F.S. (2012), in determining whether a juvenile is required to register as a sexual offender. <http://www.floridasupremecourt.org/decisions/2013/sc12-188.pdf> (May 23, 2013).

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

No new opinions for this reporting period.

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

S.K.W. v. State, \_\_\_ So.3d \_\_\_, 2013 WL 2120259 (Fla.2d DCA 2013). **THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH LOITERING OR PROWLING.** The juvenile appealed her adjudication for loitering or prowling. The juvenile and another girl were arrested for loitering or prowling in a neighborhood after a resident called the police to report that he had seen two girls walk around the side of a vacant house. The girls were not from the neighborhood and the resident observed them knock on the door of a neighbor's house, talk to that neighbor, and then walk over to the vacant house. An officer, who arrived at the scene, saw the two girls walking on the second-floor wrap-around porch from the back of house toward the front entry door. He directed the girls to come down; they complied. Responding to the officer's questions about their purpose, the girls said they were just hanging out. The girls provided their names and their street addresses, although they could not recall their exact numeric addresses. Neither girl had any drugs or weapons. Each had a cell phone and a cigarette lighter. A backup officer arrived. He inspected the house and found no signs of entry, damage, or theft. The girls were arrested for loitering or prowling. The Second District Court of Appeal found that the evidence was insufficient to establish loitering or prowling. The Second District noted that the loitering or prowling statute must not be used as a catchall provision to detain and prosecute a citizen where there is insufficient basis to convict on some other charge. In the instant case, there was no basis to detain the juvenile for attempted burglary or trespassing. The Second District found that based on the record, they could not discover probable cause to arrest the juvenile for loitering or prowling. Accordingly, the adjudication and disposition was reversed. [http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Pages\\_2013/May/May%2017,%202013/2D12-1457.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2013/May/May%2017,%202013/2D12-1457.pdf) (May 17, 2013).

J.M.H. v. State, \_\_\_ So.3d \_\_\_, 2013 WL 1847027 (Fla.2d DCA 2013). **JUVENILE WAS NOT ENTITLED TO CREDIT FOR TIME SERVED IN SECURE DETENTION FOR CONTEMPT CHARGES.** After numerous violations of her probation, the juvenile was committed to the Department of

Juvenile Justice (DJJ) for a period not to exceed 365 days. During her probation proceedings, the juvenile was cited for indirect criminal contempt. The trial court issued orders to show cause. The juvenile was ordered to serve time in secure detention for contempt. The juvenile subsequently filed a motion to correct her disposition order. The trial court partially denied the motion not allowing credit for time served in secure detention on the indirect contempt charges. The juvenile appealed the partial denial. On appeal, the Second District Court of Appeal affirmed the partial denial of her motion to correct disposition but remand for the trial court to enter the specific number of days to be credited regarding the portion of the motion that was granted. The juvenile was not entitled to credit for time served in secure detention for the contempt charges. Each violation of the probation order constituted a separate and distinct act of contempt. Because each violation is a separate act of contempt, and the trial court sentenced the juvenile to consecutive sentences pursuant to statute, the juvenile was not entitled to credit for time served for the contempt charges. However, the reverse is true for all the time served in detention on the original offense, as the trial court's order explicitly recognized. Because the order on the motion to correct sentence failed to specify the specific number of days to be credited in accordance with Florida Rule of Juvenile Procedure 8.115(d), the Second District remanded the case for the entry of the specific number of days only. Accordingly, the court affirmed the partial denial of the motion to correct disposition but remanded to enter the specific number of days to be credited regarding the portion of the motion that was granted.

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Pages\\_2013/May/May%2003,%202013/2D12-2389.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2013/May/May%2003,%202013/2D12-2389.pdf) (May 3, 2013).

D.C. v. State, \_\_ So.3d \_\_, 2013 WL 1316761 (Fla.2d DCA 2013). **RESTITUTION ORDER WAS REVERSED AND REMANDED WHERE THE RESTITUTION AMOUNT WAS NOT SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE.** The juvenile appealed his restitution order. At the restitution hearing, the husband-and-wife victims testified regarding the property stolen from their home. The couple claimed that more property was stolen than they had initially reported. The prosecutor summarized the victims' testimony and suggested reductions in value for depreciation. Defense counsel objected to the amounts and to the award of restitution for items that were never reported to the police or for items that the police said they recovered. The trial court announced that it would "award restitution in the amount suggested by the State Attorney." The trial court ordered restitution of \$652.34. On appeal, the Second District Court of Appeal found that an owner is generally qualified to offer testimony on the fair market value of his or her property. However, a restitution award must be based on competent evidence, not on mere speculation. In the instant case, the owners' testimony was incomplete because they simply furnished purchase prices for the stolen items, not the fair market value. And in several cases, they provided a range of prices. Some of the items were several years old, leading the prosecutor to propose depreciated values based on nothing more than her ad hoc

sense of what seemed fair. The prosecutor's assertions were also not competent, substantial evidence. Accordingly, the Second District held that the restitution amount was not supported by competent, substantial evidence and the restitution order was reversed and remanded for a new restitution hearing.

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Pages\\_2013/April/April%2003,%202013/2D11-6079.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2013/April/April%2003,%202013/2D11-6079.pdf) (April 3, 2013).

N.H. v. State, \_\_ So.3d \_\_, 2013 WL 1693961 (Fla.2d DCA 2013). **ADJUDICATION FOR CARRYING A CONCEALED WEAPON AND POSSESSION OF A FIREARM BY A MINOR WAS REVERSED WHERE THE EVIDENCE PRESENTED WAS INSUFFICIENT TO CONNECT THE JUVENILE TO THE WEAPON.**

The juvenile moved to dismiss carrying a concealed weapon and possession of a firearm by a minor charges for insufficient evidence. The motion was denied and the juvenile was adjudicated. Sheriff's deputies were patrolling an area because of known drug and gang activity. Three boys were observed sitting on a three-foot-high wall. The deputies stopped and exited their police van shouting that they were from the sheriff's office. A deputy observed the juvenile standing behind the wall bending down as if placing something on the ground. The deputy believed the juvenile was holding an object in his hand, but he could not identify it. The juvenile ran away and was apprehended. The deputy directed another deputy to search behind the wall for something the juvenile might have placed there. The other deputy found a .38 caliber revolver resting flush against the wall. At the hearing, the deputy who found the gun testified that the area was "pretty well-lit" and he had "the aid of a flashlight." The deputy did not recount whether anything was covering the gun. The Second District Court of Appeal found that the concealed firearm charge could be proven by evidence that the weapon was within a defendant's possession or ready reach and that it was hidden from the sight of an ordinary person. However, in the instant case, the State merely established that a gun was found behind a wall, in a public place, near an occupied apartment building. The juvenile stood behind the wall in reach of where the gun was found. Although the deputy could not see the gun from his vantage point because the wall blocked his view, the State offered no evidence that the gun was concealed from the sight of the three boys sitting nearby on the wall, or of anyone else who might have been walking by or observing from one of the apartments. There was no testimony that the gun was covered in any way. While concealment can be shown by circumstantial evidence, the facts presented in this case did not prove that the gun was hidden from the view of an ordinary person. Therefore, the evidence was insufficient to show that the juvenile carried a concealed firearm. In fact, the evidence was insufficient to even show that the juvenile possessed the gun. The deputy saw something in the juvenile's hand, but could not attest that it was a firearm. The juvenile was in the proximity of the place where the gun was found. But so were three other youths sitting on the wall. Moreover, the gun was found in a public place, at night and the deputy was using a flashlight when he found it. Whether the State proceeded under an actual, ready-reach, possession theory, or under a constructive possession theory, it must prove that the contraband item was under the accuser's control. The Second District found that the requisite control could not be proved merely by proximity—some additional evidence must connect the accused to the firearm. The juvenile did not admit that he possessed the firearm, and no one actually saw it in his hand. The State presented no other evidence, such as fingerprints, to connect the juvenile to the weapon. The mere fact that the

deputy believed the juvenile may have put something on the ground was not sufficient to establish that he possessed the gun. Accordingly, the juvenile's delinquency adjudications were reversed and remanded with instructions to dismiss the petition.

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Pages\\_2013/April/April%2019,%202013/2D11-5820.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2013/April/April%2019,%202013/2D11-5820.pdf) (April 19, 2013).

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

T.S. v. State, \_\_ So.3d \_\_, 2013 WL 1980608 (Fla. 3d DCA 2013). [ORDER SUPPRESSING PHYSICAL EVIDENCE WAS REVERSED AND REMANDED WHERE TIP FROM CITIZEN INFORMANT PROVIDED REASONABLE SUSPICION TO CONDUCT INVESTIGATORY STOP AND THE SUBSEQUENT SEARCH.](#)

The State of Florida appealed the trial court's order suppressing physical evidence obtained during an investigatory stop. The arresting officer was stopped and told by an individual that somebody had pulled a gun on him in the bathroom at McDonald's. The individual appeared to be agitated and excited and was talking on a cell phone to a 911 dispatcher. The officer verified that dispatch was on the line taking a robbery report. The individual provided a description. The officer left the scene in pursuit. The officer did not attempt to obtain the name and address of the man making the report, asking only that he remain at the McDonald's. The officer spotted two individuals, just a few hundred yards from the McDonald's, who matched the description. Since at least one of the suspects was believed to be armed, the officer approached with his gun drawn. One of the suspects, the juvenile, stated that he had a handgun in his pocket. The officer retrieved a handgun from the juvenile's pocket and called for backup. By the time the officer returned to McDonald's, the informant had gone. The trial court granted the juvenile's motion to suppress physical evidence. On appeal, the Third District Court of Appeal found that the individual who flagged the officer down was a citizen informant whose information was sufficiently reliable to support the investigatory stop and the subsequent search of the juvenile was legal. Accordingly, the order under review was reversed and remanded for further proceedings.

<http://www.3dca.flcourts.org/Opinions/3D12-2373.pdf> (May 15, 2013).

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

A.P. vs. State, \_\_ So.3d \_\_, 2013 WL 2218831 (Fla. 4th DCA 2013). [RESTITUTION ORDER REVERSED BECAUSE THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE AWARD.](#)

At the restitution hearing, the victim testified that the missing video game was worth about \$20, and the Xbox was worth about \$200 based on the amount the victim spent to purchase a replacement at a pawn shop. When offered the opportunity to cross-examine the victim, defense counsel stated that the evidence was insufficient to establish the value of the two missing items. The victim offered to accept \$175. The trial court then ordered the juvenile to

pay \$220 in restitution. The juvenile appealed and argued that the restitution was not supported by competent, substantial evidence. The State responded that the victim's testimony was sufficient evidence of the items' value. On appeal, the Fourth District Court of Appeal found that fair market value can be proven by reference to four factors: (1) the original market cost; (2) the manner in which the items were used; (3) the general condition and quality of the items; and (4) the percentage of depreciation. In the instant case, the trial court erred in ordering \$220 in restitution because the victim's testimony was based on the replacement value of the Xbox, and the source of her testimony regarding the value of the missing video game was unknown. Because the State failed to present competent, substantial evidence of the items' fair market value, the Fourth District reversed the restitution order and noted that the ruling does not prevent the State from conducting another hearing at which the fair market value of the stolen items can be properly proven. <http://www.4dca.org/opinions/May%202013/05-22-13/4D12-847.op.pdf> (May 22, 2013).

E.I. vs. State, \_\_ So.3d \_\_, 2013 WL 1890378 (Fla. 4th DCA 2013). **APPEAL WAS DISMISSED AS MOOT BECAUSE THE JUVENILE TURNED 19 YEARS OF AGE.** The State of Florida had appealed the trial court's order dismissing a petition for delinquency. While on appeal, the juvenile reached his 19th birthday. The Fourth District Court of Appeal dismissed the appeal as moot. The Fourth District found that a case becomes moot, for purposes of appeal, where, by a change of circumstances prior to the appellate decision, an intervening event makes it impossible for the court to grant a party any effectual relief. In the instant case, the juvenile court's jurisdiction over the juvenile ended when the juvenile turned 19 years of age. A moot case will generally be dismissed unless the questions raised are of great public importance or are likely to recur, or if collateral legal consequences that affect the rights of a party flow from the questions raised. Since none of these exceptions applied, the case was dismissed as moot. <http://www.4dca.org/opinions/May%202013/05-08-13/4D12-1371.op.pdf> (May 8, 2013).

W.D. vs. State, \_\_ So.3d \_\_, 2013 WL 1890362 (Fla. 4th DCA 2013). **JUVENILE COURTS STATUTORY AUTHORITY TO TERMINATE JURISDICTION WAS LIMITED TO POST-ADJUDICATORY CIRCUMSTANCES.** The State of Florida appealed the dismissal of its petition for delinquency. The juvenile had run away from Indiana. The juvenile was on probation in Indiana. When police located the juvenile and tried to take him into custody, the juvenile fled and hid in a locked closet. The State filed a petition for delinquency in October of 2010, charging the juvenile with resisting arrest without violence based upon his flight and hiding in the closet. In March of 2012, the juvenile still had not been arraigned and the juvenile and his parents/guardian had still not been served with a summons. The trial court dismissed the case stating that pursuant to s. 985.0301(6), F.S. (2012), the court may at any time enter an order ending its jurisdiction

over any child. The State appealed. The Fourth District Court of Appeal found that the language of subsection (6) was indisputably broad, providing the court may “at any time” enter an order terminating its jurisdiction over any child. However, fundamental principles of statutory construction required that the statutory language be interpreted in the context of the statute as a whole. In this light, subsection (6) was fairly viewed as authorizing the court to elect to end its jurisdiction over a child at any time following the initial adjudicatory hearing—not as permitting the trial court to use its discretion to terminate jurisdiction to put an end to the prosecution before the case ever reaches adjudication on the merits. This reading was supported by the history of subsection (6). Further, a construction limiting the application of subsection (6) to post-adjudicatory circumstances is necessary in order to avoid the statute being rendered unconstitutional. The separation of powers doctrine provides that one branch of government may not encroach upon the powers of another. And, it is the state attorney, not the trial courts, who have complete discretion in making the decision to charge and prosecute. Accordingly, the dismissal of the delinquency petition was reversed and remanded. <http://www.4dca.org/opinions/May%202013/05-08-13/4D12-1372.op.pdf> (May 8, 2013).

State v. A.A., \_\_\_ So.3d \_\_\_, 2013 WL 1629152 (Fla. 4th DCA 2013). [THE JURISDICTION OF THE COURT ATTACHED WHEN THE CHILD WAS DETAINED AND TAKEN INTO CUSTODY](#). The State appealed the dismissal of a juvenile case arguing that the trial court had not acquired jurisdiction as the child had not been served. On appeal, the Fourth District Court of Appeal found that the trial court’s jurisdiction had attached when the child was detained and taken into custody. Section 985.0301(2), F.S. (2011) provided:

(2) **The jurisdiction of the court shall attach to the child and the case** when the summons is served upon the child ..., or **when the child is taken into custody** with or without service of summons and before or after the filing of a petition, **whichever first occurs**, and thereafter the court may control the child and the case in accordance with this chapter. (Emphasis supplied).

Accordingly, the dismissal was affirmed. <http://www.4dca.org/opinions/April%202013/04-17-13/4D12-771.op.pdf> (April 17, 2013).

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

No new opinions for this reporting period.

## Dependency Case Law

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

In re Amendments to Florida Rules of Juvenile Procedure, \_\_\_ So.3d \_\_\_\_, 2013 WL 2248756 (Fla. 2013) **RULES AMENDED**. The supreme court amended several of the Juvenile Rules of Procedure. Many of the changes relate to delinquency rules, however, “subdivisions (a) and (b) of rule 8.201 (Commencement of Proceedings) are amended to add two new items constituting “commencement” of a dependency proceeding: (1) filing of a petition or affidavit or an order to take a child into custody; and (2) filing of any other petition authorized by Chapter 39, Florida Statutes, and to provide that upon commencement of any proceeding, the clerk shall open a file and assign a case number. Rule 8.260 (Orders) is amended to clarify that all orders must be signed by the judge, see section 39.0132(5), Florida Statutes (2012), and to list the types of orders over which a dependency order takes precedence, see section 39.013(4), Florida Statutes (2012). The title of rule 8.285 (Contempt) is amended to reflect that the rule addresses only criminal contempt proceedings, and new rule 8.286 (Civil Contempt) is adopted to govern civil contempt proceedings in dependency and termination of parental rights matters. Subdivision (c) of rule 8.340 (Disposition Hearings) is amended to more closely mirror the requirements for disposition orders, as set forth in section 39.521(1)(d), Florida Statutes (2012). Subdivision (b) of rule 8.345 (Post–Disposition Relief) is amended to provide that jurisdiction does not terminate at age eighteen if the court has extended jurisdiction over the child, as provided under certain circumstances in section 39.013(2), Florida Statutes (2012). New rule 8.347 (Motion to Supplement Order of Adjudication, Disposition Order, and Case Plan) is adopted in order to provide a uniform process for a party to move the court to supplement a dependency adjudication order with findings that a parent or legal guardian contributed to the dependent status of the child. The rule addresses the requirements for the content of the motion, service of the motion, and procedures for a hearing on the motion.

Rule 8.350 (Placement of Child Into Residential Treatment Center After Adjudication of Dependency) is amended to delete the requirement in subdivision (a)(11)(A)(iii) that the court consider “a case review committee recommendation, if there has been one,” as such is not required under section 39.407(6), Florida Statutes (2012). New rule 8.517 (Withdrawal and Appointment of Counsel) is adopted to address withdrawal of counsel of record for a parent or custodian in a dependency or termination of parental rights proceeding and appointment of appellate counsel in such proceedings. The new rule provides that after an order of adjudication of dependency, an order of disposition, or an order terminating parental rights has been entered, counsel of record shall not be permitted to withdraw until counsel certifies that he or she has discussed appellate remedies with the parent or custodian and certifies that the parent or custodian does not wish to appeal or, if the parent or custodian wishes to appeal, certain appellate documents have been filed and appellate counsel has been appointed. If counsel is unable to contact the parent or custodian, counsel must certify the efforts made to contact the parent or custodian. Finally, the rule requires the court to serve a copy of the order appointing appellate counsel on the appointed counsel and the clerk of the appellate court.” <http://www.floridasupremecourt.org/decisions/2013/sc12-188.pdf> (May 23, 2013).

In re Amendments to Florida Supreme Court Approved Family Law Forms, \_\_\_ So.3d \_\_\_\_, 2013 WL 1908394 (Fla. 2013) [FORMS AMENDED AND CREATED](#). The supreme court reviewed the Florida Supreme Court Approved Family Law Forms and determined that new forms and amendments to several existing forms were needed due to recent legislation relating to injunctions for protection against stalking. The existing forms were amended to: (1) add the term “stalking” to the forms' respective titles, bodies, footers, and instructions, where appropriate; (2) add language to the instructions to form 12.980(g) regarding what information to include in a supplemental affidavit in support of a petition for injunction for protection against stalking; (3) add a blank textbox to the supplemental affidavit in support of a petition for injunction for protection against stalking for the petitioner to describe the alleged stalking; and (4) renumber several forms. New forms were also adopted: 12.980(t) (Petition for Injunction for Protection Against Stalking), 12.980(u) (Temporary Injunction for Protection Against Stalking), and 12.980(v) (Final Judgment for Protection Against Stalking). The new forms may be used immediately. <http://www.floridasupremecourt.org/decisions/2013/sc13-305.pdf> (May 9, 2013).

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

No new opinions for this reporting period.

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

O.B. v. Dep’t of Children and Family Services, \_\_\_ So.3d \_\_\_\_, 2013 WL 2278040 (Fla. 2d DCA 2013) [TERMINATION OF PARENTAL RIGHTS AFFIRMED, FORMS](#). The court affirmed the final judgment of involuntary termination of parental rights of the father, but noted that the form of the final judgment made it difficult to review the case. The form did not follow Florida Rules of Juvenile Procedure form 8.983, and the court noted that an excellent form as been developed in the Sixth Judicial Circuit which aids the court in addressing the elements that must be established in a termination of parental rights case. The court encouraged the trial court to consider using a better form. [http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Pages\\_2013/May/May%2024,%202013/2D12-6151.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2013/May/May%2024,%202013/2D12-6151.pdf) (May 24, 2013).

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

No new opinions for this reporting period.

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

V.A. v. Department of Children and Families and Guardian Ad Litem V.A. v. Department of Children and Families and Guardian Ad Litem Program, \_\_\_ So.3d \_\_\_\_, 2013 WL 2217492 (Fla. 4<sup>th</sup> DCA 2013) [WAIVER OF COUNSEL](#). The Department of Children and Families conceded error and the court reversed the disposition order so that the father could either be represented by counsel or waive counsel. If the father waives counsel, the appellate court directed the trial court to question the father in sufficient detail to ascertain whether or not the waiver is made knowingly, intelligently and voluntarily, and then make its findings in writing

and hold the disposition hearing. <http://www.4dca.org/opinions/May%202013/05-22-13/4D13-775.op.pdf> (May 22, 2013).

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

R.N. v. Department of Children and Families, \_\_\_ So.3d \_\_\_, 2013 WL 2359073, (Fla. 5<sup>th</sup> DCA 2013) **PETITION FOR WRIT OF CERTIORARI DENIED.** After an evidentiary hearing, the mother appealed an order that amended her case plan to include the goal of adoption and directed the Department of Children and Families to file a petition for termination of her parental rights. The mother argued the trial court erred when it denied her request to close the dependency case with a permanent guardianship to the child's grandmother. Although the mother filed a direct appeal, the challenged order was not a final order or an appealable non-final order pursuant to Florida Rule of Appellate Procedure 9.110. The court noted that orders entered in dependency proceedings after the entry of the order adjudicating dependency and before an order terminating supervision or jurisdiction are not appealable non-final orders, and handled the appeal as a petition for writ of certiorari. However, the court found that there was no departure from the essential requirements of the law and denied the petition. May 28, 2013. <http://www.5dca.org/Opinions/Opin2013/052713/5D13-244.op.pdf> (May 28, 2013).

T.H. v. Department of Children and Families, \_\_\_ So.3d \_\_\_, 2013 WL 1844218 (Fla. 5<sup>th</sup> DCA 2013) **DEPENDENCY AFFIRMED, TERMINATION OF PARENAL RIGHTS REVERSED.** The mother appealed the order terminating her parental rights and the Department conceded that the evidence was insufficient to support a finding of egregiousness as required by §39.806(1)(f), Florida Statutes. The evidence was also insufficient to support a finding that the mother's continuing involvement in the parent-child relationship threatened the life, safety, well-being, or physical, mental or emotional health of the child, irrespective of the provision of services. No case plan had been offered, yet the psychologist testified that the mother could have benefited from therapy. The evidence also failed to support a finding that termination of the parental rights was the least restrictive means to protect the child. The court reversed the order that terminated the mother's parental rights, but affirmed the order that adjudicated the child dependent. <http://www.5dca.org/Opinions/Opin2013/042913/5D13-374.op.pdf> (May 1, 2013).

A.J. v. Department of Children and Families, \_\_\_ So.3d \_\_\_, 2013 WL 1844221 (Fla. 5<sup>th</sup> DCA 2013) **DEPENDENCY AFFIRMED.** The father appealed an order which found his daughter dependent. The child was born prematurely and has several health conditions which require significant involvement with medical providers. The Department of Children and Families removed the child from the home and subsequently filed an expedited petition for termination of parental rights as to both parents or, in the alternative, for dependency. The petition alleged that the parents neglected the child's extensive medical needs and the child was failing to thrive. During the hearing, the testimony showed that the parents' had failed to follow up on the child's medical appointments which endangered the child's health and potentially her life. The child is also in constant need of medical treatment, which depleted the father's savings and made him lose his job, which forced the family to live out of a car for over a month. Since the parents were unable to get the child the necessary medical treatment, the court affirmed the dependency. The court also noted that the purpose of the dependency action was to help the

parents meet the needs of the child, not to punish the parents. May 1, 2013.  
<http://www.5dca.org/Opinions/Opin2013/042913/5D12-4500.op.pdf> (May 1, 2013).

## **Drug Court/Mental Health Court 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***

No new opinions for this reporting period.

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

No new opinions for this reporting period.

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

Keating v. State, \_\_ So.3d \_\_, 2013 WL 1438372 (Fla. 4th DCA 2013). [MOTION TO DISQUALIFY JUDGE WAS LEGALLY SUFFICIENT WHERE THE JUDGE HAD REFUSED TO PROVIDE THE PETITIONER ANY OPPORTUNITY TO FAIRLY PRESENT HIS CASE FOR TRANSFER TO DRUG COURT.](http://www.4dca.org/opinions/April%202013/04-10-13/4D13-30.op.pdf) Petitioner sought a writ of prohibition to review the denial of his motion to disqualify the trial judge. At his arraignment hearing, Petitioner, who qualified for felony drug court, moved to have the case transferred. Petitioner's counsel asked the court to hear testimony from the Petitioner. The court immediately denied the request and cut short any argument or proffer that defense counsel could have made as to why transfer to drug court was appropriate. The court explained that it had read the probable cause affidavit and that it accepted the allegations therein as true for purposes of the motion. Petitioner filed a motion to disqualify which was denied. The Fourth District of Appeal found that the trial court had discretion in deciding whether to permit the Petitioner to enter into the drug court program. While a trial court's adverse ruling is not alone sufficient to require disqualification, where a court enters an adverse ruling without allowing a fair opportunity to present evidence or argument regarding a significant issue, disqualification may be required. In the instant case, the Petitioner clearly qualified for entry into the program, desired to enter the program, and the State did not object. Nevertheless, the court refused to provide Petitioner any opportunity to fairly present his case for transfer to drug court. The Fourth District Court held that the motion to disqualify was legally sufficient and that the Petitioner had demonstrated an objectively reasonable basis to fear that he would not receive a fair trial or hearing. Accordingly, the petition was granted and the case ordered assigned to another judge. Pursuant to Florida Rule of Judicial Administration 2.330(h), the Petitioner could move the successor judge to reconsider the court's ruling on the motion to transfer. <http://www.4dca.org/opinions/April%202013/04-10-13/4D13-30.op.pdf> (April 10, 2013).

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

No new opinions for this reporting period.

## **Dissolution Case Law**

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

In Re: Amendments to the Florida Supreme Court Approved Family Law Forms, \_\_ So.3d \_\_, 2013 WL 1908394, Fla.L.Weekly S304, (Supreme Court, May 9, 2013).

#### **SUPREME COURT ADOPTS NEW FORMS FOR PROTECTION AGAINST STALKING.**

Supreme Court adopted three forms implementing a new statutory cause of action for protection against stalking: petition for an injunction for protection against stalking; temporary injunction for protection against stalking; and final judgment for protection against stalking. The Court also incorporated stalking into a number of existing forms used in proceedings in which protection is sought. All forms take effect May 2013; comments may be filed through July 8, 2013.

<http://www.floridasupremecourt.org/decisions/2013/sc13-305.pdf> (May 9, 2013).

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

Kingsbury v. Kingsbury, \_\_ So.3d \_\_, 2013 WL 1955890, (Fla. 1<sup>st</sup> DCA 2013).

#### **ALIMONY AWARD MUST BE BASED ON NET, NOT GROSS, INCOME; TRIAL COURT MUST MAKE SPECIFIC FINDINGS AS TO NEED OF ONE SPOUSE FOR ALIMONY AND ABILITY OF OTHER TO PAY; IT MUST CONSIDER RELEVANT ECONOMIC FACTORS.**

Appellate court agreed with former husband that the trial court erred in failing to base its award of permanent periodic alimony to former wife on his net income. The ability to pay alimony should be based on a spouse's net income, rather than gross, as net is the "relevant benchmark".

A trial court must make specific findings as to one spouse's need for alimony and the other's ability to pay; these findings must reflect a consideration of all relevant economic factors.

<http://opinions.1dca.org/written/opinions2013/05-14-2013/12-3188.pdf> (May 14, 2013).

Thompson v. Watts, \_\_ So.3d \_\_, 2013 WL 1859023, Fla.L.Weekly D999, (Fla.1<sup>st</sup> DCA 2013).

#### **TRIAL COURT ERRED IN FINDING LATENT, RATHER THAN A PATENT, AMBIGUITY WITHIN A PROVISION OF A SETTLEMENT AGREEMENT; DIFFERENCE IS THAT LATENT AMBIGUITY ARISES WHERE EXTRINSIC EVIDENCE RAISES NEED FOR INTERPRETATION; PATENT AMBIGUITY IS ON THE FACE OF THE DOCUMENT; HERE, TWO INTERPRETATIONS OF THE PROVISION WERE POSSIBLE, SO PATENT AMBIGUITY WAS PRESENT; TRIAL COURT ERRED IN DENYING MODIFICATION.**

Appellate court reversed trial court order denying former husband's petition for downward modification of child support. At issue was interpretation of the child support provision in the spouses' settlement agreement. Former husband argued that his obligation should decrease when a specified qualifying event applied to one of the three minor children; former wife countered that the qualifying event must affect all three children. Reviewing the agreement *de novo*, appellate court commented that the child support provision was "far from a model of

clarity.” It held that the trial court erred in having found latent ambiguity in the support provision. A latent ambiguity exists where introduction of extrinsic evidence creates a need for interpretation or a choice among meanings; a patent ambiguity is on the face of the document. Here, the ambiguity was in the provision itself, which was subject to two possible interpretations: either former husband paid the full amount of child support until a qualifying event took place with respect to the last of the three children; or the support obligation would decrease whenever a qualifying event occurred with the first two children and would terminate when it took place with the third. Appellate court found that the latter interpretation was the more logical one. Under the first, there would have been no reason to use “decrease” in the provision because there would be no reduction due to a qualifying event for the first two children; “terminate” would have sufficed.

<http://opinions.1dca.org/written/opinions2013/05-06-2013/12-4757.pdf> (May 6, 2013).

Conway v. Conway, \_\_So.3d \_\_, 2013 WL 1316769, 38 Fla.L.Weekly D723 (Fla.1<sup>st</sup> DCA, April 3, 2013).

**TRIAL COURT CORRECTLY AWARDED ADDITIONAL ALIMONY TO SPOUSE, BUT ERRED IN NOT AWARDING PREJUDGMENT INTEREST AND ATTORNEY’S FEES;**

Former wife appealed the denial of prejudgment interest or attorney’s fees on her award of additional alimony. Appellate court affirmed the additional alimony, but reversed and remanded the denial of prejudgment interest and fees. Pursuant to an MSA, former husband was required to pay former wife a share of any annual bonus he received during the duration of his alimony obligation; however, the MSA failed to specify whether former wife’s share would be calculated based on gross or net bonus. Former wife argued that her share should be calculated from gross, pre-tax compensation. Predictably, former husband countered that it should be calculated based on net--money that had actually reached his pocket as opposed to amounts withheld from compensation. Finding the spouses’ conflicted interpretations of the MSA to “indicate an unanticipated ambiguity,” appellate court held that the trial court correctly looked to parole evidence to determine the proper construction and the spouses’ original intent. The trial court concluded that the spouses intended former wife’s share to be deducted from former husband’s net bonus. Appellate court found that this conclusion was supported by competent, substantial evidence, as was the trial court’s finding that former husband had underpaid alimony. Appellate court held that the fact that the trial court awarded additional alimony indicated its recognition of former wife’s right to the amounts she was underpaid; thus, the trial court erred in denying her prejudgment interest on the additional alimony and attorney’s fees as the prevailing party.

<http://opinions.1dca.org/written/opinions2013/04-03-2013/12-2357.pdf> (April 3, 2013).

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

Weissman v. Weissman, \_\_So.3d \_\_, 2013 WL 1891376, (Fla.2d DCA 2013).

**TRIAL COURT DID NOT DEPART FROM ESSENTIAL REQUIREMENTS OF LAW IN ENTERING ORDER, BUT TWO COMPONENTS WITHIN ORDER REQUIRED REVIEW; PETITION FOR CERTIORARI GRANTED IN PART AND DENIED IN PART.**

Appellate court granted certiorari relief to a portion of a post-judgment order entered in dissolution proceedings between former spouses. It had previously granted certiorari relief to him in *Weissman v. Weissman*, 102 So.3d 718 (Fla.2d DCA 2012). While declining to hold that the trial court had departed from essential requirements of law in entering the order under review, appellate court voiced its concern with two aspects of the order: one, the grant of temporary sole parental responsibility over the health care of the minor children to former wife, notwithstanding the fact that former husband was a physician; and two, although intended to be temporary, the order provided no “guidance” as to when its significant restrictions on former husband’s parental rights would cease or what he needed to do to have the restrictions removed. Accordingly, former husband’s petition for certiorari was granted in part and denied in part.

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Pages\\_2013/May/May%2008,%202013/2D12-5081.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2013/May/May%2008,%202013/2D12-5081.pdf) (May 8, 2013).

*Huffman v. Huffman*, \_\_So.3d\_\_, 2013 WL 1316897, 38 Fla.L.Weekly D751 (Fla.2d DCA 2013).

**TRIAL COURT FAILED TO CREDIT SPOUSE FOR ALIMONY DURING LITIGATION.**

In an appeal by both spouses to an amended final judgment of dissolution, appellate court reversed due to the trial court’s failure to credit former husband, in the equitable distribution schedule, for alimony he paid to former wife during pendency of the proceedings.

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Pages\\_2013/April/April%2003,%202013/2D11-2496.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2013/April/April%2003,%202013/2D11-2496.pdf) (April 3, 2013).

*Bazzel v. Bazzel*, \_\_So.3d\_\_, 2013 WL 1316696, 38 Fla.L.Weekly D752 (Fla.2d DCA 2013).

**TRIAL COURT ABUSED ITS DISCRETION IN CHILD SUPPORT CALCULATION.**

Former wife appealed final judgment of dissolution. Appellate court found the trial court’s calculation of child support to be unsupported by the record; accordingly, it reversed. Appellate court held that the trial court had abused its discretion in establishing the spouses’ incomes for purposes of child support calculation and in requiring former wife to pay former husband 100% of percentage of child support attributable to her by the guidelines even though she was to have the children only 40% of the time. Appellate court found this error to be “exacerbated” by the differences in the spouses’ monthly incomes prior to consideration of child support.

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Pages\\_2013/April/April%2003,%202013/2D11-2836.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2013/April/April%2003,%202013/2D11-2836.pdf) (April 3, 2013).

*Centeno v. Centeno*, \_\_So.3d\_\_, 2013 WL 1316749, 38 Fla.L.Weekly D755 (Fla.2d DCA 2013).

**TRIAL COURT ERRED IN ITS FINDINGS THAT MSA ALLOWED ONLY UPWARD MODIFICATION OF ALIMONY AND PAYOR SPOUSE HAD WAIVED MODIFICATION.**

Former husband appealed an order denying his petition to modify alimony; appellate court reversed. The MSA, which was incorporated into the final judgment, awarded former wife rehabilitative alimony of \$5000 per month for five years, but also provided that “since the alimony is insufficient to meet the needs of the wife as established during the parties’ marriage, the amount of the alimony shall be modifiable.” The term was not modifiable. The MSA provided for a reduction of alimony if former wife remarried within the five year period; it also provided for an extension of alimony at a reduced rate if she did not remarry within that time.

When former husband failed to make payments as required by the MSA, former wife moved to enforce his obligations, hold him in contempt, and be awarded fees. Former husband moved for a downward modification. The trial court found that former husband had waived his rights to seek modification of the amount of the alimony because the language of the MSA contemplated only an *increase* in alimony. Appellate court found error in that reasoning. It held that although the MSA described one “set of facts” under which the amount of alimony could be modified, the terms of the MSA neither limited modification to that set of circumstances, nor indicated a clear and unambiguous waiver by former husband of his statutory right to seek modification.

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Pages\\_2013/April/April%2003,%202013/2D12-1708.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2013/April/April%2003,%202013/2D12-1708.pdf) (April 3, 2013).

Weaver v. Corey, \_\_ So.3d \_\_, 2013 WL 1693960, (Fla.2d DCA 2013).

MSA REQUIRED SPOUSE’S PAYMENT OF COLLEGE EXPENSES FOR ADULT SON; COLLEGE EXPENSES GENERALLY INCLUDE ROOM AND BOARD IN ADDITION TO TUITION, BOOKS, AND FEES; AN AFFIRMATIVE DEFENSE NOT RAISED AT TRIAL CANNOT BE RAISED FOR THE FIRST TIME ON APPEAL; TRIAL COURT ABUSED ITS DISCRETION IN EXPERT FEE AWARD FOR CPA WHO PERFORMED SIMPLE MATH.

Pursuant to the MSA entered into during dissolution of their marriage, each spouse agreed to use their best efforts to provide for either private or parochial schooling, as well as college and graduate school for their three children, who were minors at the time of the dissolution; each spouse’s contribution would be calculated based on his or her gross annual income. Former husband appealed the trial court’s award of reimbursement to former wife and their adult son for the son’s college expenses and its award to former wife for the costs of litigating her breach of contract suit. He argued that former wife’s willful underemployment required him to pay almost 100% of the college expenses; however, his failure to raise this issue at trial cost him the opportunity to raise it on appeal. Affirmative defenses not raised at trial cannot be raised for the first time on appeal. Former husband also argued that the MSA contemplated the expenses of tuition, books, and fees, but not room and board. Noting that Florida courts have “generally recognized” that room and board are factored into the cost of higher education, appellate court affirmed the trial court’s determination that former husband was responsible for the college expenses; however, it reversed the expert witness fee part of the cost award. Appellate court held that a trial court’s discretion to award fees and costs is not “unbridled.” Appellate court found the services performed by the CPA, who reviewed college bills and invoices, to be “simple math,” rather than expert services; thus, the trial court abused its discretion in making this award.

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Pages\\_2013/April/April%2019,%202013/2D11-3113.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2013/April/April%2019,%202013/2D11-3113.pdf) (April 19, 2013).

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

Parra de Rey v. Rey, \_\_ So.3d \_\_, 2013 WL 2221492, (Fla.3d DCA 2013).

TRIAL COURT CORRECT IN GRANTING SUMMARY JUDGMENT IN DOM AND ADOPTING MSA; A TRIAL JUDGE MAY SCRUTINIZE AN MSA MORE CAREFULLY FOR FAIRNESS WHEN SPOUSES ARE NOT ESTRANGED THAN WHEN THEY ARE.

Appellate court upheld the validity of a marital settlement agreement (MSA) in the dissolution of a twenty-eight year marriage. The spouses began negotiating the MSA to control the terms of any future dissolution during a period of attempted reconciliation during pendency of the first dissolution proceeding. These negotiations continued over several months. Both former wife's accountant and lawyer explained the financial considerations of the proposed agreement and advised her that she did not have to sign it, but could continue to pursue further financial disclosure and engage in additional negotiations. Both spouses signed the agreement and the first dissolution proceeding was dismissed. A year later, former husband filed a second petition for dissolution and asked the trial court to distribute the assets pursuant to the MSA. Former wife appealed the final judgment of dissolution, which adopted and ratified the MSA, relying on *Castro v. Castro* 508 So.2d 330 (Fla.1987). Appellate court found that reliance misplaced because *Castro*, which concerned a postnuptial agreement entered into between spouses who were not in the midst of dissolution proceedings, does not govern MSAs entered into during the course of litigation. A trial judge may scrutinize an MSA more carefully for fairness between spouses who are *not* estranged than those where the spouses are dealing at arm's length and no longer have the "special fiduciary relationship of unestranged marital parties." Appellate court also found that former wife had been unable to show that the MSA should have been set aside.

<http://www.3dca.flcourts.org/Opinions/3D12-0363.pdf> (May 22, 2013).

*Sbert v. Labrada*, \_\_ So.3d \_\_, 2013 WL 1891304, (Fla.3d DCA 2013).

**PREMATURE TO APPEAL ORDER WHICH CONTEMPLATES JUDICIAL LABOR.**

Appeal of lower court order that expressly contemplates further judicial labor is premature.

<http://www.3dca.flcourts.org/Opinions/3D11-3071.pdf> (May 8, 2013).

*Rodriguez v. Reyes*, \_\_ So. 3d \_\_, 2013 WL 1810644, Fla.L.Weekly D974, (Fla.3d DCA 2013).

**WHEN A TRIAL COURT APPOINTS A MAGISTRATE TO TAKE TESTIMONY AND MAKE FINDINGS, IT CANNOT SUBSTITUTE ITS JUDGMENT FOR THE MAGISTRATE; IN THOSE INSTANCES; A TRIAL COURT'S ROLE IS SIMILAR TO APPELLATE COURT: TO REVIEW THE FINDINGS AND CONCLUSIONS, NOT REWEIGH THE EVIDENCE;**

The trial court rejected the general magistrate's recommendation that former husband receive a reduction of his child support obligation; appellate court then reversed the trial court after having found that it improperly reweighed the evidence when it reviewed the magistrate's findings. While it is usually the trial court which is charged with the task of making factual findings and legal determinations, once a trial court appoints a magistrate to take testimony and make findings, it cannot then substitute its judgment for the magistrate's. Instead, it takes on a role similar to that of an appellate court reviewing a lower court. When exceptions to the magistrate's recommendation are filed, the trial court should review the record to determine whether the magistrate's findings and conclusions are supported by competent, substantial evidence and whether the magistrate's legal conclusions are erroneous. Although a trial judge might weigh evidence differently if it were presented directly, here his or her role is strictly limited to review. <http://www.3dca.flcourts.org/Opinions/3D12-1975.pdf> (May 1, 2013).

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

Pomerance v. Pomerance, \_\_So.3d\_\_, 2013 WL 1890384, (Fla.4<sup>th</sup> DCA 2013).

#### **NO ERROR IN TRIAL COURT'S FINAL JUDGMENT OF DOM.**

Former husband appealed final judgment of dissolution which incorporated a marital settlement agreement. Finding no error, appellate court affirmed; however, it noted its ruling did not preclude former husband from proceeding on his pending petition for modification of alimony, which had not been considered by the trial court at the time he appealed the final judgment.

<http://www.4dca.org/opinions/May%202013/05-08-13/4D12-1196.op.pdf> (May 8, 2013).

Nunes v. Nunes, \_\_So.3d\_\_, 2013 WL 1890284, (Fla.4<sup>th</sup> DCA 2013).

#### **CONTEMPT ORDER AFFIRMED; SPOUSE DID NOT PRESERVE OBJECTION AS TO NOTICE AND DID NOT DEMONSTRATE TRIAL COURT FAILED TO MAKE REQUISITE FACTUAL DETERMINATIONS; APPELLATE COURT WILL NOT ASSUME TRIAL COURT COMMITTED REVERSIBLE ERROR IN ABSENCE OF A TRANSCRIPT.**

Former wife appealed an order holding her in civil contempt of court for willful failure to follow a court-ordered time-sharing plan. Appellate court found that she had not preserved her objection as to notice and had not demonstrated that the trial court failed to make the requisite factual determinations; accordingly, it affirmed. Appellate court held that the trial court's contempt order sufficiently detailed former wife's noncompliance with the time-sharing provision of the final judgment, but that even if the trial court's order had not, in the absence of a transcript, appellate court would not have assumed that the trial court committed reversible error.

<http://www.4dca.org/opinions/May%202013/05-08-13/4D12-3854.op.pdf> (May 8, 2013).

McDonald v. Browne, \_\_So.3d\_\_, 2013 WL 1315969, 38 Fla.L.Weekly D745 (Fla. 4<sup>th</sup> DCA 2013).

#### **TRIAL COURT ERRED IN FINDING SPOUSE IN DEFAULT OF STIPULATION.**

Appellate court agreed with former husband that the trial court erred in finding him in default of a settlement stipulation which gave him six months, from entry of a New York judgment dissolving the marriage, to transfer the mortgage on the spouses' jointly owned Florida home into his name. The stipulation provided that default would ultimately enable former wife to force sale of the home. Former wife moved to enforce the stipulation in Florida, arguing that former husband was in default because he had failed to remove her from liability within six months; former husband countered that default would require failure to remove her from liability and failure to pay the mortgage. The trial court found that although former husband had been paying the mortgage, he had failed to relieve former wife of her liability within the six month period; it gave him ten days to comply with the stipulation by removing her from any financial liability for the home. Appellate court held that the trial court had "erroneously interpreted" the stipulation to grant former wife a contractual right to force a sale of the home if former husband were not able to remove her from the mortgage within the six month period. Appellate court concluded that former wife's ability to force a sale had two prerequisites: former husband's failure to pay the mortgage and his failure to remove her name from the

mortgage. The finding that former husband had defaulted was incorrect under either a contractual or a contempt theory.

<http://www.4dca.org/opinions/April%202013/04-03-13/4D12-2824.op.pdf> (April 3, 2013).

Kunsman v. Wall, \_\_So.3d\_\_, 2013 WL 1442057, 38 Fla.L.Weekly D813 (Fla.4<sup>th</sup> DCA 2013).

**BASIS FOR FEE ENTITLEMENT MUST BE PLEAD IN ORIGINAL MOTION; ANY DUTY A PARENT HAS TO PAY AN ADULT CHILD'S COLLEGE EXPENSES IS MORAL, NOT LEGAL; ARGUMENT OF COUNSEL DOES NOT CONSTITUTE EVIDENCE; SPOUSE ENTITLED TO INTEREST AND COST-OF-LIVING ON DROP FUND WHEN DISBURSED.**

Former wife appealed a trial court order denying her exceptions to the general magistrate's report. Appellate court affirmed with the exception of: 1) The award of attorney's fees to former husband for his motion to compel delivery of a quit-claim deed from former wife for her share of the marital home; appellate court struck the award because former husband did not plead the basis for his fee entitlement in his original motion to enforce. 2) Regarding two payments made by former husband on behalf of two of the children, one a minor, the other an adult, appellate court found no error in the determination that the payment on the minor child's behalf was a marital expense, but held that because a parent has no legal obligation to support an adult child, the tuition payment for the adult child should not have been considered a marital obligation. Any duty a parent has to pay the college expenses of an adult child is moral rather than legal. When that obligation is made pursuant to an MSA, it is not child support, but a contractual obligation. 3) The only evidence as to other expenditures made for miscellaneous family expenses was offered by counsel; argument of counsel does not constitute evidence. On remand, those miscellaneous expenditures should be equitably divided along with the college tuition payment. 4) Former wife is entitled to accumulated interest and cost-of-living adjustments on her share of former husband's DROP fund when disbursed; trial court should correct its award on remand.

<http://www.4dca.org/opinions/April%202013/04-10-13/4D11-3285.op.pdf> (April 10, 2013).

Rivero v. Rivero, \_\_So.3d\_\_, 2013 WL 1439731, 38 Fla.L.Weekly D811 (Fla.4<sup>th</sup> DCA 2013).

**TRIAL COURT'S FAILURE TO HOLD EVIDENTIARY HEARING BEFORE GRANTING TEMPORARY RELOCATION CONTRAVENED RELOCATION STATUTE; FAILURE TO VERIFY A PLEADING, REQUIRED BY STATUTE TO BE VERIFIED, IS NOT A JURISDICTIONAL DEFECT; VERIFICATION MAY BE SUPPLIED BY AMENDMENT AND RELATE BACK TO TIME OF FILING OF ORIGINAL, UNVERIFIED PLEADING.**

This appeal of an order granting temporary relocation is included because relocation often arises within the context of dissolution. Here, the trial court's failure to hold an evidentiary hearing prior to allowing the temporary relocation contravened the requirements of the relocation statute. Appellate court also concluded that the father's verified answer to the mother's petition for relocation could be tied back to his timely, but unverified, answer. Failure to verify a pleading, required by statute to be verified, is not a jurisdictional defect; verification may be supplied by an amendment and relate back to the time the original, unverified pleading was filed.

<http://www.4dca.org/opinions/April%202013/04-10-13/4D12-3535.op.pdf> (April 10, 2013).

Rudel v. Rudel, \_\_So.3d\_\_, 2013 WL 1629167, (Fla.4<sup>th</sup> DCA 2013).

**TRIAL COURT DOES NOT LACK SUBJECT MATTER JURISDICTION AS A MATTER OF LAW BASED ON A SPOUSE'S NONPERMANENT STATUS, BUT STATUS MAY BE TAKEN INTO ACCOUNT IN FACTUAL DETERMINATION OF DOMICILIARY INTENT; ERROR TO DISMISS DV PETITION WHEN TESTIMONY WAS UNCONTROVERTED.**

Both spouses and their child were German citizens who had married in Florida; the wife and daughter were living in Florida. Husband petitioned for dissolution in Germany; wife served husband with a petition for dissolution, a petition for an injunction for protection against domestic violence, and a temporary injunction for protection at the Miami airport, on his arrival from Germany to pick up their daughter for a vacation. Evidence indicated that the wife did not intend to allow the daughter to leave with the husband. The trial court dismissed former wife's dissolution petition for lack of subject matter jurisdiction; appellate court affirmed the dismissal as being supported by competent, substantial evidence. It concluded that the trial court's ruling was not a determination that the wife could not establish residency as a matter of law, but a factual determination, based on the evidence presented, that former wife had not established actual residency with an intent to remain permanently. Appellate court held that a trial court does not lack subject matter jurisdiction as a matter of law, based on a spouse's nonpermanent status, but that status may be taken into consideration when the trial court makes its factual determination of domiciliary intent. Lack of permanent residency does not, as a matter of law, prevent a spouse from establishing residency for purposes of state court jurisdiction to dissolve a marriage. Appellate court reversed the dismissal of the petition for an injunction for protection against domestic violence because the various acts of domestic violence testified to by the wife were uncontroverted. Accordingly, it remanded for a new hearing on the domestic violence petition.

<http://www.4dca.org/opinions/April%202013/04-17-13/4D11-2616.op.pdf> (April 17, 2013).

Ingram v. Ingram, \_\_So.3d\_\_, 2013 WL 1629128, (Fla.4<sup>th</sup> DCA 2013).

**TRIAL COURT'S RESTRICTIONS REGARDING GUNS OVERLY BROAD.**

Appellate court affirmed trial court having established summer visitation, but found the trial court's restrictions regarding guns overly broad in that toy guns were included in the prohibition.

<http://www.4dca.org/opinions/April%202013/04-17-13/4D12-1940.op.pdf> (April 17, 2013).

Taylor v. Taylor, \_\_So.3d\_\_, 2013 WL 1748709, (Fla.4<sup>th</sup> DCA 2013).

**LUMP SUM ALIMONY IS NOT A TYPE OF ALIMONY BUT IS A MEANS TO ACCOMPLISH AN END; IT MAY INCLUDE REAL PROPERTY; IT IS FIXED AND NONMODIFIABLE; IT DOES NOT TERMINATE ON DEATH OF OBLIGOR OR REMARRIAGE OF OBLIGEE; TRIAL COURT MUST FIND SPECIAL CIRCUMSTANCES ABOVE AND BEYOND JUSTIFICATION FOR PERMANENT ALIMONY; NUNC PRO TUNC MEMORIALIZES PREVIOUSLY TAKEN JUDICIAL ACTS NOT NEW FACTS.**

Appellate court reversed the 2008 final judgment of dissolution due to lack of notice to former husband. On remand in 2011, the trial court issued a final judgment awarding the spouses' only significant asset—the marital home—to former wife as lump sum alimony. The award was based on the trial court's reasoning that former wife was entitled to permanent alimony, but that in

light of former husband's opposition to any spousal support, a monthly payment was doomed. Appellate court pointed out that the problem with the lump sum award was that the original justification for the award had "evaporated" by the time of the second trial in 2011 because former wife had remarried in 2009. Although the dissolution aspects of the 2011 judgment were correctly nunc pro tunc to 2008, the financial aspects involved facts developed at the 2011 trial which former husband attended; therefore, it was inappropriate for the trial court to have made all aspects of the dissolution nunc pro tunc. Appellate court held that lump sum alimony is not an actual type of alimony, it is a means to accomplish an end; it differs from other alimony remedies in that it may be comprised of real property—such as interest in a home and it establishes an obligation which is fixed and no modifiable, and which does not terminate upon death of the obligor or remarriage of the obligee. In order to award lump sum alimony, a trial court must find proof of special circumstances above and beyond the justification for permanent alimony; it must find that other forms of alimony are either unavailable or inappropriate. Appellate court concluded that the trial court was justified in finding former husband's threats and history of non-payment to be "unusual circumstances" justifying lump sum alimony over permanent periodic payments; however, there was no "special necessity" for lump sum alimony because former wife's remarriage terminated her entitlement to permanent alimony. Thus, the trial court abused its discretion in awarding former husband's entire share in the marital home.

Reversed and remanded for the trial court to divide the home through equitable distribution.  
<http://www.4dca.org/opinions/April%202013/04-24-13/4D11-4832.op.pdf> (April 24, 2013).

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

Lilly v. Lilly, \_\_ So.3d \_\_, 2013 WL 2256535, (Fla.5<sup>th</sup> DCA 2013).

**CONVERSION OF REHABILITATIVE ALIMONY TO PERMANENT ALIMONY REVERSED BECAUSE SPOUSE FAILED TO ESTABLISH REASONABLE AND DILIGENT EFFORTS TO COMPLY WITH REHABILITATIVE PLAN.**

Question was whether the trial court had properly converted an award of rehabilitative alimony, affirmed in *Lilly v. Lilly*, 35 So.3d 1022 (Fla.5<sup>th</sup> DCA 2010), to permanent alimony. In addition to having been awarded permanent alimony, former wife had been awarded rehabilitative alimony for eighteen months to receive vocational rehabilitation training. Former husband appealed the trial court having granted former wife's petition for conversion, arguing she had failed to establish reasonable and diligent efforts to comply with the rehabilitative plan. Appellate court reiterated that the purpose of a rehabilitative plan is to assist a spouse in "achieving the goal of becoming either partially or fully self-supporting, thus eliminating or reducing the need for further support." Recognizing that things do not always go as planned, appellate court held that a trial court has the discretion to convert rehabilitative alimony to permanent; however, the spouse seeking the conversion must be able to establish that he or she has made reasonable and diligent efforts to comply with the rehabilitative plan. Concluding that former wife had failed to carry her burden of establishing those efforts, appellate court reversed.

<http://www.5dca.org/Opinions/Opin2013/052013/5D11-4093.op.pdf> (May 24, 2013).

Raphael v. Raphael, \_\_So.3d\_\_, 2013 WL, (Fla.5<sup>th</sup> DCA 2013).

**ANTIPATHY OR HOSTILITY TOWARD A PARTY'S COUNSEL GROUNDS FOR DISQUALIFICATION; WRIT OF PROHIBITION GRANTED; JUDGE DISQUALIFIED;**

Former wife sought a writ of prohibition after the trial judge denied her motion to disqualify him.

Noting that a "judge's antipathy or hostility toward a party's counsel can provide ground for disqualification," appellate court found that former wife's motion was timely filed and that the petition clearly set forth the hostility existing between former wife's counsel and the trial judge. Accordingly, appellate court granted the writ and disqualified the judge from hearing the case.

<http://www.5dca.org/Opinions/Opin2013/052013/5D13-1304.op.pdf> (May 24, 2013).

Parnell v. Parnell, \_\_So.3d\_\_, 2013 WL 1482851, 38 Fla.L.Weekly D829 (Fla.5<sup>th</sup> DCA 2013).

**MINISTERIAL ACT EXCEPTION TO DIQUALIFICATION RULE DID NOT APPLY.**

Appellate court concluded the modification order issued by the trial judge after he had recused himself did not fall into the exception carved out in *Fisher v. Knuck*, 497 So.2d 240 (Fla.1986), which allows a trial judge to retain the authority to perform the purely ministerial act of reducing an oral ruling to writing; accordingly, it reversed. Although the trial court had ruled on many of the issues raised at trial and the spouses had stipulated to others, several issues remained for the spouses, in the words of the trial judge, "to figure out", specifically, the remainder of the holiday and summer-break schedule. Appellate court held that nothing in the record reflected a meeting of the minds regarding those issues and that the trial court's order provided details not articulated in its oral ruling; thus, the ministerial act exception to the disqualification rule did not apply.

<http://www.5dca.org/Opinions/Opin2013/040813/5D12-785.op.pdf> (April 12, 2013).

Price v. Price, \_\_So.3d\_\_, 2013 WL 1775534, (Fla.5<sup>th</sup> DCA 2013).

**MSA REQUIRED SON'S FULL-TIME COLLEGE ATTENDANCE FOR CONTINUED CHILD SUPPORT OBLIGATION; LACK OF COMPETENT, SUBSTANTIAL EVIDENCE THAT SON ATTENDED DURING A FALL SEMESTER TRIGGERED REIMBURSEMENT TO THE PAYOR BY THE PAYEE FOR CHILD SUPPORT PAID DURING THAT TIME.**

MSA required full-time college attendance by spouses' son for former husband's continued child support obligation. Lack of competent, substantial evidence to support the trial court's finding that the spouses' son attended college full-time during a particular semester triggered appellate court's order to former wife to reimburse former husband for child support paid during that time.

<http://www.5dca.org/Opinions/Opin2013/042213/5D12-32.op.pdf> (April 26, 2013).

## **Domestic Violence Case Law**

## ***Florida Supreme Court***

In re Amendments to Florida Supreme Court Approved Family Law Forms, \_\_\_ So.3d \_\_\_\_, 2013 WL 1908394 (Fla. 2013) [FORMS AMENDED AND CREATED](#). The Supreme Court reviewed the Florida Supreme Court Approved Family Law Forms and determined that new forms and amendments to several existing forms were needed due to recent legislation relating to injunctions for protection against stalking. The existing forms were amended to: (1) add the term “stalking” to the forms' respective titles, bodies, footers, and instructions, where appropriate; (2) add language to the instructions to form 12.980(g) regarding what information to include in a supplemental affidavit in support of a petition for injunction for protection against stalking; (3) add a blank textbox to the supplemental affidavit in support of a petition for injunction for protection against stalking for the petitioner to describe the alleged stalking; and (4) renumber several forms. New forms were also adopted: 12.980(t) (Petition for Injunction for Protection Against Stalking), 12.980(u) (Temporary Injunction for Protection Against Stalking), and 12.980(v) (Final Judgment for Protection Against Stalking). The new forms may be used immediately. <http://www.floridasupremecourt.org/decisions/2013/sc13-305.pdf> (May 9, 2013).

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

No new opinions for this reporting period.

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

Baker v. Baker, \_\_\_ So.3d \_\_\_\_, 2013 WL 1891372 (Fla. 2d DCA 2013) [DENIAL OF MOTION TO DISSOLVE INJUNCTION REVERSED](#). The former husband filed a motion to dissolve an injunction for protection against domestic violence, and following a hearing, the trial court denied the motion. The appellate court noted that in order to dissolve the injunction, the former husband had to show a change in circumstances. Since the injunction was ordered, the former husband was incarcerated on a 30 year sentence, and the court held that the incarceration had substantially changed the situation and the injunction no longer served a valid purpose. Therefore, the injunction was dissolved. [http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Pages\\_2013/May/May%2008,%202013/2D12-464.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2013/May/May%2008,%202013/2D12-464.pdf) (May 8, 2013).

Goudy v. Duquette, \_\_\_ So.3d \_\_\_\_, 2013 WL 1891323 (Fla. 2d DCA 2013) [REPEAT VIOLENCE INJUNCTION REVERSED](#). A dance team coach obtained an injunction for protection against repeat violence against a dancer's parent and the parent appealed. The court held that most of the contact served legitimate purposes and were not sufficient to cause a reasonable person emotional distress. Since there was no repeated harassment or malicious following there was no proof of stalking, and without stalking there was no proof of repeat violence, and the court reversed the injunction. [http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Pages\\_2013/May/May%2008,%202013/2D12-1593.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2013/May/May%2008,%202013/2D12-1593.pdf) (May 8, 2013).

Fernandez v. Wright, \_\_\_ So.3d \_\_\_\_, 2013 WL 1442165, (Fla. 2d DCA 2013) **AWARD OF ATTORNEY FEES REVERSED**. The mother filed a petition for modification of child support, and the father filed a motion requesting attorney fees, additional time sharing, and enforcement of the previous court order. The mother had previously filed three petitions for an injunction for protection against domestic violence that were not a part of this family law case. The court ordered a modification to the parenting plan and awarded the father attorney fees for the family law case and the domestic violence cases, and the mother appealed. The appellate court held that the trial court abused its discretion in awarding attorney fees to the father for work related to the domestic violence petitions because the domestic violence statute does not allow an award of attorney fees in domestic violence cases.

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Pages\\_2013/April/April%2010,%202013/2D12-849.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2013/April/April%2010,%202013/2D12-849.pdf) (April 10, 2013).

McNulty ex rel. G.M. v. Douglas ex rel. K.D., \_\_\_ So.3d \_\_\_\_, 2013 WL 1442281, (Fla. 2d DCA 2013) **DATING VIOLENCE INJUNCTION REVERSED**. A father petitioned for an injunction against a minor boy for protection against dating violence on behalf of his minor daughter. The court granted the injunction and the father of the minor boy appealed. The appellate court reversed and remanded the case for a full hearing because the trial court did not allow the minor boy to call witnesses or cross-examine the petitioner and therefore was not allowed due process.

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Pages\\_2013/April/April%2010,%202013/2D11-4191.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2013/April/April%2010,%202013/2D11-4191.pdf) (April 10, 2013).

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

No new opinions for this reporting period.

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

Rudel v. Rudel, \_\_\_ So.3d \_\_\_\_, 2013 WL 1629167, (Fla. 4<sup>th</sup> DCA 2013) **DISMISSAL OF INJUNCTION REVERSED**. The wife, a German citizen, petitioned for dissolution of marriage and for an injunction for protection against domestic violence. The court granted the ex parte temporary injunction, but later dismissed the petition for injunction against domestic violence and the wife appealed. The court reversed the part regarding the injunction dismissal and noted that the wife gave uncontradicted testimony regarding acts of domestic violence and also provided corroborating witness testimony. Although the dissolution of marriage petition was correctly dismissed due to jurisdiction issues, the appellate court held that the wife did present sufficient evidence to support an injunction, and remanded the case for a new hearing because the husband did not have the opportunity to present evidence on the domestic violence issue since his challenge to jurisdiction was still outstanding.

<http://www.4dca.org/opinions/April%202013/04-17-13/4D11-2616.op.pdf> (April 17, 2013).

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

Curtis v. Curtis, \_\_\_ So.3d \_\_\_\_, 2013 WL 1482837 (Fla. 5<sup>th</sup> DCA 2013) **ORDER DENYING INJUNCTION REVERSED**. The wife filed a petition for an injunction for protection against domestic violence against her husband. The petition contained a sworn statement

about a violent incident and also contained a copy of the husband's arrest report. The court denied the petition without a hearing and handwrote on the order "the petitioner is protected by conditions of release" from the pending criminal action. The wife filed a motion for rehearing, but the trial court denied the motion and ruled that the petitioner cannot reasonably fear that she is in danger since the respondent currently has conditions of release more restrictive than what an injunction could provide, including electronic monitoring. The wife appealed and argued that the trial court erred by denying her petition without conducting a hearing, and the appellate court agreed and reversed. The appellate court noted that the trial court should have held a hearing, and also erred by deciding that the husband's bond conditions were sufficient to fully protect the wife. Criminal bond conditions are not the same as the conditions which can be imposed under the domestic violence injunction statute, and do not award the petitioner exclusive use of the parties' home, temporary support, or order the respondent to participate in treatment, intervention, counseling services, or a batterers' intervention program. The court also noted that since the wife is not a party to the criminal proceeding, she might not receive timely notice of any dismissal or changes in the husband's bond conditions. <http://www.5dca.org/Opinions/Opin2013/040813/5D12-1537.op.pdf> (April 12, 2013).