**OSCA/OCI'S FAMILY COURT CASE LAW UPDATE**
**August-September 2011**

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## Delinquency Case Law

### *Florida Supreme Court*

No new opinions for this reporting period.

### *First District Court of Appeal*

M.H. v. State, __ So. 3d __, 2011 WL 3837285 (Fla. 1st DCA 2011). DISPOSITION REVERSED AND REMANDED WHERE TRIAL COURT'S ORDER FAILED TO MEET THE DICTATES REQUIRED BY E.A.R. V. STATE, 4 SO. 3D 614 (FLA. 2009). The juvenile pled guilty to possession with intent to sell, manufacture, or deliver a controlled substance, and possession of less than 20 grams of marijuana. The juvenile had two previous arrests for possession of marijuana and was placed on probation for both offenses. The juvenile was still on probation for one of the prior charges at the time of his arrest on the instant charges. The Department of Juvenile Justice (DJJ) recommended probation and substance abuse education but did not discuss the timing of the prior arrests or provide any reason why probation would be any more effective than it had been in the previous cases. The trial court rejected the DJJ's recommendation and placed the juvenile in a moderate-risk facility. The juvenile appealed the disposition. The First District Court of Appeal held that the trial court's order failed to meet the requirements of E.A.R. v. State, 4 So. 3d 614 (Fla. 2009), in order to deviate from a DJJ disposition recommendation. The First District found that the trial court's order failed to articulate: why DJJ's recommendation was deficient; an understanding of the respective characteristics of the opposing restrictiveness levels; and why placement in a moderate-risk facility was the least-restrictive setting necessary to protect the public from recidivism, while balancing the need for rehabilitation. Accordingly, the disposition order was reversed and remanded to allow the trial court an opportunity make the necessary findings to support deviating from the DJJ's recommendation or else enter a new order placing appellant on probation.
http://opinions.1dca.org/written/opinions2011/08-31-2011/11-0572.pdf (August 31, 2011).

### *Second District Court of Appeal*

M.P. v. State, __ So. 3d __, 2011 WL 3303476 (Fla. 2d DCA 2011). RESTITUTION ORDER REVERSED WHERE THE VICTIM'S LOSS WAS NOT CAUSED DIRECTLY OR INDIRECTLY BY THE JUVENILE'S OFFENSE. The juvenile dropped off an acquaintance to "test drive" a motorcycle that was for sale. The acquaintance rode off and never returned. The juvenile left the scene before the police arrived and was charged as an accessory after the fact to grand theft of a motorcycle. The juvenile plead no contest and the trial court imposed restitution. The juvenile appealed the restitution order, arguing that he could not be held jointly or severally liable because the damages occurred independently of his offense. The Second District Court of Appeal found that for restitution to be imposed against the juvenile, the victim's loss must have been caused directly or indirectly by the juvenile's offense. In the instant case, there was no evidence that suggested that the juvenile acted in concert to steal the motorcycle. Thus, the damages arising from the motorcycle theft would have occurred regardless of whether the juvenile was found an accessory after the fact. Therefore, the juvenile could not be held liable

for restitution. Accordingly, the order of restitution was reversed.
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/August/August%2003,%202011/2D10-2046.pdf (August 3, 2011).

## *Third District Court of Appeal*

K.D. v. State, __ So. 3d __, 2011 WL 4056161 (Fla. 3d DCA 2011). JUVENILE COULD NOT BE ADJUDICATED DELINQUENT FOR LESSER-INCLUDED OFFENSE WHERE THE CHARGING DOCUMENT FAILED TO EXPLICITLY ALLEGE ALL THE ELEMENTS OF THE LESSER OFFENSE. The juvenile was found guilty of committing a trespass in a conveyance as a permissive lesser included offense of grant theft. The juvenile appealed his adjudication for trespass in a conveyance. The Third District Court of Appeal held that the juvenile could not be adjudicated delinquent for trespass in a conveyance as a lesser-included offense of grand theft, where the petition did not allege an essential element of the lesser-included offense. The petition for delinquency in this case failed to allege the essential element that the juvenile willfully entered or remained in the motor scooter. Accordingly, the adjudication for trespass in a conveyance was reversed with directions to vacate.
http://www.3dca.flcourts.org/Opinions/3D10-1590.pdf (September 14, 2011).

L.T. v. State, __ So. 3d __, 2011 WL 4056658 (Fla. 3d DCA 2011). MOTION TO DISMISS CHARGE OF PROVIDING FALSE IDENTIFICATION TO A POLICE OFFICER SHOULD HAVE BEEN GRANTED WHERE THE JUVENILE RECANTED BEFORE ANY SERIOUS HARM COULD OCCUR. The juvenile appealed from an order denying his motion to dismiss and adjudicating him delinquent for providing false identification to a police officer. The juvenile argued that he recanted before any serious harm could occur. Police officers investigating an armed aggravated battery spoke with the alleged victim and the juvenile's mother, who provided the officer with the juvenile's name and date of birth as well as a description of what he looked like, his tattoos, and what he was wearing when last seen. The officers then proceeded to where they believed they might find the juvenile. The officers saw an individual who, based on the description given, they immediately knew to be the juvenile. On questioning, the juvenile provided a false name. The juvenile was taken into custody. As he was being taken to the police car for transport, they passed by the juvenile's mother who commented, "Oh, they got him." The juvenile was read his Miranda rights and was placed in the back seat of the police car. As the officers began filling out paperwork related to the arrest, the juvenile provided his true identity. The State maintained that the recantation defense was untenable once the juvenile was arrested. See L.J. v. State, 971 So. 2d 942 (Fla. 3d DCA 2007). The Third District Court of Appeal found that the record confirmed that the officers knew the juvenile's true identity almost immediately and before he was arrested. Thus, no "harm" was incurred by the juvenile not recanting until shortly after he was arrested. The Third District noted that while an arrest may be a critical or essential factor in determining whether a false identification may be recanted, it is not alone determinative, and the decision in L.J. should not be read as so holding. In the instant case, the officers knew the juvenile's identity almost immediately upon encountering him and the arresting officer testified that the false name given by the juvenile impeded his investigation for about a second. Accordingly, the juvenile's motion to dismiss should have been granted. The order under review

was reversed.
http://www.3dca.flcourts.org/Opinions/3D10-2678.pdf (September 14, 2011).

D.J. v. State, __ So. 3d __, 2011 WL 3687427 (Fla. 3d DCA 2011). ADJUDICATION AFFIRMED BECAUSE ADMISSION OF SCHOOL ATTENDANCE RECORD INTO EVIDENCE WITHOUT PROPER AUTHENTICATION WAS FOUND TO BE HARMLESS ERROR. The juvenile appealed his adjudication, arguing that the trial court erred in admitting his school attendance record into evidence. The Third District Court of Appeal found that the trial court erred in admitting the school attendance record without proper authentication. See s. 90.901, F.S. (2010). However, the adjudication was affirmed because the trial court's error was harmless error beyond a reasonable doubt.
http://www.3dca.flcourts.org/Opinions/3D10-0934.pdf (August 24, 2011).

M.J. v. State, __ So. 3d __, 2011 WL 3687405 (Fla. 3d DCA 2011). EVIDENCE SUPPORTED ADJUDICATION FOR RESISTING AN OFFICER WITHOUT VIOLENCE. The juvenile appealed his adjudication for resisting a police officer without violence. Police were dispatched in response to a burglary in process. After setting up a perimeter, they observed the juvenile running through an alleyway. One of the officers called out the juvenile's nickname, "Skeeter," and told him to stop. The juvenile turned, smiled, and continued running. Another officer, who also was able to identify the juvenile from a previous encounter, observed him coming up from the bushes where he was hiding in the alleyway. After being chased by both officers down the alley, over some fences and into buildings—all the while being told by officers to "stop"— the juvenile was apprehended and placed in handcuffs. The juvenile argued that there was no reasonable suspicion of criminal activity sufficient to justify the stop and thus the officers were not executing a legal duty as required to sustain the charge of resisting arrest without violence. The Third District Court of Appeal found that to support a conviction for resisting arrest without violence under s. 843.02, F.S. (2007), the State must prove that: (1) the officer was engaged in the lawful execution of a legal duty; and (2) the defendant's actions, by his words, conduct, or a combination thereof, constitute obstruction or resistance of the lawful execution of a legal duty. The element of lawful execution of a legal duty is satisfied if an officer has either a founded suspicion to stop the person or probable cause to make a warrantless arrest. A stop is justified when an officer observes facts giving rise to a reasonable suspicion that criminal activity has occurred or is about to occur. Whether an officer's suspicion is reasonable must be determined from the totality of the circumstances existing at the time of the investigative stop, based on the facts known to the officer before the stop. In the instant case, the Third District held that there was reasonable suspicion for the officers to stop the juvenile, and that the officers were lawfully executing a legal duty sufficient to satisfy the charge of resisting an officer without violence. Accordingly, the juvenile's adjudication for resisting an officer without violence was affirmed. The case was, however, remanded for the purpose of holding an evidentiary hearing to determine if the juvenile voluntarily waived his presence at sentencing.
http://www.3dca.flcourts.org/Opinions/3D11-0153.pdf (August 24, 2011).

D.F. v. State, __ So. 3d __, 2011 WL 3300391 (Fla. 3d DCA 2011). SUPPRESSION OF MARIJUANA EVIDENCE WAS AFFIRMED WHERE THE CONTRABAND WAS THE PRODUCT OF AN ILLEGAL

SEIZURE. The juvenile was charged with a violation of 985.711, F.S. (2010), possession of marijuana upon the grounds of a juvenile detention facility. During a multi-agency investigatory sweep at an apartment complex, a detective with binoculars observed the juvenile discard baggies of suspected marijuana. The detective arrested the juvenile, and he was transported to the Juvenile Assessment Center (JAC). During a search at the JAC, a small bag of marijuana was found hidden in the juvenile's hair. The juvenile filed a motion to suppress, arguing that this contraband was the product of an initial illegal seizure that occurred during an investigatory sweep. The sweep involved at least twenty police officers who swarmed an apartment complex with firearms drawn and made verbal commands such as "police" and "stop." The trial court granted the juvenile's motion to suppress, concluding that based on the totality of circumstances, the juvenile was "seized" when he discarded the suspected contraband, and the seizure was not supported by probable cause, reasonable suspicion, or subject to a warrant exception. As a result, the trial court suppressed the "fruits" of the illegal seizure. The State appealed. The Third District held that: (1) a reasonable person in juvenile's position, would not have felt free to leave when twenty armed police officers approached, conducting a raid of apartment complex, and (2) the juvenile submitted to the police show of authority. Therefore, the trial court correctly concluded that the juvenile was illegally seized and that the resulting evidence must be suppressed. Accordingly, the trial court's granting of the juvenile's motion to suppress was affirmed. Judge Rothenberg dissented.
http://www.3dca.flcourts.org/Opinions/3D10-0996.pdf (August 3, 2011).

## *Fourth District Court of Appeal*

C.D. v. State, __ So. 3d __, 2011 WL 4056214 (Fla. 4th DCA 2011). DENIAL OF MOTION TO SUPPRESS MARIJUANA EVIDENCE WAS REVERSED WHERE VIOLATION OF NONCRIMINAL ORDINANCE DID NOT SUPPORT THE JUVENILE'S ARREST OR SEARCH. Two deputies were conducting surveillance at a city park because of reports of drug paraphernalia found there. Two boys were observed after dark. The deputies confronted the boys as they approached the park exit. The deputies attempted to explain the dawn to dusk ordinance for the park. Posted signs gave notification of the park's time of operation. The juvenile was recognized as a person who had been warned several weeks earlier. As one of the deputies began to explain the ordinance, the juvenile began to walk away. The deputy called him back, but the juvenile continued to walk away. At that point the juvenile was arrested for violation of the ordinance. The juvenile then made movements toward his pocket. The deputy was unsure if the juvenile had a weapon and searched him incident to the arrest for officer safety. Marijuana was found and the juvenile was charged with possession. The juvenile moved to suppress claiming that the ordinance was noncriminal and could not support an arrest or a search incident thereto. The trial court denied the motion, finding that the officer had a right to search the juvenile to ensure officer safety because of the furtive movements. The juvenile pled to the charge, reserving his right to appeal the dispositive issue. The Fourth District Court of Appeal found that the juvenile was initially arrested for being in the city park after dark, a violation of a municipal ordinance. That ordinance was a noncriminal ordinance that provided for no penalty other than possibly a fine. An "arrest" for the violation of such an ordinance, as authorized in s. 901.15(1), F.S., permits only a detention for the time necessary to issue a summons or notice to appear.

Thus, the full custodial detention and search, in the instant case, violated the Fourth Amendment. The State had argued that the deputy had the right to detain the juvenile for violation of the ordinance and in doing so became concerned for officer safety when the juvenile moved his hand close to his pocket, thus justifying the search. The Fourth District found that such a movement by an individual detained for a noncriminal infraction is insufficient to warrant a pat-down or any protective search. An officer can do a pat-down for weapons where he has a reasonable suspicion that the suspect is armed. A weapons pat-down is justified where an officer sees a bulge in the defendant's clothing. However, an officer does not have reasonable suspicion that a defendant is armed merely because, following a noncriminal traffic stop, the defendant appears nervous and keeps his hands in or near his pockets. The officer only saw the juvenile move his hands towards his pocket. The officer saw no bulge or any indication of a weapon. Moreover, the officer did not do a mere pat-down but commenced a full search. The circumstances were insufficient to warrant a reasonable suspicion that the juvenile was armed. Accordingly, the Fourth District held that the trial court erred in denying the juvenile's motion to suppress, and reversed and remanded to vacate the adjudication. http://www.4dca.org/opinions/Sept%202011/09-14-11/4D10-219.op.pdf (September 14, 2011).

T.S.W. v. State, __ So. 3d __, 2011 WL 3586168 (Fla. 4th DCA 2011). CARRYING A CONCEALED WEAPON FINDING WAS REVERSED WHERE THE KNIFE WAS FOUND TO MEET THE COMMON POCKETKNIFE EXCEPTION. The juvenile appealed the order finding him guilty of carrying a concealed weapon in violation of s. 790.01, F.S. (2009). The blade of the knife was approximately three and a quarter inches, and folded into the handle. When fully opened, the knife measured almost eight inches long. The cutting edge of the blade consisted of a combination of smooth and serrated portions. The first inch and a half was smooth, and the next inch had a serrated edge. When folded, the knife handle was slightly curved with a camouflage pattern on each side. The handle also had grooves to allow the user to hold the knife securely. The State argued that the knife was a combat-style knife and not a common pocketknife. The grooves on the handle along with the partially serrated blade were weapon-like characteristics, which took the knife out of the exception of the definition of a weapon. The Fourth District Court of Appeal disagreed, and found that the knife had the characteristics of a common pocketknife and had no weapon-like characteristics such as a hilt guard or notched combat-style grip. The Fourth District held that the trial court erred in denying the juvenile's motion for judgment of dismissal because the evidence established that the characteristics of the knife were those of a common pocketknife and not a weapon as defined by s. 790.001(13), F.S. Order finding the juvenile guilty of carrying a concealed weapon was reversed. http://www.4dca.org/opinions/Aug%202011/08-17-11/4D10-969.op.pdf (August 17, 2011).

T.T. v. State, __ So. 3d __, 2011 WL 3586194 (Fla. 4th DCA 2011). VIOLATION OF PROBATION REVERSED WHERE NO EVIDENCE WAS PRESENTED THAT THE JUVENILE VIOLATED HIS PROBATION ON THE DATES CONTAINED IN THE CHARGING AFFIDAVIT. The affidavit of violation specified that the juvenile had violated a condition of probation by skipping school or being tardy on specific dates. The Fourth District Court of Appeal found that no evidence was presented at the violation of probation hearing that the juvenile violated his probation on those

specific dates. The Fourth District cited the court in Cherington v. State, 24 So. 3d 658 (Fla. 2d DCA 2009), which found in a similar case that to revoke probation based on conduct not charged in the affidavit would be a deprivation of due process. Accordingly, in the instant case, the violation of probation finding was reversed and remanded.
http://www.4dca.org/opinions/Aug%202011/08-17-11/4D10-1869.op.pdf (August 17, 2011).

A.M.O. v. State, __ So. 3d __, 2011 WL 3477073 (Fla. 4th DCA 2011). LOITERING AND PROWLING FINDING REVERSED WHERE OFFICER DID NOT AFFORD THE JUVENILE THE OPPORTUNITY TO IDENTIFY HIMSELF OR TO EXPLAIN HIS PRESENCE AND CONDUCT. A detective observed the juvenile and his friend riding their bicycles, wearing what was described as black ski masks on their heads. There had been numerous robberies in the area. The detective approached the juvenile and his friend because he was concerned that they were getting ready to rob some children. The juvenile explained that the "ski masks" were from Halloween. Since it had been three weeks since Halloween, the detective's alarm was not dispelled and they were placed into custody. At trial, when the State rested, the juvenile moved for a judgment of dismissal, arguing that the detective failed to ask the juvenile to identify himself or ask for an explanation for the juvenile's presence as required by s. 856.021(2), F.S. The juvenile also argued there was no threat to persons or property, only that the detective had a hunch that they were going to somehow harm the children walking around. The trial judge denied the motion. The juvenile then testified that he and his friend were going to a skate park, but stopped at a gas station to get a drink. When questioned about the ski masks, he explained that they were common knit hats that they cut holes in for Halloween. After Halloween, they still used them to soak up sweat and keep it from getting in their eyes when riding their bikes. The juvenile renewed his motion for judgment of dismissal. The trial judge denied the renewed motion. The trial judge stated that the juvenile was not charged with a robbery and he did not think the juvenile was trying to rob anyone. However, the trial judge found the juvenile guilty of loitering and prowling. The Fourth District Court of Appeal found that s. 856.021(2), F.S., clearly stated that a person cannot be convicted of loitering and prowling if the law enforcement officer does not require the person to identify themselves and explain their presence and conduct. In the instant case, the juvenile was not afforded this opportunity. There was no testimony that the juvenile refused to identify himself, took flight, or concealed himself. More importantly, the trial court found that the juvenile was not about to commit robbery at the time he was stopped. If the detective had believed the same thing as the trial judge, it would have dispelled the alarm and immediate concern. Therefore, the trial court's finding that the juvenile was not trying to rob someone precluded the trial judge from finding the juvenile guilty of prowling and loitering. Accordingly, the judgment of guilt was reversed and remanded. http://www.4dca.org/opinions/Aug%202011/08-10-11/4D10-2418.op.pdf (August 10, 2011).

K.M.B. v. State, __ So. 3d __, 2011 WL 3477077 (Fla. 4th DCA 2011). FINDING OF TRESPASS AFTER WARNING REVERSED WHERE NOTICE TO LEAVE WAS NOT PROVIDED. The juvenile appealed his adjudication for resisting arrest without violence and trespass after warning. The incident took place at a shopping mall. At 10:15 p.m. mall security routinely does a sweep of all juveniles who are unaccompanied by a parent. A juvenile will be asked to leave the property if he or she is unaccompanied by a parent and does not have a movie ticket. If a movie ticket is

bought, the juvenile needs to enter the movie theater—a juvenile cannot remain in the common area of the mall. The mall hires off-duty police officers to enforce trespass. An off-duty officer testified that he observed the juvenile having a verbal altercation with a security guard and that the juvenile was shouting obscenities. The officer tried to get the juvenile's information but the juvenile responded "f—— you, cracker." At that point, based on what the officer saw, the officer told the juvenile that he was under arrest. The officer did not tell the juvenile why he was under arrest. The officer testified that it was his intention to arrest the juvenile for disorderly conduct. As the officer tried to arrest him, the juvenile grabbed a hand rail; the officer could not get his handcuffs on the juvenile or get the juvenile's hands behind his back. The officer then placed the juvenile in a headlock and took him to the ground. Eventually a security officer was able to handcuff the juvenile. The juvenile was then arrested and removed from the property. The officer testified that he never got to the point of mentioning anything to the juvenile about trespassing, nor did he specifically tell the juvenile to leave the property. Once the juvenile said "f—— you, cracker," the officer placed him under arrest. The juvenile was charged with resisting arrest without violence and trespass after warning. The juvenile moved several times for a judgment of dismissal as to the trespass after warning charge. The trial court denied the motions and found the juvenile guilty of resisting arrest without violence and trespass after warning. On appeal, the juvenile argued that the trial court erred in denying his motions because the officer did not warn him that he was trespassing, or ask him to leave. The Fourth District Court of Appeal held that the trial court erred in denying the juvenile's motions for judgment of dismissal as to the trespass charge because the officer never warned the juvenile or actually communicated that he was to leave pursuant to s. 810.09, F.S. The Fourth District found that the officer did not have probable cause to arrest the juvenile for disorderly conduct. Mere cursing at an officer was insufficient to form probable cause for an arrest for disorderly conduct. However, this point was not raised on appeal. Thus, the Fourth District reversed as to the trespass after warning charge, but affirmed as to the resisting arrest without violence charge. http://www.4dca.org/opinions/Aug%202011/08-10-11/4D10-2645.op.pdf (August 10, 2011).

## *Fifth District Court of Appeal*

A.B. v. State, ___ So. 3d ___, 2011 WL 3627418 (Fla. 5th DCA 2011). PROBATION UNTIL AGE TWENTY-ONE WAS PROPER WHERE JUVENILE HAD BEEN PLACED IN SEX OFFENDER PROGRAM. The juvenile appealed and argued that the trial court exceeded its jurisdiction by placing her on probation until age twenty-one because she was not committed to a residential treatment facility. The Fifth District Court of Appeal found that s. 985.0301(5)(h), F.S. (2010), provided that a court may retain jurisdiction of a juvenile sexual offender who has been placed in a program or facility for juvenile sexual offenders until the juvenile sexual offender reaches the age of 21. The Fifth District held that the statute is unambiguous; if either condition is satisfied, extended jurisdiction is proper. Since the trial court placed the juvenile in a sex offender "program", the fact that she was not committed to a residential treatment facility was inconsequential and probation until age twenty-one was proper. http://www.5dca.org/Opinions/Opin2011/081511/5D10-3565.op.pdf (August 19, 2011).

H.L.D. v. State, ___ So. 3d ___, 2011 WL 3359610 (Fla. 5th DCA 2011). DENIAL OF MOTION FOR EXTRAORDINARY RELIEF REVERSED BECAUSE THE TRIAL COURT'S ORDER WAS BASED, IN PART, ON INFORMATION RECEIVED THROUGH IMPROPER EX PARTE COMMUNICATIONS. The juvenile allegedly committed the offenses of aggravated stalking of a minor under sixteen years of age and making harassing telephone calls. The alleged victim testified that the juvenile made repeated threatening calls to her over a two-day period. One of the calls was directed to voicemail, recorded onto a CD, and then given to a law enforcement officer. The juvenile acknowledged that the recorded telephone call was from him. However, he testified that he called the victim to get her boyfriend's telephone number because the boyfriend had just called and threatened him. The juvenile denied making any other telephone calls to the victim. The CD was admitted into evidence. After first hearing the recording, the trial judge stated that he had no idea what was being said on the tape. After a second playing, the trial judge stated that it sounded audible and that he was going to have to go listen to it a couple of times. At the conclusion of closing arguments, the trial judge advised the parties that he was going to take the recording into the court reporter's office to listen to it, perhaps at a slower speed, "as many times as I need, to understand it or determine that I'm not able to understand it." Approximately thirty minutes later, the trial judge returned and advised the parties that after listening to the CD, he believed that it contained threats to both the victim and her boyfriend. The trial judge then announced that he found the victim's testimony regarding repeated phone calls to be credible, and found the juvenile guilty of aggravated stalking and making harassing telephone calls. The juvenile filed a motion for extraordinary relief pursuant to Florida Rule of Juvenile Procedure 8.140, arguing that the trial judge had improperly sought assistance from a court reporter to ascertain the contents of a CD. The trial judge recused himself and an evidentiary hearing was held before a successor judge. The original trial judge testified that he went to the court reporter's office and listened to the CD numerous times. The judge testified that a court reporter helped the trial judge "understand what was on the recording." Specifically, for portions that the judge could not understand, the court reporter listened and suggested what she thought was said. Then the judge would listen again. The successor judge denied the motion for extraordinary relief, determining that the original trial judge had not engaged in prohibited ex parte communications with the court reporter because the Code of Judicial Conduct specifically authorizes a judge to consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities. The Fifth District of Appeal found that a judge may not independently investigate facts outside the presence of the parties except when expressly authorized by law to do so. Here, the juvenile and the victim gave conflicting testimony as to the contents of the CD. The court reporter, in essence, provided the trial court with a third interpretation of the contents of the recording. The "evidence" given by the court reporter was done outside the presence of the parties, without their knowledge or consent, and without the opportunity to challenge. The Fifth District could not conclude that the result would have been the same had the trial judge not received "assistance" from the court reporter. Thus, the order finding the juvenile guilty of aggravated stalking and making harassing telephone calls, and the subsequent orders finding him guilty of violating his probation, were vacated, and the case was remanded for a new adjudicatory hearing. http://www.5dca.org/Opinions/Opin2011/080511/5D09-2698.op.pdf (August 5, 2011).

## Dependency Case Law

### *Florida Supreme Court*

No new opinions for this reporting period.

### *First District Court of Appeal*

G.C. v. R.S. and K.C., --- So. 3d ----, 2011 WL 4104731 (Fla. 1st DCA 2011). REASONABLE PARENTAL DISCIPLINE IS NOT DOMESTIC VIOLENCE. The father appealed a final judgment of injunction for protection against domestic violence. The petition for injunction was filed by his former wife on behalf of their minor child after the father administered a single spank on the child's buttocks in response to the child's disrespectful and defiant behavior. The appellate court confirmed that a spouse has standing to seek an injunction against domestic violence against a former spouse on behalf of the parties' children. However, the court also noted that the common law recognized a parent's right to discipline his or her child in a reasonable manner, and that in both civil and criminal child abuse proceedings, a parent's right to administer reasonable and non-excessive corporal punishment to discipline their children is legislatively recognized. The court held that under established Florida law this single spank constituted reasonable and non-excessive parental corporal discipline and, as a matter of law, was not domestic violence. The court also stated that reasonable parental discipline is available as a defense against a petition for an injunction against domestic violence and reversed the final judgment. http://opinions.1dca.org/written/opinions2011/09-16-2011/11-2710.pdf (September 16, 2011).

C.L. v. Department of Children and Families, 66 So. 3d 411, 36 Fla. L. Weekly D1701 (Fla. 1st DCA 2011). TERMINATION OF PARENTAL RIGHTS REVERSED.
The First District Court of Appeal reversed termination of a father's rights because the final hearing was held when he could not be present. The father was aware that his failure to appear at the hearing constituted consent to termination of his rights but he informed the court prior to the hearing that he could not attend the hearing because he could neither miss his work in Louisiana nor afford the trip to Florida until he was paid. On appeal, the court reversed the order terminating his parental rights and remanded the case for a new final hearing.
http://opinions.1dca.org/written/opinions2011/08-04-2011/11-1941.pdf (August 4, 2011).

### *Second District Court of Appeal*

No new opinions for this reporting period.

### *Third District Court of Appeal*

C.G. v. Department of Children & Family Services and Guardian ad Litem Program,
67 So. 3d 1141, 36 Fla. L. Weekly D1649, 2011 WL 3250545 (Fla. 3rd DCA 2011).
TERMINATION OF PARENTAL RIGHTS AFFIRMED.
The Third District Court of Appeal affirmed termination of a mother's parental rights pursuant to section 39.806(1)(e), F.S. The child entered care in 2008 at the age of three and subsequently

the mother was committed under the Baker Act. The mother consented to dependency. After a brief reunification, the child reentered care in January 2009 after the mother was convicted of prostitution. In 2010, the goal was changed to adoption and the Department petitioned to terminate the mother's parental rights. During the termination proceedings, the Department sought judicial notice of, *inter alia*, court orders and case plans. The mother argued that the Department had to reprove dependency of the child by the standard of clear and convincing evidence. The trial court took notice of the adjudication of dependency but did not consider the dependency order to be proven by clear and convincing evidence. Instead, the court accepted the orders by their respective weights in the dependency case. After considering the judicially noticed record and order, as well as witness testimony, the court determined that termination of the mother's rights was the least restrictive means of protecting the child. On appeal, the court reviewed the record which showed that the mother had five different reunification plans over a two-year period. The court also reviewed the evidence and noted that the trial court had not relied on only judicially noticed orders or on hearsay in reaching the decision to terminate parental rights. The trial court had ultimately found by clear and convincing evidence that the mother did not substantially comply with her case plans, and that it was in the child's manifest best interests to terminate parental rights. The District Court held that the trial court's finding of clear and convincing evidence was supported by competent substantial evidence in the records, and that the mother failed to comply with the case plans. The court therefore affirmed termination.
http://www.3dca.flcourts.org/Opinions/3D11-0661.pdf (August 1, 2011).

## *Fourth District Court of Appeal*

P.S. v. Department of Children and Families, --- So. 3d ----, 2011 WL 3903198 (Fla. 4th DCA 2011). TERMINATION OF PARENTAL RIGHTS AFFIRMED. The father appealed the final judgment terminating his parental rights as to his three children, contending that the Department did not make reasonable good faith efforts to rehabilitate him and reunify him with his children. Since the father did not provide the court with a full transcript of the proceedings and did not allege any error that was apparent on the face of the final judgment, the appellate court affirmed.
http://www.4dca.org/opinions/Sept%202011/09-07-11/4D11-2058.op.pdf (September 7, 2011).

Department of Children and Families v. B.R., ___ So. 3d ____, 36 Fla. L. Weekly D1881, 2011 WL 3687444 (Fla. 4th DCA 2011). ORDER FOR DEPARTMENT TO PAY ADMINISTRATIVE FEE REVERSED.
In light of more recent caselaw, the Fourth District Court of Appeal withdrew a previously issued opinion and reversed an order for the Department to pay a $500 administrative fee for the establishment of a new trust established through the Center for Special Needs Trust Administration. The child in question was receiving Social Security benefits as a result of her mental disability. When the child reached the age of eighteen and left foster care, she no longer qualified for a Master Trust. The trial court ordered the Department to pay the administrative fee for a new trust, but this was erroneous as the fee is intended to, and does, benefit the child.

In addition, the trial court did not have the benefit of the caselaw mandating reversal. Therefore, on appeal the court reversed the order.
http://www.4dca.org/opinions/Aug%202011/08-24-11/4D10-2421.rhg.op.pdf (August 24, 2011).

## *Fifth District Court of Appeal*

K.R-P. v. Department of Children and Families, --- So. 3d ----, 2011 WL 3962122 (Fla. 5th DCA 2011). TERMINATION OF PARENTAL RIGHTS AFFIRMED. The mother appealed an order terminating her parental rights which found that she consented to the termination by failing to appear at the adjudicatory hearing. After a careful review of the record, the appellate court found that there was sufficient competent evidence to sustain the trial court's findings and conclusions, and affirmed the final judgment in all respects.
http://www.5dca.org/Opinions/Opin2011/090511/5D10-3897.op.pdf (September 8, 2011).

T.K. v. Department of Children and Families,67 So. 3d 1197, 36 Fla. L. Weekly D1950 (Fla. 5th DCA 2011). TERMINATION OF PARENTAL RIGHTS AFFIRMED.
The Fifth District Court of Appeal affirmed termination of a mother's parental rights. The child was first sheltered in December 2008 due to abuse of alcohol and prescription medications by the parents. The mother's case plan included a drug abuse evaluation & treatment, a parenting program, and payments for child support. In 2009, the mother was arrested for DUI, and the Department subsequently petitioned to terminate her parental rights. However, the District Court of Appeal reversed the previous termination of the mother's parental rights. T.K. v. Department of Children and Families, 44 So. 3d 1271 (Fla. 5th DCA 2010). The case was subsequently retried on remand and the petition for termination of the mother's rights alleged the mother's failure to substantially comply with her case plan, and that the mother's parental rights were previously terminated to another child. The mother argued on appeal that her drug tests showing prescription drug use could not support the conclusion that she failed to substantially comply with the case plan. However, the court disagreed, noting that the circumstances of the mother's drug possession belied any legitimate medical use; the mother possessed unfilled prescriptions from different doctors for the same medications; and the mother's evaluation concluded that she was an addict. Moreover, the mother presented no evidence of a legitimate basis for her use of medications. Although the mother completed her parenting class, she had not paid child support, visited the child, or completed treatment. Therefore the trial court did not err in finding that termination was the least restrictive means of protecting the child.
http://www.5dca.org/Opinions/Opin2011/082911/5D11-481.op.pdf (August 29, 2011).

J.D. v. Department of Children and Families, 67 So. 3d 1196, 36 Fla. L. Weekly D1907 (Fla. 5th DCA 2011). CONCESSION OF ERROR.
Based on the Department's concession of error, the Fifth District Court of Appeal reversed an order terminating the father's parental rights and remanded the case for further proceedings.
http://www.5dca.org/Opinions/Opin2011/082211/5D11-228.op.pdf (August 26, 2011).

## Dissolution Case Law

### *Florida Supreme Court*

In re: Amendments to the Florida Supreme Court Approved Family Law Forms and the Florida Family Law Rules of Procedure Forms, __So. 3d__, (Fla. 2011).
A number of family law forms containing notices of hearing were revised in accordance with amendments to Florida Rule of Judicial Administration 2.540. As amended, that rule requires all notices of court proceedings to contain a statement advising persons with disabilities regarding their requests for any accommodations in order to participate in the proceeding. Pursuant to the rule as amended, the notices appear in bold face, 14-point Times New Roman font.
http://www.floridasupremecourt.org/decisions/2011/sc11-1314.pdf (September 28, 2011).

In re: Amendments to the Florid Supreme Court Approved Family Law Forms, __So. 3d__, 2011 WL 3715037 (Fla. 2011).
A new form, 12.962, Writ of Bodily Attachment for Child Support, was adopted by the Court on December 2, 2010, and was published for comment. Interested persons were given 60 days from issuance of the opinion to file comments with the Court. The Department of Revenue (DOR), timely filed comments; upon consideration, the form was revised in response to the comments. http://www.floridasupremecourt.org/decisions/2011/sc10-1947.pdf (August 25, 2011).

### *First District Court of Appeal*

Achurra v. Achurra, __So. 3d__, 2011 WL 4397969 (Fla. 1st DCA 2011).
INCOME DEDUCTION ORDER CAN ONLY BE USED WITH COURT-ORDERED SUPPORT AND RELATED FEES; PRE-PAID COLLEGE TUITION IS NOT PART OF SUPPORT OBLIGATION.
Former husband sought review of non-final orders entered in the pending dissolution of marriage. The appellate court found that the trial court had improperly ordered deductions from former husband's income for a portion of an arrearage that did not represent either family support or related attorney's fees. Pursuant to section 61.1301(1)(b)1, F.S., an income deduction order (IDO) is authorized to direct a payor to deduct from the obligor's income his or her court-ordered support and related attorney's fees. The appellate court held that pre-paid college accounts were not part of former husband's support obligation; thus, they could not be enforced through an IDO. Former husband was required, however, to comply with the trial court's order to place funds from those accounts in trust pending final determination of their marital status.
http://opinions.1dca.org/written/opinions2011/09-22-2011/10-6770.pdf
(September 22, 2011).

Sellers v. Sellers, __So. 3d__, 2011 WL 3667885 (Fla. 1st DCA 2011).
MARITAL HOME CANNOT BE AWARDED AS PERMANENT ALIMONY, ONLY LUMP SUM; TRIAL COURT MUST MAKE SPECIFIC FINDINGS TO JUSTIFY ITS AWARDS.

Both spouses appealed the final judgment of dissolution of marriage. Former wife argued that the trial court abused its discretion in denying her request for permanent periodic alimony in a marriage lasting almost 17 years where she was unable to meet her monthly expenses and there was a disparity in income between the former spouses; former husband contended that the trial court abused its discretion in awarding former wife his equity in the marital home without special circumstances, and in awarding her lump sum alimony which gave her a substantially greater amount of the marital assets. Finding both issues to be interrelated, the appellate court reversed. Because a marital home cannot be awarded as permanent alimony, the appellate court stated that it appeared as if the trial court had intended to award the home to former wife as lump sum alimony in lieu of permanent alimony; however, it failed to make any findings justifying the award. Due to the trial court's failure to make findings to support its determination and the relationship between denial of permanent alimony and award of the marital home, the appellate court reversed and remanded for the trial court to clarify its order, to consider available avenues to do equity between the parties, and to make findings justifying such awards.
http://opinions.1dca.org/written/opinions2011/08-23-2011/10-2739.pdf (August 23, 2011).

Vanzant v. Vanzant, __So. 3d__, 2011 SL 3558151 (Fla. 1st DCA 2011).
TRIAL COURT CANNOT SPLIT THE DIFFERENCE BETWEEN VALUES OF BUSINESS PRESENTED BY SPOUSES; MUST BASE VALUATION ON COMPETENT EVIDENCE.
Former husband appealed the trial court's equitable distribution and the alimony and child support awards in the amended final dissolution of marriage; former wife cross-appealed. The appellate court held that the trial court had abused its discretion by unequally distributing the parties' net assets so that former wife received substantially more without including any findings to justify the unequal distribution. Believing that the unequal distribution stemmed from an error in the calculation of an offset of the mortgage debt distributed to former husband, the appellate court remanded for the trial court to either distribute the assets equally or make specific findings to justify an unequal distribution. The appellate court held that "splitting the difference" between the values presented by the parties regarding their liquor store without explanation or evidence supporting the valuation was error; the trial court's valuation must be based on competent evidence.
The appellate court reversed the alimony and child support awards as they appeared to have been based on former husband's gross income, as shown on his financial affidavit, rather than net income.
http://opinions.1dca.org/written/opinions2011/08-15-2011/10-3768.pdf (August 15, 2011).

Ragle v. Ragle, __So. 3d__, 2011 WL 3558156 (Fla. 1st DCA 2011).
TRIAL COURT DOES NOT HAVE SAME BROAD DISCRETION WHEN MODIFYING CUSTODY AS IT DOES WHEN INTIALLY DETERMINING IT; PARTY SEEKING TO MODIFY CARRIES EXTRAORDINARY BURDEN AND MUST SHOW SUBSTANTIAL AND MATERIAL CHANGE IN CIRCUMSTANCES PLUS BENEFIT TO CHILD.
Former husband appealed the modification of primary custody, imputation of minimum wage to former wife, and denial of a motion for contempt; the appellate court reversed the modification, but affirmed the other issues. Stating that its purpose with regard to orders

modifying custody is to review for abuse of discretion, the appellate court noted that a trial court does not enjoy the same broad discretion to modify custody that it does to initially determine it. A party seeking to modify carries what the appellate court termed an "extraordinary" burden of proof and must demonstrate that, in addition to a substantial and material change in circumstances since the time of the final judgment, the "welfare of the child will be promoted by the change in custody."
Concluding that the trial court failed to apply the extraordinary burden test and that former wife had failed to demonstrate a substantial and material change of circumstances, the appellate court reversed the modification of custody and remanded for proceedings consistent with its opinion.
http://opinions.1dca.org/written/opinions2011/08-15-2011/10-5518.pdf (August 15, 2011).

Bainbridge v. Pratt, __So. 3d__, 2011 WL 3331263 (Fla. 1st DCA 2011).
TRIAL COURT CANNOT ORDER ROTATING TIME-SHARING PLAN IF NEITHER PARTY REQUESTED IT IN PLEADINGS OR ARGUED FOR IT AT FINAL HEARING.
Although not a dissolution of marriage case, this appeal is included for the appellate court's statement that, "under Florida law, a trial court may not order an annual, rotating time-sharing plan where neither parent requested such a plan in the pleadings, nor argued for the plan at the final hearing." See Moore v. Wilson, 16 So. 3d 222, 223 (Fla. 5th DCA 2009).
http://opinions.1dca.org/written/opinions2011/08-04-2011/10-6791.pdf (August 4, 2011).

## *Second District Court of Appeal*

Torres v. Torres, __So. 3d__, 2011 WL 4469136 (Fla. 2d DCA 2011).
SPECIFIC FINDINGS REQUIRED FOR TRIAL COURT TO IMPUTE INCOME.
The appellate court held that the trial court erred in having imputed income to former husband for computation of child support arrearage without having provided adequate findings in support of such.
Reiterating that allegations of employability do not constitute substantial evidence for imputing income, the appellate court held that section 61.30(2), F.S., requires a trial court to consider recent work history, occupational qualifications, and prevailing levels of earnings in the community for a position. If the trial court does not make the required findings, the record must reveal competent, substantial evidence supporting the trial court's decision.
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/September/September%2028,%202011/2D10-765.pdf (September 28, 2011).

Draulans v. Draulans, __So. 3d__, 2011 WL (Fla. 2d DCA 2011).
NOT SETTING TERMINATION DATE FOR REHABILITATIVE ALIMONY IS ERROR.
Former husband appealed the final judgment of dissolution of marriage, arguing that an open-ended award of rehabilitative alimony was erroneous; the appellate court agreed. The appellate court held that it is error for a trial court to fail to set a termination date for payment of rehabilitative alimony; accordingly, it remanded to the trial court for reconsideration.
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/September/September%2016,%202011/2D09-2420.pdf (September 16, 2011).

Otto-Jones v. Jones, __So. 3d__, 2011 WL 3862359 (Fla. 2d DCA 2011).
ROTATING BETWEEN SCHOOLS IN SAME YEAR NOT IN CHILD'S BEST INTEREST.
The appellate court reversed a trial court order requiring parties' nine-year-old son to attend a private school in Pinellas County for the first half of the school year and a public school in Hillsborough County the second half, because there was no evidence that rotating between schools was in the child's best interest. The appellate court held that if the parents could not agree on which school the child would attend, the trial court would need to hold an evidentiary hearing to determine which school was in the child's best interest to attend.
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/September/September%2002,%202011/2D10-4193.pdf (September 2, 2011).

Halawy v. Halawy, __So. 3d__, 2011 WL 3760859 (Fla. 2d DCA 2011).
TRIAL COURT ERRED IN REQUIRING ONE SPOUSE TO PAY ENTIRE AMOUNT OF CHILD SUPPORT AFTER IMPUTING EQUAL INCOME TO EACH SPOUSE.
The trial court erred in issuing a non-final child support order which required former husband to pay the entire amount even though the court imputed equal income to each former spouse.
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/August/August%2026,%202011/2D10-806.pdf (August 26, 2011).

Cooper v. Cooper, __So. 3d__, 2011 WL 3629359 (Fla. 2d DCA 2011).
SUPPORT OBLIGATION CANNOT REQUIRE EXCESSIVE AMOUNT OF INCOME.
This case, stemming from appeal from an order on a petition for support unconnected with dissolution is included as an example of abuse of discretion by the trial court when an obligation it places on a spouse consumes an excessive amount of his or her income--in this case over 80% of the net monthly income. This case is also included for the holding that a trial court has jurisdiction over a petition for prospective downward modification of alimony and child support even while an appeal of the initial award is pending because the granting of the modification relief prospectively would have no effect on the order being appealed.
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/August/August%2019,%202011/2D10-1102.pdf (August 19, 2011).

Tummings v. Francois, __So. 3d__, 2011 WL 3477165 (Fla. 2d DCA 2011).
ABSENT MISCONDUCT, SPOUSE'S EMPLOYMENT BONUSES, DEPLETED DURING DISSOLUTION OF MARRIAGE PROCEEDINGS, SHOULD NOT BE INCLUDED AS MARITAL ASSET; CREDIT CARD CHARGES REIMBURSED BY SPOUSE'S EMPLOYER ARE NOT MARITAL DEBT; NONCOVERED MEDICAL EXPENSES SHOULD BE DIVIDED BASED ON PARENTS' SHARE OF MONTHLY SUPPORT OBLIGATION; REQUEST FOR FEES SHOULD TAKE SUBSTANTIAL DISPARITY IN SPOUSES' INCOME INTO ACCOUNT.
Former wife challenged the inclusion of her employment bonuses as marital assets; former husband argued that the trial court erred in including a portion of former wife's credit card balance as marital debt. The appellate court held that, in the absence of having found that former wife had committed misconduct in depleting the bonuses, the trial court abused its discretion in including them in the equitable distribution scheme. The appellate court also

found that the trial court had abused its discretion in having included, as marital debt, business-related credit card charges made by former wife for which she was reimbursed by her employer. The trial court was found to have erred in assessing former husband 43% of the non-covered medical expenses even though his percentage share of the child support was roughly half that. Non-covered expenses, when not added to the basic obligation, should be divided in accordance with the parents' respective percentage shares of the monthly child support obligation. The trial court abused its discretion in basing its denial of former husband's request for fees and costs upon the equitable distribution without taking into account the substantial disparity in the spouses' incomes.
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/August/August%2010,%202011/2D10-3149.pdf (August 10, 2011).

Hunter v. Hunter, __So. 3d__, 2011 WL 3303481 (Fla. 2d DCA 2011).
TRANSFER OF CUSTODY NOT AN APPROPRIATE SANCTION FOR CONTEMPT; DUE PROCESS REQUIRES THAT PARENT SEEKING CHANGE IN CUSTODY PUT THE OTHER PARENT ON NOTICE; MODIFICATION MUST BE IN CHILD'S BEST INTEREST.
Former husband appealed being replaced by former wife as the children's primary residential parent after former wife obtained an order of contempt and a subsequent pick-up order. The trial court's order transferring primary custody to former wife was devoid of written findings as to whether the transfer was in the children's best interests. The appellate court reversed was for three reasons. First, transfer of custody is not an appropriate sanction for contempt; it is error for a trial court to change custody as punishment for a parent's conduct regarding visitation. Second, a violation of due process occurs when a parent is not properly put on notice that the other parent is seeking a change in primary residential custody. Here, although it appeared that the transfer took place after a non-evidentiary hearing, neither of former wife's motions sought a change of primary custody. As the violation of former husband's rights was apparent on the face on the record, reversal was required even in absence of a transcript. Third, the trial court's failure to comply with Section 61.13(4)(c), F.S., regarding relief available when a parent refuses to honor a time-sharing schedule, required reversal as well. Subsection 61.13(4)(c)6 authorizes a trial court to modify the parenting plan at the request of the parent who did not violate the time-sharing schedule if modification is in the best interests of the child; here, neither of those conditions were met. Reversed and remanded with directions that the trial court enter an order returning primary residential custody of the children to former husband without prejudice to former wife to seek any relief to which she may be entitled.
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/August/August%2003,%202011/2D10-4810.pdf (August 3, 2011).

## *Third District Court of Appeal*

Edge v. Edge, __So. 3d__, 2011 WL 3903094 (Fla. 3d DCA 2011).
DOCTRINE OF UNCLEAN HANDS SEPARATE AND DISTINCT GROUND FOR DENYING RELIEF FROM DOCTRINE OF LACHES; EXPLANATION OF DOCTRINES.
Former husband appealed separate trial court orders: 1) ordering that he reimburse former wife for federal income taxes she paid on seven years of post-dissolution alimony payments;

and 2) granting former wife's counsel's objection to referral of his request for fees and costs under section 57.105(1), F.S., to a magistrate. The appellate court dismissed the appeal from the order on the second issue for lack of jurisdiction, but reversed the reimbursement. Holding that the doctrine of unclean hands is a separate and distinct ground for denying relief from the doctrine of laches, the appellate court discussed both doctrines.
http://www.3dca.flcourts.org/Opinions/3D10-3348.pdf (September 7, 2011).

Jurasek v. Jurasek, __So. 3d__, 2011 WL 3820754 (Fla. 3d DCA 2011).
TRIAL COURT ABUSED ITS DISCRETION IN AWARDING "SPECIAL EQUITY" WHERE SPOUSE FAILED TO OVERCOME STATUTORY PRESUMPTION THAT JOINTLY TITLED REAL ESTATE IS MARITAL PROPERTY; EVIDENCE THAT ONE SPOUSE PROVIDED NON-MARITAL FUNDS TO PURCHASE MARITAL HOME "STANDING ALONE" IS INSUFFICENT TO PROVE THAT SPOUSE DID NOT INTEND A GIFT.
Former wife appealed a final judgment awarding former husband special equity in their jointly owned marital home and denying her request for attorney's fees; the appellate court reversed on both issues. When former husband's father sustained an auto accident which necessitated that he move in with the former spouses, a portion of his insurance settlement proceeds was used by them to purchase a larger apartment. The former spouses became joint owners and tenants by the entireties. Noting that the term, "special equity" was replaced in 2008 by "a claim for unequal distribution," the appellate court concluded that the trial court abused its discretion in awarding former husband special equity because he failed to overcome the statutory presumption that jointly titled real estate is marital property. The appellate court reiterated that "standing alone, evidence that one spouse provided non-marital funds to purchase a marital home is insufficient to prove that the spouse did not intend a gift." David v. David, 58 So. 3d 336, 339 (Fla. 5th DCA 2011). The appellate court also held that, when parties stipulate that the court will reserve the issue of fees, that agreement is binding on the court; thus, the trial court erred in denying fees to former wife after the spouses agreed that issue would be heard at a subsequent hearing.
http://www.3dca.flcourts.org/Opinions/3D10-1070.pdf (August 31, 2011).

## *Fourth District Court of Appeal*

Matteis v. Matteis, __So. 3d__, 2011 WL 4056288 (Fla.4th DCA 2011).
ERROR ON THE FACE OF A JUDGMENT IS EXCEPTION TO GENERAL RULE THAT FAILURE TO PROVIDE TRANSCRIPT OR RECORD RESULTS IN AFFIRMATION.
Former husband appealed the amended final judgment of dissolution on numerous grounds; the appellate court reversed and remanded the portion regarding sale of the marital residence. The trial court's judgment ordered the spouses to equally divide the proceeds of the sale of the home and be equally responsible for any debt arising from the sale, but did not address either payment of expenses of the home pending sale or what would happen in the event the home did not sell within a specified time. The appellate court noted that an error on the face on the judgment is an exception to the general rule that failure to provide a transcript or trial record results in affirmation of the trial court's decision. The case was affirmed in part, reversed in part, and remanded for further clarification or consideration.

http://www.4dca.org/opinions/Sept%202011/09-14-11/4D10-1509.op.pdf (September 14, 2011).

Stroh v. Stroh, __So. 3d__, 2011 WL 3687429 (Fla. 4th DCA 2011).
COMPETENT, SUBSTANTIAL EVIDENCE REQUIRED FOR ALIMONY, DISTRIBUTION.
Awards of permanent, periodic alimony, alimony set-offs, and plans for equitable distribution must be supported by competent, substantial evidence.
http://www.4dca.org/opinions/Aug%202011/08-24-11/4D10-190.op.pdf (August 24, 2011).

Simpson v. Simpson, __So. 3d__, 2011 WL 3687430 (Fla. 4th DCA 2011).
CONTEMPT CANNOT BE USED TO SETTLE PROPERTY DISPUTES BUT IS USED ONLY TO ENFORCE AWARDS OF ALIMONY, SUPPORT, OR MAINTENANCE; MODIFICATION OF ALIMONY AWARDS REVIEWED FOR ABUSE OF DISCRETION; MOVING PARTY CARRIES HEAVIER-THAN-NORMAL BURDEN IN SEEKING MODIFICATION WHEN ORIGINAL ALIMONY OR SUPPORT IS BY AGREEMENT.
Former wife appealed the downward modification of former husband's alimony obligations and denial of her motion for civil contempt; the appellate court reversed the modification, but affirmed the denial of the motion. The appellate court held that the trial court was correct in determining that it could not hold former husband in contempt for failing to pay former wife's car loan as the contempt power of a trial court cannot be used to settle disputes in rights to property. In accordance with Florida's constitution, contempt can only be used to enforce awards of alimony, support, or maintenance. Reviewing the settlement agreement de novo, the appellate court found that the trial court had erred in its interpretation of a provision in the settlement agreement regarding abatement of the alimony obligation. The appellate court held that modifications of alimony awards are reviewed for abuse of discretion; a party seeking permanent modification must demonstrate a substantial change in circumstances which is sufficient, material, voluntary, and permanent. Here, the appellate court concluded former husband had not met his burden of demonstrating a "substantial change" in income. The appellate court noted that where the original alimony or support is set by agreement, the moving party carries a "heavier-than-normal" burden. The appellate court found that competent, substantial evidence did not support the trial court's conclusion that the downturn in the economy permitted former husband's tender of a lower amount to be transferred from his 401(k) account than the settlement required.
http://www.4dca.org/opinions/Aug%202011/08-24-11/4D10-459.op.pdf (August 24, 2011).

Opatz v. Opatz, __So. 3d__, 2011 WL 3687434 (Fla. 4th DCA 2011).
FAILURE TO FOLLOW RULES OF PROCEDURE ABUSE OF DISCRETION.
A trial court's failure to follow Florida Family Law Rule of Procedure 1.490 is an abuse of discretion.
http://www.4dca.org/opinions/Aug%202011/08-24-11/4D10-1856.op.pdf (August 24, 2011).

Shinitzky v. Shinitzky, __So. 3d__, 2011 WL 3586157 (Fla. 4th DCA 2011).
ABSENT PERMISSION, TRIAL COURT CANNOT ALTER AN APPELLATE MANDATE.

Successor judge, who issued the order after remand, ( Shinitzky v. Shinitzky, 16 So. 3d 168 (Fla. 4th DCA 2009)), modified portions of the final judgment and enforcement order. The appellate court reversed and remanded with instructions for the trial court to effectuate the final judgment and enforcement order issued by the original judge, specifically with regard to disbursement of the investment funds and the equalizing payment, which had been at issue in the earlier appeal. The appellate court had affirmed the final judgment in the first appeal and had issued a mandate for the trial court to enforce the final judgment. The appellate court held that absent permission to alter a mandate, a trial court is without authority to do so and should perform the purely ministerial act of implementing it.
http://www.4dca.org/opinions/Aug%202011/08-17-11/4D10-137.op.pdf (August 17, 2011).

Bell v. Bell, __So. 3d__, 2011 WL 3477036 (Fla. 4th DCA 2011).
ACCOUNTS RECEIVABLE ON SPOUSE'S BUSINESS WERE MARITAL ASSETS SUBJECT TO EQUITABLE DISTRIBUTION; ASSETS ACQUIRED BY BEQUEST OR DEVISE ARE NON-MARITAL; MAKING MORTGAGE PAYMENTS ON HOUSE LATER INHERITED DOES NOT MAKE HOUSE MARITAL ASSET IF PAYMENTS ARE GIFT.
Former wife appealed the final judgment of dissolution, contending that the trial court erred by: 1) incorrectly calculating the equalization payment; 2) failing to make findings before denying bridge-the-gap alimony; and 3) failing to reserve jurisdiction on the issue of fees; former husband cross-appealed regarding the equitable distribution. The appellate court reversed on all issues with the exception of the trial court's failure to reserve jurisdiction to determine fees.
The appellate court held that accounts receivable of the former husband's business were marital assets subject to equitable distribution and that the trial court failed to make the appropriate findings regarding alimony. Assets acquired by bequest or devise are non-marital; the trial court erred in its conclusion that, because former husband had made mortgage payments on his mother's house during the marriage and then inherited the house, the house should be equitably distributed. The appellate court held that the testimony at trial indicated that the mortgage payments made by former husband were a gift to his mother; therefore, the house he inherited was a non-marital asset, making his share of the proceeds from sale of the house also non-marital.
http://www.4dca.org/opinions/Aug%202011/08-10-11/4D10-40.op.pdf (August 10, 2011).

## *Fifth District Court of Appeal*

Coleman v. Bland, __So. 3d__, 2011 WL 4405759 (Fla. 5th DCA 2011).
TRIAL COURT MUST DETERMINE IF ASSETS ARE MARITAL OR NON-MARITAL.
The trial court made no finding in the final judgment as to whether former husband's pension was marital or non-marital. Being unable to adequately review the pension issue without findings, the appellate court reversed and remanded for the trial court to make proper findings on that issue.
http://www.5dca.org/Opinions/Opin2011/091911/5D10-1326.op.pdf (September 23, 2011).

Jones v. Jones, __So. 3d__, 2011 WL 3861484 (Fla. 5th DCA 2011).
APPEAL DISMISSED DUE TO LACK OF A RECORD OR SUBSTITUTE.
Former husband's appeal of the final judgment of dissolution, and the setting aside of a settlement agreement which was reached at mediation, was dismissed for lack of a record or substitute.
http://www.5dca.org/Opinions/Opin2011/082911/5D10-637.op.pdf (September 2, 2011).

Wraight v. Wraight, __So. 3d__, 2011 WL 3754715 (Fla. 5th DCA 2011).
TRIAL COURT ERRED IN EQUITABLY DIVIDING NON-MARITAL PENSION; APPELLATE COURT CANNOT RE-WEIGH EVIDENCE BUT CAN ONLY DECIDE WHETHER COMPETENT, SUBSTANTIAL EVIDENCE EXISTED FOR DECISION.
The appellate court found that the trial court erred in equitably dividing former husband's non-marital pension on which former wife was the named beneficiary. The appellate court held that former wife had no right to the pension unless or until former husband passed away. With regard to the granting of former wife's petition for relocation, the appellate court noted that it could not re-weigh the evidence considered by the trial court in reaching its decision, but could only decide whether competent, substantial evidence existed to support that decision. Here, "some evidence" existed.
http://www.5dca.org/Opinions/Opin2011/082211/5D10-3083.op.pdf (August 26, 2011).

Joshi v. Joshi, __So. 3d__, 2011 WL 3627410 (Fla. 5th DCA 2011).
TRIAL COURT ABUSED ITS DISCRETION IN ALLOCATING STIMULUS CHECK TO SPOUSE IN ABSENCE OF EVIDENCE THAT CHECK WAS RECEIVED BY HOUSEHOLD.
The trial court abused its discretion in allocating the value of a stimulus check to former husband where the record did not indicate one was ever received in the household.
http://www.5dca.org/Opinions/Opin2011/081511/5D09-2128.op.pdf (August 19, 2011).

Burnett v. Burnett, __So. 3d__, 2011 WL 3627416 (Fla. 5th DCA 2011).
TEMPORARY SUPPORT PAYMENTS CANNOT BE IN EXCESS OF IMPUTED INCOME.
The appellate court found no error in the imputation of income to former husband; however, it found that the trial court had erred by having ordered temporary support payments in excess of the imputed income. The trial court was instructed on remand to address all support issues with due consideration to former husband's ability to pay.
http://www.5dca.org/Opinions/Opin2011/081511/5D10-2160.op.pdf (August 19, 2011).

Mincy v. Mincy, __So. 3d__, 2011 WL 3359636 (Fla. 5th DCA 2011).
TRIAL COURT MUST MAKE FINDINGS REGARDING REASONABLENESS OF FEES.
This was a brief opinion in which the appellate court affirmed the fee award for former wife's current attorney, but reversed the fee award for her prior counsel as well as for her accountant, both of which were remanded for the trial court to make sufficient findings regarding reasonableness.
http://www.5dca.org/Opinions/Opin2011/080511/5D10-2039.op.pdf (August 1, 2011).

## Domestic Violence Case Law

### *Florida Supreme Court*

No new opinions for this reporting period.

### *First District Court of Appeal*

G.C. v. R.S. and K.C., --- So. 3d ----, 2011 WL 4104731 (Fla. 1st DCA 2011). REASONABLE PARENTAL DISCIPLINE IS NOT DOMESTIC VIOLENCE. The father appealed a final judgment of injunction for protection against domestic violence. The petition for injunction was filed by his former wife on behalf of their minor child after the father administered a single spank on the child's buttocks in response to the child's disrespectful and defiant behavior. The appellate court confirmed that a spouse has standing to seek an injunction against domestic violence against a former spouse on behalf of the parties' children. However, the court also noted that the common law recognized a parent's right to discipline his or her child in a reasonable manner, and that in both civil and criminal child abuse proceedings, a parent's right to administer reasonable and non-excessive corporal punishment to discipline their children is legislatively recognized. The court held that under established Florida law this single spank constituted reasonable and non-excessive parental corporal discipline and, as a matter of law, was not domestic violence. The court also stated that reasonable parental discipline is available as a defense against a petition for an injunction against domestic violence and reversed the final judgment. http://opinions.1dca.org/written/opinions2011/09-16-2011/11-2710.pdf (September 16, 2011).

Furry v. Rickles, --- So. 3d ----, 2011 WL 3849697 (Fla. 1st DCA 2011). DUE PROCESS VIOLATION. The appellant challenged a final judgment of injunction for protection against domestic violence. The court began the hearing by informing the parties that they had a limited amount of time to present their cases. The court then conducted all questioning of the parties and virtually all questioning of the other witnesses that testified. The court was aware the attorneys might wish to conduct direct/cross examination as it made two comments dismissing any request based on time constraints. The court also dismissed Appellant's request for a "quick hearing"; denied his request to present the relevant noncumulative testimony of a pertinent witness; and did not allow him to "object to," or cross-examine, the opposing party's expert witness. While the court might have remained unconvinced had it heard additional evidence, it still should have provided Appellant the opportunity to fully present his case. Because the trial court entered the injunction without conducting a full evidentiary hearing pursuant to §741.30(5), F.S. (2010), its actions constituted a due process violation. The appellate court therefore reversed and remanded the case. http://opinions.1dca.org/written/opinions2011/08-31-2011/10-5945.pdf (August 31, 2011).

### *Second District Court of Appeal*

L.C. v. A.M.C., --- So. 3d ----, 2011 WL 3629356 (Fla. 2d DCA 2011). DOMESTIC VIOLENCE INJUNCTION REVERSED. This opinion replaces the opinion that was issued on May 11, 2011. The

paternal grandfather appealed from the final judgment of injunction for protection against domestic violence which prohibited him from having any contact with his granddaughter. After reviewing the Mother's petition, the court found that the facts as stated in the petition standing alone did not justify the entry of a temporary injunction. The court had then set a hearing for April 15, 2010, at 11:00 a.m. The Grandfather was not served with notice of the hearing until April 14, 2010, at 9:45 a.m. The Grandfather attempted to obtain counsel, but was unable to do so in time for the hearing and the parties appeared as scheduled. The Mother stated that she sought an injunction because the school crossing guard and the child had told her that the Grandfather had been coming to the child's school to see the child without the Mother's knowledge. She expressed her fear that the Grandfather would kidnap the child because, approximately five years ago, the child's father had taken the child from a restaurant during visitation while the child's grandparents were present. In response, the Grandfather testified that he had attempted to see the child at her request. He also stated that the grandparents were never ordered by a court to stay away from their granddaughter.
The Grandfather further argued that the trial court denied him his fundamental right to due process by not providing him a full evidentiary hearing. The appellate court agreed, and reversed and remanded the case for a full evidentiary hearing. The appellate court also noted that in due process hearings each party should be permitted to call witnesses with relevant information, and cross-examination should be permitted. The court similarly stated that the Grandfather was also denied due process by the service of notice only twenty-five hours before the hearing. Because of this, he was not provided sufficient notice to hire an attorney or to prepare a defense to the allegations in the petition.
In the original brief, the appellant claimed he was not afforded due process because he wasn't sworn; however, he withdrew that claim after receiving a corrected transcript of the hearing that included the portion of the court proceedings where the oath was administered.
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/August/August%2019,%202011/2D10-2669rh.pdf (August 19, 2011).

## *Third District Court of Appeal*

No new opinions for this reporting period.

## *Fourth District Court of Appeal*

Jean Voltaire Jean-Louis v. State of Florida, --- So. 3d ----, 2011 WL 3820109 (Fla. 4th DCA 2011).
CONDITIONS OF PROBATION. After a non-jury trial, the trial court found the defendant guilty of attempted simple stalking, a second degree misdemeanor, and imposed a five-year suspension of his concealed weapons license as a condition of his probation. The defendant appealed, and the appellate court affirmed the conviction but reversed the trial court's five-year revocation because it exceeded the time permitted by the statute. Section 790.06(3), F.S., limits the time frame for either revocation or suspension of a concealed weapons license to three years.
http://www.4dca.org/opinions/Aug%202011/08-31-11/4D09-3556.op.pdf (August 31, 2011).

Barker v. Rodriguez, --- So. 3d ----, 2011 WL 3586224 (Fla. 4th DCA 2011). INJUNCTION AFFIRMED. The appellant challenged the trial court's entry of a final judgment of injunction for protection against domestic violence with minor child, which also gave temporary custody of the child to the mother. In his pro se brief, he claimed that by failing to hear his case the trial court did not provide him with due process. However, the final judgment shows that both parties were present at the final hearing, and the record, which did not include a transcript of the proceedings, was insufficient to show that appellant was denied the opportunity to present evidence. The decision was affirmed. http://www.4dca.org/opinions/Aug%202011/08-17-11/4D10-2617.op.pdf (August 17, 2011).

## *Fifth District Court of Appeal*

Deale v. Deale, --- So. 3d ----, 2011 WL 3962111 (Fla. 5th DCA 2011). DISMISSAL OF TEMPORARY INJUNCTION AFFIRMED. The husband appealed the trial court's order dismissing a temporary injunction for protection against domestic violence and claimed that the trial court erred by finding that there was insufficient evidence to warrant the issuance of an injunction for protection against domestic violence by the wife. The trial court entered a temporary injunction for protection against domestic violence, but at the hearing, was not persuaded that the law supported issuing a permanent injunction. Although the appellate court agreed that the husband had offered evidence to support his allegations and claims, the court stated that it was not in a position to substitute its judgment for that of the trial court, and affirmed the dismissal. http://www.5dca.org/Opinions/Opin2011/090511/5D10-2820.op.pdf (September 9, 2011).

Niederkorn v. Trivino, --- So. 3d ----, 2011 WL 3861573 (Fla. 5th DCA 2011). DENIAL OF INJUNCTION FOR DATING VIOLENCE REVERSED. Mr. Niederkorn appealed the denial of his petition for injunction for protection against dating violence. Both he and the Appellee filed petitions for protection against dating violence arising out of the same incident. At the trial on the merits of both parties' claims, Mr. Niederkorn advised the court that he had no objection to the entry of Ms. Trivino's injunction against him. Ms. Trivino, however, objected to an injunction being entered against her, and the case proceeded to an evidentiary hearing. During the hearing, Mr. Niederkorn did not have the opportunity to cross-examine the witnesses. The appellate court recognized that trial courts are pressed for time and that typically on a domestic violence hearing day there are numerous hearings that need to be heard. As a result, trial courts tend to move them along quickly and expeditiously, and sometimes, by doing so, deny litigants fundamental due process. In this case, Mr. Niederkorn was entitled to a full evidentiary hearing which included direct examination of witnesses, cross-examination of witnesses, and the presentation of any other evidence. He was denied that right. Therefore, the final judgment denying Mr. Niederkorn's petition for protection against dating violence was reversed, and the case was remanded for a full evidentiary hearing.
http://www.5dca.org/Opinions/Opin2011/082911/5D10-3009.op.pdf (September 2, 2011).