

OSCA OCI Case Law Update August – September 2013

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Baker/Marchman Act Case Law

Florida Supreme Court

No new opinion for this reporting period.

First District Court of Appeal

No new opinion for this reporting period.

Second District Court of Appeal

No new opinion for this reporting period.

Third District Court of Appeal

No new opinion for this reporting period.

Fourth District Court of Appeal

No new opinion for this reporting period.

Fifth District Court of Appeal

No new opinion for this reporting period.

Delinquency Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

No new opinions for this reporting period.

Second District Court of Appeal

V.A.C. v. State, __ So.3d __, 2013 WL 5226524 (Fla.2d DCA 2013). [THE JUVENILE COURT LOST JURISDICTION TO ORDER RESTITUTION WHERE IT FAILED TO ENTER A SEPARATE AND DISTINCT RESTITUTION ORDER PRIOR TO LOSING JURISDICTION.](#) The juvenile was placed on juvenile probation for an indeterminate period of time. At the conclusion of the hearing, the judge orally stated that he would be ordering restitution, and the “check boxes” on both the disposition order and the order of probation were checked to reflect the court’s reservation to order restitution. However, no separate restitution order was rendered. On December 1, 2010, the State filed a motion to establish restitution, but did not notice or schedule it for a hearing. On December 10, 2010, the juvenile filed a notice of appeal. In October 2011, the juvenile

turned nineteen years of age. The appellate court mandate was issued in January 2012. In March 2012, the State filed a notice of hearing to address its December 1, 2010 motion to establish restitution. A second motion to establish restitution was filed on April 4, 2012. A restitution hearing was held in May 2012. Over the juvenile's objections, the court ordered restitution in the amount of \$2,312.94. The juvenile appealed. The Second District Court of Appeal found that s. 985.0301(5)(i), F.S. (2010) (subsequently renumbered (5)(h)) provided that a juvenile court can reserve jurisdiction to enforce restitution orders until they are satisfied. However, to do so, the court must enter a distinct restitution order prior to losing jurisdiction. Otherwise, the juvenile court's authority to order restitution ends when the child reaches nineteen. In the instant case, there was no separate and distinct restitution order entered prior to the date the court's jurisdiction ceased. Therefore the juvenile court erred in ordering restitution after it lost jurisdiction. Accordingly, the restitution order was reversed and quashed.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2013/September/September%2018,%202013/2D12-3409.pdf (September 18, 2013).

D.K.A. v. State, __ So.3d __, 2013 WL 4614682 (Fla.2d DCA 2013). **ORDER OF PROBATION REVERSED AND REMANDED BECAUSE IT FAILED TO STATE THE TERM OF THE PROBATION IMPOSED.** The juvenile challenged the trial court's finding that he committed battery on an elderly person and abuse of a disabled person. The Second District Court of Appeal found no error and affirmed without further comment. However, the Second District found that the trial court's order of probation did not state the term of the probation imposed. Accordingly, the trial court's probation order was reversed and remanded with directions to enter a corrected probationary order.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2013/August/August%2030,%202013/2D12-1977.pdf (August 30, 2013)

S.R. v. State, __ So.3d __, 2013 WL 4033993 (Fla.2d DCA 2013). **APPELLATE COURT NOTED PROBABLE ERROR IN LENGTH OF PROBATION.** The Second District Court of Appeal affirmed the juvenile's adjudication and disposition for resisting an officer without violence. However, the Second District noted a probable disposition error. The juvenile was placed on probation for an indefinite period of time not to exceed his nineteenth birthday. At the time of disposition, the juvenile was approximately seventeen years and eleven months old. The juvenile probation could not exceed one year for a first-degree misdemeanor. Therefore, a term of probation until his nineteenth birthday would exceed the statutory maximum by approximately one month.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2013/August/August%2009,%202013/2D12-5478.pdf (August 9, 2013).

Third District Court of Appeal

D.H. v. State, __ So.3d __, 2013 WL 4734572 (Fla. 3d DCA 2013). **ORDER DENYING MOTION TO SUPPRESS FIREARM AND MARIJUANA WAS REVERSED BECAUSE THERE WAS NO REASONABLE SUSPICION TO BELIEVE THE SUSPECT WAS ARMED AND DANGEROUS AND THERE WAS NO PROBABLE CAUSE TO ARREST WHEN THE PAT-DOWN WAS CONDUCTED.** The juvenile appealed the denial of his motion to suppress a firearm and marijuana found after a pat-down search during an investigatory stop. An officer smelled burnt marijuana emanating from the area near a group of juveniles. The officer did not see anyone smoking marijuana but he did notice a puff of smoke hanging in the air near the juveniles. Without asking any questions or further investigation, the officer conducted a pat-down search of the individuals to check for weapons due to his safety concerns. The officer felt a hard bulge in the juvenile's pocket. The officer placed the juvenile on the ground and detained him and two other juveniles at gunpoint. When backup arrived, the officer continued the search and verified that the bulge was a handgun. The juvenile was arrested. A search incident to the arrest revealed marijuana in the juvenile's pocket. The juvenile filed a motion to suppress the firearm and marijuana evidence which was denied. The Third District Court of Appeal found that although the officer had reasonable suspicion to conduct an investigatory stop, he exceeded the scope of the investigatory stop when he conducted a pat-down search of the juvenile. A pat-down search during an investigatory stop may only be conducted based on an objectively reasonable belief that the suspect was armed and dangerous. In the instant case, there was insufficient evidence to support a reasonable suspicion that the juvenile was armed and dangerous. Further, the Third District found that searches incident to an arrest may be conducted prior to or contemporaneous with the actual arrest so long as probable cause for the arrest existed at the time of the search. A finding of probable cause must be particularized to a specific individual. The scent of marijuana and a puff of smoke coming from a group of individuals did not by itself give the officer probable cause to arrest and search any particular individual in the group. Therefore, the search of the juvenile was unlawful. Accordingly, the Third District reversed the denial of the juvenile's motion to suppress the evidence and remanded with directions to discharge the juvenile.

<http://www.3dca.flcourts.org/Opinions/3D12-2520.pdf> (September 4, 2013).

D.S. v. State, __ So.3d __, 2013 WL 5338763 (Fla. 3d DCA 2013). **DENIAL OF MOTION TO SUPPRESS MARIJUANA EVIDENCE DISCOVERED DURING SEARCH INCIDENT TO ARREST FOR LOITERING AND PROWLING WAS AFFIRMED.** On rehearing, the appellate court withdrew its prior opinion and substituted this opinion. The issue on appeal was whether the trial court erred in not granting the juvenile's motion to suppress marijuana evidence discovered during a search incident to his arrest for loitering and prowling. Responding to a burglary call, the

juvenile was found inside the unoccupied home by responding officers. A witness had observed the juvenile and two others break down the door to the home. The Third District Court of Appeal found that this testimony alone provided probable cause to arrest the juvenile for burglary. Even if probable cause to arrest the juvenile for loitering and prowling did not exist, the search incident to that arrest was still lawful as there was probable cause to arrest him for another charge, burglary. Therefore, even if no probable cause existed to arrest the juvenile for loitering and prowling, as long as there was probable cause to arrest him for burglary, the search incident to arrest was lawful. The fact the juvenile was arrested for loitering and prowling does not render the search incident to arrest unlawful, or the marijuana discovered pursuant to that search subject to suppression as the fruit of an illegal search and seizure. Accordingly, the trial court's denial of the suppression motion was affirmed.

<http://www.3dca.flcourts.org/Opinions/3D12-2520.pdf> (September 4, 2013).

O.S. v. State, __ So.3d __, 2013 WL 4081704 (Fla. 3d DCA 2013). **BRASS KNUCKLES DISCOVERED IN THE JUVENILE'S VEHICLE WERE NOT A CONCEALED WEAPON.** The juvenile appealed the denial of his motion for judgment of dismissal and subsequent withhold of adjudication for carrying a concealed weapon. The juvenile's vehicle was stopped for failing to have a functioning tag light. The juvenile was asked to step out of the vehicle because he was observed to be very "fidgety". The officer observed the brass knuckles sitting in the pocket of the driver's door when the door was opened. The brass knuckles were not covered in any way. When the officer asked the juvenile if there was anything in the car that he should know about, the juvenile immediately responded that the car contained brass knuckles. The Third District Court of Appeal found that the brass knuckles were not concealed under the factors set forth in Dorelus v. State, 747 So.2d 368 (Fla. 1999). The weapon was located in an open side pocket. It was not covered so as to obscure the officer's view of the weapon. The juvenile made no attempt to conceal the weapon with his body in any way. The juvenile immediately admitted to possessing the weapon upon questioning by the officer. Finally, the officer testified that he identified the weapon "right away." Accordingly, the Third District held that the weapon was not concealed as a matter of law and reversed and remanded with directions to discharge the juvenile.

<http://www.3dca.flcourts.org/Opinions/3D13-0310.pdf> (August 14, 2013).

Fourth District Court of Appeal

T.J.J. v. State, __ So.3d __, 2013 WL 4821677 (Fla. 4th DCA 2013). **TRIAL COURT ERRONEOUSLY INCLUDED RESTITUTION FOR ITEMS NOT LISTED IN THE ORIGINAL CHARGING DOCUMENT AND A SPECIAL CONDITION PROHIBITING THE JUVENILE FROM CERTAIN ASSOCIATIONS WAS**

UNAUTHORIZED, OVERBROAD, VAGUE, AND VIOLATED THE SEPARATION OF POWERS. The juvenile argued that the trial court erroneously included restitution for items not listed in the original charging document. The juvenile also argued that a special condition prohibiting the juvenile from associating with persons under supervision, members of gangs, or whose contact is prohibited by the juvenile's probation officer, parent or guardian was not an authorized conditions of release, was overbroad, vague, and violated the separation of powers. The juvenile had entered a plea of no contest to burglary and agreed to pay restitution. The original charging document included a narrative and listed the items stolen as a blue Dell lap top computer, assorted jewelry, a Sony PS3 [PlayStation 3] controller, three PS3 games, and a blue ray DVD system all valued at around \$1,200.00. However, the court entered an order requiring payment of \$2,718 for assorted items of jewelry, fifty video games which included 20 PS2 video games and 30 PS3 video games, a PS3 controller, five Blue Ray DVD video games, and assorted coins and change. The Fourth District Court of Appeal found that restitution, as part of a plea agreement, is limited to restitution arising out of the offense charged as reflected in the information and/or by the factual basis for the plea. In the instant case, 47 video games and the assorted coins and change were not included in the charging documents. The Fourth District concluded that the Blue Ray DVDs were within the charging document because the state charged the juvenile with taking a Blue Ray system, and Blue Ray DVDs can be considered part of that system. The juvenile also admitted to taking some DVDs. The Fourth District partially reversed the order of restitution with directions to delete the restitution for the coins and all video games except three PS3 games. Otherwise, the restitution award was affirmed. Next, the Fourth District found that neither s. 985.435, F.S. (2012), nor Form 8.947 of the juvenile rules of procedure contained as a condition of probation, a blanket prohibition of willful contact with anyone on supervision by juvenile or adult court, a member of a criminal gang, or someone whom the child's parent, guardian or probation officer prohibits the child from contacting. The Fourth District found that because the condition was not a statutorily imposed general condition, the condition must be related to the crime committed. In the instant case, the condition had no relationship to the crime charged. In addition, the condition was found invalid as vague and overbroad. Finally, the Fourth District found that the condition should be stricken because it violated the separation of powers doctrine. Only a court can set conditions of probation. Here, the trial court unlawfully delegated to the probation officer and parents the authority to expand or contract the individuals with whom the juvenile was prohibited from contact. For all the foregoing reasons, the special condition of probation was reversed. Accordingly, the Fourth District reversed and remanded with instructions to correct the restitution order and conditions of probation consistent with their opinion. <http://www.4dca.org/opinions/September%202013/09-11-13/4D12-835.op.pdf> (September 11, 2013).

H.D. v. Sharon Shore, Superintendent of the Broward County Regional Detention Center, ___ So.3d ___, 2013 WL 4821050 (Fla. 4th DCA 2013). **TRIAL COURT COULD NOT ORDER SECURE DETENTION AFTER JUVENILE VIOLATED PRE-ADJUDICATION HOME DETENTION.** Petition for writ of habeas corpus was previously granted and the juvenile was immediately released from secure detention. This opinion followed to explain the appellate court's reasoning. The juvenile was arrested for burglary and grand theft offenses. The juvenile did not score sufficient points on the risk assessment instrument (RAI) for secure detention. At the initial detention hearing, the trial court ordered home detention for up to twenty-one days pending the adjudicatory hearing. A few days later, the juvenile allegedly violated his home detention. The juvenile probation officer filed an affidavit setting forth the violation. The juvenile was taken into custody, and the trial court held a detention hearing. The trial court ordered the child held in secure detention until expiration of the twenty-one day period. The juvenile filed a petition for writ of habeas corpus which was granted. The Fourth District Court of Appeal found that trial court's secure detention decision must be based on the results of the risk assessment instrument and the detention criteria set forth in the statute. Section 985.255, F.S. (2012) did not authorize secure detention based merely on a violation of pre-adjudication home detention. Further, Subsection (3)(b) provided that if the court orders a placement more restrictive than indicated by the results of the RAI, the court must state, in writing, clear and convincing reasons for such placement. In this case, the juvenile did not score sufficient points on the RAI for secure detention and the court did not provide clear and convincing reasons for departing from the RAI. The Fourth District agreed with the decision in K.T.E. v. Lofthiem, 915 So.2d 767 (Fla. 2d DCA 2005) that a court may initiate direct contempt proceedings to punish a violation of a pre-adjudication home detention order. However, in this case, the trial court never initiated indirect contempt of court proceedings. The Fourth District disagreed with K.T.E. and other Second District Court of Appeal decisions that indicate that a trial court can order secure detention by making written findings of "significantly changed circumstances." Section 985.265(1), F.S. (2012) provided that the Department of Juvenile Justice may transfer the child from nonsecure or home detention care to secure detention care only if significantly changed circumstances warranted such transfer. However, this provision only constrains the department and does not create an independent basis for a trial court to order secure detention. In the instant case, the juvenile did not qualify for secure detention under the RAI, or state in writing other "clear and convincing" reasons, and the juvenile was not transferred to secure detention by the department. Therefore, the Fourth District held that under the circumstances, the trial court could not order secure detention after the juvenile violated his pre-adjudication home detention and granted the petition for writ of habeas corpus. Conflict was certified with the decision in K.T.E. to the extent discussed in the opinion.

<http://www.4dca.org/opinions/September%202013/09-11-13/4D12-2690.op.pdf> (September

11, 2013).

M.J. v. State, ___ So.3d ___, 2013 WL 5222391 (Fla. 4th DCA 2013). **THE JUVENILE’S CONFESSION SHOULD HAVE BEEN SUPPRESSED BECAUSE IT RESULTED FROM AN ILLEGAL DETENTION FOR LOITERING AND PROWLING.** The juvenile appealed the denial of his motion to suppress his confession. The juvenile was observed in front of a house in a high crime area during school hours. The deputy knew the juvenile from prior dealings with the juvenile. The deputy attempted to initiate a truancy investigation. The juvenile ran and hid. The juvenile was found and read his *Miranda* rights. The juvenile said he was at the house to see a friend. The deputy knocked on the door but no one answered. The deputy, being suspicious about the circumstances, walked around the house. The deputy found three boxes of sneakers in some bushes along the side of the house. At that point, the deputy noticed the home's resident at the home's window. The resident told the deputy that the juvenile had brought the shoes to his residence. The juvenile was arrested for loitering and prowling and transported to the sheriff's office where an interrogation was conducted. The juvenile confessed to the burglary during the interrogation. At the time of the arrest, the deputy did not know that the shoes were stolen. At the station, the deputy was informed that a burglary of shoes had been reported. The juvenile's motion to suppress the confession was denied and the juvenile appealed. The Fourth District Court of Appeal found that the deputy had reasonably stopped the juvenile for truancy. However, he did not have probable cause to arrest the juvenile for loitering and prowling. Truancy is not a crime. While a law enforcement officer has the authority to take a juvenile into custody, that authority is limited to returning the child to school or the child's parents. In the instant case, the officer did not have the authority to transport the child to a police station for further questioning based upon truancy. Where an officer has reasonable suspicion that a person is involved in criminal activity, the officer may conduct an investigatory stop. However, that investigation should be limited and cannot extend beyond the place of initial encounter. To transport an individual for additional questioning, a law enforcement officer must have probable cause for an arrest. The Fourth District held that the deputy did not have probable cause to arrest the juvenile for loitering and prowling. When the deputy first saw the juvenile, he suspected him of being a truant, not of committing a crime. The juvenile's flight did not provide probable cause to arrest. Indeed, it may have been quite normal of a truant to flee from law enforcement. All other conduct on which the deputy relied in his decision to arrest the juvenile occurred after stopping and detaining the juvenile. Even the discovery of the sports shoes did not provide probable cause because the deputy admitted that at the time of arrest, he had no idea that the shoes were the subject of a burglary. There was nothing at the time and place of the juvenile's detention for truancy to provide probable cause that any criminal activity had occurred, was occurring, or was about to occur. Thus, the deputy had only a bare suspicion

that the juvenile was up to something. Therefore, the transport and questioning of the juvenile at the police station, which resulted in the juvenile's confession to burglary, violated his Fourth Amendment rights. The juvenile's detention and transport to the station for questioning was illegal, making his confession the fruit of an illegal arrest. Accordingly, the trial court erred in denying the motion to suppress the confession. Since the issue was dispositive, the trial court was directed to dismiss the delinquency petition on remand. <http://www.4dca.org/opinions/September%202013/09-11-13/4D12-3106.op.pdf> (September 18, 2013).

J.D.J. v. State, __ So.3d __, 2013 WL 4525430 (Fla. 4th DCA 2013). **ADJUDICATION FOR DIRECT CRIMINAL CONTEMPT AND IMPOSITION OF FIVE DAYS OF DETENTION WAS REVERSED AND REMANDED WHERE THE JUVENILE'S TARDINESS WAS NOT WILLFUL AND THE APPLICABLE RULES OF JUVENILE PROCEDURE WERE NOT FOLLOWED.** The juvenile was fifteen minutes late to court and was found in direct criminal contempt and given five additional days in secure detention. The Fourth District Court of Appeal found that willfulness was required for an individual to be detained or incarcerated for direct criminal contempt. In the instant case, the Fourth District held that the un rebutted facts demonstrated that the juvenile did not have control over his arrival time. Therefore, his tardiness could not have been willful. Further, the Florida Rule of Juvenile Procedure 8.150(a) expressly mandated that the opportunity to be heard included an opportunity to present evidence. In the instant case, the trial court did not conduct an evidentiary hearing or allow the juvenile the opportunity to present evidence of excusing or mitigating circumstances. Instead, the trial court developed the facts by asking questions and soliciting unsworn answers. As such, fundamental error occurred. Accordingly, the Fourth District reversed and remanded after concluding that the facts were insufficient to support a finding of willfulness and the applicable rules of juvenile procedure were not followed. <http://www.4dca.org/opinions/August%202013/08-28-13/4D12-1973.op.pdf> (August 28, 2013).

G.T. v. State, __ So.3d __, 2013 WL 4436572 (Fla. 4th DCA 2013). **ADJUDICATION FOR RESISTING AN OFFICER WITHOUT VIOLENCE WAS REVERSED BECAUSE THE POLICE OFFICER LACKED REASONABLE SUSPICION TO SUSPECT THE JUVENILE OF CRIMINAL ACTIVITY.** The juvenile appealed her adjudication for resisting an officer without violence when she refused to give the arresting officer her name and personal information after the officer detained her and other juveniles under the suspicion of underage drinking and disorderly intoxication. The arresting officer was dispatched to an apartment complex in response to a call about a disturbance of juveniles drinking and smoking. The officer heard loud talking and approached six juveniles. One of the youths (not the juvenile) was holding an empty liquor bottle. The juveniles began to

walk away. The officer told them to stop. The juveniles stopped and appeared to the officer to be intoxicated. The officer asked the juveniles for their names, dates of birth, and parents' or guardians' telephone numbers. The juvenile refused to give the requested information and was arrested for resisting an officer without violence and disorderly intoxication in a public place. The trial court denied the juvenile's subsequent motions for dismissal and found her guilty. The juvenile argued that the State failed to prove that the officer was engaged in the lawful execution of a legal duty when he detained her and asked for her name and information. The Fourth District Court of Appeal found that to be engaged in the lawful execution of a legal duty in detaining a person, an officer must have reasonable suspicion of criminal activity by the person. Further, a reasonable suspicion analysis cannot include any facts that comes to light after a stop or detention. In the instant case, the officer lacked a particularized and objective basis for suspecting that the juvenile herself was engaged in criminal activity. The State was unable to articulate specific facts to connect the juvenile to the empty liquor bottle or to demonstrate that the officer had more than an inchoate hunch that this group of juveniles was the one he had been dispatched to investigate. Furthermore, the totality of the circumstances, based solely on facts known to the officer before the stop, did not indicate any suspect behavior on the part of the juvenile. The State had argued that the juveniles' red, glossy eyes and slurred speech indicated to the officer that they were intoxicated. However, the officer made this observation after he detained them. Thus, that observation could not form any part of the basis for the officer's reasonable suspicion justifying the detention. As a result, the Fourth District held that the officer lacked reasonable suspicion and was not engaged in the lawful execution of a legal duty when he detained the juvenile and asked her for her name and information. Therefore, her refusal did not constitute resisting an officer. Accordingly, the Fourth District reversed the trial court's denial of the juvenile's motions for judgment of dismissal and remanded for discharge. <http://www.4dca.org/opinions/August%202013/08-21-13/4D12-1983.op.pdf> (August 21, 2013).

Q.J.L. v. State, ___ So.3d ___, 2013 WL 4436609 (Fla. 4th DCA 2013). **EVIDENCE FAILED TO SUPPORT ADJUDICATION FOR ATTEMPTED BURGLARY OF A DWELLING AND CRIMINAL MISCHIEF**. The juvenile argued that the trial court should have granted his motion for judgment of dismissal because the evidence was insufficient to prove attempted burglary of a residence and criminal mischief. Law enforcement responded to a report of a burglary in progress. The juvenile was seen in the immediate vicinity. There was a broken window and a fresh set of footprints with a zigzag pattern outside the broken window. Police observed a fresh abrasion on the inside of the juvenile's left forearm. The juvenile was wearing shoes with a zigzag pattern. The grooves in the soles of the juvenile's shoes were filled with dirt similar to the dirt under the broken window. The juvenile gave a videotaped statement that other boys were

responsible. The juvenile indicated that he knew the other boys were going to rob the house, that he was present at the house, but that he did not participate. The trial court found that: (1) the scratch on the juvenile's arm was insignificant because there was nothing tying it to the incident; (2) the juvenile was wearing "as typical a shoe as you can have"; (3) the dirt in the tread of the shoe was the same dirt that could be found throughout the neighborhood; and (4) nothing about the dirt on his sneakers or the sneaker pattern tied the juvenile to this crime. Nevertheless, the trial court found the juvenile guilty of attempted burglary and criminal mischief. The trial court relied on his presence in the area and his taped admission to being there, knowing what the boys were doing and staying while they broke in. The court withheld adjudication and placed the juvenile on probation. The trial court also ordered restitution. The Fourth District Court of Appeal found that while the evidence was insufficient to prove attempted burglary and criminal mischief, the evidence was sufficient to establish a trespass. The juvenile's hypothesis of innocence was that, although he went into the backyard, he left before any crime other than trespass had been committed. The State offered nothing to contradict this hypothesis of innocence. Therefore, the trial court should have entered a judgment of dismissal as to the crimes charged and found him guilty only of trespass. Accordingly, the case was reversed and remanded for the trial court to reduce the finding of guilt to trespass and to reconsider the disposition order. <http://www.4dca.org/opinions/August%202013/08-21-13/4D12-601.op.pdf> (August 21, 2013).

D.B. v. State, __ So.3d __, 2013 WL 4006940 (Fla. 4th DCA 2013). **STATUTE AND JUVENILE RULES MANDATED THE DISMISSAL OF DELINQUENCY PETITION WHERE THE JUVENILE REMAINED INCOMPETENT AFTER THREE YEARS.** Juvenile filed a petition for a writ of prohibition to prevent the trial court from exercising any further jurisdiction over delinquency proceedings due to his continuing incompetency. After a delinquency petition was filed, the juvenile was declared incompetent. More than three years had passed and according to all the experts the child remained incompetent. The Fourth District Court of Appeal found that the Florida Rule of Juvenile Procedure 8.095(a)(7) and s. 985.19(5), F.S. (2012) provided that the court must dismiss the delinquency petition if, at the end of the 2-year period following the date of the order of incompetency, the child has not attained competency and there is no evidence that the child will attain competency within a year. In the instant case, the trial court was presented with evidence that the child remained incompetent after three years. Therefore, the trial court was required to dismiss the proceedings. Accordingly, the petition was granted with directions to dismiss the delinquency petition. <http://www.4dca.org/opinions/August%202013/08-07-13/4D13-1893.op.pdf> (August 7, 2013).

Fifth District Court of Appeal

No new opinions for this reporting period.

Dependency 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

Department of Children and Families v. J.M.B., ___ So.3d ____, 2013 WL 4726901 (Fla. 4th DCA 2013) **DISCOVERY ORDER QUASHED**. The Department of Children and Families sought certiorari review of a non-final discovery order that required it to release confidential records of children who were not parties to the case. The trial court issued the order while it was reviewing a suitability assessment associated with a specific dependent child. During the hearing, the court heard about the delay between the child's referral for psychiatric evaluation and the actual assessment and got frustrated. The court then ordered the Department to produce to the attorney ad litem all referrals, information, documentation or records made in the 30 days preceding the order for a dependent child to receive the psychiatric evaluation and/or assessment. Since the discover should have been reviewed in camera due to the confidentiality of the information and the production was too broad, the appellate court granted the petition and quashed that portion of the order. <http://www.4dca.org/opinions/September%202013/09-04-13/4D13-773.op.pdf> (September 04, 2013).

Fifth District Court of Appeal

Chew v. Roberts, ___ So.3d ____, 2013 WL 5378094 (Fla. 5th DCA 2013) **ORDER QUASHED FOR LACK OF DUE PROCESS**. The foster parents sought certiorari review of a non-final order consolidating an adoption case brought by the maternal great uncle and aunt of a child who's parental rights have been terminated. The foster parents also want to adopt the child and moved to intervene as parties in the dependency case. The motion to intervene was granted. The aunt and uncle filed a separate action seeking to adopt the child and filed an amended motion to modify placement and have the child moved to their home. This motion was noticed for hearing, and the foster parents filed a motion to strike the amended motion and stated that

the relatives were not parties and therefore, lacked standing to file a motion to modify placement. The aunt and uncle filed another motion to consolidate their previous two motions, but failed to include the foster parents in the certificate of service. At the hearing, the judge decided that before hearing either motion, it needed to consolidate the two cases. The court then overruled the foster parents' objection to lack of notice, granted the motion to consolidate, and scheduled the amended motion to modify placement for an evidentiary hearing at a later date. Because the foster parents were denied due process when the trial court considered and ruled upon the relatives' motion to consolidate, the appellate court granted the writ and quashed the order for the hearing. The appellate court noted that the trial court departed from the essential requirements of law when it proceeded, over objection, to consider and rule upon the relatives' motion to consolidate despite the lack of notice to the foster parents. It also noted that the trial court's decision on the motion to consolidate implicitly granted the relatives status as parties rather than as participants in the dependency case. <http://www.5dca.org/Opinions/Opin2013/092313/5D13-2697.op.pdf> (September 27, 2013).

Dissolution Case Law

Florida Supreme Court

In Re: Amendments to Florida Supreme Court Approved Family Law Forms, __So.3d__, 2013 WL 4734603, 38 Fla.L.Weekly S617, (Fla. 2013). [FORMS REVISED TO IMPLEMENT LAW ON DESIGNATION OF BENEFICIARIES.](#)

The Florida Supreme Court adopted revisions to several family law forms to implement section 732.703, Florida Statutes, which was enacted in 2012. That section provides that a designation made by or on behalf of a decedent, providing payment or transferring interest in an asset, is void if the decedent's marriage was dissolved or declared invalid prior to his or her death and the designation was made prior to the dissolution or court order; however, the statute allows a designation of beneficiary to survive dissolution if specifically provided for in a marital settlement agreement (MSA) or an order of dissolution. Two forms for MSAs and two forms for final judgment of dissolution were revised to implement the new statute; the glossary of the general instructions for self-represented litigants was also revised. The revised forms took effect September 4, 2013; a 60 day period has been provided for interested persons to file comments.

<http://www.floridasupremecourt.org/decisions/2013/sc13-532.pdf> (September 4, 2013).

First District Court of Appeal

Bradham v. Bradham, __So.3d__, 2013 WL 5269765, (Fla.1st DCA 2013).

[IT IS ERROR TO AWARD FEES AND COSTS ABSENT THE NECESSARY FINDINGS.](#)

Former husband appealed the trial court's order modifying his alimony obligation and ordering him to pay fees and costs to former wife. Appellate court found no abuse of discretion in the modification of alimony; however, it reversed and remanded the order granting fees and costs because the trial court failed to make findings to support its award. Awarding fees and costs without making the necessary findings as to the proper amount is reversible error—even where

the record supports awarding fees and costs. Here, although the trial court found that former wife had a need for contribution to her fees and costs and that former husband had the ability to pay, there was no indication that it considered the factors required under *Fla. Patient's Com. Fund v. Rowe*, 472 So.2d 1145 (Fla.1985), in reaching its decision to award fees and costs. <http://opinions.1dca.org/written/opinions2013/09-18-2013/12-4380.pdf> (September 18, 2013).

Newman v. Newman, __So.3d__, 2013 WL 5269547, (Fla.1st DCA, September 18, 2013).
TRIAL COURT ERRED IN AWARDING FEES WITHOUT GIVING OTHER SPOUSE OPPORTUNITY TO DISPUTE REASONABLENESS; ABSENT A STIPULATION, SPOUSE SEEKING FEES MUST PROVE REASONABLENESS AT AN EVIDENTIARY HEARING.

Appellate court found that the trial court erred in awarding fees and costs to former wife without conducting a hearing and giving former husband an opportunity to dispute the reasonableness of the attorney's hourly rate and number of hours expended. In absence of a stipulation, a spouse seeking fees must prove the reasonableness of those fees at an evidentiary hearing.

<http://opinions.1dca.org/written/opinions2013/09-18-2013/12-5998.pdf> (September 18, 2013).

Lampert-Sacher v. Sacher, __So.3d__, 2013 WL 4860100, (Fla.1st DCA 2013).
SPOUSE FAILED TO DEMONSTRATE ABUSE OF DISCRETION BY TRIAL COURT.

Former wife appealed a supplemental final judgment regarding time-sharing entered on former husband's petition for modification. Appellate court treated her motions as review of the trial court's denial of a stay. In such reviews, an abuse of discretion standard is applied, with the burden on the movant to demonstrate abuse of discretion, as well as a likelihood of prevailing on appeal, irreparable harm to the movant if a stay were not granted, or a showing that a stay would be in the public interest. Appellate court concluded former wife failed to meet this standard. Finding no abuse of discretion, appellate court affirmed the trial court's order denying a stay. <http://opinions.1dca.org/written/opinions2013/09-12-2013/13-3967.pdf> (September 12, 2013).

Graham v. Graham, __So.3d__, 2013 WL 4712999, (Fla.1st DCA 2013).
TRIAL COURT MISCALCULATED SPOUSE'S SHARE OF 401(k) AND PENSION; PLAIN MEANING OF HALF OWNERSHIP IS SOMETHING OTHER THAN ENTITLEMENT TO A FIXED SUM; SBP PREMIUMS NOT DEDUCTIBLE FROM GROSS RETIREMENT PAY UNLESS MADE PURSUANT TO COURT ORDER.

Former wife argued that the trial court's post-judgment order failed to effectuate the spouses' marital settlement agreement (MSA). Appellate court agreed with her that the trial court erred in calculating her share of former husband's 401(k) account and his Army pension; accordingly, it reversed. The MSA entitled former wife to 10/23 of former husband's Army pension as of the date of the MSA and ½ of former husband's 401(k) as of July 24, 1993. The trial court, following former husband's logic, awarded former wife the value of her half share as of July 24, 1993. Noting that its interpretation of the MSA is de novo, appellate court held that the MSA granted former wife half ownership of the 401(k) account as of July 1993. That ownership entitled her to gains (or losses) on her share. Appellate court held that the plain meaning of half ownership

of any asset is something other than entitlement to a fixed sum of money; if spouses want to agree to a certain dollar amount, they can specify an agreed-upon sum in their MSA. Appellate court remanded with instructions to the trial court that it determine the present value of former wife's half of what the 401(k) held as of July 1993. With regard to the Army pension, appellate court noted a trial court may now divide a former service member's "disposable retired pay"; in order to do so, a trial court must first calculate the disposable retired pay. Here, the trial court erred by deducting former husband's voluntary survivor benefit plan (SBP) payments for his current spouse when calculating his disposable retired pay; such payments may only be deducted from gross retirement pay if they are being made pursuant to court order.

<http://opinions.1dca.org/written/opinions2013/09-03-2013/12-4416.pdf> (September 3, 2013).

Bruno v. Bruno, __ So.3d __, 2013 WL 4614732, (Fla.1st DCA 2013).

TRIAL COURT'S AWARD OF DURATIONAL ALIMONY INADEQUATE; JUDGMENT LACKED REQUIRED FINDINGS AS TO INCOME AND WAS UNCLEAR AS TO HOW TRIAL COURT REACHED ITS DECISION OF TYPE AND AMOUNT OF ALIMONY.

Appellate court agreed with former wife that the trial court erred in awarding only durational alimony in the final judgment of dissolution--without providing the statutorily required findings-- and in awarding an inadequate monthly amount. The spouses entered the nine year marriage as homeowners; each deeded an undivided half-interest in their home to the other. The couple lived in former husband's house and sold former wife's. The final judgment awarded the marital home to former husband, with a small fraction of his pension as an off-set to former wife. She was awarded bridge-the-gap/durational alimony for 36 months at \$700 per month. The judgment was unclear as to how the trial court arrived at its decision as to type and amount of alimony or even where former wife would live. The record reflected a disparity between the spouses' incomes; however, it was not clear this disparity was considered by the trial court. Appellate court cited *Kemmet v. Kemmet*, 885 So.2d 408 (Fla.1st DCA 2004) in reversing and remanding.

<http://opinions.1dca.org/written/opinions2013/08-30-2013/12-5515.pdf> (August 30, 2013).

Brooks v. Walker-Brooks, __ So.3d __, 2013 WL 4488931, (Fla.1st DCA 2013).

AN ORDER RESULTING FROM A HEARING AT WHICH A PARTY RECEIVED NO NOTICE MUST BE REVERSED ON DUE PROCESS GROUNDS; A FEE AWARD MUST CONTAIN SPECIFIC FINDINGS AS TO RATE AND NUMBER OF HOURS EXPENDED.

Former husband appealed the trial court's denying his request to change venue and awarding a fee to former wife's counsel. Appellate court reversed due to the trial court having held an unnoticed hearing at which only former wife's counsel was present and its failure to have set forth any specific findings regarding the fee award in the order resulting from that hearing. Appellate court held that an order resulting from a hearing at which a party received no notice must be reversed on due process grounds. It also held that a fee award must set forth specific findings as to the hourly rate and the numbers of hours expended. Here, it concluded that "neither the trial court's order nor the record contains a scintilla of evidence" to support the fee.

<http://opinions.1dca.org/written/opinions2013/08-23-2013/12-3780.pdf> (August 23, 2013).

McKee v. Mick, __So.3d__, 2013 WL 4482487, (Fla.1st DCA 2013).

INTERSPOUSAL GIFTS ARE INCLUDED IN MARITAL ASSETS FOR PURPOSES OF EQUITABLE DISTRIBUTION; NON-INTERSPOUSAL GIFTS ARE NOT.

Former husband appealed an amended final judgment of dissolution on several grounds. Appellate court found merit in two: the trial court incorrectly classified a jointly titled burial plot as former wife's nonmarital property; and incorrectly classified a 1999 Cadillac as a marital asset. Although former wife had received the plots from her aunt as a gift during the marriage, she added former husband to the deed for one of them. Interspousal gifts are included in marital assets for purposes of equitable distribution; therefore, the plot should have been classified as marital. Title to the Cadillac, on the other hand, had been transferred to former husband from his mother before she entered a nursing home. Because assets acquired separately by either spouse by non-interspousal gift are nonmarital assets, the car should have been classified as nonmarital. Reversed and remanded for the trial court to correct the errors and to review former wife's award of attorney's fees in light of the revised scheme of equitable distribution.

<http://opinions.1dca.org/written/opinions2013/08-22-2013/12-4954.pdf> (August 22, 2013).

Butler v. Hall, __So.3d__, 2013 WL 4106693, (Fla.1st DCA 2013).

REVERSAL IS REQUIRED WHERE A WRITTEN JUDGMENT IS INCONSISTENT WITH A TRIAL COURT'S ORAL PRONOUNCEMENTS.

Appellate court agreed with former husband that the portion of the trial court's written judgment regarding the spouses' time-sharing schedule was inconsistent with its oral pronouncement on that issue. Appellate court reiterated that reversal is required where a written judgment is inconsistent with a trial court's oral pronouncement; accordingly, it reversed and remanded with instructions that the trial court conform the judgment to its oral pronouncement regarding time-sharing and to correct the percentages for the spouses' overnights with their children.

<http://opinions.1dca.org/written/opinions2013/08-15-2013/13-0250.pdf> (August 15, 2013).

Second District Court of Appeal

Coppola v. Coppola, __So.3d__, 2013 WL 5338051, (Fla.2d DCA 2013).

TRIAL COURT'S FINDING UNSUPPORTED BY RECORD; REMANDED FOR TRIAL COURT TO CONSIDER MOTION TO ENFORCE FEE AWARD ON ITS MERITS.

Former husband appealed denial of his motions to enforce an attorney's fee award entered against former wife and the subsequent denial of rehearing; appellate court reversed. Finding the trial court's factual finding that the fee award was made directly to former husband's attorney and not to former husband unsupported by the record, appellate court remanded for the trial court to consider former husband's motions to enforce the fee award on its merits.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2013/September/September%2025,%202013/2D12-333.pdf (September 25, 2013).

Card v. Card, __So.3d__, 2013 WL, 5289962 (Fla.2d DCA 2013).

IF FEES HAVE NOT BEEN DETERMINED, THAT PORTION OF FINAL JUDGMENT IS NOT FINAL AND NONAPPEALABLE; TRIAL COURT DID NOT ERR IN FAILING TO RESERVE JURISDICTION OVER CHARGING LIEN BECAUSE FEES AND COSTS HAD NOT BEEN FINALIZED AND IT HAD RESERVED JURISDICTION FOR THAT PURPOSE.

At issue in former wife's appeal of the award of fees and costs was whether the trial court erred in failing to reserve jurisdiction over the charging lien filed by her counsel. Appellate court dismissed her challenge to the award for lack of jurisdiction. Because the amount of fees had not been determined, that portion of the final judgment was nonfinal and nonappealable; however, there was no dispute as to former wife's attorney having timely filed his charging lien. Appellate court held that, "notwithstanding a lack of express reservation of jurisdiction over the charging lien," the trial court was not precluded from considering the charging lien because the issue of fees and costs had not been finalized and the trial court had reserved jurisdiction for that purpose. *Baker & Hostetler, LLP v. Swearingen*, 998 So.2d 1158, 1163, (Fla.5th DCA 2008). http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2013/September/September%2020,%202013/2D11-6307.pdf (September 20, 2013).

Cash v. Cash, __ So.3d __, 2013 WL 5288857, (Fla.2d DCA 2013).

TRIAL COURT ABUSED ITS DISCRETION IN MODIFYING CHILD SUPPORT BY DEVIATING FROM GUIDELINES WITHOUT PROVIDING SUFFICIENT FINDINGS AND FAILING TO IMPUTE INCOME TO SPOUSE WHEN OTHER SPOUSE PRESENTED COMPETENT, SUBSTANTIAL EVIDENCE OF VOLUNTARY UNEMPLOYMENT; RETROACTIVITY IS THE RULE NOT THE EXCEPTION WITH MODIFICATION.

Appellate court agreed with former husband that the trial court had abused its discretion in deviating from the guidelines when modifying his child support obligation. The child support ordered in the final judgment of dissolution was calculated using a stipulated-to income attributed to former husband; his request for downward modification was based on a substantial decrease in income. Appellate court held the trial court erred in failing to impute income to former wife, in calculating former husband's income, and in failing to apply the reduced child support obligation retroactively to the filing date of the petition for modification. Appellate court acknowledged that while specific findings are not required for a 5% deviation, neither the record nor the trial court's order indicated that it had considered "any of the statutory factors". Appellate court concluded the trial court abused its discretion in deviating from the guidelines by an additional 5%--for former husband's limited time-sharing--without providing sufficient findings. It found the trial court's failure to impute income to former wife was error in light of competent, substantial evidence presented by former husband that her unemployment was voluntary. Appellate court reiterated that when modification of child support or alimony is granted, retroactivity is the rule rather than the exception; there is a presumption of retroactivity unless there is a basis for determining that the award should not be retroactive. On remand, the modified child support obligation should be made retroactive to the filing date of the petition.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2013/September/September%2020,%202013/2D12-435.pdf (September 20, 2013).

Caudill-Rosa v. Rosa, __ So.3d __, 2013 WL 5226537, (Fla.2d DCA 2013).

REVERSED FOR TRIAL COURT’S FAILURE TO PROVIDE SPECIFIC WRITTEN FINDINGS IN SUPPORT OF ITS DEVIATION FROM CHILD SUPPORT GUIDELINES.

Former wife appealed dissolution of marriage. Appellate court affirmed with the exception of the trial court’s deviation from the child support guidelines in which it failed to provide specific written findings in support of the deviation. Reversed and remanded for further proceedings.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2013/September/September%2018,%202013/2D12-3954.pdf (September 18, 2013).

Emmenegger v. Emmenegger, __So.3d__, 2013 WL 5224926, (Fla.2d DCA 2013).

TRIAL COURT ERRED IN APPLYING STATUTORY ADJUSTMENT TO CHILD SUPPORT FOR SUBSTANTIAL TIME-SHARING WHEN PARENT HAD WAIVED THAT ADJUSTMENT IN POST-DISSOLUTION AGREEMENT; REVERSED AND REMANDED FOR RECALCULATION OF CHILD SUPPORT IN ACCORD WITH AGREEMENT.

Former wife argued that the trial court had unreasonably interpreted a post-dissolution agreement specifying that visitation arrangements would not be considered as former husband having 40% time with the children. When former husband sought a reduction in child support based on the oldest child reaching majority, at issue was whether his number of overnights entitled him to a credit towards his child support obligation. Former wife argued that former husband had waived his statutory right to receive credit in their agreement; therefore, the child support should not take the number of overnights into account. Appellate court concluded that the spouses had agreed that former husband’s time-sharing schedule would have no effect on his support obligation; the intent of their agreement was that former husband would pay a specific amount of child support, that he would receive 40% of the overnights, and that he would not receive the adjustment to his child support obligation that percentage would ordinarily entitle him to. It held that the “goal to be accomplished by the agreement” was that former husband would provide child support in an amount certain without consideration of his substantial time-sharing. It concluded that the trial court erred in applying the adjustment absent a “substantial change in circumstances that would justify overlooking the father’s earlier waiver of his right to that statutory reduction.” Appellate court noted that when agreed-upon child support is incorporated into an order, a spouse seeking to reduce it bears a “heavier burden” than would otherwise be required. Reversed and remanded for the trial court to recalculate child support in accord with the spouses’ post-dissolution agreement and without the statutory adjustment for former husband’s substantial time-sharing.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2013/September/September%2018,%202013/2D12-4244.pdf (September 18, 2013).

Stocker v. Stocker, __So.3d__, 2013 WL 5226553, (Fla.2d DCA 2013).

LACK OF PERSONAL JURISDICTION IN DOMESTICATING STATE NOT A GROUND FOR REFUSAL OF ENFORCEMENT OF FOREIGN JUDGMENT.

Citing its opinion in *Hinchee v. Golden Oak Bank*, 540 So.2d 262,263, (Fla. 2d DCA 1989), appellate court held that lack of personal jurisdiction in domesticating state is not a ground to refuse enforcement of a foreign judgment.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2013/September/September%2018,%202013/2D12-4980.pdf (September 18, 2013).

Tarkow v. Tarkow, __So.3d__, 2013 WL 4525302, (Fla.2d DCA 2013).

IT IS ERROR FOR A TRIAL COURT TO FAIL TO CONSIDER TAX IMPLICATIONS OF AN ALIMONY AWARD IF EVIDENCE IS PRESENTED; CALCULATIONS RELYING ON INCOME FROM INVESTMENTS SHOULD BE BASED ON CURRENT INFORMATION.

Both spouses appealed a trial court order substantially reducing former husband's permanent periodic alimony payment based on former wife's involvement in a supportive relationship. The amount of the permanent alimony award had been previously reduced in *Tarkow v. Tarkow*, 805 So.2d 854 (Fla.2d DCA 2001), following the 2000 dissolution of a twenty-eight year marriage. At the time of his May 2010 petition for modification, former husband was obligated to pay former wife \$6000 per month; he alleged both a substantial change of circumstances due to a significant reduction in his income, and also that former wife was in a supportive relationship. The general magistrate (GM) recommended a substantial reduction of the alimony obligation; however, her calculations failed to take into account the effect of federal and state income taxes on former wife's needs. The trial court also failed to address this matter. This was error. A trial court must consider tax implications of alimony if presented. Because the final hearing was continued over a two month period, during which time former wife's investments decreased in value, the GM relied on incorrect information in calculating former wife's income from her investments. This too was error. The GM's calculations should have reflected "current reality." The trial court failed to address this issue as well. Appellate court reversed the amount of the reduction in the alimony award, remanded it for reconsideration in light of former wife's income tax obligations and current investment income, and instructed the trial court to adjust the amount of the reduction so that the alimony obligation would be sufficient to meet former wife's needs.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2013/August/August%2028,%202013/2D12-1162.pdf (August 28, 2013).

Craciun v. Opritescu, __So.3d__, 2013 WL 4525754, (Fla.2d DCA 2013).

TRIAL COURT ORDER AFFIRMED, BUT REMANDED FOR CORRECTION.

Appellate court affirmed trial court order but remanded for correction to require former wife to communicate with former husband regarding nonmedical and nonemergency medical decisions.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2013/August/August%2028,%202013/2D13-939.pdf (August 28, 2013).

Elsaid v. Elsaid, __So.3d__, 2013 WL 4483468, (Fla.2d DCA 2013).

NONFINAL TRIAL COURT ORDER AFFIRMED BUT REMANDED FOR CORRECTION OF SCRIVENER'S ERRORS; TRIAL COURT ENCOURAGED TO RESOLVE ISSUES REGARDING TEMPORARY SUPPORT AND SCHEDULE FINAL HEARING DUE TO ITS LIMITED OPTIONS TO MAKE EQUITABLE ADJUSTMENTS IN THE FINAL ORDER.

Appellate court affirmed trial court order granting temporary alimony, increasing temporary child support, and imposing sanctions on spouse for his willful noncompliance with a previous child support order, but remanded for correction of scrivener's errors regarding the arrearages.

Citing its opinion in *George v. George*, 32 So.3d 651 (Fla.2d DCA 2010), appellate court encouraged the trial court to schedule a final hearing to resolve these issues to “prevent any potential inequities” as a trial court is limited in making equitable adjustments in the final order.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2013/August/August%2023,%202013/2D13-92.pdf (August 23, 2013).

Mansour v. Mansour, __ So.3d __, 2013 WL 4081240, (Fla.2d DCA 2013).

A TRIAL COURT MUST EXPRESSLY FIND THAT AN ALLEGED CONTEMNOR HAD NOTICE OF THE MOTION AND HEARING; TRIAL COURT’S FINDING OF PRESENT ABILITY TO PAY THE PURGE MUST BE BASED ON COMPETENT, SUBSTANTIAL EVIDENCE; GROSS RECEIPTS OF A BUSINESS ARE AN INSUFFICIENT BASIS FOR VALUATION; TRIAL COURT MUST DETERMINE VALUE OF CORPORATE STOCK.

Former husband appealed a trial court order finding him in contempt for failing to pay substantial child support arrearages. Appellate court found error. It held that the trial court failed to expressly find that former husband had notice of former wife’s motion for contempt and the hearing date; it also concluded that the trial court’s finding that former husband had the present ability to pay the purge was not supported by competent, substantial evidence. Noting that the trial court appeared to have valued former husband’s interest in a business entity based on its gross receipts, appellate court held that gross receipts are an insufficient basis for valuation; instead, the trial court must determine the value of corporate stock. Reversed and remanded.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2013/August/August%2014,%202013/2D12-2664.pdf (August 14, 2013).

Third District Court of Appeal

Millen v. Millen, __ So.3d __, 2013 WL 5433533, (Fla.3d DCA 2013).

TRIAL COURT ERRED WHEN IT ALLOWED GUARDIAN AD LITEM TO QUESTION WITNESSES BUT IT WAS NOT FUNDAMENTAL ERROR REQUIRING REVERSAL.

Appellate court disagreed with former husband that the guardian ad litem’s participation in the trial required reversal. Neither spouse had objected when asked by the trial court if either had any objection to the guardian’s questioning of witnesses. Appellate court held that a “guardian ad litem serves an important fact-finding role in cases that involve minor children.” Appellate court found that the trial court erred in allowing the guardian ad litem to question the witnesses, but held it was not fundamental error. A fundamental error is one which goes to “the foundation of the case” ; an issue may be considered for the first time on appeal if it is fundamental error.

<http://www.3dca.flcourts.org/Opinions/3D12-2871.pdf> (September 30, 2013).

Pullis v. Pullis, __ So.3d __, 2013 WL 4007238, (Fla.3d DCA 2013).

SPOUSE’S FAILURE TO APPEAR DUE TO “EXCUSABLE NEGLIGENCE”; TRIAL COURT MUST DETERMINE NET INCOME FOR CALCULATION OF CHILD SUPPORT; IN CHILD SUPPORT MODIFICATION, RETROACTIVITY IS RULE RATHER THAN EXCEPTION; TAX EXEMPTION CLAIM REQUIRES WAIVER

BY ONE PARENT AND CURRENT SUPPORT PAYMENTS BY OTHER; FEE AWARD BASED ON NON-COMPLIANCE REVERSED IF NON-COMPLIANCE IS DUE TO EXCUSABLE NEGLIGENCE.

Final judgment of dissolution granted former wife's petition for relocation and ordered former husband to pay child support of \$125 per month; this amount was to continue for three months from entry of the judgment and be recalculated after the spouses exchanged financial information. Ten months later, former husband moved to establish child support. Although former wife's counsel was served with the motion and resulting order, she received no notice of either. Former husband then moved to claim their child as a dependent and determine attorney's fees; at this point, her attorney informed former husband's counsel that he no longer represented her. Counsel for former husband served former wife, who moved for reconsideration; her attorney then withdrew. Appellate court characterized former wife's failure to appear at the hearing to establish child support as, "at the very least, excusable neglect—if neglect at all." It found the order establishing child support erroneous on its face because the trial court failed to make any findings as to the net income of each spouse for calculating child support nor did it explain how the calculation was performed. It concluded that the trial court had abused its discretion in denying former wife's motion to vacate the order establishing child support. Accordingly, it reversed and remanded for the trial court to determine the net income of each spouse and calculate child support based on those findings. That award could be made retroactive to the date former husband's filed his motion to establish child support. Appellate court found the trial court erred by not having required former wife to execute a waiver transferring the tax exemption to former husband, and by not conditioning the waiver on him being current with child support payments. Because former wife's non-compliance with the final judgment was due to excusable neglect, former husband's award of attorney's fees was reversed.

<http://www.3dca.flcourts.org/Opinions/3D12-1835.pdf> (August 7, 2013).

Fourth District Court of Appeal

Kuchera v. Kuchera, __So.3d__, 2013 WL 4727960, (Fla.4th DCA 2013).

REMANDED FOR TRIAL COURT TO RULE ON TAX CONSEQUENCES OF ALIMONY.

Both spouses appealed a third amended final judgment of dissolution. Appellate court reversed and remanded for the trial court to make a ruling regarding the tax consequences of payments agreed to in the marital settlement agreement (MSA); otherwise, the trial court's order was affirmed. The MSA required former husband to make payments, but was silent as to whether the payments would be deductible by former husband or includible in former wife's income. Usually, alimony is taxable to the recipient and deductible by the payor; however, payments are not deductible by the payor if they are part of a property settlement agreement. If payments qualify as lump sum alimony, they remain payable to the estate of a receiving spouse and are generally not deductible by the paying spouse under the Internal Revenue Code. Appellate court noted that the spouses' accountants disagreed as to whether former husband could deduct the payments. It held that the trial court erred when it declined to rule on that issue. Appellate court directed the trial court to analyze the MSA and amend its final judgment to indicate whether the payments would be deductible by former husband and taxable to former wife.

<http://www.4dca.org/opinions/September%202013/09-04-13/4D11-2573.op.pdf> (September 4).

Fifth District Court of Appeal

Packo v. Packo, __So.3d__, 2013 WL 4605622, (Fla.5th DCA 2013).

TRIAL COURT MUST MAKE SPECIFIC FINDINGS OF FACT WHEN EQUITABLY DISTRIBUTING MARITAL PROPERTY; FAILURE TO COMPLY IS REVERSIBLE ERROR; FINDINGS ARE ALSO REQUIRED WHEN A TRIAL COURT IMPOSES REQUIREMENT THAT SPOUSE OBTAIN LIFE INSURANCE TO SECURE AN OBLIGATION; AMOUNT OF INSURANCE MUST BE RELATED TO THE OBLIGATION.

Former husband appealed final judgment of dissolution. Appellate court held section 61.075(3), Florida Statutes (2011), requires a trial court make specific findings of fact when equitably distributing marital property; its failure to comply is reversible error. Appellate court found the final judgment lacked the requisite valuation for the marital home and other properties distributed. The trial court's failure to properly value the marital assets precluded meaningful review; thus, appellate court reversed and remanded for the trial court to make the required findings. Appellate court held that if a trial court requires an obligor to secure an obligation with life insurance, it must make findings regarding the availability and cost of the insurance, the obligor's ability to pay, and the special circumstances warranting security for the obligation; failure to do so is reversible error. The amount of insurance must be related to the obligation; it is error to order a spouse to purchase a life insurance policy greater in value than the obligation.

<http://www.5dca.org/Opinions/Opin2013/082613/5D12-238.op.pdf> (August 30, 2013).

Moore v. Moore, __So.3d__, 2013 WL 4483065, (Fla.5th DCA 2013).

NEITHER 401(k) CONTRIBUTION NOR HEALTH SAVINGS ACCOUNT QUALIFIED AS AUTHORIZED DEDUCTION IN CALCULATION OF NET INCOME FOR CHILD SUPPORT; ALIMONY NOT CONSIDERED ORDINARY DEBT; ABSENT COMPELLING CIRCUMSTANCES, A TRIAL COURT ERRS IF IT SETS OFF DEBT AGAINST ALIMONY.

Former husband appealed a final judgment of dissolution on numerous grounds; appellate court found merit in two. One, the trial court erred in determining former wife's net income; and two, the trial court erred in setting-off the equalization payment, which former husband was required to make to former wife against her bridge-the-gap alimony obligation. Alimony is not considered an ordinary debt; a trial court errs in allowing a set-off of debt against alimony absent compelling equitable considerations. Here, the set-off was inconsistent with the purpose of a bridge-the-gap alimony award.

<http://www.5dca.org/Opinions/Opin2013/081913/5D12-2234.op.pdf> (August 23, 2013).

Demarco v. Demarco, __So.3d__, 2013 WL 4482994, (Fla.5th DCA 2013).

TRIAL COURT DID NOT ABUSE ITS DISCRETION IN AMOUNT AND DURATION OF ALIMONY; SPOUSE MAY SEEK MODIFICATION OF AMOUNT UPON RETIREMENT.

Former husband argued that the trial court abused its discretion in the amount and duration of alimony awarded in dissolution of long-term marriage. Appellate court affirmed, but noted that

its affirmance was “without prejudice” for former husband to seek a modification of the alimony amount upon his retirement.

<http://www.5dca.org/Opinions/Opin2013/081913/5D12-4596.op.pdf> (August 23, 2013).

Lopez v. Lopez, __So.2d__, 2013 WL 4225210, (Fla.5th DCA 2013).

A SPOUSE’S USE OF AN ASSET OUT OF NECESSITY OR FOR REASONABLE LIVING EXPENSES— INCLUDING ATTORNEY’S FEES—DOES NOT JUSTIFY AN AWARD OF THAT DEPLETED ASSET ABSENT MISCONDUCT; MISCONDUCT MUST BE INTENTIONAL DISSIPATION OR DESTRUCTION OF AN ASSET FOR A SPOUSE’S OWN BENEFIT UNRELATED TO THE MARRIAGE, NOT SIMPLY MISMANAGEMENT OR SQUANDERING FUNDS IN A WAY DISAPPROVED OF BY OTHER SPOUSE.

Appellate court agreed with former husband that the trial court improperly allocated the full value of a depleted asset, including the tax consequences, to him. Former husband liquidated a 401(k) account and then used a large portion of the after tax amount on attorney’s fees for himself and former wife and for taxes and repairs for the marital home. Appellate court reiterated that generally it is error for a trial court to include assets that have been diminished or dissipated during dissolution proceedings in absence of misconduct. Misconduct must be an “intentional dissipation or destruction of the asset” for a spouse’s own benefit and unrelated to the marriage, not just mismanagement or squandering funds in a way disapproved by the other spouse. A spouse’s use of an asset out of necessity or for reasonable living expenses—including attorney’s fees—does not justify an award of a depleted asset. Appellate court concluded that the only depleted funds that should be allocated to former husband were those that the trial court found he spent on his girlfriend.

<http://www.5dca.org/Opinions/Opin2013/081213/5D12-2887.op.pdf> (August 16, 2013).

Burno v. Burno, __So.3d__, 2013 WL 3949071, (Fla.5th DCA 2013).

REMANDED TO INCLUDE SIGNIFICANT ORAL FINDINGS IN JUDGMENT.

Appellate court remanded a partial final judgment to include “significant oral findings made at the conclusion of the trial”, but otherwise affirmed.

<http://www.5dca.org/opinions/Opin2013/072913/5D12-3642.op.pdf> (August 2, 2013).

Caryi v. Caryi, __So.3d__, 2013 WL 3949069, (Fla.5th DCA 2013).

ACTION TO ESTABLISH CHILD SUPPORT OBLIGATION NOT A DECLARATORY JUDGMENT; MSA DID NOT CONTAIN WAIVER OF FEES TO ESTABLISH CHILD SUPPORT; ONE SPOUSE SHOULD NOT HAVE TO DEplete HIS OR HER ASSETS TO PAY LEGAL FEES WHEN OTHER HAS A SUPERIOR FINANCIAL ABILITY TO PAY.

Former wife appealed an order denying her motion for fees incurred in a post-judgment action to establish former husband’s child support obligation; appellate court reversed. Despite substantial differences in the spouses’ net worth, the trial court concluded that: 1) the proceeding was in essence a declaratory judgment action to enforce the marital settlement agreement (MSA); 2) the MSA precluded an award of fees; and 3) the former wife had no need of fees because her parents had paid for the litigation. Appellate court disagreed with the conclusion that the proceeding was declaratory in nature; therefore, its decision in *Flanders v. Flanders*, 516 So.2d 1090 (Fla.5th DCA 1987), cited by the trial court, did not apply. Appellate court found no language in the MSA “reflecting an intent by either party to waive the right to

seek an attorney's fee award" in an action to establish child support. With regard to former wife's need for fees, appellate court noted that the purpose of section 61.16, Florida Statutes (2010), is to ensure each spouse has a similar ability to secure counsel; however, a spouse should not have to deplete his or her assets in order to pay legal fees when the other spouse has a far superior financial ability to pay them. Appellate court found no support in the record for the conclusion that former wife did not have a need for the fees. Although former wife's parents had provided her with funds to pay for her litigation, that money was provided as a loan, not a gift. Reversed and remanded with instructions to the trial court to award former wife the entire amount of attorney's fees she reasonably incurred relating to establishing former husband's child support obligation.

<http://www.5dca.org/Opinions/Opin2013/072913/5D12-4016.op.pdf> (August 2, 2013).

Domestic Violence Case Law

Florida Supreme Court

No new cases reported.

First District Court of Appeal

No new cases reported.

Second District Court of Appeal

No new cases reported.

Third District Court of Appeal

No new cases reported.

Fourth District Court of Appeal

No new cases reported.

Fifth District Court of Appeal

Kirton v. McKissick, ___ So.3d ___, (Fla. 5th DCA 2013) **INJUNCTION EXTENSION UPHELD**. The appellant appealed an amended final judgment that granted an extension of an injunction for protection against repeat violence. He claimed that the trial court abused its discretion in determining that the appellee's continuing fear of violence by the appellant was reasonable. The trial court held an evidentiary hearing on the motion and granted the extension, even though the appellant argued that he had not committed any additional acts of violence against the appellee during the initial injunction period. The appellate court affirmed the decision and noted that the trial court's analysis "is not limited to determining whether the respondent committed additional acts of violence during the pendency of the initial injunction. Rather, the appropriate analysis focuses on whether the petitioner's professed continuing fear of future

violence is reasonable under the circumstances.”

<http://www.5dca.org/Opinions/Opin2013/081913/5D13-1180.op.pdf> (August 23, 2013).

Touchet v. Jones, ___ So.3d ____, (Fla. 5th DCA 2013) **INJUNCTION REVERSED IN PART**. A petitioner filed for an injunction against domestic violence against her partner in a same sex relationship alleging that the respondent had physically attacked her. The respondent also filed a reciprocal petition for protection against domestic violence against her partner, and the court heard the two petitions simultaneously. The trial court granted the initial petition and found that there was “an overwhelming amount of evidence in her favor.” The trial court then ordered the respondent to complete a certified batterers' intervention program and to undergo evaluations for both substance abuse and mental health, and also ordered the petitioner to obtain psychological evaluations for herself and her son to specifically address the issue of why the petitioner kept going back to the respondent. The petitioner filed a motion for stay pending appeal, and the trial court denied the motion. The trial court then issued an order of contempt threatening to incarcerate the petitioner if she did not comply with the order within thirty days.

The petitioner appealed the part of the order that required her to obtain the psychological evaluations and argued that the trial court erred by including this in the order. The appellate court agreed. Although s.741.30(6)(a), Florida Statutes, allows the court to order a respondent to participate and pay for treatment, intervention, or counseling services, there was no authority under the statute to order the petitioner to undergo an evaluation. The court also noted that the statute is designed to protect victims of domestic violence, and “requiring a victim of domestic violence to undergo a psychological evaluation would impose a substantial financial and emotional burden on the victim and would have a chilling effect on victims of domestic violence seeking the protection of the courts.” Therefore, the court reversed the portion of the order requiring the petitioner to get the evaluations.

<http://www.5dca.org/Opinions/Opin2013/081213/5D12-4088.op.pdf> (August 16, 2013).

Drug Court/Mental Health Court Case Law

Florida Supreme Court

No new opinion for this reporting period.

First District Court of Appeal

No new opinion for this reporting period.

Second District Court of Appeal

No new opinion for this reporting period.

Third District Court of Appeal

No new opinion for this reporting period.

Fourth District Court of Appeal

No new opinion for this reporting period.

Fifth District Court of Appeal

No new opinion for this reporting period.