

OSCA/OCI'S FAMILY COURT CASE LAW UPDATE
December/January 2008-2009

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Delinquency Case Law

Florida Supreme Court

In re Amendments to Florida Family Law Rule 12.010, __ So.2d __, 2008 WL 5170622 (Fla. 2008). [THE FLORIDA SUPREME COURT ADOPTED THE FAMILY LAW RULES COMMITTEE'S PROPOSED AMENDMENT TO FLORIDA FAMILY LAW RULE OF PROCEDURE 12.010\(B\)\(1\)](#). Florida Family Law Rule of Procedure 12.010(b)(1) addresses the purpose of the rules. The amendment became effective immediately upon the release of the opinion. <http://www.floridasupremecourt.org/decisions/2008/sc08-641.pdf> (December 11, 2008).

First District Court of Appeal

No new opinions for this reporting period.

Second District Court of Appeal

C.C.N. v. State, __ So.2d __, WL 5170622 (Fla. 2d DCA 2009). [JUVENILE DID NOT WAIVE CONSTITUTIONAL RIGHT TO BE PRESENT AT RESTITUTION HEARING](#). The juvenile was not present at his restitution hearing. Defense counsel requested a continuance but indicated that he was prepared to go forward without the juvenile's present. The trial court denied the continuance and proceeded to hear testimony and take evidence regarding damages. The trial court ordered \$ 948.09 in restitution. The juvenile appealed. The State conceded error. The Second District Court of Appeals found that it is a constitutional right to be present at a restitution hearing. This right may be waived, but the court must conduct a proper inquiry prior to the hearing. Further, the State must present competent, substantial evidence proving an effective waiver. In the instant case, the Second District held that the trial court failed to conduct an inquiry and made no findings as to whether the juvenile waived his right to be present. The State offered no evidence to show actual notice of the hearing. A probation officer stated that the juvenile knew about the hearing, but this statement was not sworn testimony and was made at the end of the hearing. As a result, the restitution order was reversed and remanded for a new restitution hearing at which the juvenile is present or has effectively waived that right.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/January/January%2021,%202009/2D08-639.pdf (January 21, 2009).

M.A.M. v. State, __ So.2d __, 2009 WL 32416 (Fla. 2d DCA 2009). [JUVENILE STATUTES PROHIBIT A JUVENILE, CHARGED WITH DOMESTIC VIOLENCE, FROM BEING HELD IN SECURE DETENTION FOR MORE THAN 21 DAYS IN TOTAL. HOWEVER, THE 21-DAY MAXIMUM DOES NOT INCLUDE THE INITIAL 24 HOURS PRIOR TO THE DETENTION HEARING](#). The juvenile filed an emergency petition for writ of habeas corpus seeking immediate discharge from secure detention. The petition was granted by prior unpublished opinion. This opinion followed to explain the Second District Court of Appeal's reasoning. On October 8, 2008, the juvenile was arrested for misdemeanor battery on a family member and placed into secure detention. On October 9, there was a detention hearing and the juvenile was ordered to be held in secure detention for

two days pending a 48-hour detention review. On October 11, the juvenile was ordered to remain in secure detention for another 48 hours pending another 48-hour review. On October 13, the juvenile was ordered to be held in secure detention for 21 days beginning on October 13. An arraignment was scheduled 21 days later on November 4, 2008. In his emergency petition, the juvenile argued that the juvenile statutes limit detention to a total of 21 days. The Second District Court of Appeal found that pursuant to s. 985.255(2), F.S., a juvenile charged with domestic violence that does not otherwise meet the secure detention criteria, may continue to be held in secure detention for up to 48 hours if the court makes specific written findings that respite care is unavailable and that secure detention is required to prevent victim injury. After 48 hours, the court shall hold a hearing if the state attorney or victim requests that secure detention be continued. The child may continue to be held in detention care if the court makes a specific, written finding that detention care is necessary to protect the victim from injury. Section 985.255(2), F.S. states that a juvenile may not be held in detention beyond the time limits set forth in ss. 985.255 and 985.26. Section 985.26(2), F.S., limits detention to 21 days unless an adjudicatory hearing for the case has been commenced in good faith by the court. Therefore, the trial court was prohibited from ordering secure detention for more than 21 days in total. Further, the Second District found that the 21-day maximum does not include the initial 24 hours under which the child may be placed in custody prior to the initial detention hearing. Thus, the 21-day clock began running on October 9, the day the juvenile was first brought into court for a detention hearing. Because no motion to continue was filed by the State and no adjudicatory hearing was commenced, the juvenile was entitled to be released on October 29.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/January/January%2007,%202009/2D08-5147co.pdf (January 7, 2009).

C.M.S. v. State, __ So.2d __, 2008 WL 5412326 (Fla. 2d DCA 2008). **TRIAL COURT DID NOT ABUSE ITS DISCRETION BY AWARING RESTITUTION BASED ON THE VICTIM'S OUT-OF-POCKET COSTS.** The juvenile challenged the amount of restitution and court costs ordered after he plead no contest to several theft-related charges. Adjudication had been withheld. The victim testified that he discovered the theft of his work tools when he arrived at a job site. Because he was unable to work without his tools, he spent \$575.55 to replace the most critical items, but he did not replace everything that had been stolen. Later, he recovered his stolen tools from a pawn shop by paying an additional \$70. The juvenile argued that restitution should be limited to the fair market value of the tools. The trial court concluded that replacement cost was necessary to make the victim whole and awarded restitution of \$645.55. The Second District Court of Appeal found that the legislature gave the court's discretion in making these awards pursuant to s. 775.089(1)(a), F.S. (2006). Thus, while fair market value is often used to determine restitution, it is not the only permissible basis. Given the victim's immediate need to replace the stolen tools, the Second District concluded that the trial court did not abuse its discretion in basing the restitution award on the victim's out-of-pocket costs. However, the amount of restitution should have been offset by the salvage value of the property returned. It is incumbent upon the State to present evidence of the value of the recovered property in order to carry its burden of proving the amount of the victim's loss. Accordingly, the restitution award was reversed and remanded for a new restitution hearing. The juvenile also challenged a

\$50 court cost assessed under s. 775.083(2), F.S. (2006). The State conceded that this cost may only be assessed when the juvenile has been adjudicated delinquent. Since adjudication was withheld, the trial court was directed to strike this court cost.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2008/December/December%2031,%202008/2D07-4976.pdf (December 31, 2008).

D.B.B. v. State, __ So.2d __, 2008 WL 5234181 (Fla. 2d DCA 2008). **THROWN BICYCLE FOUND NOT TO BE A DEADLY WEAPON.** The juvenile appealed his adjudication for aggravated assault with a deadly weapon and revocation of probation for petit theft based on the adjudication. The juvenile argued that there was insufficient evidence of a deadly weapon. At trial, the juvenile's mother testified that in the middle of an argument, the juvenile cursed and threw his bicycle at her. The bicycle landed about five feet from her. The juvenile threw the bicycle again. The mother thought the juvenile was aiming at her and she felt very scared. The bicycle was not measured or taken into evidence. The Second District Court of Appeal found that a deadly weapon is an item which, when used in the ordinary manner contemplated by its design, will or is likely to cause death or great bodily harm; or any instrument likely to cause great bodily harm because of the way it is used during a crime. Whether an item is a deadly weapon is a factual question. The Second District concluded that the State failed to present sufficient evidence to establish that the bicycle's character was such that it could be considered a deadly weapon. Thus, the evidence was insufficient to establish aggravated assault with a deadly weapon. However, the evidence did support an adjudication for misdemeanor assault. Accordingly, the adjudication was reversed and remanded for the trial court to reduce the offense to misdemeanor assault. Since misdemeanor assault properly forms a basis for revoking the juvenile's probation, the order revoking probation and adjudicating the juvenile delinquent for petit theft was affirmed.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2008/December/December%2017,%202008/2D07-6034.pdf (December 17, 2008).

J.C. v. State, __ So.2d __, 2008 WL 5191769 (Fla. 2d DCA 2008). **TRIAL COURT DID NOT ABUSE ITS DISCRETION BY AWARDING RESTITUTION BASED ON FAIR MARKET VALUE AS ESTABLISHED BY THE MOST RECENTLY OFFERED DISCOUNTED RETAIL PRICES.** The juvenile appealed the restitution order issued for the grand theft of four bikes from a store. The testimony at the restitution hearing established that the bikes were purchased two years earlier and that parts were no longer available. Several offers were recently made to purchase the bikes for \$100 less than the marked retail price. The offers were rejected. The juvenile offered no countervailing evidence as to the value of the bikes. The juvenile argued that, as a matter of law, restitution should have been limited to the wholesale price because the store could not sell them at their marked retail price. The trial court awarded restitution based on the discounted price offered by the recent interested buyers. The Second District Court of Appeal held that while the evidence could have supported an award of restitution based on the wholesale cost, the trial court did not abuse its discretion by awarding restitution based on the fair market value as established by the most recently offered discounted retail prices. Accordingly, the restitution order was affirmed.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2008/December/December%20

[12,%202008/2D08-1929.pdf](#) (December 12, 2008).

Third District Court of Appeal

E.J. v. State, __ So.2d __, 2008 WL 5412057 (Fla. 3d DCA 2008). **RESTITUTION ORDER WAS REVERSED AND REMANDED BECAUSE EVIDENCE FAILED TO ESTABLISH THE JUVENILE'S PRESENT OR FUTURE ABILITY TO PAY THE RESTITUTION.** The juvenile appealed the restitution imposed following his plea to first-degree misdemeanor battery. At the restitution hearing, the State presented medical bills in excess of \$20,000. The juvenile was in detention at the time of the restitution hearing and awaiting disposition in another case. The juvenile testified that he was fifteen, had no prospects of employment and was doubtful of his chances to secure employment based on his juvenile record. There was no evidence establishing the juvenile's present or future ability to pay. The trial court found the juvenile did not have the present ability to pay. However, the trial court orally set restitution at \$21,474 and retained jurisdiction to review the ability to pay every 6 months. The Third District Court of Appeal found that while there is no requirement that a child be employed before a restitution order can be entered; there must be some testimony to support the finding that the juvenile can reasonably pay the ordered amount. In the absence of any evidence, restitution cannot be ordered. In the instant case, the trial court essentially deferred the ability to pay fact finding by setting the case for future status conferences every 6 months. The Third District held that the trial court's approach did not satisfy the requirements. Therefore, the restitution order was reversed and remanded for a hearing on the child's ability to earn and to pay restitution.

<http://www.3dca.flcourts.org/Opinions/3D07-2877.pdf> (December 31, 2008).

S.R. v. State, __ So.2d __, 2008 WL 5233794 (Fla. 3d DCA 2008). **TRIAL COURT ABUSED ITS DISCRETION BY DENYING THE STATE'S REQUEST TO REOPEN AND CALL AS A WITNESS A SECURITY GUARD ALREADY SWORN IN AND STANDING JUST OUTSIDE THE COURTROOM.** The State sought review of a trial court order granting a motion to suppress physical evidence. The juvenile brought a firearm to school. A school security guard was informed by a fellow student that the juvenile was armed. The security guard relayed this tip to the school's resource officer, who patted-down the juvenile and discovered a firearm. The juvenile's subsequent Motion to Suppress and the suppression hearing focused on whether the officer sufficiently investigated the tip to justify the pat-down. The only witnesses at the suppression hearing were the officer, who conducted the pat-down and discovered the gun, and the juvenile. The security guard who received the tip did not testify but was sworn in and available just outside the courtroom. After the close of evidence, the judge, for the first time, posited that the tip may have been stale. Reacting to the judge's concern, the State requested to call the security guard as a witness. The State's request was denied. The juvenile's Motion to Suppress was granted because the record lacked facts sufficient to prove the timelines of the tip. The Third District Court of Appeal found that the decision to reopen a case and hear additional testimony is ordinarily within the discretion of a trial court. However, the trial court's discretion is not absolute. In the instant case, the security guard's testimony was material and readily available. Not only was the witness standing outside the courtroom, but the State, as an alternative to live testimony, offered prior deposition testimony, which the judge also rejected. The Third District held that

the State had good reason for its belated request to call the security guard as a witness. The State first learned that the tip's timeliness was at issue when the judge inquired about it during closing arguments. The security guard's testimony was material to the adjudication and would have neither prejudiced defendant nor delayed the administration of justice. The Third District held that the trial court abused its discretion by denying the State's request to reopen the case and call the security guard as a witness. Case was reversed and remanded.

<http://www.3dca.flcourts.org/Opinions/3D08-0252.pdf> (December 17, 2008).

S.W. v. State, __ So.2d __, 2008 WL 5233707 (Fla. 3d DCA 2008). **NO GENERAL RULE THAT WHERE THERE IS AN AQUITTAL ON A THEFT CHARGE, THERE MUST ALSO BE AN AQUITTAL ON ANY RELATED BURGLARY CHARGE.** The juvenile appealed his adjudication for burglary of an automobile. As police officers approached a stolen car, the juvenile exited from the driver's seat. The juvenile was arrested and placed in a police car. The next morning a key was found in the police car where the juvenile had been sitting. The key was capable of starting the stolen vehicle. The juvenile was charged with burglary, theft of a vehicle, and criminal mischief. The trial court granted a motion for judgment of acquittal on the criminal mischief charge and found the juvenile not guilty of theft of a vehicle. However, the juvenile was found guilty of burglary. The juvenile argued that he could not be convicted of burglary since he was acquitted of theft. The Third District Court of Appeal held that the evidence was legally sufficient for both the offenses. The fact that the juvenile was seen in the vehicle's driver's seat and had possession of a key that would start the vehicle would provide legally sufficient evidence of dominion and control to support the theft charge. There was also testimony that the juvenile was 13 years old and unable to drive. The vehicle was found a considerable distance from where it was stolen and had been missing for several days before the juvenile was found inside it. The Third District found that the trial court's rulings may have reflected a conclusion that the juvenile actively participated in the entry into the vehicle with the intent to steal it and was therefore guilty of burglary. The trial court may have entertained reasonable doubt about whether the juvenile had actually driven the vehicle, and thus acquitted him on the theft charge. Thus, the two rulings could be harmonized. Even assuming that the two rulings are inconsistent, the general rule is that inconsistent verdicts are permitted in Florida. See Brown v. State, 959 So.2d 218, 220 (Fla.2007). The Third District noted that there is an exception to this general rule, but the exception did not apply to this case. The Third District affirmed. Judge Ramirez issued a dissenting opinion. <http://www.3dca.flcourts.org/Opinions/3D07-3142.pdf> (December 17, 2008).

C.B. v. Dobuler, etc., et al., Respondents, __ So.2d __, 2008 WL 5156639 (Fla. 3d DCA 2008). **TRIAL JUDGE LACKED AUTHORITY TO ORDER SECURE DETENTION WHERE RISK ASSESSMENT SCORE DID NOT AUTHORIZED SECURE DETENTION, JUVENILE FAILED TO APPEAR AT MULTIPLE PRIOR HEARINGS, AND THE NEXT COURT HEARING WAS SET BEYOND 72 HOURS.** The juvenile filed a petition for writ of habeas corpus for immediate release from secure detention. The Third District Court of Appeal noted that this case was the twelfth in a series of cases spanning 3 years in which the same trial judge had summarily ordered an uncooperative juvenile directly to secure detention contrary to law. The juvenile was arrested for misdemeanor Disorderly Intoxication and Resisting an Officer Without Violence. The juvenile's Risk Assessment

Instrument (RAI) score did not authorize secure detention. The juvenile was released to the custody of a guardian. The juvenile failed to appear at arraignment and two subsequently scheduled final adjudicatory hearings. A pick-up order was issued for his retrieval. On June 2, 2008, the juvenile was subsequently arrested on new misdemeanor charges for Loitering, Resisting an Officer Without Violence, and Possession of Marijuana. The next day, the juvenile was brought before the court on the new charges and the pick-up order on the prior outstanding charges. With the new charges, the RAI still did not authorize detention. The court set a sounding for the new case and the final adjudication for the first case on June 10. The judge sua sponte ordered the juvenile directly to secure detention for repeatedly failing to appear for trial in the first case. The Third District Court of Appeal held that s. 985.255; F.S. establishes the criteria for detaining a child, pending the outcome of a juvenile delinquency case. Section 985.255(1)(i.) provides that a juvenile may continue to be detained by the court if the juvenile is detained on a judicial order for failure to appear and has previously willfully failed to appear, after proper notice, for an adjudicatory hearing on the same case regardless of the results of the risk assessment instrument. However, the juvenile may only be held in secure detention for up to 72 hours in advance of the next scheduled hearing. In the instant case, the next scheduled court hearing was more than 72 hours away. Thus, the detention was not authorized pursuant to s. 985.255(1)(i), F.S. Petition was granted and juvenile was released. <http://www.3dca.flcourts.org/Opinions/3D08-1454.pdf> (December 10, 2008).

Fourth District Court of Appeal

G.P. v. State, __ So.2d __, 2008 WL 5070296 (Fla. 4th DCA 2008). **RESTITUTION FOR THEFT CANNOT INCLUDE ITEMS NOT REFERENCED IN THE CHARGING DOCUMENT.** The juvenile pled guilty to grand theft and was ordered to pay \$1,225 in restitution. The juvenile appealed and argued the restitution award included items not referenced or included in the charging document. The delinquency petition charged the juvenile with the theft of “miscellaneous jewelry and/or clothing.” The restitution order included amounts for a purse, three pair of sunglasses and 60 CDs. The Fourth District Court of Appeal found that restitution cannot include items not encompassed within the charge contained in the information. The Fourth District held that the juvenile’s claim as to the sunglasses was not properly preserved for appeal. The CDs were neither jewelry nor clothing and thus not properly included in the restitution award. The Fourth District found no abuse of discretion in the remainder of the restitution award. Accordingly, the restitution order was affirmed in all respects, except for the inclusion of the CDs. <http://www.4dca.org/opinions/Dec%202008/12-3-08/4D07-4495.op.pdf> (December 3, 2008).

P.D.T. v. State, __ So.2d __, 2008 WL 5070330 (Fla. 4th DCA 2008). **EVIDENCE WAS INSUFFICIENT TO ESTABLISH THAT THE JUVENILE ENTERED A HOME WITH THE INTENT TO COMMIT AN OFFENSE THEREIN.** The juvenile appealed the denial of his motion for judgment of dismissal. The juvenile was subsequently adjudicated for burglary of a dwelling. The juvenile was at a party, thrown in a home without the owners’ permission, while the owners’ were on vacation. The house sustained property damage. The Fourth District Court of Appeal found that the essential elements of burglary of a dwelling were unauthorized entry with the intent to commit an offense therein. At the time of the motion for judgment of dismissal, the evidence

established that the juvenile entered the home without permission. However, there was no evidence that the juvenile intended to commit an offense in the home. While the State's evidence established that the juvenile and the others entered the home to "party", there was no evidence that, at the time of the juvenile's entry, he was aware that beer and marijuana were inside the home. In the absence of such evidence, the trial court was required to grant the juvenile's motion for judgment of dismissal. However, as conceded by the juvenile, the evidence was sufficient to sustain a conviction for trespass. Therefore, the Fourth District reversed and remanded with directions to enter a judgment adjudicating the juvenile guilty of trespass and conduct a new disposition hearing.

<http://www.4dca.org/opinions/Dec%202008/12-3-08/4D08-1111.op.pdf> (December 3, 2008).

Fifth District Court of Appeal

D.S.D. and J.T.D. v. State, ___ So.2d ___, 2008 WL 5262709 (Fla. 5th DCA 2008). **EVIDENCE FAILED TO SUPPORT ADJUDICATION FOR LOITERING AND PROWLING.** Juveniles appealed their adjudications for loitering and prowling arguing that the State failed to prove a prima facie case. The police received a prowler report at 3:30 a.m. Police made contact with the juveniles at a street corner two blocks from the vicinity of the report. Both wore all black. They did not flee when they saw the officer. The juveniles identified themselves and indicated they were looking for a friend named "Ashley" who was supposedly waiting for them at a street corner approximately ten blocks away. The juveniles thought they were lost and said they were going home, about two and a half miles away. The officer arrested the juveniles. Incident to arrest, the juveniles were searched and a pair of cloth gloves was found in one of the juvenile's front pockets. The Fifth District Court of Appeal held that the elements of loitering and prowling were not met. The juveniles' presence without more, did not support the charge, even when joined with the 3:30 a.m. prowler report. The officer was justified in questioning the juveniles when he discovered them wearing dark clothes in the area of the report. However, no additional facts came to light to support an arrest. The information gleaned from the circumstances was simply insufficient to demonstrate a threat to public safety or an imminent breach of the peace. The discovery of the gloves did not alter the result. Accordingly, the adjudications were reversed.

<http://www.5dca.org/Opinions/Opin2008/121508/5D07-2789.pdf> (December 15, 2008).

S.R.J. v. State, ___ So.2d ___, 2008 WL 5262712 (Fla. 5th DCA 2008). **HEARING TRANSCRIPT WAS NECESSARY FOR A FAIR REVIEW ON APPEAL OF JUVENILE'S VIOLATION OF PROBATION WHERE THE JUDGE INADVERTENTLY TURNED OFF THE DIGITAL RECORDING AT THE BEGINNING OF THE HEARING.** The juvenile appealed his adjudication and sentence resulting from an alleged violation of probation in a delinquency case. The juvenile filed a motion for new trial due to the unavailability of the adjudicatory hearing transcript. The court reporter attested that there was no audio recording of the violation of probation proceeding because the judge inadvertently turned off the digital recording at the beginning of the hearing. The parties attempted to reconstruct the record, but were unable to do so. The Fifth District Court of Appeal found that a transcript was necessary to a fair review on appeal. Unlike cases where only a portion of a proceeding was missing and no articulated grounds were raised to support error during trial, counsel for the juvenile sought review of the sufficiency of the evidence used to support the juvenile's adjudications. With no ability to review any portion of the adjudicatory proceeding on

appeal, no meaningful appellate review could occur. Accordingly, the Fifth District reversed and remanded with directions for the trial court to conduct a de novo violation of probation hearing. <http://www.5dca.org/Opinions/Opin2008/121508/5D08-1857.pdf> (December 15, 2008).

M.M. v. State, ___ So.2d ___, 2008 WL 5188829 (Fla. 5th DCA 2008). [THE JUVENILE'S DISRUPTION OF BUS TRANSPORTATION SUPPORTED AN ADJUDICATION FOR DISRUPTION OF A SCHOOL FUNCTION IN VIOLATION OF S. 877.13, F.S. \(2007\)](#). The juvenile was charged with resisting an officer without violence, disorderly conduct, and disruption of a school function. Following trial, the juvenile was found guilty of resisting an officer without violence and disruption of a school function, but not guilty of disorderly conduct. The juvenile appealed and argued that he did not violate s. 877.13, F.S. (2007), because his conduct, which resulted in the disruption of bus transportation, occurred after school. The Fifth District Court of Appeal found that the fact that the juvenile's actions occurred after classes formally ended is not dispositive. The functions of an educational institution inherently extended beyond the classroom. The juvenile also asserted that the evidence failed to establish a specific intent to disrupt or interfere with school functions. The Fifth District noted that the issue of intent was a factual issue for the trier of fact. In the instant case, the evidence showed that the juvenile knew there were other students on the bus as it prepared to leave and that by leaving the bus he disrupted its schedule, as well as the schedule of other buses. The Fifth District held that the evidence was sufficient to establish a violation of s. 877.13, F.S. (2007) and affirmed. Judge Griffin wrote a dissenting opinion. <http://www.5dca.org/Opinions/Opin2008/120808/5D08-562.pdf> (December 8, 2008).

Dependency Case Law

Florida Supreme Court

In re Amendments to Florida Family Law Rule 12.010, ___ So.2d ___, 2008 WL 5170622 (Fla. 2008). [THE FLORIDA SUPREME COURT ADOPTED THE FAMILY LAW RULES COMMITTEE'S PROPOSED AMENDMENT TO FLORIDA FAMILY LAW RULE OF PROCEDURE 12.010\(B\)\(1\)](#). Florida Family Law Rule of Procedure 12.010(b)(1) addresses the purpose of the rules. The amendment became effective immediately upon the release of the opinion. <http://www.floridasupremecourt.org/decisions/2008/sc08-641.pdf> (December 11, 2008).

First District Court of Appeal

M.E. v. Florida Department of Children and Families, --- So.2d ----, 2009 WL 36556 (Fla. 1st DCA 2009) [TERMINATION OF PARENTAL RIGHTS REVERSED](#). The court terminated the mother's parental rights because of evidence that appellant exhibited irrational behavior at times, and the mother appealed. Only one mental health professional testified as to the mother's mental condition, and the witness gave very vague answers and had never treated the mother. The trial court even mentioned in the order that it was troubled by the lack of evidence the Department was presenting to support the TPR. The appellate court therefore concluded that the trial court's ruling was not supported by competent, substantial evidence, and reversed. <http://opinions.1dca.org/written/opinions2009/01-08-2009/08-2662.pdf> (January 9, 2009).

L.J.S. v. Department of Children and Families,

995 So. 2d 1151, 33 Fla.L.Weekly D2793 (Fla. 1st DCA 2008).

(No. 1D07-5941) **CASE REMANDED FOR FACTUAL FINDINGS.** The mother appealed the trial court's lack of factual findings in overruling her exceptions to a report of a general magistrate. The court of appeal reversed the order the trial court's order and remanded the case for the trial court to make factual findings required by statute. The children had been removed from the mother's home after she had attempted to commit suicide in front of them and the petition for dependency alleged that the mother's seizures, mental health problems, and hospitalization impaired her ability to care for the children and was likely to impair the children's health. The mother completed her case plan for reunification as well as a parenting skills course and counseling after which the Guardian ad Litem and Department filed a joint motion to modify visitation and terminate protective supervision. The magistrate recommended placing the children in permanent guardianship, terminating supervision, modifying visitation, and denying reunification. The magistrate contradicted its oral pronouncement that the mother had complied with her case plan and found her to be noncompliant. The magistrate also found that the children's health would be endangered if they were returned to the mother. The trial court adopted the magistrate's recommended orders. The court of appeal noted the presumption that children should be returned to a parent who has substantially complied with the case plan and noted the factors required to be considered by the trial court by section 39.621(10), Florida Statutes. The trial court had failed to make detailed factual findings regarding several of the required factors. Concluding that the trial court had improperly relied upon the magistrate's deficient recommended order, the court of appeal reversed and remanded for the trial court to make detailed findings pursuant to section 39.621(10), Florida Statutes.

<http://opinions.1dca.org/written/opinions2008/12-05-08/07-5941.pdf> (December 5, 2008).

T.M. v. Department of Children and Families, 995 So. 2d 619, 33 Fla.L.Weekly D2747 (Fla. 1st DCA 2008). (No. 1D08-4647) **APPEAL DISMISSED.** The father's appeal was dismissed for lack of jurisdiction because the notice of appeal was untimely filed. The dismissal was without prejudice to the father's right to seek relief in the trial court.

<http://opinions.1dca.org/written/opinions2008/12-02-08/08-4647.pdf> (December 2, 2008).

Second District Court of Appeal

C.M. v. Department of Children and Family Services and Guardian ad Litem Program,

___ So. 2d ___, 2008 WL 5411977, 34 Fla.L.Weekly D37 (Fla. 2nd DCA 2008).

(No. 2D07-4976) **AFFIRMED IN PART, REVERSED IN PART, REMANDED.**

The court affirmed the adjudication of dependency of two of three children while reversing the dependency adjudication of the youngest child. The children had been adjudicated dependent based on evidence that the oldest child, a girl, had been sexually abused by the mother's boyfriend. The department conceded that if had failed to present competent substantial evidence that the youngest child, an infant, was abused, neglected, or abandoned. The court affirmed the adjudication of dependency of the older children. Although the middle child was not the target of the sexual abuse, he was abused within the statutory definition. The court of appeal reviewed the statutory definitions of "abuse" and "harm." After having been informed of the sexual abuse, the mother continued to reside with her boyfriend and the children and

the evidence of abuse of the oldest child was sufficient. The court conducted a lengthy and thorough analysis of the relevant caselaw on the issue of the adjudication of the middle child, who had not been sexually abused, as dependent. After reviewing the law and the facts of this case, the court agreed that the trial court could conclude that the mother had not only abused and neglected her daughter by failing to protect her from continued contact with her boyfriend but also that the mother had abused her son. The court therefore affirmed the adjudication of dependency of those children. However, the court noted that as to the infant sibling, the Department conceded that there was no evidence that established that the infant was at imminent risk. The infant is a half-sibling to the older children and is the child of the mother and her boyfriend. The court therefore reversed the adjudication of the infant as dependent and remanded for further proceedings.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2008/December/December%2031,%202008/2D07-4976.pdf (December 31, 2008).

P.E. v. Department of Children and Family Services and Guardian ad Litem Program,
___ So. 2d ___, 2008 WL 5070152, 33 Fla.L.Weekly D2749 (Fla. 2nd DCA 2008).
(No. 2D07-4605) **TERMINATION OF PARENTAL RIGHTS REVERSED.**

The mother had failed to appear at the final adjudicatory hearing and the trial court found she had consented to termination of her parental rights. The mother argued that the trial court was required to take evidence to prove the allegations in its petition. On appeal, the court agreed with the views of the Third and Fifth District Courts of Appeal that a parent's failure to appear does not end the trial court's judicial labor but disagreed that the trial court was required to hear evidence of the petition's alleged grounds. The court discussed the distinction between voluntary and involuntary termination of parental rights and reviewed the statutory language referring to "consent." The court concluded that although a parent's nonappearance provides a ground for termination of parental rights, the court must still determine manifest best interest of the child. This requires that the trial court hear evidence as to the child's manifest best interests prior to terminating parental rights, even after the parent consented by nonappearance at the final hearing. The court rejected the Department's reliance on testimony by the Guardian ad Litem at the permanency hearing. The court reversed and remanded for the trial court to hear evidence from both parties as to manifest best interests of the child. The court also certified conflict with decisions of the Third and Fifth District Courts of Appeal as to whether the Department is required to present evidence as to termination grounds after a consent for nonappearance is entered.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2008/December/December%2003,%202008/2D07-4605.pdf (December 3, 2008).

T.R. v. Department of Children and Family Services and Guardian ad Litem Program,
___ So. 2d ___, 2008 WL 5070455, 33 Fla.L.Weekly D2757 (Fla. 2nd DCA 2008).
(No. 2D08-2696) **TERMINATION OF PARENTAL RIGHTS AFFIRMED.**

The court of appeal affirmed the trial court's order terminating the mother's parental rights. The mother had argued, *inter alia*, the ineffectiveness of her trial counsel. However, the court noted that even if the argument was cognizable on direct appeal, the record lacked sufficient information to determine the claim's merits.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2008/December/December%2003,%202008/2D08-2696.pdf (December 3, 2008).

Third District Court of Appeal

No new opinions for this reporting period.

Fourth District Court of Appeal

R.E. v. Department of Children and Family Services, ___ So. 2d ___, 2008 WL 5156731, 33 Fla.L.Weekly D2810 (Fla. 4th DCA 2008).

(No. 4D08-1675) **TERMINATION OF PARENTAL RIGHTS AFFIRMED.**

The parents' parental rights were terminated after they failed to appear at a properly noticed advisory hearing. The trial court denied parents' motions to vacate the consents to termination. A year later, the parents renewed their motions before a successor judge, which were denied. After additional procedural developments, including an appeal that was dismissed due to an agreement between the parties, the trial court held a hearing on manifest best interests and terminated the father's parental rights. The court addressed each of the manifest best interest factors required by section 39.810, Florida Statutes. The father argued that placement of the child with the maternal grandmother was improperly denied but on appeal, the court found competent substantial evidence to support the trial court's finding that placement with the maternal grandmother was not an appropriate placement. The father also argued that the successor judge could not hold a hearing on manifest best interests without also rehearing the termination case. However, the court of appeal found no abuse of discretion by the trial court's default against the parents and the denial of the motion to vacate. The court also agreed with the trial court that the father's motion to recuse the trial judge was legally insufficient. <http://www.4dca.org/opinions/Dec%202008/12-10-08/4D08-1675.op.pdf> (December 10, 2008).

Fifth District Court of Appeal

A.G. v. DCF, --- So.2d ----, 2009 WL 211071 (Fla. 5th DCA 2009) **QUESTION CERTIFIED.** The 5th DCA certified the following question to the Supreme Court: May A Parent Whose Parental Rights Have Been Terminated Challenge The Judgment Of Termination By Petition For Habeas Corpus On The Basis That The Parent Was Denied Effective Assistance Of Counsel?

<http://www.5dca.org/Opinions/Opin2009/012609/5D08-2944.pdf> (January 27, 2009).

R.B. v. Department of Children and Families, ___ So. 2d ___, 2008 WL 5422870, 34 Fla.L.Weekly D77 (Fla. 5th DCA 2008).

(No. 5D08-1869) **TERMINATION OF PARENTAL RIGHTS AFFIRMED.**

The mother appealed the denial of her motion to withdraw her surrender of her parental rights. At the mother's arraignment hearing, the mother surrendered her parental rights after being placed under oath and signing a written surrender of her parental rights. At the request of the mother's counsel, due to the mother's possible mental instability, the general master entered into a colloquy with the mother regarding, *inter alia*, the effect of her surrenders and her mental health. The general master found that the surrenders were made knowingly,

intelligently, and voluntarily, and the trial judge approved those findings. Five months later, the mother, represented by new counsel, filed a motion to set aside the surrenders. The mother argued that the surrenders had been coerced, were not properly acknowledged, and that her mental condition was not properly addressed. The trial court denied the motion after a hearing. On appeal, the court found that the general master had the authority to take the mother's acknowledgements and that the mother had failed to prove by clear and convincing evidence that she had been under duress when she signed the surrenders. The court of appeal also held that the mother had failed to preserve for appellate review the issue of whether the trial court erred in not making factual findings as to the specific acts causing termination of her parental rights. The court affirmed the trial court.

<http://www.5dca.org/Opinions/Opin2009/122908/5D08-1869.pdf> (December 30, 2008).

Dissolution Case Law

Florida Supreme Court

In re Amendments to Florida Family Law Rule 12.010, __ So.2d __, 2008 WL 5170622

(Fla. 2008). [THE FLORIDA SUPREME COURT ADOPTED THE FAMILY LAW RULES COMMITTEE'S PROPOSED AMENDMENT TO FLORIDA FAMILY LAW RULE OF PROCEDURE 12. 010\(B\)\(1\)](#). Florida Family Law Rule of Procedure 12.010(b)(1) addresses the purpose of the rules. The amendment became effective immediately upon the release of the opinion.

<http://www.floridasupremecourt.org/decisions/2008/sc08-641.pdf> (December 11, 2008).

First District Court of Appeal

Campbell v. Campbell, __ So. 2d __, 2008 WL

[CERTIORARI REQUIRES DEMONSTRATION OF HARM THAT CANNOT BE REMEDIED ON APPEAL](#)
Petition must demonstrate harm that cannot be remedied on post-judgment appeal in order for the court to exercise certiorari jurisdiction.

<http://opinions.1dca.org/written/opinions2008/12-02-08/08-1901.pdf> (December 2, 2008).

Smith v. Smith, __ So. 2d __, 2008 WL 5101138,(Fla.1st DCA December 5, 2008) (NO.1D07-5379).

[DAMAGES FOR FUTURE LOSS OF EARNINGS AND/OR EARNING CAPACITY PROPERTY OF INJURED SPOUSE; TRIAL COURT SHOULD MAKE FINDINGS RE ACTUAL INCOME IN DETERMINING CHILD SUPPORT](#)

Former husband appealed final judgment of dissolution of marriage; appellate court reversed award to former wife of one-half interest in former husband's pending social security disability and workers' compensation claims. Citing the holding in Weisfeld v. Weisfeld, 545 So. 2d 1341, 1346 (Fla. 1989), that "damages for future loss of earnings and loss of earning capacity and future medical expenses are the separate property of the injured spouse," the appellate court ordered the trial court on remand to make findings regarding the portions of future awards that are considered marital property. Finding itself unable to determine whether the trial court had abused its discretion with regard to equitable distribution of the marital home absent additional findings by the trial judge, the appellate court reversed the distribution and

remanded for additional findings. In doing so, the appellate court noted that, generally, distribution of assets is equal, unless unequal distribution is justified based on factors within s. 61.075, F. S. The appellate court also held that if a trial court fails to articulate findings regarding the actual income of the former spouses along with any adjustments to income, that a reviewing court is unable to ascertain whether the child support award is within the guidelines.

<http://opinions.1dca.org/written/opinions2008/12-05-08/07-5379.pdf> (December 5, 2008).

Taylor v. Taylor, __ So. 2d __, 2009 WL 186155 (Fla. 1st DCA, January 28, 2009)(NO. 1D08-1788).

SECTION 732.702(1), F.S., PERMITS WAIVER OF RIGHTS OF SURVIVING SPOUSE IN PRENUPTIAL

At issue was the effect of a prenuptial agreement executed between former wife and deceased former husband. The trial court had ruled that the agreement had no effect on former wife's right to partake in former husband's intestate estate as his surviving spouse. The appellate court found this ruling to be in error and held that because the language of the agreement provided that all property belonging to each spouse would remain within his or her personal estate and that, "said property shall remain forever free of claim by the other," that former wife had waived any rights generally afforded to the surviving spouse. The appellate court pointed out that section 732.702(1), F.S., permits such waiver and that the trial court erred in determining that the agreement was ambiguous as to former wife's rights in former husband's estate.

<http://opinions.1dca.org/written/opinions2009/01-28-2009/08-1788.pdf> (January 28, 2009).

Rabbath v. Farid, __ So. 2d __, 2009 WL 127862, (Fla. 1st DCA, January 21, 2009)(NO. 1D07-6583).

FINDINGS OF DISSIPATION AND CONCEALMENT OF ASSETS SUPPORTED, IMPUTATION IN ERROR

Former husband appealed final judgment of dissolution of his long-term marriage, arguing that the trial court had abused its discretion in: finding that he had concealed income and assets and dissipated marital funds; the amount of permanent, periodic alimony for former wife and child support he was ordered to pay; ordering him to pay attorney's fees to former wife; and imputing income to him. Concluding that there was no competent, substantial evidence to support the trial court's imputation of income to former husband, the appellate court reversed the awards of alimony, child support, and fees and remanded for an evidentiary hearing to determine the proper amount of income to be imputed. With regard to the issues of dissipation of marital assets and concealment of assets and income, the appellate court found no abuse of discretion by the trial court in its findings that former husband had dissipated a substantial amount while engaged in an extra-marital affair and also held that there was competent, substantial evidence to support the trial court's conclusion that former husband attempted to conceal income and assets.

<http://opinions.1dca.org/written/opinions2009/01-21-2009/07-6583.pdf> (January 21, 2009).

Second District Court of Appeal

Perkovich v. Humprey-Perkovich, __ So. 2d __, 2008 WL 4999084, (Fla.2ndDCA, November 26, 2008)(NO. 2D06-407 and 2D06-3530)

DISPARATE INCOMES, STANDING ALONE, DO NOT JUSTIFY AWARD OF PERMANENT ALIMONY

In a dissolution of a long-term marriage between two professionals, the appellate court held that disparate incomes, standing alone, do not justify an award of permanent alimony to a former spouse whose income is lower than the other; however, it found that it was within the discretion of the trial court on remand whether to award former wife a nominal amount of permanent periodic alimony for the purposes of reserving jurisdiction in the event of a substantial change in former wife's earning abilities in the future. The appellate court noted that former husband could not be held liable for any potential future claims arising out of former wife's obstetric practice as marital liabilities are those incurred during the marriage individually by either spouse or jointly by both. With regard to former wife's practice, the appellate court held the trial court had erred in assigning the full value of a practice she shared with a partner to her alone. With regard to properties sold prior to entry of the final judgment, the appellate court found that the trial court had erred in relying on estimated costs as opposed to the actual numbers; and accordingly, remanded to the trial court with instructions for it to recalculate the appropriate valuations using the actual numbers resulting from the sales.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2008/November/November%2026,%202008/2d06-407%2006-3530.pdf (November 26, 2008).

Lombard v. Lombard, __ So. 2d __, 2008 WL 5263637, (Fla. 2nd DCA, December 19, 2008) (NO. 2D07-234 and 2D07-2335).

VISITATION, INCLUDING MAKE-UP VISITATION, APPLIES ONLY TO THE NON-CUSTODIAL PARENT

Both former spouses appealed aspects of the final judgments of dissolution of marriage, appellate court concluded that the trial court had made "significant errors" in the provisions regarding visitation. Reasoning that the term, "visitation" applies only to the non-custodial parent and not to the primary residential parent, the appellate court reversed the portions of the order awarding make-up visitation to former wife and held that on remand, the trial court could only award make-up visitation to former husband as the non-custodial parent.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2008/December/December%2019,%202008/2D07-234.pdf (December 19, 2008).

Udell v. Udell, __ So. 2d __, 2008 WL 5234173, (Fla. 2nd DCA, December 17, 2008) (NO. 2D05-1754).

TRIAL COURT'S DISCRETION IN GRANTING CONTINUANCES BROAD, BUT NOT UNLIMITED

Appellate court held that trial court abused its discretion in denying former husband's "well-founded" request for a continuance in his dissolution of marriage proceeding and commented that while it recognized that a trial court has broad discretion in determining whether a continuance should be granted, that such discretion is not unlimited.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2008/December/December%2017,%202008/2D05-1754.pdf (December 17, 2008).

Grey v. Grey, __ So. 2d __, 2008 WL 5191670, (Fla. 2nd DCA December 12, 2008) (NO. 5270).

ADMISSIONS NOT SUFFICIENT TO ESTABLISH COMPLIANCE WITH STATUTORY RESIDENCY REQUIREMENT

Former wife appealed final judgment of dissolution of marriage because neither she nor former husband presented the requisite evidence of residency in Florida; appellate court reversed.

Pursuant to

section 61.021, F.S., one of the parties to the marriage must have resided six months in Florida prior to filing the petition for dissolution; section 61.052.(2), F.S., sets forth how that is accomplished. Here, former husband and former wife conceded that although each admitted to the other's residency in Florida, that those admissions are not sufficient to establish compliance with the residency requirement. The appellate court held that the trial court erred in entering final judgment of dissolution in absence of evidence establishing compliance with statutory residency requirement.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2008/December/December%2012,%202008/2D07-5270.pdf (December 12, 2008).

Schmidt v. Schmidt, __ So. 2d __, 2008 WL 5158563, (Fla. 2nd DCA December 12, 2008)(NO. 2D07-2178).

IN GENERAL, TRIAL COURT SHOULD AWARD NOMINAL SUM OF ALIMONY TO RESERVE JURISDICTION

In a case in which there was no transcript of the final hearing on the dissolution of marriage and the trial court was unable to approve either party's statement of the evidence submitted pursuant to Fla.R.App.P. 9.200(b), the appellate court concluded that its review was limited to whether the final judgment was erroneous on its face. Having found such error in the trial court's final judgment and its order entered on rehearing on the issue of permanent, periodic alimony, the appellate court held that when a spouse is entitled to permanent, periodic alimony, but the other spouse is unable to pay, the trial court should award a nominal sum in order to reserve jurisdiction in the event of a change in the parties' financial circumstances in the future.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2008/December/December%2010,%202008/2D07-2178.pdf (December 10, 2008).

Oluwek v. Oluwek, __ So. 2d __, 2009 WL 187890 (Fla. 2nd DCA, January 21, 2009)(NO. 2D07-5116).

GENERAL RULE AND EXCEPTION TO IT RE WHEN GIFT TO SPOUSE MAY BE IMPUTED AS INCOME

Former husband appealed an amended final judgment of dissolution of marriage. The appellate court reiterated the general rule that a trial court may not take financial assistance from family or friends into consideration in determining a former spouse's ability to pay alimony or child support; however, an exception to the rule exists allowing the trial court to impute income based on gifts if they have been continuing and ongoing rather than sporadic, and where the evidence shows they will continue in the future. Here, the evidence was uncontroverted that the payments would not continue in the future; thus, the trial court erred in having imputed them as income to former husband.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/January/January%2021,%202009/2D07-5116.pdf (January 21, 2009).

Braswell v. Braswell, __ So. 2d __, 2009 WL 103162, (Fla. 2nd DCA, January 16, 2009)(NO. 2D08-344).

AWARD OF ATTORNEY'S FEES REQUIRES COMPETENT, SUBSTANTIAL EVIDENCE (INVOICES, RECORDS)

Appellate court reiterated that an award of attorney's fees requires competent, substantial evidence which includes invoices, records, and other information detailing services provided as well as testimony from the attorney in support of his or her fee; an attorney's time records are critical in determining the appropriate number of hours expended on the client's behalf. Here, no evidence was introduced by former wife's attorney to support the award of fees or costs; accordingly, the appellate court reversed.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/January/January%2016,%202009/2D08-344.pdf (January 16, 2009).

Pierce v. Pierce, __ So. 2d __, 2009 WL 103163 (Fla. 2nd DCA, January 16, 2009)(NO. 2D08-356).

INCARCERATION FOLLOWING CONTEMPT REQUIRES SEPARATE FINDING OF ABILITY TO PAY PURGE

Appellate court reversed portion of trial court's order on motion for contempt which resulted in former husband's incarceration for failure to pay alimony to former wife in absence of a separate affirmative finding that former husband had the ability to pay the purge amount.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/January/January%2016,%202009/2D08-356.pdf (January 16, 2009).

Parks v. Parks, __ So. 2d __, 2009 WL 80230 (Fla. 2nd DCA, January 14, 2009)(NO. 2D07-298).

ABSENT A FINDING OF MISCONDUCT, ASSETS USED FOR LIVING EXPENSES SHOULD NOT BE ASSIGNED

Former wife appealed final judgment of dissolution of marriage of a long-term marriage; appellate court reversed as to the equitable distribution scheme, but affirmed all other aspects of the final judgment. Although the appellate court found that the trial court did set forth supporting findings of fact regarding former wife's share of the sale of the marital home and that the trial court had not abused its discretion in crediting former husband for one-half of the mortgage and home equity loan payments under the facts of the case, the appellate court found that former wife was entitled to an offset equal to one-half of the reasonable rental value and that the trial court had erred in having assigned to her as part of her equitable distribution funds withdrawn from a home equity loan which she had used for living expenses. (Former husband had withdrawn the same amount of funds from the same account to purchase a motorcycle; the trial court had determined that the motorcycle was a non-marital asset.) The appellate court reiterated that an asset used by a former spouse out of necessity for reasonable living expenses should not be assigned to the spouse who used them absent a finding of misconduct.

http://www.2dca.org/opinions/opinion_Pages/Opinion_Page_2009/January/January%2014,%202009/2D07-298.pdf (January 14, 2009).

Third District Court of Appeal

Martinez v. Martinez, 995 So. 2d 1091, 2008 WL 4998684 (Fla. 3rd DCA November 26, 2008)(NO. 3D07-1743).

CHILD SUPPORT MUST BE BASED ON COMPETENT, SUBSTANTIAL EVIDENCE; TRIAL COURT OBLIGATED TO MAKE SPECIFIC PROVISION RE CHILD'S HEALTH INSURANCE; COURT MUST CONSIDER SECTION 61.08,

Former wife appealed final judgment of dissolution of marriage; appellate court affirmed in part and reversed in part. During the course of the proceedings, the record reflected that former husband failed to comply with numerous orders leading to contempt orders on his part and former wife contending with repossession of her car, loss of water and power in the marital home, and foreclosure and sale of the home. Former husband also dissipated the equity of the home and sold it--in contravention of another order -- during his bankruptcy proceedings. Former husband's failure to comply with discovery re disclosure of his income led to his being found in contempt; the fact that financial information had been erased from his computer led the general magistrate to conclude that he was concealing his true income. In its final judgment, the trial court designated former wife as primary, residential parent and provided very specific instructions as to visitation, commenting that eventually, shared parental responsibility should exist between the former spouses. The appellate court agreed with former wife that the issue of shared parental responsibility was one that should be addressed in the future via modification proceedings and ordered that language struck from the final judgment. The appellate court also agreed with former wife that the trial court erred when it reduced former husband's income during its calculation of child support and reiterated that there must be competent, substantial evidence to support a trial court's determination of child support. Finding that the trial court was in error when it ordered former husband to obtain health insurance if "financially feasible," the appellate court held that the trial court is obligated to make a specific provision regarding a child's health insurance. With regard to alimony, the appellate court found that the trial court had failed to consider all factors enumerated in section 61.08, F.S.; the appellate court commented that notwithstanding the trial court's characterization of former husband's behavior as "outrageous" in dissipating the couple's only substantial asset, the marital home, that it had failed to take that into account in the equitable distribution. Although agreeing that former wife was entitled to attorney's fees, the appellate court reversed the amount and remanded for hearing on that issue.

<http://www.3dca.flcourts.org/Opinions/3D07-1743.pdf> (November 26, 2008).

Fourth District Court of Appeal

Lande v. Lande, ___ So.2d ___, 2008 WL5352144,(Fla. 4th DCA, December 24, 2008)(NO. 4D08-158).

LIMITS ON JURISDICTION OF TRIAL COURT WHERE FORMER SPOUSE AND CHILD RESIDE OUTSIDE FLA

Former wife challenged the trial court's jurisdiction as part of her appeal to the final judgment of dissolution of marriage and several accompanying orders. Appellate court reversed the portions of the final judgment regarding child custody and child support, but otherwise affirmed. Although the former spouses had most recently resided in Pinellas County and

purchased a home there in 2002, former husband filed his petition for dissolution of marriage in Palm Beach County in 2005; former wife had been living with the couple's son in Brazil since 2002. The appellate court found that the trial court had properly determined that it had jurisdiction to dissolve the marriage, equitably distribute the property, and enter a child support award, concluding that the trial court had subject matter jurisdiction over the marriage because former husband had been a continuous resident of Florida since 2000. In addition, the appellate court held that the trial court had personal jurisdiction over both former spouses because both appeared in the dissolution proceedings without having challenged personal jurisdiction. With regard to the trial court's order allowing former husband to unilaterally negotiate the mortgage on the marital home even though it was located outside the county where the petition was filed, the appellate court held that, "when the focal point of an action is *in personem*, a court has the power to determine the parties' equitable rights even when the relief sought might incidentally affect real property over which the court does not have *in rem* jurisdiction." The appellate court pointed out that the trial court's order neither acted directly on the property nor directly ordered transfer of title; rather it allowed former husband to take action on the mortgage to effectuate equitable distribution of marital property; therefore, the trial court's personal jurisdiction over both parties was sufficient. With regard to child custody, however, the appellate court reasoned that Brazil, not Florida, was the child's home state. <http://www.4dca.org/opinions/Dec%202008/12-24-08/4D08-158.op.pdf> (December 24, 2008).

Craissati v. Craissati, ___ So. 2d ___, 2008 WL 5156648, (Fla. 4th DCA December 10, 2008)(NO.4D07-1506).

LIVING WITH A CELLMATE MAY BE CONSTRUED AS COHABITATION UNDER TERMS OF MSA

Case in which both former spouses appealed the trial court's order which reduced, but did not terminate, the level of alimony agreed to in the marital settlement agreement (MSA) which was incorporated into the final judgment of dissolution of marriage. Cohabitation, defined within the MSA as former wife living with a person other than the couple's child for a period of three consecutive months, was grounds for termination of alimony. Subsequent to entry of the final judgment, former wife was sentenced to nine years in prison; former husband filed a petition for modification, arguing that former wife was cohabitating with her cellmate. During the evidentiary hearing, the former spouses stipulated that by living with her cellmate, former wife was cohabitating as that term was defined within the MSA. Although it found that the definition contained within the MSA was controlling and was not ambiguous, the trial court concluded that construing cohabitation to encompass living with a cellmate was an "absurd result" and not one reasonably intended by the drafters of the MSA. The appellate court, however, held that because the relevant provision of the MSA was not ambiguous and the former wife agreed that her incarceration met the definition of cohabitation, that the parties' stipulation bound not only them but the trial court as well. Accordingly, it reversed the trial court and directed a judgment be entered on remand terminating the alimony. <http://www.4dca.org/opinions/Dec%202008/12-10-08/4D06-3645.rhgop.pdf> (December 10, 2008).

Bohner v. Bohner, ___ So. 2d ___, 2008 WL 5156656, (Fla. 4th DCA December 10, 2008)(NO. 4D07-3234).

DISPARITY IN INCOME INSUFFICIENT TO OBTAIN AWARD OF FEES; NEED MUST BE ESTABLISHED

Former husband appealed an order requiring him to obtain life insurance to secure alimony and child support obligations and awarding attorney's fees to former wife; appellate court affirmed the portion of the order requiring him to obtain life insurance, but reversed the award of attorney's fees. The appellate court found the trial court's order re life insurance to be supported by the evidence and clearly within its discretion, but held that neither the findings of the trial court nor the evidence supported a conclusion that former wife was in need. The appellate court reiterated that disparity in income does not justify an award of attorney's fees; need for the fees must be established by the party seeking relief.

<http://www.4dca.org/opinions/Dec%202008/12-10-08/4D07-3234.op.pdf> (December 10, 2008).

Ross v. Ross, 995 So. 2d 1165, (Fla. 4th DCA, December 10, 2008)(NO. 4D07-4006).

AWARD OF FEES APPROPRIATE WHERE LITIGATION IS WITHOUT MERIT AND BROUGHT TO HARASS

Appellate court affirmed in part and reversed in part a trial court's order which denied former husband's petition for modification based on his allegations that his income and assets had decreased. Although he filed the petition shortly after having received an attorney's fee in excess of \$1,000,000, his reason for not having included that fee was that it was an "aberration." The appellate court reasoned that reversal of the order denying her attorney's fees was appropriate owing not only to former husband's improved financial position, but also because it found the litigation to be without merit and apparently "brought primarily to harass." <http://www.4dca.org/opinions/Dec%202008/12-10-08/4D07-4006.op.pdf> (December 10, 2008).

Calero v. Calero, 996 So. 2d 244, 2008 WL 5156678, (Fla. 4th DCA December 10, 2008)(NO. 4D07-4113).

REQUIREMENTS OF SECTION 61.30(7) F.S. RE CHILD CARE COSTS AND CHILD SUPPORT

In a case where the only disputed issue was that of child support, former husband appealed the trial court's findings of fact regarding his income. Agreeing with former husband that the trial court's findings were not based on competent, substantial evidence, the appellate court reversed. The appellate court also found that the trial court had not acted in accordance with section 61.30(7) F.S., with regard to child care costs and instructed the trial court on remand to determine the amount of such costs, to reduce that amount by 25% as required by the statute, and then add each parent's percentage of that amount to his or her obligation.

<http://www.4dca.org/opinions/Dec%202008/12-10-08/4D07-4113.op.pdf> (December 10, 2008).

Mahmood v. Mahmood, ___ So. 2d ___, 2009 WL 187807, (Fla. 4th DCA, January 28, 2009)(NO. 4D08-4743).

CERTIORARI REQUIRES IRREPARABLE HARM; SECTION 39.0139, F.S., NOT APPLICABLE TO C. 61, F.S. DOM

Former wife petitioned for writ of certiorari in a pending dissolution of marriage proceeding seeking to prohibit former husband from visitation privileges with the couple's 15 and 17 year

old sons. The appellate court reiterated that certiorari is appropriate where there is a departure from essential requirements of law which will cause material injury to the petitioner which cannot be remedied on appeal; it then concluded that certiorari did not lie in this case because section 39.0139, F.S., did not apply in the chapter 61, F.S. dissolution proceedings. <http://www.4dca.org/opinions/Jan%202009/01-28-09/4D08-4743.op.pdf> (January 28, 2009).

French v. French, __ So. 2d __, 2009 WL 129587, (Fla. 4th DCA, January 21, 2009)(NO. 4D06-3860).

ALIMONY MUST EITHER BE REDUCED OR TERMINATED IF SUPPORTIVE RELATIONSHIP EXISTS

Former husband appealed trial court's denial of reduction or termination of alimony after trial court found a supportive relationship existed between former wife and the man with whom she had lived since 1990. The appellate court reasoned that once a trial court makes a finding, pursuant to

section 61.14(1)(b) , F.S., that a supportive relationship exists, then it is incumbent on the court to either reduce or terminate the alimony because the needs of the former spouse in the supportive relationship have changed. For the trial court to do neither renders both its findings and the statute meaningless.

<http://www.4dca.org/opinions/Jan%202009/01-21-09/4D06-3860.op.Rhrg.pdf> (January 21, 2009).

Fifth District Court of Appeal

Hoye v. Hoye, __ So. 2d __, 2009 WL 151091 (Fla. 5th DCA, January 23, 2009)(NO. 5D07-1143).

FINDINGS MUST BE SUPPORTED BY EVIDENCE; ASSETS MUST BE VALUATED AND DISTRIBUTED

Appellate court reversed final judgment of dissolution of marriage because trial court's findings were either contrary to the evidence or unsupported by sufficient factual findings and because the trial court failed to value and distribute all marital assets.

<http://www.5dca.org/Opinions/Opin2009/011909/5D07-1143.pdf> (January 23, 2009).

Kitchens v. Kitchens, __ So. 2d __, 2009 WL 18705 (Fla. 4th DCA January 5, 2009)(NO. 4D08-698).

DISCRETIONARY IRA WITHDRAWALS NOT INCOME; MANDATORY OR MINIMUM WITHDRAWALS ARE

Former husband appealed the final order on his second amended petition for modification of the award of alimony to former wife. The appellate court agreed with former husband that the trial court had erred in treating his discretionary IRA withdrawals as income for purposes of calculating alimony, but did not reach that same conclusion with regard to the mandatory withdrawals, holding instead that mandatory or minimum IRA withdrawals are properly treated as income for purposes of calculating alimony. Having concluded that it was error for the discretionary withdrawals to have been considered as income, the appellate court held that the trial court had abused its discretion in having awarded the amount of permanent, periodic alimony to former wife that it did. The disparity in income resulting from the trial court's calculation was substantial and therefore, subject to reversal.

<http://www.4dca.org/opinions/Jan%202009/01-05-09/4D08-698.op.pdf> (January 5, 2009).

Lift v. Lift, __ So 2d __, 2009 WL 18678, (Fla. 4th DCA January 5, 2009)(NO. 4D07-1168).

TRIAL COURT MUST MAKE SPECIFIC FINDINGS OF FACT; FORCING FORMER SPOUSES TO REMAIN IN BUSINESS TOGETHER INTOLERABLE; TRIAL COURT CANNOT ORDER SALE OF HOME IF NOT REQUESTED

In its final judgment of dissolution of marriage, the trial court awarded each of the former spouses 50% interest in: former wife's veterinary business; the marital home; and all other assets (excluding six cats which were awarded to former wife). The trial court also awarded former husband permanent alimony and ordered that the marital home be sold. The appellate court noted that both former husband and wife agreed that the final judgment lacked specific findings of fact and reiterated that the trial court is required to make specific written findings of fact with regard to equitable distribution and that failure to do so not only constitutes reversible error but precludes meaningful review. The former spouses also agreed that the trial court erred in awarding each of them a half interest in former wife's business, thereby forcing them to be business partners. The appellate court referred to its earlier holdings that forcing former spouses to remain in business together is an intolerable situation. The appellate court agreed with the former spouses that the trial court erred in ignoring stipulations reached by them at trial and held that generally, stipulations are binding on the trial court as well as the parties. The final agreement by the former spouses with which the appellate court concurred was that the trial court could not order the sale of the marital home where neither former husband nor wife had requested it.

<http://www.4dca.org/opinions/Jan%202009/01-05-09/4D07-1168.op.pdf> (January 5, 2009).

Moskowitz v. Moskowitz, __ So. 2d __, 2009 WL 18684 (Fla. 4th DCA January 5, 2009)(NO.4D07-2456).

ARREST OF JUDGE FOR POSSESSION OF CONTROLLED SUBSTANCE GROUNDS TO DISQUALIFY

During a recess in what the appellate court termed "a contentious divorce," after former husband had tried to offer evidence of former wife's overuse of drugs (to which the judge was unreceptive), the judge was caught smoking marijuana in a public park and arrested for possession of a controlled substance. Following this episode, former husband moved to disqualify the judge, citing his arrest as well as other grounds, and stating that he (former husband) did not believe a fair trial was possible. The judge denied the motion as insufficient without holding a hearing. The appellate court termed the motion to disqualify a "stew of reasons" and found it legally sufficient. The appellate court pointed out that while the judge should be afforded the presumption of innocence with regard to the criminal charges pending against him, that the litigants before him could still question that his impartiality had been impaired. The appellate court instructed that on remand, whether to begin a new trial or rely on some or all of the existing record would be up to the new judge.

<http://www.4dca.org/opinions/Jan%202009/01-05-09/4D07-2456.op.pdf> (January 5, 2009).

Domestic Violence Case Law

Florida Supreme Court

In re Amendments to Florida Family Law Rule 12.010, ___ So.2d ___, 2008 WL 5170622 (Fla. 2008). [THE FLORIDA SUPREME COURT ADOPTED THE FAMILY LAW RULES COMMITTEE'S PROPOSED AMENDMENT TO FLORIDA FAMILY LAW RULE OF PROCEDURE 12.010\(B\)\(1\)](#). Florida Family Law Rule of Procedure 12.010(b)(1) addresses the purpose of the rules. The amendment became effective immediately upon the release of the opinion. <http://www.floridasupremecourt.org/decisions/2008/sc08-641.pdf> (December 11, 2008).

First District Court of Appeal

No new opinions for this reporting period.

Second District Court of Appeal

M.A.M. v. State, --- So.2d ----, 2009 WL 32416 (Fla. 2d DCA 2009) [SECURE DETENTION FOR JUVENILES](#) M.A.M., a juvenile, filed an emergency petition for writ of habeas corpus seeking to be discharged from secure detention. Although focusing on other issues, the court reminds juvenile judges that when a child has been charged with committing an act of domestic violence that does not otherwise meet the secure detention criteria, the child may continue to be held in secure detention only if the court makes "specific written findings" that respite care is unavailable and that secure detention is required to prevent victim injury. http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/January/January%2007,%202009/2D08-5147.pdf (January 7, 2009).

Third District Court of Appeal

No new opinions for this reporting period.

Fourth District Court of Appeal

No new opinions for this reporting period.

Fifth District Court of Appeal

No new opinions for this reporting period.