

OSCA/OCI'S FAMILY COURT CASE LAW UPDATE
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Delinquency Case Law

Florida Supreme Court

J.A.B. v. State, __ So.3d __, 2009 WL 26540 (Fla. 2009). **TRIAL COURT MAY ORDER RESTITUTION PAYMENTS TO BEGIN ON A DATE CERTAIN WITHOUT REGARD TO THE JUVENILE'S PRESENT EMPLOYMENT STATUS.** This case was a review of J.A.B. v. State, 993 So.2d 1150 (Fla. 2d DCA 2008). The Second District Court of Appeal affirmed the trial court's decision and certified conflict with the decision of the First District Court of Appeal in J.A.M. v. State, 601 So.2d 278 (Fla. 1st DCA 1992), on the issue of whether setting the commencement date for restitution must be conditioned on the juvenile obtaining employment. The juvenile was eighteen, unemployed and pregnant. The trial court ordered the juvenile to pay restitution at the rate of \$50 per month, reasoning that this amount could be paid given the resources available to the juvenile even if she worked only part-time at minimum wage. The trial court deferred any payment until approximately six weeks after the juvenile's due date. The Florida Supreme Court affirmed the Second District's decision and held that: (1) trial court could set a restitution payment schedule for unemployed and pregnant juvenile, despite lack of employment history and limited education, and (2) the trial court may order that the payments begin on a date certain without regard to the juvenile's present employment status, disapproving J.A.M. v. State, 601 So.2d 278. The Florida Supreme Court found that nothing in the juvenile restitution statute required a trial court to condition the payment schedule on the juvenile obtaining employment, and it was appropriate for the trial court to set a restitution amount and payment schedule based on the expectation of employment and on what the juvenile could reasonably be expected to pay upon finding suitable employment. If the juvenile subsequently fails to make payments, the State would have to prove in an enforcement proceeding that the probationer willfully violated a substantial condition of probation. The issue would be whether the juvenile had the ability to pay the amount of restitution ordered and the juvenile's inability to find employment despite reasonable efforts. Accordingly, the Florida Supreme Court affirmed the Second District's decision in J.A.B. and disapproved the First District's decision in J.A.M. to the extent that it required that a commencement date for restitution be conditioned on the juvenile obtaining employment.

<http://www.floridasupremecourt.org/decisions/2010/sc08-2326.pdf> (January 7, 2010).

In Re: Amendments to the Florida Rules of Juvenile Procedure, __ So.3d __, 2009 WL 4841088 (Fla. 2009). **THE FLORIDA SUPREME COURT ADOPTED AMENDMENTS TO THE FLORIDA RULES OF JUVENILE PROCEDURE EFFECTIVE JULY 1, 2009.** Amendments were adopted for rules 8.010(Detention Hearing); 8.070(Arraignments); 8.080(Acceptance of Guilty or Nolo Contendre Plea); 8.100(General Provisions for Hearing); 8.115(Disposition Hearing); 8.130(Motion for Rehearing); 8.235(Motions); 8.257(General Magistrates); 8.265(Motion for Rehearing); 8.310(Dependency Petitions); 8.400(Case Plan Development); 8.410(Approval of Case Plans); 8.505(Process and Service); 8.982(Notice of Action for Advisory Hearing); and 8.978(a)(Order Concerning Youth's Eligibility for Florida's Tuition and Fee Exemption).

<http://www.floridasupremecourt.org/decisions/2009/sc09-141.pdf> (December 17, 2009).

C.E.L. v. State, __ So.3d __, 2009 WL 4841076 (Fla. 2009). **JUVENILE'S CONTINUED FLIGHT, WITHIN A HIGH-CRIME AREA, IN DEFIANCE OF A VERBAL ORDER TO STOP, CONSTITUTED THE OFFENSE OF OBSTRUCTING AN OFFICER WITHOUT VIOLENCE.** This case was a review of C.E.L. v. State, 995 So.2d 558 (Fla. 2d DCA 2008). The Second District Court of Appeal certified a direct conflict with the decision of the Third District Court of Appeal in D.T.B. v. State, 892 So.2d 522 (Fla. 3d DCA 2004). Two police officers were patrolling an apartment complex in response to a prior complaint regarding drugs and trespassing. The juvenile was standing in the public area of the complex with another teenager. When the two officers approached the youths, the juvenile took flight. The officers ordered the juvenile to stop, but he continued to run. The juvenile was later apprehended. The juvenile was adjudicated for resisting, obstructing, or opposing a law enforcement officer without violence. The juvenile appealed and argued that the police officers lacked reasonable suspicion to detain him before he took flight. Thus, any action he took after flight could not constitute the offense of resisting without violence. The Second District affirmed the adjudication. The Florida Supreme Court found that the issue was whether there should be a specific rule of law interpreting s. 843.02, F.S., to require that reasonable suspicion of criminal activity exist before an individual flees. In the instant case, the juvenile's flight in a high-crime area created the reasonable suspicion sufficient to warrant a lawful investigative stop, and thus the officer was engaged in the lawful execution of a legal duty. For purposes of the offense of obstructing an officer without violence, it is of no consequence whether the obstructing conduct is initiated before the officer has any legal duty to act; the essential inquiry should instead focus on whether the officer was lawfully executing a legal duty when the obstructing conduct occurred. The Florida Supreme Court held that the plain language of s. 843.02, F.S., does not support the distinction set forth by the Third District in D.T.B. that would require reasonable suspicion to arise before the flight begins. Therefore, the juvenile's continued flight, within a high-crime area, in defiance of a police officer's verbal order to stop, constituted the offense of obstructing an officer without violence, disapproving D.T.B. v. State, 892 So.2d 522 (Fla. 3d DCA 2004).

<http://www.floridasupremecourt.org/decisions/2009/sc08-1898.pdf> (December 17, 2009).

First District Court of Appeal

C.M.H. v. State, __ So.3d __, 2009 WL 143758 (Fla. 1st DCA 2009). **DISPOSITION ORDER REVERSED FOR FAILURE TO COMPLY WITH E.A.R. V. STATE, 4 SO.3D 614 (FLA.2009). WHEN THE TRIAL COURT DEPARTED FROM THE DEPARTMENT OF JUVENILE JUSTICE'S RECOMMENDATION.** The Department of Juvenile Justice (DJJ) recommended probation. The trial court committed the juvenile to a moderate-risk program, but suspended the sentence and placed him on probation. The First District Court of Appeal found that the trial court did not engage in the rigorous analysis required by E.A.R. v. State, 4 So.3d 614 (Fla.2009), before departing from the DJJ's recommendation. Accordingly, the disposition order was reversed and remanded to provide the trial court an opportunity to enter an order in compliance with E.A.R., or else impose the probation recommended by the DJJ.

<http://opinions.1dca.org/written/opinions2010/01-15-2010/09-3091.pdf> (January 15, 2010).

C.A.M. v. State, __ So.3d __, 2009 WL 5152363 (Fla. 1st DCA 2009). **RESTITUTION ORDER REVERSED AND REMANDED BECAUSE JUVENILE WAS NOT PRESENT FOR THE FIRST SESSION OF A TWO-PART RESTITUTION HEARING, AND THERE WAS NO VOLUNTARY AND INTELLIGENT WAIVER OF HIS RIGHT TO ATTEND.** The First District Court of Appeal found that the juvenile was entitled to a new restitution hearing because he was not present for the first session of a two-part restitution hearing, and nothing in the record suggested a voluntary and intelligent waiver of his right to attend. In addition, the record contained no determination by the trial court that the restitution amount did not exceed an amount the child and the parent or guardian could reasonably be expected to pay or make. Accordingly, the amended restitution order was reversed and remanded for further proceedings.

<http://opinions.1dca.org/written/opinions2009/12-31-2009/09-3700.pdf> (December 31, 2009).

Second District Court of Appeal

E.I. v. State, __ So.3d __, 2009 WL 5125170 (Fla. 1st DCA 2009). **STATE FAILED TO PRESENT A PRIMA FACIE CASE OF ATTEMPTED TAMPERING WITH PHYSICAL EVIDENCE WHERE THE JUVENILE THREW A BAG CONTAINING METHAMPHETAMINE OUT OF A TRUCK WINDOW DURING A TRAFFIC STOP.** The juvenile was a passenger in a pickup truck being pulled over for a traffic stop. As the truck pulled into a gas station and started to slow down, the officer saw the juvenile throw an item out of the passenger window which was later discovered to be a package containing methamphetamine. The juvenile told the police that the driver removed the package from his pocket, handed it to him, and told him that he didn't want the police to find the package. At the driver's direction, the juvenile threw the package out the truck window. The juvenile made no statements about his intent in throwing the package. The First District Court of Appeal found that while the juvenile was clearly trying to disassociate himself from the package, there was nothing about this act under the circumstances that showed the juvenile was trying to alter, destroy, or conceal the package. Further, the juvenile did not remove it from the scene of the traffic stop. Thus, this act was factually and legally nothing more than abandonment, and the trial court should have granted the juvenile's motion for judgment of dismissal. The State presented no evidence that the juvenile intended to alter or destroy the methamphetamine. The most that can fairly be determined from the facts is that the juvenile followed the driver's instructions and attempted to abandon the methamphetamine in plain view of the officers. Further, the juvenile's intent cannot be inferred from the statements of the driver. While the State's evidence might arguably show that the driver of the pickup truck intended to conceal the methamphetamine, the State presented no evidence that the juvenile shared this intent. In the absence of such evidence, the State failed to present a prima facie case of attempted tampering. Therefore, the juvenile's motion for judgment of dismissal should have been granted. Accordingly, the adjudication and sentence was remanded for discharge. http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/December/December%2030,%202009/2D08-4971.pdf (December 30, 2009).

Third District Court of Appeal

T.R. v. State, __ So.3d __, 2009 WL 173749 (Fla. 3d DCA 2009). [JUVENILE ENTITLED TO A NEW DISPOSITION HEARING BEFORE A DIFFERENT JUDGE BECAUSE THE JUVENILE'S ELECTION TO ASSERT HER INNOCENCE AND DEMAND A TRIAL WAS AT LEAST "A FACTOR" IN THE TRIAL JUDGE'S ADJUDICATION AND DISPOSITION OF THE CASE.](#) The juvenile appealed her withhold of adjudication and sanction for simple battery. The juvenile was charged with simple battery for smacking a fellow student with her lunch box at a bus stop. The juvenile argued that she was entitled to a new disposition hearing before a different judge because the trial court impermissibly relied upon the fact that she maintained her innocence to the charged offense and requested an adjudicatory hearing throughout the proceeding below. At the adjudicatory hearing, the judge made references that the case should have been resolved before trial. At the disposition hearing the judge repeatedly referred to the opportunities that were available to resolve the case prior to rendering his decision. Further, at the disposition hearing, the Juvenile Probation Officer (JPO) recommended that the juvenile should be referred to Juvenile Alternative Services Sanctions (JASS), a diversion program. The State opposed the recommendation on the ground that the juvenile twice had been offered and rejected the same offer prior to trial. According to the State, giving the same sanction post-adjudication as offered before trial "would be a get out of jail free card." The trial court agreed with the State and rejected the recommendation by the JPO. The Third District Court of Appeal found that juveniles have a constitutional right not to be unfairly penalized for the assertion of innocence and demand for trial. The Third District held that it was "abundantly clear" from the record provided that the juvenile's election to assert her innocence and demand a trial was at least "a factor" in the trial judge's adjudication and disposition of this case. For these reasons, the adjudication and disposition were reversed and remanded. In an abundance of caution and to insure completely fair proceedings, the case was remanded for retrial and redispotion before a different judge.

<http://www.3dca.flcourts.org/Opinions/3D08-0808.pdf> (January 20, 2010).

H.A. v. State, __ So.3d __, 2009 WL 5125101 (Fla. 3d DCA 2009). [PHOTOGRAPHS DOWNLOADED FROM SURVEILLANCE VIDEO WERE PROPERLY ADMITTED AS DUPLICATES PURSUANT TO SS. 90.953 AND 90.954, F.S. \(2008\).](#) The juvenile appealed his adjudication and disposition for petit theft based on the admission of photographs downloaded from a surveillance video from the night of the theft. The Third Circuit Court of Appeal concluded that the photographs were properly admitted as duplicates pursuant to ss. 90.953 and 90.954, F.S. (2008), and affirmed. A store employee testified that he saw the juvenile take some beer before running out the door to a blue Nissan. The employee wrote down the license plate number and gave it to the police, who traced it to the juvenile. The employee also identified photographs downloaded from the surveillance video from the night of the theft, and he testified that he originally saw the pictures on a video screen and that the store number, date and time were not printed on the photos. The juvenile argued that ss. 90.952 to 90.954, F.S., required the State to produce the original videotape or demonstrate that the original was unavailable before the photographs could be properly admitted. The Third Circuit found that s. 90.953 provides that duplicates are admissible "to the same extent as an original" unless a genuine question is raised about the

authenticity of the original or it would be unfair under the circumstances to admit the duplicates. In the instant case, the still photographs produced from the surveillance video fell within the statutory definition of a duplicate. The juvenile did not raise any genuine question as to the authenticity of the original video and he failed to demonstrate how the trial court's decision to admit the photographs in lieu of the video was unfair under the circumstances. Accordingly, the Third Circuit found no abuse of discretion in the trial court's admission of the photographs.

<http://www.3dca.flcourts.org/Opinions/3D09-1199.pdf> (December 30, 2009).

A.M. v. State, __ So.3d __, 2009 WL 4928058 (Fla. 3d DCA 2009). **ADJUDICATION FOR GIVING A FALSE NAME TO A LAW ENFORCEMENT OFFICER WAS AFFIRMED BECAUSE THE JUVENILE WAS LAWFULLY DETAINED WHEN HE PROVIDED THE FALSE NAME AND IDENTITY.** The police had received an anonymous call regarding a burglary in progress in an area identified as a “hot zone” because of an increase in burglaries. The caller provided the location of the alleged burglary and a description of the suspect. According to the arresting officer, the dispatcher indicated that a witness had followed the suspect to an auto parts store. The officer drove to the auto parts store and was flagged down by the witness. The officer spoke to the individual for ten to twenty seconds, in order to ascertain that they were talking about the same person. The individual pointed out the direction taken by the suspect. Neither the officer nor the dispatcher obtained the name of this witness. The officer saw the juvenile who matched the provided description. The officer stopped his car and spoke to the juvenile. The juvenile provided a fake name and date of birth. The officer advised the juvenile that he was eventually going to find out his correct name even if the officer had to take him into custody and fingerprint him. The officer handcuffed the juvenile and put him in the back seat of his police car. The juvenile then provided a second name and date of birth which also turned out to be false. During a pat down, an identification card was discovered which provided the juvenile’s correct identity. The juvenile was charged and adjudicated for providing a false name to a law enforcement officer. The juvenile appealed his adjudication and argued that there was he was no reasonable suspicion to support an investigatory stop. Thus, he was unlawfully detained when he provided the false identity. The juvenile relied primarily on Baptiste v. State, 995 So.2d 285 (Fla.2008) for support. The Third District held that the Baptiste decision was factually distinguishable and did not support the juvenile’s position. In the instant case, in addition to an anonymous telephone call, the police officer had a face-to-face discussion at the scene in order to corroborate that they were talking about the same suspect and the direction taken, where the officer found the juvenile. The juvenile argued that the encounter with the citizen should be ignored because the officer testified that he did not know whether the citizen was the one who had placed the telephone call to the police. The Third District rejected this argument. The telephone call indicated that an individual had followed the subject to the auto shop, and a citizen flagged the officer down when he arrived at that location. The officer did not ask the individual specifically whether he or she had made the telephone call to the police. Logically, however, either the citizen was the one who placed the call, or the citizen had been present with the one who did make the telephone call. Under the circumstances of this case, the Third District held that the stop of the juvenile was lawful and affirmed.

<http://www.3dca.flcourts.org/Opinions/3D08-2926.pdf> (December 23, 2009).

Fourth District Court of Appeal

State v. V.S., __ So.3d __, 2009 WL 289274 (Fla. 4th DCA 2009). [SUPPRESSION ORDER AFFIRMED](#). The state appealed the trial court's order suppressing drugs found in the juvenile's purse. The issue the parties address on appeal is whether the father could consent to a search of the juvenile's purse. The Fourth District Court of Appeal found that the initial factual question was whether the father consented to a search at all. The trial court did not make a specific finding that the father actually consented to a search. A deputy had testified that the juvenile's father gave permission to search her room, yet that same deputy said that the purse was not found in the room but was opened by the father who gave the drugs to the deputy upon their arrival at the house. The trial court found this deputy's testimony not to be credible. A second deputy did not testify that anyone gave consent to a search but testified that the purse was found in the child's room in a drawer. The father did not testify. The Fourth District held that based on the widely divergent facts, they could not conclude that the trial court erred in suppressing the evidence. Decision affirmed.

<http://www.4dca.org/opinions/Jan%202010/01-27-10/4D09-2653.op.pdf> (January 27, 2010)

S.W. v. State, __ So.3d __, 2009 WL 289172 (Fla. 4th DCA 2009). [MOTION FOR REHEARING DENIED IN CASE WHERE APPELLATE COURT HELD THE TRIAL COURT'S DISPOSITION SATISFIED THE REQUIREMENTS OF E.A.R. V. STATE, 4 SO.3D 614 \(FLA.2009\)](#). In November, the Fourth District Court of Appeal affirmed the trial court's departure from the Department of Juvenile Justice's (DJJ) recommended disposition. The juvenile filed a motion for rehearing. The Fourth District denied the motion for rehearing and issued a substitute opinion for its November 18, 2009, opinion to address the departure issue in greater detail. At the Disposition hearing, the DJJ recommended probation. The trial court noted that the DJJ's predisposition report contained a comprehensive evaluation that recommended a highly-structured residential facility capable of handling the juvenile's extensive substance abuse issues. The trial court departed from the DJJ's recommendation and ordered a level 8, high-risk commitment. The Fourth District held that the juvenile court satisfied the criteria set forth in E.A.R., 4 So.3d 614 (Fla.2009), when departing from the DJJ's disposition recommendation. The Fourth District found that the trial court articulated an understanding of the respective characteristics of the opposing restrictiveness levels including the type of child that each restrictiveness level is designed to serve. The trial court recognized that a high-risk program was justified for a child who had been in a diversion program, on probation, and under parental supervision, of which none "have worked." The trial court also articulated an understanding of the potential "lengths of stay" associated with each level. A high-risk program would allow jurisdiction until 22 years of age if necessary, whereas, with probation or a lower level commitment, jurisdiction would end at 19 years of age. The court further articulated an understanding of the divergent treatment programs and services available to the juvenile at these levels. The court logically and persuasively explained why, in light of these differing characteristics, a high-risk program was better suited to serving the juvenile's rehabilitative needs - in the least restrictive setting - while maintaining the state's ability to protect the public from further delinquent acts. In sum, the court employed the proper legal standard in providing its on-the-record departure reasons. Further, the court's stated reasons also are supported by a preponderance of the competent,

substantial evidence contained within the record. Therefore, the trial court satisfied its duty to determine the most appropriate dispositional services in the least restrictive available setting. Motion for rehearing was denied. <http://www.4dca.org/opinions/Jan%202010/01-27-10/4D08-4040.opREHEARING.pdf> (January 27, 2010).

S.P. v. State, __ So.3d __, 2009 WL 5126238 (Fla. 4th DCA 2009). **DISMISSAL OF DELINQUENCY PETITION WAS REVERSED WHERE THE JUVENILE FAILED TO SHOW HOW HE WAS PREJUDICED BY THE CHANGE IN THE AMENDED PETITION FOR DELINQUENCY.** The State of Florida appealed the dismissal of a petition for delinquency for loitering and prowling filed against the juvenile. The juvenile had moved to dismiss because the state amended its charging document, which originally charged the juvenile with loitering and prowling by attempting to open doors of various vehicles for no legitimate purpose to attempting to open doors on a number of residences. The trial court granted the juvenile's motion to dismiss and the state appealed. The juvenile argued that the change was substantive, with the petitions actually alleging different law violations, which subjected the new petition to the ninety-day speedy trial period. The state argued that it merely amended the delinquency petition to correct a clerical error and there was no new substantive violation. The state reasoned that it had to prove the juvenile loitered or prowled in a place at a time or in a manner not usual for law abiding citizens, but did not have to prove he was opening vehicle doors or doors of residences. The Fourth District agreed with the state and found that the amended petition did not change victims or allege a different violation. Further, the defense had access to the police reports, which clearly referred to residences, not vehicles. According to the probable cause affidavit, the juvenile was observed by the police trying the doors on a number of residences-not trying car doors. The juvenile failed to show that he was prejudiced by the change in the Amended Delinquency Petition. Accordingly, the dismissal was reversed and remanded for further proceedings. <http://www.4dca.org/opinions/Dec%202009/12-30-09/4D08-4731.op.pdf> (December 30, 2009).

D.A.R. v. State, __ So.3d __, 2009 WL 4282913 (Fla. 4th DCA 2009). **THE JUVENILE'S CONVICTIONS FOR RESISTING ARREST WITH VIOLENCE AND RESISTING ARREST WITHOUT VIOLENCE VIOLATED DOUBLE JEOPARDY BECAUSE THEY AROSE OUT OF A SINGLE CONTINUOUS EPISODE.** The juvenile appealed his adjudication for both resisting an officer with violence and resisting an officer without violence which arose from the same incident as a violation of double jeopardy. The Fourth District Court of Appeal found that that the juvenile's convictions violated double jeopardy because they arose out of a single continuous episode. The case was reversed and remanded with instructions to vacate the juvenile's adjudication of delinquency for resisting an officer without violence. <http://www.4dca.org/opinions/Dec%202009/12-02-09/4D09-393.op.pdf> (December 2, 2009).

Fifth District Court of Appeal

R.J.L. v. State, __ So.3d __, 2009 WL 5150085 (Fla. 5th DCA 2009). **APPEAL DISMISSED BECAUSE IT CONCERNED A NONFINAL, NON-APPEALABLE ORDER AND A MOOT ISSUE.** The juvenile challenged the trial court's order that deferred, at the juvenile's request, the payment of court

costs imposed pursuant to hearings conducted over six months earlier. The Fifth District Court of Appeal found that the order was not a final, appealable order under the Florida Rule of Appellate Procedure 9.145(b). Further, any error regarding the payment deferral was not properly preserved and cannot be said to be adverse or prejudicial when entered pursuant to the juvenile's request. The juvenile's jurisdictional objection below was incorrect because his probation term, revoked and terminated for a violation of probation, was imposed anew for one year. The trial court's order also denied appointment of appellate counsel. Although this issue was moot because the juvenile obviously has counsel, the juvenile was entitled to appellate counsel under s. 985.033(1), F.S. (2007). The trial court is cautioned that Florida and federal law entitled the accused to the appointment of counsel. Accordingly, the appeal dismissed because it concerns a nonfinal, non-appealable order and a moot issue.

<http://www.5dca.org/Opinions/Opin2009/122809/5D09-149.corrop.pdf> (December 31, 2009).

N.R. v. State, __ So.3d __, 2009 WL 4455375 (Fla. 5th DCA 2009). **DISPOSITION ORDER REVERSED FOR FAILURE TO COMPLY WITH E.A.R. V. STATE, 4 SO.3D 614 (FLA.2009), WHEN THE TRIAL COURT DEPARTED FROM THE DEPARTMENT OF JUVENILE JUSTICE'S RECOMMENDATION.** The trial court committed the juvenile to a high-risk commitment program and rejected the Department of Juvenile Justice's (DJJ) recommended disposition to a moderate-risk commitment program. The Fifth District Court of Appeals held that the trial court's explanation for departing from the recommendation of the DJJ was not in accordance with the newly articulated standard set forth in E.A.R. v. State, 4 So.3d 614 (Fla.2009). Accordingly, the disposition order was reversed and remanded for the entry of an order which complied with the requirements of E.A.R. <http://www.5dca.org/Opinions/Opin2009/113009/5D08-4328.op.pdf> (December 4, 2009).

A.W. v. State, __ So.3d __, 2009 WL 4403201 (Fla. 5th DCA 2009). **THE JUVENILE'S MOTION TO CORRECT SCRIVENER'S ERROR WAS GRANTED.** The juvenile's motion to correct scrivener's error in A.W. v. State, 15 So.3d 929 (Fla. 5th DCA 2009), was granted. The corrected opinion cites s. 938.27, F.S. (2009) in its analysis of whether court costs were authorized. The original opinion erroneously cited s. 938.29, F.S. (2009).

<http://www.5dca.org/Opinions/Opin2009/113009/5D08-2920.op.pdf> (December 4, 2009)

A.C., C.M., T.M., D.O., and P.W. v. State, __ So.3d __, 2009 WL 4403238 (Fla. 5th DCA 2009). **CUSTODY ORDERS WERE QUASHED WHERE THE TIME ALLOWED FOR NOTICE OF THE ADVANCEMENT OF THE TRIAL DATES WAS INSUFFICIENT.** Five juveniles each sought a writ of certiorari directed to similar custody orders issued after each failed to appear at their adjudicatory hearing. All of the juveniles were represented by the public defender and had trial dates scheduled at their arraignments. Thereafter, thousands of cases were reassigned within the juvenile divisions in the Ninth Judicial Circuit in Orange County. Because of a backlog, a senior judge was scheduled to run an additional docket and the clerk was charged with scheduling hearings on that docket. When it was belatedly discovered that no cases had been assigned to the extra docket as they should have been, the administrative judge decided to reassign to that docket cases that had already been set for trial at a later time. The juveniles' cases were among those reassigned and the trial dates were advanced. All of the juveniles

failed to appear and custody orders were issued. The transcript in all of the cases revealed that they lasted no more than two to three minutes, that counsel requested that a custody order not be issued, objected to the case being reset with such short notice, informed the court that he or she had not been able to contact the juveniles and asked that the original trial date be restored. In each case, the trial court concluded that notice was reasonable and that if the juveniles did not receive notice, it was due to his or her own failure to keep in touch with his or her counsel. The Fifth District Court of Appeals found that there is no rule of juvenile procedure that speaks specifically to service of orders resetting trials or the amount of notice required when a trial is reset. The juveniles argued that notice given only to their counsel was not “reasonable notice” as is required by rule 8.100(f). The State contended that service upon counsel is all that is required and that in this case, twelve days was a reasonable amount of time under rule 8.100(f). The Fifth District found that service on counsel for the juveniles was sufficient. Florida Rule of Juvenile Procedure 8.085(b) provided that service of pleadings and papers upon a party shall be made on the attorney, if the party is represented, unless service on the party is ordered by the court. However, the Fifth District held that the time allowed for notice of the advancement of the trial dates was insufficient. Rule 8.085(c) provides that notices of hearings shall be served a reasonable time before the time specified for the hearing. While there are no hard and fast rules about how many days constitute a reasonable time, the party served with notice must have actual notice and time to prepare. In this case, the proceedings at issue were all adjudicatory hearings, for which significant preparation is required, and the defendants, who have the constitutional right to be present at all stages of a trial, are entitled to actual notice of the hearing. The State did not present any evidence that the juveniles actually knew about the moved-up dates of their trials; to the contrary, there was evidence that they did not know about them. The Fifth District held that the amount of time the public defenders were given to notify their clients that their hearings had been advanced by a month to a date only six to eight working days hence was not reasonable under the circumstances. Accordingly, the writs were granted and the custody orders were quashed. <http://www.5dca.org/Opinions/Opin2009/113009/5D09-2421.op.pdf> (December 4, 2009).

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

J.C. and H.C. v. Department of Children and Families, ___ So.3d ___, 2010 WL 307578 (Fla. 3d DCA 2010). **TERMINATION OF PARENTAL RIGHTS REVERSED**. The parents appealed final judgments terminating their parental rights. The appellate court reversed and remanded the judgments because there was no showing of any statutory basis for the termination. <http://www.3dca.flcourts.org/Opinions/3D09-2337&09-2164.pdf> (January 27, 2010).

C.R. v. Department of Children and Families, __ So.3d __, 2010 WL 98993 (Fla. 3^d DCA 2010). **TRIAL COURT RETAINS CONCURRENT JURISDICTION**. The mother petitioned the court for a writ of mandamus on her Motion for the Appointment of an Attorney for the Child. The trial court declined to rule on the motion on the ground that several orders in the case are pending review before the appellate court. The appellate court held that the trial court retains concurrent jurisdiction with the appellate court to rule upon the motion. The court also noted that "The lower court is prohibited only from altering the order or acting in any manner with respect to its appealed order as might frustrate the efforts of the appellate court or render moot its labors." <http://www.3dca.flcourts.org/Opinions/3D09-2928.pdf> (January 13, 2010).

Fourth District Court of Appeal

No new opinions for this reporting period.

Fifth District Court of Appeal

J.R. v. Department of Children and Families, __ So.3d __, (Fla. 5th DCA 2010). **TERMINATION OF PARENTAL RIGHTS AFFIRMED**. The father appealed the termination of his parental rights to five children after the death of the sixth child. The deceased child had been severely abused with over 60 injuries. Although the evidence showed that the mother delivered the blows to the child, the father did not take the child for emergency care for over six hours. The appellate court affirmed the trial court's ruling. <http://www.5dca.org/Opinions/Opin2010/011810/09-1514.op.pdf> (January 22, 2010).

R.N. v. Department Of Children and Families, __ So.3d __, 2010 WL 198471 (Fla. 5th DCA 2010). **AMENDING CASE PLAN DID NOT VIOLATE FATHER'S PROCEDURAL DUE PROCESS RIGHTS**. The trial court entered an order adjudicating the children dependent and accepting the case plan agreed to by the parents and DCF in mediation. A new domestic violence incident occurred and DCF filed an expedited motion for modification of visitation, during which the trial court added additional tasks to the case plan. The father sought certiorari review of the order that amended his case plan that required him to perform additional tasks claiming that the amendment to the case plan was done in contravention of his procedural due process rights. The appellate court noted that although Rule 8.420 contemplates an evidentiary basis to support a case plan amendment, the rule does not require that specific prior notice of a possible amendment be given. In this case, the trial court's actions complied with both section 39.6013 and Rule 8.420. The trial court determined, after a duly noticed evidentiary hearing, that there was a demonstrated need to amend the case plan based on circumstances that arose after its approval of the initial case plan. The amendment to the case plan was deemed

necessary for the protection of the children, and substantial competent evidence supported the trial court's decision. The father had notice and an opportunity to be heard on the new allegations and was aware that DCF was seeking a restriction on his visitation rights as well as any other relief necessary and reasonable to protect the children. There was no denial of the father's procedural due process rights.

<http://www.5dca.org/Opinions/Opin2010/011810/5D09-1777.op.pdf> (January 20, 2010).

L.J.M. v. Department Of Children And Families, __ So.3d __, 2010 WL 178915 (Fla. 5th DCA 2010). **PARENT IMPROPERLY DENIED APPOINTMENT OF COUNSEL** The case was reversed and remanded after DCF admitted that the parent was improperly denied appointment of counsel in the proceedings that resulted in an order Placing Child in a Permanent Guardianship, Designating Authority of Guardian, and Terminating Protective Services.

<http://www.5dca.org/Opinions/Opin2010/011110/08-4318.op.pdf> (January 15, 2010).

Dissolution Case Law

Florida Supreme Court

Arthur v. Arthur, __ So.3rd __, 2010 WL 114532, (Fla. Supreme Court 2010).

TRIAL COURT'S DETERMINATION AS TO RELOCATION MUST BE AT PRESENT TIME RATHER THAN IN THE FUTURE; FINDINGS MUST BE SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE.

Former husband sought review of the decision entered against him in by the 2d DCA in Arthur v. Arthur, 987 So.2d 212, (Fla. 2d DCA 2008), contending that it directly conflicted with decisions issued by the 1st DCA; Supreme Court quashed the decision issued by the 2d DCA. The trial court had ordered shared parental responsibility, named former wife as the primary residential parent and awarded former husband reasonable visitation. It also authorized former wife to relocate to the state of Michigan after the child, who was 16 months of age at the final hearing, turned three years of age, reasoning that it was important for a child to bond with both parents between birth and three years. Former husband argued on appeal that the trial court had erred and was without authority to make a prospective determination of the child's best interest; a trial court is required to determine whether relocation is appropriate at the present time. The 2d DCA disagreed, holding that the trial court had not exceeded its authority and had made detailed findings supporting former wife's request for relocation. Citing a line of decisions by the 1st DCA indicating a preference for finality in trial court judgments and the responsibility of the trial court to make a final decision on child custody issues at the final hearing, the Supreme Court held that the determination of best interests in petitions for relocation must be made at the time of the final hearing and must also be supported by competent, substantial evidence. The Court commented that a future- based analysis is "unsound" and improperly shifts the burden of proof; a trial court is not equipped with a "crystal ball" that enables it to determine whether future relocation is in the child's best interests.

<http://www.floridasupremecourt.org/decisions/2010/sc08-1675.pdf> (January 14, 2010).

First District Court of Appeal

Presley v. Presley, __So.3d__, 2009 WL 5152364, (Fla. 1st DCA 2009).

FORMER SPOUSE'S ABILITY TO PAY AN AWARD MUST BE CONSIDERED BY THE TRIAL COURT.

Former husband appealed the sufficiency of the trial court's findings regarding his ability to pay \$50,000 at the rate of \$1,000 per month towards former wife's attorney's fees after the trial court, in rehearing the question of former wife's attorney's fees, failed to address former husband's ability to pay. The appellate court concluded that it was not readily apparent that former husband had the ability to pay and remanded for the trial court to reconsider the issue. <http://opinions.1dca.org/written/opinions2009/12-31-2009/09-2644.pdf> (December 31, 2009).

Demont v. Demont, __So.3d__, 2010 WL 4912605, (Fla. 1st DCA 2009).

A FINAL JUDGMENT OF DISSOLUTION OF MARRIAGE WHICH CONTAINS AN EXPRESS RESERVATION OF JURISDICTION AND REQUIRES MORE JUDICIAL LABOR IS NOT FINAL FOR PURPOSES OF APPEAL.

Former wife appealed an amended final judgment of dissolution of marriage that appeared to be final except for its express reservation of jurisdiction to consider division of marital personal property. Former wife argued that the reservation of jurisdiction was collateral and did not change the finality of the order; former husband contended that although the final judgment was not final for purposes of appellate review, that the appellate court should relinquish jurisdiction to the trial court for entry of a final order. The appellate court held that although the order on appeal terminated the marriage and adjudicated certain issues, procedurally, it did not conclude the need for more judicial labor; furthermore, the judicial labor required for entry of a final order went beyond curing a defect or technicality. The appeal was dismissed without prejudice.

<http://opinions.1dca.org/written/opinions2009/12-22-2009/09-4184.pdf> (December 22, 2009).

Second District Court of Appeal

Paulk v. Paulk, __So.3d__, 2010 WL 143451, (Fla. 2d DCA 2010).

WITHOUT PROPER SERVICE, A TRIAL COURT LACKS JURISDICTION TO DECIDE AN ISSUE NOT RAISED BY THE PLEADINGS.

Former wife appealed the trial court's order which vacated the rotating custody agreement of the final judgment of dissolution of marriage and awarded primary residency to former husband. The final judgment, entered in 2003, incorporated the terms of a marital settlement agreement, which included a plan for rotating custody as well as an agreement that neither parent would change the children's schools or move the children without the other parent's permission. The following year, former husband consented to former wife and the children moving to a nearby county; however, the distance effectively ended the rotating custody. Several pleadings ensued between the former spouses, one of which was former husband's petition to modify custody. The trial court instructed former husband at the final hearing that his failure to obtain proper service of that petition on former wife meant that it was not before the court; however, the trial court then proceeded to make certain findings regarding the former wife's poor parenting and named former husband the primary residential parent. The

appellate court found this to be error as the rotating custody plan incorporated into the final judgment was a determination of custody; when the trial court ruled that former husband's petition for modification could not be considered, it was without jurisdiction to grant the relief requested in his petition. A trial court lacks jurisdiction to decide an issue not raised by the pleadings.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2010/January/January%2015,%202010/2D08-5043.pdf (January 15, 2010).

Third District Court of Appeal

Valladares v. Junco-Valladares, __So.3d__, 2010 WL 22716, (Fla. 3d DCA 2010).

STANDARD OF REVIEW FOR DISSOLUTION PROCEEDINGS IS ABUSE OF DISCRETION; HOWEVER, LEGAL CONCLUSIONS ARE REVIEWED DE NOVO; A MINOR CHILDREN'S SOCIAL SECURITY BENEFITS SHOULD BE CALCULATED AS PART OF FORMER HUSBANDS INCOME FOR CHILD SUPPORT PURPOSES AND USED TO OFFSET HIS/HER SUPPORT OBLIGATION; TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ACCEPTING TESTIMONY OF ONE SPOUSE OVER THE OTHER WITH REGARD TO THE MARITAL HOME.

Former husband appealed both the final judgment and amended final judgment which awarded equitable distribution, lump sum alimony, permanent periodic alimony, and child support to former wife; he also appealed the attorney's fees and other costs awarded to her. Appellate court affirmed the dissolution of marriage and the equitable distribution of the marital home, but reversed and remanded on the other issues. Reiterating that the standard of review for dissolution proceedings is abuse of discretion, but that a trial court's legal conclusions are reviewed de novo, the appellate court held that the trial court had abused its discretion in the distribution of assets and liabilities and in the alimony and had failed to provide a legally sufficient basis to support its determination that former husband's income would continue at the same level in light of his age (70). The appellate court also held that the trial court had incorrectly imputed the minor children's social security benefits as income to former wife; those benefits, attributable to former husband, should have been calculated as part of former husband's income for determination of child support and used to offset his child support obligation. The trial court's acceptance of former wife's testimony over that of former husband with regard to the marital home was found not to be an abuse of discretion.

<http://www.3dca.flcourts.org/Opinions/3D08-2327.pdf> (January 6, 2010).

American University of the Caribbean v. Ming Tien, __So.3d__, 2010 WL 21087, (Fla. 3d DCA 2010).

ENTRY OF EX PARTE INJUNCTION REQUIRES SHOWING OF IMMEDIATE OR IRREPARABLE INJURY.

Former spouses were married in Taiwan in 1952. Former husband established a medical school, American University of the Caribbean (AUC), in Montserrat in 1980 which was relocated in 1995 to St. Maarten. In the words of the appellate court, "the University thrived, though the marriage did not." The couple began living apart and in October 2006, former husband filed for dissolution of marriage in Taiwan; former wife followed suit a month later in Miami. The court in Taiwan entered a final judgment of dissolution in October 2008. Prior to the dissolution action, it came to light that one of the couple's adult sons had transferred nearly \$70 million of

AUC funds into Miami bank accounts without authorization. When AUC demanded return of the funds, the bank filed an interpleader action. While the funds were frozen, former wife moved for an ex parte injunction to avoid alleged dissipation of marital assets which the trial court granted. Following resolution of the interpleader action, AUC petitioned for a writ of mandamus to compel the trial court to conduct an evidentiary hearing. Appellate court reversed the trial court's order to neither vacate nor modify the injunction as the record demonstrated there was no immediate or irreparable injury that would have resulted had an ex parte injunction not been entered and neither former wife's motion nor the trial court's order set forth a sufficient factual or legal basis for the injunction. The record reflected that the funds enjoined were AUC corporate funds; former husband's stock would be a marital asset subject to equitable distribution in the Florida dissolution. Former wife made no showing that disposition of former husband's shares in AUC would be unenforceable or that former husband had begun dissipating AUC's funds or assets.
<http://www.3dca.flcourts.org/Opinions/3D09-0929.pdf> (January 6, 2010).

Corey v. Corey, __So.3d__, 2010 WL 5125084, (Fla. 3d DCA 2009).

ENACTMENT OF SECTION 61.121, F.S., MEANS THE FORMER PRESUMPTION AGAINST ROTATING CUSTODY NO LONGER EXISTS; EXCEPTIONAL CIRCUMSTANCES NO LONGER REQUIRED; TRIAL COURT'S FINDINGS UNDER SECTION 61.13(3) MUST BE BASED ON COMPETENT, SUBSTANTIAL EVIDENCE.

Former husband argued that the trial court erred in designating former wife the primary residential parent of their son. Appellate court agreed, concluding that the trial court had erred in having found that former husband was required to overcome a presumption against rotating custody and establish exceptional circumstances. The appellate court pointed out that prior to the 1997 enactment of Section 61.121, Florida Statutes, which authorizes a court to order rotating custody if it is in the child's best interest, there was a presumption against rotating custody; however, that presumption no longer exists. Recognizing that some courts still continue to apply the presumption, the appellate court commented, "we cannot reach the same conclusion as our sister courts." The appellate court held that in the wake of the 1997 legislation, because the presumption no longer exists, a parent seeking rotating custody is not required to establish exceptional circumstances. It also held that a trial court's findings regarding Section 61.13(3)(d) and (m), Florida Statutes, must be supported by competent, substantial evidence; here they were not. <http://www.3dca.flcourts.org/Opinions/3D08-1461.pdf> (December 30, 2009).

Fourth District Court of Appeal

Garcia v. Garcia, __So.3d__, 2010 WL 174149, (Fla. 4th DCA 2010).

REVERSAL OF ALIMONY AWARD WHEN THE POST-DISSOLUTION DISPOSABLE MONTHLY INCOME FOR RECEIVING SPOUSE WOULD EXCEED HER CLAIMED LIVING EXPENSES.

Former husband appealed a final judgment of dissolution of marriage arguing that the trial court incorrectly valued his interest in a medical partnership and miscalculated the alimony; appellate court affirmed the valuation of the partnership interest but reversed a portion of the alimony award because former wife's post-dissolution disposable monthly income would

exceed her claimed living expenses. The appellate court remanded for the trial court to reconsider the alimony award in accordance with the financial needs of former wife. <http://www.4dca.org/opinions/Jan%202010/01-20-10/4D08-4453.op.pdf> (January 20, 2010).

Minakan v. Husted, __So.3d__, 2010 WL 174333, (Fla. 4th DCA 2010).

SPOUSE DENIED DUE PROCESS WHEN TRIAL COURT TOOK ONE SPOUSE'S TESTIMONY, BUT REFUSED TO TAKE THE OTHER'S PRIOR TO RULING ON MOTION; SANCTIONS MIGHT APPLY IF SPOUSE'S DISCOVERY AND FORWARDING OF EMAIL TO HIS/HER ATTORNEY WAS DONE IN BAD FAITH—EVEN IF NO UNFAIR ADVANTAGE WAS GAINED BY THAT SPOUSE.

During dissolution proceedings, former husband accused former wife of hacking into his email and having her sister forward an email from him to his attorney to former wife's attorney. Although former wife's attorney recognized that the email was privileged communication and returned it to former husband's attorney, former husband sought disqualification of former wife's attorney and sanctions. At the hearing, the court took testimony from former husband, but did not allow former wife to testify prior to granting former husband's motion. Former wife then petitioned for a writ of certiorari to quash the trial court's order. The appellate court, finding the first of former wife's arguments—that she was denied due process—dispositive; granted the writ. It went on to discuss former wife's other arguments in the event they arose on remand and then instructed the trial court on remand to determine whether former husband treated the email as confidential, whether former wife gained an unfair advantage by having discovered it and having it forwarded to her attorney, and if so, whether disqualification of former wife's attorney would be the appropriate remedy. The appellate court also pointed out that disqualification and other sanctions might still be appropriate if former wife's actions in discovering and forwarding the email were found to be in bad faith—regardless of whether she gained an unfair advantage. <http://www.4dca.org/opinions/Jan%202010/01-20-10/4D09-4439.op.pdf> (January 20, 2010).

Gelman v. Gelman, __So.3d__, 2010 WL 46647, (Fla. 4th DCA 2010).

TRIAL COURT CANNOT GRANT RELIEF NOT SOUGHT IN THE PLEADINGS; ORDERING A NONCUSTODIAL PARENT TO PAY PRIVATE SCHOOL TUITION REQUIRES A FINDING THAT PARENT CAN PAY, THE EXPENSE IS IN ACCORDANCE WITH THE FAMILY'S STANDARD OF LIVING, AND IT IS IN THE CHILD'S BEST INTEREST.

Former husband appealed final judgment of dissolution of marriage; appellate court affirmed with the exception of the trial court's order that former husband pay the minor children's private school tuition. The appellate court held that a trial court may order the noncustodial parent to pay for such tuition if it finds that the parent has the financial ability to pay, the expense is in accordance with the family's usual standard of living, and is in the child's best interest; however, it reiterated that it is error for a trial court to grant relief not sought in the pleadings. Here, former wife's pleadings did not contain a request for former husband to pay the tuition, it was not established that former husband had agreed to pay, nor did the trial court make the requisite findings that former husband was able to pay and that the expenses were in accordance with the family's customary standard of living.

<http://www.4dca.org/opinions/Jan%202010/01-06-10/4D08-3918.op.pdf> (January 6, 2010).

Gordon v. Gordon, __ So.3d __, 2009 WL 4927882, (Fla. 4th DCA 2009).

SPOUSE'S DISCLOSURE OF OTHER ASSETS IN MSA PROVIDED OTHER SPOUSE WITH AN APPROXIMATE KNOWLEDGE OF HIS RESOURCES DESPITE HIS HAVING FAILED TO DISCLOSE A PENSION PLAN; A TRIAL COURT'S FINDINGS RE AN MSA MUST BE SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE.

A prenuptial agreement entered into by the parties provided, in the event of a dissolution: that property owned by a party at the time of the marriage was to remain his or her own separate property; that each party would waive the other's benefit plans; and that all savings investments, retirement accounts, 401k accounts, military retirement accounts, and property listed on the schedule attached to the agreement as being owned by a party would remain the property of that party. Each party also attached a financial disclosure to the agreement. Reiterating that a trial court's findings on a motion to set aside a prenuptial agreement should not be disturbed absent a showing that the findings are not supported by competent, substantial evidence, the appellate court found no error in the trial court's conclusion that there was no fraud, deceit, duress, coercion, misrepresentation, or overreaching in the execution of the agreement, notwithstanding former husband's failure to disclose his airline pension plan. Considering the value of that plan, in light of the substantial assets former husband did disclose, the agreement was sufficient to provide former wife with an approximate knowledge of former husband's resources.

<http://www.4dca.org/opinions/Dec%202009/12-23-09/4D08-604.op.pdf> (December 23, 2009).

Bohner v. Bohner, __ So.3d __, 2009 WL 428912, (Fla. 4th DCA 2009).

TEMPORARY ATTORNEY'S FEES APPROPRIATE WHEN DISPARATE INCOME IS SHOWN; HIGHER INCOME SPOUSE'S UNNECESSARY LITIGATION REQUIRED CONTRIBUTION TO FEES OF LOWER INCOME SPOUSE.

Former husband appealed the award of temporary attorney's fees to former wife in connection with his petition to modify alimony. Appellate court affirmed, commenting that not only did former wife show that her income was substantially less than former husband but that his unnecessary litigation required that he contribute to her fees.

<http://www.4dca.org/opinions/Dec%202009/12-02-09/4D09-1226.op.pdf> (December 2, 2009).

Fifth District Court of Appeal

Calderon v. Calderon, __ So.3d __, 2010 WL 322161, (Fla. 5th DCA 2010).

EXCEPTIONS TO GM'S REPORT MUST BE FILED WITHIN 10 DAYS OF SERVICE; THE DAY FROM WHICH TIME BEGINS TO RUN IS NOT COUNTED; 5 DAYS ARE ADDED FOR SERVICE BY MAIL; SERVICE IS COMPLETE UPON MAILING; CERTIFICATE OF SERVICE IS PRIMA FACIE PROOF OF SERVICE.

Former husband appealed the trial court's final judgment of dissolution of marriage and the order denying his exceptions to the general magistrate's report and recommendation because they were untimely filed. Finding the exceptions to have been timely filed, the appellate court reversed. Former wife filed a notice for non-jury trial of all issues concerning the dissolution after former husband failed to appear for a court-ordered mediation. The matter was set for hearing before a general magistrate; at its conclusion, the general magistrate made his report

and recommendation on October 2, 2008. Although former husband filed exceptions, dated October 16, 2008, the trial court struck them as being untimely filed and entered a final judgment of dissolution adopting the general magistrate's recommendations. The appellate court determined that in accordance with Rule 12.490, Fla. R. Civ. P., exceptions to a general magistrate's report must be served within 10 days after service while Rule 1.090, Fla. R. Civ. P., provides that the day from which time begins to run shall not be included and that five days are added for service by mail. The appellate court reiterated that service by mail is complete upon mailing and that the certificate of service is prima facie proof of the service. In this case, the certificate of service was not dated; however, former husband had the document notarized on October 16, 2008 and then returned it via express mail. Former husband's exceptions were timely; accordingly, the case was remanded for the trial court to consider the exceptions on the merits.

<http://www.5dca.org/Opinions/Opin2010/012510/5D08-4062.op.pdf> (January 29, 2010).

Madariaga v. Madariaga, __So.3d__, 2010 WL 129670, (Fla. 5thDCA 2010).

TRIAL COURT ERRED WHEN IT DID NOT AFFORD SPOUSE AN OPPORTUNITY TO BE HEARD RE AUDIT.

Former wife appealed trial court's amended order on her motion for rehearing and relief of judgment and its order requiring her to reimburse former husband for overpayment of child support and alimony. The trial court had directed its clerk to cease former husband's child support and alimony obligations, credit his overpayment and perform an audit; it had also referred the case to a magistrate. Ultimately, the trial court entered its order requiring former wife to repay former husband. The trial court based its findings, in large part, upon the clerk's audit; however, former wife was not given an opportunity to be heard regarding the audit. The appellate court held that the trial court erred in not affording former wife an opportunity to be heard and remanded for the trial court to hold a hearing on the arrearages.

<http://www.5dca.org/Opinions/Opin2010/011110/5D08-4442.op.pdf> (January 11, 2010).

Sheth v. Sheth, __So. 3d__, 2009 WL 5150064, (Fla. 5th DCA 2009).

TRIAL COURT ERRED IN DESIGNATING AS A MARITAL ASSET A CD REDEEMED BY A SPOUSE AND USED FOR LIVING EXPENSES FOR HERSELF AND THE CHILDREN IN COUPLE'S EARLIER DOM PROCEEDING.

Former wife appealed the amended final judgment of dissolution of marriage entered eleven years after the original petition for dissolution was filed. The appellate court agreed with former wife that the trial court erred in having designated as a marital asset a certificate of deposit (CD) she redeemed for use as living expenses for herself and the children when the first petition for dissolution was filed. (This proceeding was dismissed during an attempt at reconciliation.) When former wife filed a new petition for dissolution two years later, the trial court determined the CD to be a marital asset; however, the appellate court found error in the trial court having treated the previously liquidated CD as a marital asset in the subsequent proceeding. The appellate court instructed that the value of the car purchased by former wife with the proceeds of the CD should be allocated to her on remand.

<http://www.5dca.org/Opinions/Opin2009/122809/5D08-500.op.pdf> (December 28, 2009).

Dann v. Dann, __ So.3d __, 2009 WL 5150074, (Fla. 5th DCA 2009).

APPELLATE COURT IS WITHOUT JURISDICTION WHEN NEITHER MOTION FOR REHEARING NOR NOTICE OF APPEAL IS TIMELY FILED.

Former husband appealed a final judgment of dissolution of marriage arguing that the trial court had abused its discretion in fashioning its scheme for equitable distribution and imputing income to him for child support purposes. The appellate court found that neither former husband's motion for rehearing nor his notice of appeal was timely filed; accordingly, it dismissed for lack of jurisdiction.

<http://www.5dca.org/Opinions/Opin2009/122809/5D08-3659.op.pdf> (December 28, 2009).

Burbage v. Burbage, __ So.3d __, 2010 WL 4874784, (Fla. 5th DCA 2009).

TRIAL COURT MUST MAKE FINDINGS RE PARENT'S PRESENT ABILITY TO PAY THE PURGE AMOUNT.

Former husband appealed the trial court's order: finding him in arrears of his past child support obligation; concluding that he willfully failed to pay; finding him in contempt of the order to pay; and sentencing him to 90 days. The purge amount set equaled the amount of the arrearage; however, the trial court failed to make any findings with regard to former husband's present ability to pay the purge. Accordingly, the appellate court reversed and remanded for the trial court to make this determination.

<http://www.5dca.org/Opinions/Opin2009/121409/5D08-4102.op.pdf> (December 18, 2009).

Domestic Violence Case Law

Florida Supreme Court

In Re: Standard Jury Instructions In Criminal Cases--Report No. 2009-01, --- So.3d ----, 2010 WL 26546 (Fla. 2010). **JURY INSTRUCTIONS WERE AMENDED.** Criminal jury instructions were amended to help juries decide whether or not a defendant was justified in the use of deadly force. Unless an exception exists, the jury should be instructed that the defendant had no duty to retreat and is presumed to have had a reasonable fear of imminent death or great bodily harm if the victim had unlawfully and forcibly entered or removed or another person against that person's will from the dwelling, residence or occupied vehicle. Exceptions to the presumption of fear include if "the person against whom the defensive force is used has the right to be in [or is a lawful resident of the [dwelling] [residence]] [the vehicle], such as an owner, lessee, or titleholder, and there is not an injunction for protection from domestic violence or a written pretrial supervision order of no contact against that person".

<http://www.floridasupremecourt.org/decisions/2010/sc09-622.pdf> (January 7, 2010).

First District Court of Appeal

No new opinions for this reporting period.

Second District Court of Appeal

No new opinions for this reporting period.

Third District Court of Appeal

No new opinions for this reporting period.

Fourth District Court of Appeal

No new opinions for this reporting period.

Fifth District Court of Appeal

R.N. v. Department Of Children and Families, __So.3d __, 2010 WL 198471 (Fla. 5th DCA 2010). [AMENDING CASE PLAN DID NOT VIOLATE FATHER’S PROCEDURAL DUE PROCESS RIGHTS](#). The trial court entered an order adjudicating the children dependent and accepting the case plan agreed to by the parents and DCF in mediation. A new domestic violence incident occurred, and DCF filed an expedited motion for modification of visitation, during which the trial court added additional tasks to the case plan, including participation in a batterer’s intervention program. The father sought certiorari review of the order that amended his case plan that required him to perform additional tasks claiming that the amendment to the case plan was done in contravention of his procedural due process rights. The appellate court noted that although Rule 8.420 contemplates an evidentiary basis to support a case plan amendment, the rule does not require that specific prior notice of a possible amendment be given. In this case, the trial court's actions complied with both section 39.6013 and Rule 8.420. The trial court determined, after a duly noticed evidentiary hearing, that there was a demonstrated need to amend the case plan based on circumstances that arose after its approval of the initial case plan. The amendment to the case plan was deemed necessary for the protection of the children and substantial competent evidence supported the trial court's decision. The father had notice and an opportunity to be heard on the new allegations and was aware that DCF was seeking a restriction on his visitation rights as well as any other relief necessary and reasonable to protect the children. There was no denial of the father's procedural due process rights. <http://www.5dca.org/Opinions/Opin2010/011810/5D09-1777.op.pdf> (January 20, 2010).