

OSCA/OCI'S FAMILY COURT CASE LAW UPDATE

December 2011 – January 2012

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Delinquency Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

J.T.R. v. State, __ So. 3d __, 2012 WL 104511 (Fla. 1st DCA 2012). [THE APPELLATE COURT FOUND SUFFICIENT EVIDENCE TO SUPPORTED FINDING OF VIDEO VOYEURISM AS PROSCRIBED IN S. 810.145\(2\)\(A\), F.S.](#) The juvenile was found to have committed the offense of video voyeurism as proscribed in s. 810.145(2)(a), F.S. The juvenile argued that the trial court erred in denying his motion for judgment of dismissal because the State failed to establish that he secretly recorded the victim. The First District Court of Appeal found that the victim testified that juvenile stood at the bathroom stall door for five seconds before victim looked up and saw juvenile holding a cell phone over the stall door, juvenile admitted videotaping victim, and two other students testified to seeing the video, including one who indicated that victim looked up at the camera after the recording began. Viewing the evidence and all reasonable inferences in the light most favorable to the State, the First District held that sufficient evidence supported the disposition order withholding adjudication and imposing probation on juvenile for the offense of video voyeurism.

<http://opinions.1dca.org/written/opinions2012/01-13-2012/11-3725.pdf> (January 13, 2012).

X.G. v. State, __ So. 3d __, 2011 WL 6851259 (Fla. 1st DCA 2011). [TRIAL COURT'S FINDINGS FELL SHORT OF THE ANALYSIS REQUIRED UNDER E.A.R. V. STATE, 4 SO. 3D 614, 638 \(FLA. 2009\), WHEN DEVIATING FROM A DEPARTMENT OF JUVENILE JUSTICE DISPOSITION RECOMMENDATION.](#) The juvenile was found guilty of battery upon a school employee. The Department of Juvenile Justice (DJJ) initially recommended commitment to a moderate-risk residential program. However, DJJ later amended its recommendation to supervised probation. The trial court deviated from DJJ's amended recommendation and committed the juvenile to a moderate-risk program. The trial court found that DJJ failed to provide "any rational explanation" regarding the change in its recommended disposition. The trial court specifically referred to the child's violent behavior, the threat posed to "the employees at [his] school" or "any school," and found based on the totality of the circumstances that "a moderate-risk placement would serve the needs of both the child and the community." The First District Court of Appeal found that the trial court's findings fell short of the scrupulous analysis required under E.A.R. v. State, 4 So. 3d 614, 638 (Fla. 2009), when deviating from a DJJ recommendation. The First District reversed and remanded. On remand, the trial court was ordered to articulate on the record an understanding of the opposing restrictiveness levels or the divergent treatment programs and services available to the juvenile at these levels and why a moderate-risk commitment was better suited to serving the rehabilitative needs of the juvenile as required by the Florida Supreme Court's holding in E.A.R.

<http://opinions.1dca.org/written/opinions2011/12-30-2011/11-1864.pdf> (December 30, 2011)

K.R.R. v. State, __ So. 3d __, 2011 WL 6224589 (Fla. 1st DCA 2011). **TRIAL COURT’S FINDINGS FELL SHORT OF THE ANALYSIS REQUIRED UNDER E.A.R. V. STATE, 4 SO. 3D 614, 638 (FLA. 2009), WHEN DEVIATING FROM A DEPARTMENT OF JUVENILE JUSTICE DISPOSITION RECOMMENDATION.** The juvenile pled no contest to violating her probation by failing to attend school. This was the fourth violation of juvenile probation. The Department of Juvenile Justice (DJJ) recommended that probation be continued. The trial court deviated from DJJ's recommendation and ordered the juvenile committed to a moderate-risk program. The trial court articulated that the juvenile’s basic disrespect for authority and the apparent ineffectiveness of probation in light of her repeated violations were reasons for not continuing her probation. The First District Court of Appeal found that the trial court’s findings fell short of the scrupulous analysis required under E.A.R. v. State, 4 So. 3d 614, 638 (Fla. 2009), when deviating from a DJJ recommendation. The trial court did not articulate on the record why a moderate-risk commitment program was better suited to serving the rehabilitative needs of the juvenile “in the least restrictive setting and protecting the public from further acts of delinquency.” The First District reversed and remanded with instructions to enter an order in compliance with E.A.R., or else impose the probation recommended by the DJJ. <http://opinions.1dca.org/written/opinions2011/12-15-2011/11-3348.pdf> (December 15, 2011).

Second District Court of Appeal

K.W. v. State, __ So. 3d __, 2012 WL 163914 (Fla. 2d DCA 2012). **JUVENILE WAS ENTITLED TO JUDGMENT OF DISMISSAL BECAUSE THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH A PRIMA FACIE CASE OF LEAVING THE SCENE OF A CRASH INVOLVING INJURY.** The juvenile appealed the decision withholding adjudication and placing her on juvenile probation for leaving the scene of a crash involving injury. The juvenile argued that the evidence did not establish that she knew or should have known that the crash involved injury. An officer arrived at the scene of a reported accident involving an overturned vehicle. While he was investigating the crash, a car pulled up. The driver of that car told the officer that a person who was involved in the accident was inside the car. The juvenile was that person, and she told the officer she had been driving. The man in the overturned vehicle was the only eye-witness to the crash to testify. The man said he was driving down the highway when his car was struck by another car and rolled over. The man had sustained injuries. He did not see who hit him or where on his vehicle the impact occurred. He understood that whoever hit his vehicle hit another vehicle first. The only evidence regarding the extent of the juvenile's involvement in the accident came from the investigating officer's testimony that the left rear of the juvenile's car had sustained damage. The third vehicle involved in the crash was found. There was no information regarding the extent of its involvement in the crash or where it sustained damage. The Second District Court of Appeal found that s. 316.027(1)(a), F.S. (2010), proscribes the crime of leaving the scene of a crash involving personal injury or death. In order to meet the intent requirement, the State must establish that the driver “either knew of the resulting injury or death or reasonably should have known from the nature of the accident.” The Second District held that the State never established how the three vehicles impacted to cause the injured man’s vehicle to roll over. And, while the nature of an impact could establish that a defendant should have known the crash resulted in injury, there was simply not enough evidence establishing that the juvenile

was involved in the impact that caused the vehicle to roll over or that she was aware of what happened to the overturned vehicle. The question before the appellate court was whether the State presented sufficient evidence of the juvenile's intent to survive a judgment of dismissal. In cases involving circumstantial evidence, the State must also present evidence that is inconsistent with the defendant's reasonable hypothesis of innocence. The juvenile argued that based on the evidence, it seemed more likely that the juvenile's car was in a collision with the third car and the third car caused the rollover. In that scenario, the juvenile could have continued driving down the interstate without knowledge of the second impact that caused the car to roll over. Accordingly, the juvenile was entitled to a judgment of dismissal. http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2012/January/January%2020,%202012/2D11-685.pdf (January 20, 2012).

S.G. v. VINCENT VURRO, as Superintendent of the Southwest Florida Juvenile Detention Center, Department of Juvenile Justice, Respondent, ___ So. 3d ___, 2012 WL 164068 (Fla. 2d DCA 2012). **THE CIRCUIT COURT WAS NOT AUTHORIZED TO PLACE THE JUVENILE IN SECURE DETENTION FOR VIOLATING ITS TRUANCY ORDER.** The juvenile was found to be in indirect criminal contempt of a truancy order and sentenced to five days of secure detention. The juvenile filed a petition for writ of habeas corpus, asserting that his secure detention was illegal. The juvenile was released prior to any hearing on the petition. However, the Second District Court of Appeal declined to dismiss the petition as moot because the issue presented was capable of repetition yet evading review. The Second District found that a delinquent child who has been held in indirect criminal contempt may be placed in a secure detention facility for five days for a first offense or for fifteen days for a second or subsequent offense. However, a child who violates a truancy order is deemed to be a "child in need of services" and not a delinquent child. As such, his subsequent violation of the truancy order is expressly excluded from the delinquency definition set forth in s. 985.03(8), F.S. (2011). Whereas a delinquent contemnor may be punished by placement in secure detention, a child in need of services who commits contempt of court may be placed in "a staff-secure shelter or a staff-secure residential facility solely for children in need of services," or if no such placement is available, in "an appropriate mental health facility or substance abuse facility for assessment." See s. 984.09(2)(b), F.S. Therefore, the circuit court was not authorized to place the juvenile in secure detention for violating its truancy order, and the detention was illegal. Accordingly, the petition for writ of habeas corpus was granted. http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2012/January/January%2020,%202012/2D11-4944.pdf (January 20, 2012).

D.W. v. State, ___ So. 3d ___, 2011 WL 6793346 (Fla. 2d DCA 2011). **RESTITUTION ORDER WAS REVERSED DUE TO PROCEDURAL IRREGULARITIES.** The juvenile appealed her restitution order, which required her to repay \$400 to her grandmother. The juvenile was sent to a store with \$400 to buy her grandmother a \$360 money order. After she returned from the store, the \$360 money order and the \$40 in change disappeared. The juvenile's mother found the \$360 money order at a motel room at which the juvenile's mother was staying. Law enforcement initially

took custody of the money order but then returned it to the juvenile's mother. The mother claimed she put the money order in the mail to the grandmother, and the grandmother claimed she never received the money order. The State filed a delinquency petition against the juvenile for grand theft. The juvenile negotiated a plea to petit theft. Thus, for purposes of her adjudication and disposition, the court did not determine what the juvenile had taken or its value. The juvenile disputed the amount of restitution. The juvenile court referred the restitution issue to a magistrate. A magistrate heard and decided the restitution issue. The report of the magistrate was signed on October 5 and filed on October 8, and informed the juvenile that she could file exceptions within ten days "in accordance with the Florida Rules of Juvenile Procedure 8.257(f)." The order directing restitution did not refer to the magistrate's report in any manner and was signed and filed by the juvenile court on October 6. The Second District Court Appeal reversed and remanded the restitution order for a restitution hearing in the juvenile court due to procedural irregularities. First, the restitution order preceded the report of the magistrate in the record. The fact that the juvenile court immediately signed and recorded the restitution order would be troubling even if the magistrate had been authorized to conduct this hearing. Second, no authority was found that would allow the juvenile court to delegate its judicial determination of the amount of restitution to a magistrate. This determination is generally deemed to be nondelegable. Even if such a delegation could be accomplished by administrative order, no administrative order was found in the Tenth Judicial Circuit authorizing such delegation. Next, it was evident from the record that the magistrate usually conducted dependency hearings and had little experience with hearings to set restitution. The magistrate made findings "by clear and convincing evidence," rather than by a preponderance of the evidence. The magistrate's report did not actually resolve the juvenile's primary contention, which was that she should not be liable for the loss of the \$360 money order after it was delivered to law enforcement and placed into the control of her mother. Finally, rule 8.257(f) applies to dependency and termination of parental rights proceedings. No authority was found or cited that would allow for the application of this rule in delinquency proceedings. Accordingly, the restitution order was reversed and remanded for a restitution hearing due to procedural irregularities. http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/December/December%2028,%202011/2D10-5267.pdf (December 28, 2011).

J.A.M. v. State, __ So. 3d __, 2011 WL 6058721 (Fla. 2d DCA 2011). **EVIDENCE FAILED TO SHOW THAT THE JUVENILE WAS UNDER SUSPENSION WHEN HE ARRIVED ON CAMPUS TO ATTEND THE HOMECOMING DANCE.** The juvenile argued that the State failed to submit sufficient evidence to prove that he committed trespass by entering school property while under suspension. On Friday, October 9, the juvenile was given a ten-day suspension for having a weapon on campus. The discipline referral form set forth the out-of-school suspension dates as "10/12–10/26." The following was also stamped on the form: "MAY NOT BE ON SCHOOL CAMPUS OR ANY PASCO COUNTY SCHOOL BOARD PROPERTY DURING OUT OF SCHOOL SUSPENSION. TRESPASSING COULD RESULT IN AN ARREST." According to the assistant principal who signed the referral, he brought this provision to the juvenile's attention on October 9 and gave him a copy of the referral form. The homecoming dance was held the next evening, on Saturday, October 10. The juvenile went to the dance and was charged with trespass on school property in violation of s.

810.097(1), F.S. (2009). In his testimony, the assistant principal asserted that the juvenile's suspension began when the referral was issued on October 9, but he did not say that he explained this to the juvenile. The Second District Court of Appeal found that the juvenile's suspension began on Monday, October 12, and it ended on Monday, October 26. That period spanned ten school days and two weekends—but not the weekend just after the October 9 referral. The evidence failed to show that the juvenile was under suspension when he entered school property to attend the dance on October 10. The Second District reversed and remanded with directions to dismiss the trespass charge.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/December/December%2007,%202011/2D10-3069.pdf (December 7, 2011).

Third District Court of Appeal

J.J. v. State, __ So. 3d __, 2012 WL 75111 (Fla. 3d DCA 2012). **ATTEMPTED BATTERY ON A LAW ENFORCEMENT OFFICER IS A NONEXISTENT OFFENSE.** The juvenile appealed the trial court's order finding him delinquent for attempted battery on a law enforcement officer and withholding adjudication. The Third District Court of Appeal reversed and remanded the trial court's order based upon the State's proper confession of error, and on the binding authority of Merritt v. State, 712 So. 2d 384, 385 (Fla.1998); J.S. v. State, 925 So. 2d 438 (Fla. 5th DCA 2006); and Brown v. State, 798 So. 2d 827 (Fla. 3d DCA 2001). Section 784.07(2), F.S. (2011), is an enhancement statute which increases the penalties for certain enumerated crimes when the victim is a law enforcement officer. Because attempted battery is not one of the enumerated crimes, attempted battery on a law enforcement officer is a nonexistent offense. Although the juvenile failed to raise this argument at trial and put the trial court on notice regarding the law on this issue, a conviction for a nonexistent offense is fundamental error which may be raised for the first time on appeal. Accordingly, the trial court's order was reversed and remanded with instructions to vacate the order of delinquency for attempted battery on a law enforcement officer and to issue an order finding the juvenile delinquent as to attempted battery, a second degree misdemeanor.

<http://www.3dca.flcourts.org/Opinions/3D11-2215.pdf> (January 11, 2012).

C.W. v. State, __ So. 3d __, 2011 WL 6783486 (Fla. 3d DCA 2011). **ADJUDICATION FOR RESISTING AN OFFICER WITHOUT VIOLENCE WAS REVERSED BECAUSE POLICE OFFICERS WERE NOT ENGAGED IN THE LAWFUL EXECUTION OF A LEGAL DUTY WHEN THEY ASKED JUVENILE TO MOVE OFF OF STREET.** The juvenile appealed his adjudication for resisting an officer without violence. The underlying basis for the arrest was disorderly conduct, which in turn arose from an uncharged pedestrian infraction for obstructing traffic. The juvenile was talking to another boy when they saw a police car slowly approaching. The officers veered slightly around the kids and asked them to move out of the roadway. When they did not, the officers parked, approached the boys and ordered them to move out of the road and onto the unpaved swale. The juvenile refused and used profanity. The officers then arrested him. The juvenile was not given a citation for the pedestrian violation and the violation was not cited as a basis for the arrest. The Petition for Delinquency only stated that the juvenile failed "to follow the order of said officer to get out of the street where traffic was moving..." Although the juvenile was

arrested for disorderly conduct, neither the record nor the petition indicated that the juvenile was prosecuted for disorderly conduct. The only charge for which the juvenile was adjudicated delinquent was the charge of resisting an officer without violence. The Third District Court of Appeal found that the evidence did not support a conclusion that the officers were engaged in the lawful execution of a legal duty with their initial request that the juvenile step out of the street. Therefore juvenile's refusal to move and the use of profanity in response did not constitute resisting an officer without violence. The officers' initial request was a reasonable part of their job as community safety officers. However, the officers had no legal duty to insist on compliance and to enforce that insistence with arrest where the record shows that there was no actual interference with traffic. The mere potential to interfere with traffic was insufficient to justify the officers' actions. If a police officer is not engaged in executing process on a person, is not legally detaining that person, or has not asked the person for assistance with an ongoing emergency that presents a serious threat of imminent harm to person or property, the person's words alone can rarely, if ever, rise to the level of an obstruction. The fact that the incident may have attracted the attention of onlookers, without more, is insufficient to support a charge of disorderly conduct. The Third District held that the record did not support a finding of disorderly conduct or obstruction of a legal duty. Accordingly, the order denying the juvenile's motion for judgment of dismissal was reversed and remanded with instructions to dismiss the adjudication of delinquency and to correct the juvenile's post-adjudication records accordingly. Judge Rothenberg filed a dissenting opinion.

<http://www.3dca.flcourts.org/Opinions/3D10-1591.pdf> (December 28, 2011)

D.O. v. State, __ So. 3d __, 2011 WL 6373008 (Fla. 3d DCA 2011). **POLICE OFFICER MAY CONDUCT A LIMITED PAT-DOWN SEARCH FOR WEAPONS, EVEN IN THE ABSENCE OF REASONABLE SUSPICION TO BELIEVE THE JUVENILE IS ARMED, BEFORE PLACING THE JUVENILE IN A POLICE VEHICLE FOR THE PURPOSE OF DELIVERING THE JUVENILE WITHOUT UNREASONABLE DELAY TO THE APPROPRIATE SCHOOL SYSTEM SITE.** After determining that the observed juvenile was sixteen years old and should have been in school, a police officer prepared to take the juvenile back to school. Before placing the juvenile into the patrol car, the officer conducted a pat-down search of the juvenile's outer clothing. The officer did not have consent and the officer acknowledged that he had no reasonable suspicion to believe that the juvenile was armed. The officer testified that he conducted the pat-down search pursuant to department policy for officer safety. While conducting the pat down, the officer felt a "bulge," which the juvenile told the officer was a firearm. The juvenile was charged with carrying a concealed firearm. The juvenile filed a motion to suppress. The Third District Court of Appeal affirmed the trial court's order denying the motion to suppress, citing E.P. v. State, 997 So. 2d 1240 (Fla. 3d DCA 2008) (citing Jackson v. State, 791 P. 2d 1023 (Alaska Ct.App.1990)("in the case of transportation in a police vehicle, however, or in the analogous circumstances here, the necessity of close proximity will itself provide the needed basis for a protective pat-down of the person"), In re Kelsey, 243 Wis. 2d 422, 626 N.W.2d 777 (2001), and State v. Evans, 67 Ohio St. 3d 405, 618 N.E. 2d 162 (1993)).

<http://www.3dca.flcourts.org/Opinions/3D10-3001.pdf> (December 21, 2011).

Fourth District Court of Appeal

C.J.T. v. State, __ So. 3d __, 2012 WL 75252 (Fla. 4th DCA 2012). **DISPOSITION ORDER REVERSED WITH INSTRUCTIONS TO CORRECT THE SENTENCE SO IT IS CLEAR THAT PROBATION SHALL NOT EXCEED ONE YEAR.** The juvenile was fourteen years old when placed on juvenile probation for the misdemeanor offense of making a false report to a law enforcement officer. The trial court made the juvenile's term of probation indeterminate, not to exceed his nineteenth birthday. The juvenile preserved his argument that the disposition was illegal by first filing a timely motion to correct disposition error with the trial court, pursuant to Florida Rule of Juvenile Procedure 8.135(b). The trial court did not rule on the motion in time, so the motion was deemed denied. Section 985.455(3), F.S.(2010), provided, "Any commitment of a delinquent to the department must be for an indeterminate period of time ...; however, the period of time may not exceed the maximum term of imprisonment that an adult may serve for the same offense...." The Fourth District Court of Appeal found that as they held in J.A.-W. v. State, 873 So. 2d 523, 524 (Fla. 4th DCA 2004), "The problem with the sentencing order in this case is that it could be interpreted as permitting commitment until the child reached the age of nineteen, well past the one-year maximum length of commitment for a first-degree misdemeanor." Thus, the Fourth District reversed and remanded the disposition order with instructions to the trial court to correct the sentence so it was clear that probation shall not exceed one year. The new disposition order shall be entered *nunc pro tunc* to the date of the original order. <http://www.4dca.org/opinions/Jan%202012/01-11-12/4D11-2624.op.pdf> (January 11, 2012).

D.J. v. State, __ So. 3d __, 2011 WL 6373018 (Fla. 4th DCA 2011). **KNIFE CARRIED BY JUVENILE WAS A COMMON POCKETKNIFE AND DID NOT CONSTITUTE A WEAPON FOR CHARGE OF POSSESSION OF A WEAPON OR FIREARM ON SCHOOL PROPERTY.** The juvenile was found to have possessed a weapon or firearm on school property. Adjudication of delinquency was withheld and probation was imposed. The juvenile appealed, arguing that the trial court erred when it denied his motion for judgment of dismissal and determined the knife he was charged with carrying was not a common pocketknife, but a weapon as defined in s. 790.001(13), F.S. The trial court held the knife was distinguishable from a common pocketknife because it was larger and heavier than a common pocketknife, snapped out in a smooth action and locked into place, and the blade had serrations, was very sharp, and very pointy. On appeal, the State argued that the knife at issue in this case was not a common pocketknife because it had a serrated edge. The Fourth District Court of Appeal found that the knife was a folding knife that snapped closed and locked into place. It had a partially serrated, curved single-edge blade with a pointed tip. The length of the blade was slightly less than three inches, and the entire length of the blade and handle was less than four inches. The blade showed quite a bit of wear and scratches consistent with significant use. A clip on the handle allowed the knife to be attached to a belt. In L.B. v. State, 700 So. 2d 370 (Fla.1997), the supreme court defined a "common pocketknife" as "[a] type of knife occurring frequently in the community which has a blade that folds into the handle and that can be carried in one's pocket." The Fourth District held that the knife carried by juvenile was a common pocketknife and, thus, did not constitute a weapon. The knife lacked any of the weapon-like characteristics and included features previously held to not distinguish a knife from a common pocketknife. Therefore, the trial court erred in denying the

motion for judgment of dismissal. Accordingly the delinquency finding was reversed. <http://www.4dca.org/opinions/Dec%202011/12-21-11/4D10-1592.op.pdf> (December 21, 2011).

Fifth District Court of Appeal

No new opinions for this reporting period.

Dependency Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

J.S. v. Department of Children and Families, ___ So. 3d ____, 36 Fla. L. Weekly D2664 (Fla. 1st DCA 2011). **TERMINATION OF SUPERVISION REVERSED.**

The First District Court of Appeal reversed an order that denied a mother's motion for reunification, placed the child with the father, and terminated protective services supervision. Both DCF and the GAL conceded that the trial court erred because services were terminated at a hearing for which the mother was not provided notice that termination would be considered. The court also declined to address the merits of the order denying the mother's motion for reunification and placing the child with the father, instead deferring review until the trial court fully disposed of the custody and visitation issues.

<http://opinions.1dca.org/written/opinions2011/12-05-2011/11-4031.pdf> (December 5, 2011).

Second District Court of Appeal

J.C. and C.C. v. Department of Children and Family Services and Guardian Ad Litem Program, --- So. 3d ----, 2012 WL 246466 (Fla. 2d DCA 2012). **ORDER OF NO CONTACT QUASHED.** The grandparents had been granted custody of the child by the parents and later filed a private termination of parental rights petition. During the course of the proceedings, the grandfather revealed that 20 years ago, he had been convicted of a misdemeanor charge for molestation of a child. The conviction arose when the grandfather had been using drugs and alcohol, and he had subsequently gone through treatment and provided proof of rehabilitation. However, the trial court order the grandfather to have no contact with the grandchild pursuant to the Keeping Children Safe Act and the grandparents sought certiorari review. The appellate court noted that the grandparents did have standing because they were the petitioners in this private action. The court also stated that the Keeping Children Safe Act did not apply since the child had not been sexually abused. Section 39.0139(3), F.S. (2010), also provides for a rebuttable presumption of detriment to a child when a caregiver has been found guilty of child molestation, and the court departed from the essential requirements of law by not allowing the detriment to be rebutted. The grandparents presented substantial evidence that the grandfather's 20 year old misdemeanor conviction was tied to the grandfather's substance abuse at the time, and that the grandfather had completed treatment and been sober for over

20 years. Also, the case manager, the GAL and the grandmother all had no concerns about the grandfather's relationship with the child. Since the trial court made it clear that it believed that no amount of evidence could rebut the presumption of harm to the child, the appellate court found this to be a manifest injustice and granted the grandparents' writ of certiorari.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2012/January/January%2027,%202012/2D11-3659.pdf (January 27, 2012).

Third District Court of Appeal

A.H. v. Department of Children & Families, ___ So. 3d ____, 2011 WL 6783631 (Fla. 3d DCA 2011). **TERMINATION OF PARENTAL RIGHTS REVERSED.**

The Third District Court of Appeal reversed an order terminating a mother's parental rights because there was no statutory basis for the termination. The court held that not only did the record lack clear and convincing evidence for termination, the record was devoid of any evidence to support termination of parental rights under grounds (s. 39.806(1)(c) & 39.806(1)(f), F.S. (2010)) found by the trial court. The mother was alleged to have insufficiently kept the children's mentally ill and abusive father away from the mother's home and from the children. The mother herself was not alleged to have harmed the children. On appeal, the court held that the evidence failed to establish that the mother's continued interaction with the children threatened the children's life, safety, or health. Although the mother did not always follow her plan, the District Court noted that she did everything in her powers to protect the children from the father and set out specific examples. In addition, the court found that the father no longer presented a threat to the children because his rights had been terminated, he was the subject of a no contact order, was incarcerated, and was likely to be deported. As to the egregious conduct ground, the court noted that at oral argument the appellees conceded a lack of evidence and could not cite any case in which a parent's actions or inactions to protect their children were comparable to the mother's but were still held to meet the standard of egregious conduct under the statutory ground in 39.806(1)(f). The court therefore reversed the order terminating parental rights and remanded the case for further proceedings.

<http://www.3dca.flcourts.org/Opinions/3D10-2760.pdf> (December 28, 2011).

Fourth District Court of Appeal

Louisma v. State, --- So. 3d ----, 2012 WL 75238 (Fla. 4th DCA 2012). **ORDER FOR PSYCHOTROPIC DRUGS REVERSED.** The appellant, an individual who was adjudicated incompetent to proceed to trial in a criminal matter and committed to the Department of Children and Families, refused to give express and informed consent to the treatment center's recommended plan which included anti-psychotic medications. The treatment center petitioned the court for an order authorizing the psychiatric medication and treatment for the appellant, and attached two written opinions from psychiatrists that supported the petition. Neither opinion stated whether the doctors were members of the appellant's multidisciplinary treatment team. The magistrate granted the petition, finding that the medication was necessary for appellant to gain competency, that the treatment was necessary for the appellant's mental illness and did not present any unreasonable risk of harm, and that appellant was in immediate need of psychiatric

medication and treatment pursuant to section §916.107(3)(a), F.S. (2010). The circuit court adopted the magistrate's report and recommended order authorizing treatment.

Appellant claimed that no competent, substantial evidence supported the finding that the involuntary administration of psychotropic medication was deemed necessary and essential by his multidisciplinary team, as required by §916.107. Because there was no evidence that the testifying physician was a member of the team or that he discussed the need for medication with the team, the appellate court reversed. The court noted that case law requires the petitioner to present at least some evidence that the multidisciplinary team has discussed and approved the necessity of treatment. <http://www.4dca.org/opinions/Jan%202012/01-11-12/4D10-4244.op.pdf> (January 11, 2012).

Fifth District Court of Appeal

J.C. v. Department of Children and Families, ___ So. 3d ____, 2012 WL 315873 (Fla. 5th DCA 2012). **REUNIFICATION ORDERED**. The trial court placed the appellant's five children in permanent guardianship with their paternal aunt and terminated DCF's supervision, after which the father appealed, arguing that the court erred in denying his request for reunification. During the hearing on the appellant's motion for reunification, DCF acknowledged that the appellant had complied with his case plan and that it had no evidence to support its position that reunification would jeopardize the children. Even so, the lower court denied reunification with the appellant without stating any evidence to support its finding. In doing so, the court improperly relied solely on issues existing at the time the dependency case was initiated, without regard to the appellant's progress in overcoming those issues. The lower court also improperly relied upon a failed prior reunification attempt. The record indicated that the children were previously reunified with both their parents and were subsequently removed because of the mother's actions. The appellant and the children's mother were no longer together. Since there was no substantial, competent evidence to support the conclusions of the trial judge, the appellate court reversed and ordered the lower court to grant the appellant's motion for reunification. <http://www.5dca.org/Opinions/Opin2012/013012/5D11-2275.op.pdf> (January 30, 2012).

R.A. v. Department of Children and Families, ___ So. 3d ____, 36 Fla. L. Weekly D2752 (Fla. 5th DCA 2011). **TERMINATION OF PARENTAL RIGHTS FOR FAILURE TO APPEAR REVERSED**. The Fifth District Court of Appeal reversed the termination of a father's parental rights that was based on his failure to appear at an advisory hearing. The Department had alleged in its petition for termination of parental rights that the father had abandoned his children. The father appeared at his advisory hearing by telephone and authorized the father to appear by phone for the adjudicatory hearing, which the father did. However, the court continued the adjudicatory hearing, scheduling another advisory hearing rather than an adjudicatory hearing. The father failed to appear but the court held he hadn't received proper notice, and scheduled a third advisory hearing. The father failed to appear at the third advisory hearing and the court conducted an adjudicatory hearing only on manifest best interests. The trial court terminated the father's rights for failure to appear and abandonment. On appeal, the court held that the trial court lacked authority to conduct multiple advisory hearings because chapter 39 only

contemplates a single advisory hearing, after which the next hearing is an adjudicatory hearing, not another advisory hearing. The court noted that once a parent appears at an advisory hearing and its due process purposes are accomplished, the parent's absence from any subsequent non-adjudicatory hearing cannot defeat the progress of the case. The court further concluded that the trial court's error in entering a consent against the father was fundamental error and therefore the father could raise it for the first time on appeal. Although the District Court agreed that the evidence was insufficient to support a finding that the father abandoned his children, it recognized that DCF was not on notice on the need to present evidence of abandonment. The reversal of termination of parental rights was therefore without prejudice to DCF to present such evidence. The case was reversed and remanded for further proceedings. <http://www.5dca.org/Opinions/Opin2011/121211/5D11-1504.op.pdf> (December 13, 2011).

S.S. v. Department of Children and Families, ___ So. 3d ____, 36 Fla. L. Weekly D2695 (Fla. 5th DCA 2011). **TERMINATION OF PARENTAL RIGHTS AFFIRMED.**

The Third District Court of Appeal affirmed the termination of a mother's parental rights to her four children in a consolidation of two appeals. The court found that competent, substantial evidence supported the trial court's findings that the department had proven statutory grounds for termination. The mother's material breach of the case plan included several failures; among them, failing to refrain from committing new law violations, including criminal child neglect. The court affirmed termination of parental rights but elaborated on the issue of a case plan requirement that the mother have no new law violations. The court analyzed the decision of the Second District Court of Appeal in In the Interest of C.N., 51 So. 3d 1224 (Fla. 2d DCA 2011), and agreed with the Second District that breach of a no new law violation condition, standing alone, is insufficient to terminate parental rights, but disagreed with the conclusion that no such condition may be imposed in the first place, or that doing so violates separation of powers. Instead, the court held that chapter 39 authorizes a condition of no new violations of law so long as the condition is related to correcting a parent's behavior or to acts resulting in risk to the child. Therefore, the mother's conviction for child neglect was relevant, and the mother's drug use posed a threat to the children when the case plan was developed and approved.

<http://www.5dca.org/Opinions/Opin2011/120511/5D11-1184.op.pdf> (December 8, 2011).

Dissolution Case Law

Florida Supreme Court

In Re: Implementation of Committee on Privacy and Court Records Recommendations— Amendments to the Florida Rules of Civil Procedure; The Florida Rules of Judicial Administration; The Florida Rules of Criminal Procedure; The Florida Probate Rules; The Florida Small Claims Rules; The Florida Rules of Appellate Procedure, and The Florida Family Law Rules of Procedure, _So. 3d _, 2012 WL 143610 (Fla. 2012).

The Supreme Court amended Family Law Rule of Procedures Form 12.932, Certificate of Compliance with Mandatory Disclosure, in response to comments timely filed by Judge Renee Goldenberg of the Seventeenth Judicial Circuit. The Court agreed with Judge Goldenberg that

the amendments would provide better notice to self-represented litigants as to the documents that should or should not be filed with the trial court. A comment regarding a form not included in the above case was not addressed by the Court.

<http://www.floridasupremecourt.org/decisions/2012/scC08-2443.pdf> (January 19, 2012).

First District Court of Appeal

Mollinea v. Mollinea, __ So. 3d __, 2012 WL 130598 (Fla. 1st DCA 2012).

TRIAL COURT ERRED IN STATING THAT IT HAD PREVIOUSLY DISPENSED OF ALL REIMBURSEMENT ALLOCATIONS AS IT HAD VACATED TWO ORDERS REGARDING REIMBURSEMENT OF MORTGAGE PAYMENTS AND HAD SPECIFICALLY RESERVED JURISDICTION TO DETERMINE APPROPRIATE CREDIT DUE TO SPOUSE. The appellate court affirmed portions of a trial court order granting former wife's motion for contempt regarding fees and costs and denying her motion for fees and costs, but reversed and remanded the denial of her motion for reimbursement of mortgage payments. The appellate court disagreed with the trial court's conclusion that it had previously dispensed with all allocations regarding reimbursement. The appellate court noted that the trial court had vacated two of the prior orders it had relied on in the denial and that it had specifically reserved jurisdiction to determine credit due to former wife for one-half of the mortgage payments she had made on the marital home.

<http://opinions.1dca.org/written/opinions2012/01-18-2012/10-5507.pdf> (January 18, 2012).

O'Connor v. Zane, __ So. 3d __, 2012 WL 104505 (Fla. 1st DCA 2012).

TRIAL COURT CORRECTLY DISMISSED SPOUSE'S MOTION FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES; JUDGMENT CREDITORS HAVE STANDING TO ASSERT CLAIMS AGAINST UNCLAIMED PROPERTY HELD BY DEPARTMENT OF FINANCIAL SERVICES, FOR DETERMINATION WHETHER PROPERTY BELONGS TO JUDGMENT DEBTOR; IF PROPERTY CONSISTS OF CASH, DEPARTMENT MUST STATE THE AMOUNT SO CREDITOR CAN THEN PURSUE JUDICIAL REMEDIES.

The appellate court affirmed the trial court's dismissal of former wife's motion for declaration, owing to her failure to exhaust administrative remedies, in her pursuit of recovery of approximately \$32,000, belonging to former husband, and held by the Bureau of Unclaimed Property in the Department of Financial Services. Former wife had previously obtained a judgment against former husband for unpaid child support and other obligations. The appellate court held that although the department was not authorized by statute to determine the priority of claims for unclaimed property in its possession, a judgment creditor has standing to assert a claim against unclaimed property in the "hands of the state" in order to determine whether the property belongs to the judgment debtor. Once former wife filed a claim, the department would have to determine whether unclaimed property in its possession belonged to former husband; if the property consisted of cash, the department would be obligated to state the amount so that former wife could pursue judicial remedies.

<http://opinions.1dca.org/written/opinions2012/01-13-2012/11-2516.pdf> (January 13, 2012).

Koslowski v. Koslowski, __ So. 3d __, 2011 WL 6847812 (Fla. 1st DCA 2011).

NO ABUSE OF DISCRETION IN TRIAL COURT ORDERING ONE SPOUSE TO REIMBURSE THE OTHER FOR LIMITED AMOUNT OF RESPITE CARE RELATED TO THAT SPOUSE'S CARE OF THEIR MENTALLY INCOMPETENT ADULT CHILD.

Former husband appealed the trial court order that he pay for respite care related to former wife's care of their mentally incompetent child, arguing that the cost of such care constituted additional child support which the trial court had no legal basis to order. The appellate court disagreed with his argument; it found no abuse of discretion in the trial court's requirement that he reimburse former wife, "who shoulders most of the responsibility," for a limited amount of respite care.

<http://opinions.1dca.org/written/opinions2011/12-30-2011/10-4128.pdf> (December 30, 2011).

Galligar v. Galligar, __ So. 3d __, 2011 WL 6847810 (Fla. 1st DCA 2011).

TRIAL COURT CANNOT ORDER ALIMONY IN AN AMOUNT EXCEEDING PAYOR'S INCOME; ABUSE OF DISCRETION FOR TRIAL COURT TO AWARD FEES AFTER EQUITABLE DISTRIBUTION AND EQUALIZATION OF INCOME THROUGH ALIMONY.

Former husband appealed the trial court's order granting his petition for a downward modification of alimony payments and directing him to pay a portion of former wife's attorney's fees; the appellate court reversed on two issues. The appellate court held that the trial court had erred: 1) by modifying the permanent periodic alimony obligation to an amount that exceeded former husband's ability to pay; and 2) by requiring former husband to pay a portion of former wife's attorney's fees.

Pursuant to the final judgment of dissolution issued in 2005, former husband was ordered to pay \$5,000 per month in permanent alimony; at that time, he was earning \$175,000 annually. His 2010 petition to modify was based on his involuntary decrease in salary to \$66,000 annually. Stating that it was "well-settled" that a trial court abuses its discretion when it orders alimony in an amount that exhausts the paying spouse's income, the appellate court reversed and remanded the alimony award. With regard to the fee award, the appellate court agreed with former husband that because the record reflected former wife was in a superior financial position and could pay her own fees, it was error for the trial court to order him to pay; accordingly, it reversed on this issue.

<http://opinions.1dca.org/written/opinions2011/12-30-2011/10-6108.pdf> (December 30, 2011).

Luke v. Luke, 76 So. 3d 388 (Fla. 1st DCA 2011).

TRIAL COURT DID NOT ABUSE DISCRETION IN MODIFICATION OF ALIMONY GIVEN ITS FINDINGS, BUT ERRED BY NOT INDICATING IN ORDER WHETHER IT CONSIDERED REASONABLENESS OF FEE AMOUNT OR HOURS EXPENDED.

Former husband appealed the modification of his alimony obligation and the assessment of fees against him. Finding no abuse of discretion given the trial court's findings, the appellate court affirmed the modification; however, it reversed and remanded on the issue of attorney's fees due to the trial court's failure to indicate that it had considered the reasonableness of either the amount of fees or the hours expended.

<http://opinions.1dca.org/written/opinions2011/12-30-2011/11-0021.pdf> (December 30, 2011).

Nabinger v. Nabinger, __ So. 3d __, 2011 WL 6851182 (Fla. 1st DCA 2011).

CALCULATION OF CHILD SUPPORT BY TRIAL COURT SHOULD BE CONSISTENT WITH GUIDELINES AND WITHOUT REGARD TO ADOPTION SUBSIDY.

The appellate court found that the trial court erred in its calculation of new child support amount after modification when it offset the amount in the child support guidelines by the adoption subsidy received by former wife. The appellate court found no request in the record by either parent that the subsidy be factored into the equation during modification proceedings, nor did the marital settlement agreement, which was incorporated into the final judgment of dissolution, provide that former husband's child support obligation would be reduced by the subsidy, although it did provide that former wife would receive the subsidy. The appellate court concluded that because the offset made by the trial court was not a part of either the original settlement or final judgment, it was a material change in calculation of child support not requested by either party; therefore, the trial court erred in granting relief not plead. In addition, the appellate court found the trial court's offset to be against public policy and noted that had the parents not separated, the child would have benefitted from both their incomes--and the subsidy. In crediting the subsidy to former husband, the trial court reduced, rather than maintained, "the resources intended to meet the child's needs." The appellate court reversed and remanded for recalculation of the new child support amount consistent with the guidelines and without regard to the adoption subsidy.

<http://opinions.1dca.org/written/opinions2011/12-30-2011/11-2616.pdf> (December 30, 2011).

Sparks v. Sparks, 75 So. 3d 861 (Fla. 1st DCA 2011).

A CHILD'S BEST INTERESTS GOVERN PARENTING ISSUES; TRIAL COURT CANNOT ABDICATE ITS RESPONSIBILITY TO A CHILD.

Former husband appealed a trial court order awarding custody pursuant to a marital settlement agreement (MSA). Although initially, the trial court had reserved the right to evaluate the MSA to determine if it was in the child's best interests, the court then limited its inquiry to whether the MSA was a product of fraud or duress or was unreasonable on its face; concluding that it was not, the trial court incorporated the MSA into its amended final judgment of dissolution. Finding that the trial court had erred in not considering whether the MSA was in the child's best interests, the appellate court reversed. Citing Lane v. Lane, 599 So. 2d 218, 219 (Fla. 4th DCA 1992), and Jones v. Jones, 674 So. 2d 770,774 (Fla. 5th DCA 1996), the appellate court held that a trial court cannot abdicate its responsibility to a child. A court is bound by neither an agreement between the parents nor the opinions of any expert; a child's best interests govern the custody decision regardless of any stipulation between the parents.

<http://opinions.1dca.org/written/opinions2011/12-20-2011/11-3327.pdf> (December 20, 2011).

Pomeroy v. Pomeroy, 75 So. 3d 428 (Fla. 1st DCA 2011).

EXCEPTING EXTRAORDINARY CIRCUMSTANCES, SUCH AS SEVERE PHYSICAL OR MENTAL INCAPACITATION, A PARENT OWES NO DUTY OF SUPPORT TO AN ADULT CHILD.

The appellate court rejected former husband's argument that the trial court lacked subject matter jurisdiction, but reversed the portion of the trial court's order requiring that he provide health, dental, and medical insurance for the former couple's daughter who was over eighteen. Citing Kern v. Kern, 360 So. 2d 482, 486 (Fla. 4th DCA 1978), the appellate court held that "a

parent owes no duty of support to an adult child except in extraordinary circumstances as when the child suffers severe physical or mental incapacitation.”

<http://opinions.1dca.org/written/opinions2011/12-15-2011/11-2315.pdf> (December 15, 2011).

Sullivan v. Hoff-Sullivan, 75 So. 3d 1146 (Fla. 1st DCA 2011) and 2011 WL 6224494, (Fla. 1st DCA 2011). **DETERMINATION OF MODIFICATION SHOULD BE PURSUANT TO CS GUIDELINES.**

Former husband appealed the trial court’s order on status conference, entered after remand in Sullivan v. Hoff-Sullivan, 58 So. 3d 293 (Fla. 1st DCA 2011). In its opinion issued December 2nd, the appellate court agreed with former husband that the trial court failed to follow Sullivan on remand. The appellate court held that the trial court should have relied on the child support guidelines when it determined the modification; accordingly, the appellate court reversed and remanded for further proceedings consistent with its opinion. In its opinion issued December 15th, the appellate court affirmed trial court’s findings of contempt and award of attorney’s fees, and found other issues to be rendered moot by the trial court’s order on status conference.

<http://opinions.1dca.org/written/opinions2011/12-15-2011/11-1056.pdf> (December 15, 2011).

<http://opinions.1dca.org/written/opinions2011/12-02-2011/11-3552.pdf> (December 2, 2011).

Becnel-Delivorias v. Delivorias, 75 So. 3d 721 (Fla. 1st DCA 2011).

MODIFICATION OF PRIMARY CUSTODY OR VISITATION REQUIRES SUBSTANTIAL, MATERIAL, AND UNANTICIPATED CHANGE OF CIRCUMSTANCES AND THAT MODIFICATION BE IN CHILD’S BEST INTEREST; FAILURE OF TRIAL COURT TO USE MAGIC WORDS IS NOT FATAL IF IT IS READILY APPARENT WHY COURT RULED THE WAY IT DID AND EVIDENCE SUPPORTS THE RESULTS; CHEEK V. HESIK AND OTHER RECENT 1ST DCA CASES DISTINGUISHED FROM THIS CASE.

On motion for rehearing and rehearing en banc of the appellate court’s PCA of a trial court order granting former husband’s motion for contempt and for temporary relief on his counter-petition for modification of primary residential custody, (which effectively transferred primary residential custody to him), the appellate court granted the motion for rehearing in order to clarify its basis for affirming the trial court, but denied the motion for rehearing en banc. Reiterating that modification of primary residential custody or visitation requires demonstration of substantial, material, and unanticipated change in circumstances occurring after the original determination, and that the modification be in the children’s best interest, the appellate court noted that a trial court’s failure to include “magic words” is not fatal. The appellate court held that where the “correct test” for modification was presented and the result is supported by competent, substantial evidence, a trial court’s failure to explain its reasoning does not render the order reversible if it is “readily apparent why the trial court ruled in the manner it did and the result is legally sustainable.” The appellate court distinguished this scenario from those in which a trial court fails to make findings and no evidence in the record supports the trial court’s ruling. The appellate court also distinguished this case from Cheek v. Hesik, ___ So. 3d ___ (Fla. 1st DCA 2011), which it issued on November 1, 2011, stating that reversal in that case was due to the trial court’s failure to find that the manner in which make-up time-sharing was implemented was in the child’s best interest, and that even if that finding were implicit in the trial court’s order, there was no competent, substantial evidence to support it. The appellate court also noted that in Cheek, the remedy imposed by the trial court was

never sought by the parties. Concluding that no conflict existed between this case and Cheek, the appellate court went on to distinguish other cases issued by it that were cited by former wife. <http://opinions.1dca.org/written/opinions2011/12-12-2011/11-2640.pdf> (December 12, 2011).

Second District Court of Appeal

Zambuto v. Zambuto, __ So. 3d __, 2011 WL 6265527 (Fla. 2d DCA 2011).

TRIAL COURT MAY ATTRIBUTE TO A SPOUSE AN EARNING CAPACITY SUPPORTED BY THE EVIDENCE WHEN CALCULATING ALIMONY; ERROR TO ASSIGN GAMBLING LOSSES TO A SPOUSE WITHOUT A FINDING OF MISCONDUCT.

The appellate court agreed with former husband that the trial court erred in failing to account for former wife's earning capacity, which was relevant to the amount of alimony necessary to meet her needs; accordingly, it reversed and remanded for adjustment. Citing its opinion in LaFlam v. LaFlam, 854 So. 2d 809 (Fla. 2d DCA 2003), the appellate court held that when calculating alimony, a trial court may attribute to a spouse an earning capacity that is supported by the evidence. Here, the trial court had announced its intention to award rehabilitative alimony and to impute salary to former wife based upon a 40 hour work week in her field; however, the final judgment contained neither. With regard to equitable distribution, the appellate court concluded that the trial court had erred in assigning gambling losses to former husband in absence of a finding of intentional misconduct.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/December/December%2016,%202011/2d10-2231.pdf (December 16, 2011).

El Gohary v. El Gohary, 76 So. 3d 355 (Fla. 2d DCA 2011).

FINAL JUDGMENT IS NOT FINAL IF IT FAILS TO DISPOSE OF INTEGRALLY RELATED ISSUES; A MOTION FOR REHEARING DOES NOT TOLL THE TIME FOR FILING AN APPEAL IF THE ORDER APPEALED FROM IS NOT FINAL.

Former husband appealed a final judgment of dissolution of marriage. Finding that the judgment was not final because it failed to dispose of "integrally related issues," and that former husband had failed to file a notice of appeal within 30 days of its rendition, the appellate court dismissed for lack of jurisdiction. Because the final judgment was not actually final, former husband's motion for rehearing did not toll the time for filing an appeal. The appellate court noted that former husband could appeal once the trial court either entered the final order for which it reserved jurisdiction or issued any nonfinal orders appealable under Florida Rule of Appellate Procedure 9.130.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/December/December%2016,%202011/2D10-5553.pdf (December 16, 2011).

Irvin v. Irvin, __ So. 3d __, 2011 WL 6058281 (Fla. 2d DCA 2011).

TRIAL COURT'S MODIFICATION OF FINAL JUDGMENT WAS CONTRARY TO PLAIN LANGUAGE OF MEDIATION AGREEMENT ENTERED AFTER FINAL JUDGMENT.

Former wife appealed the trial court order denying her motion to hold former husband in contempt for failure to pay child support and granting his motion to enforce a second mediation agreement.

The first mediation agreement contained a clause that the spouses would share equally in funds due under a note, if any money was paid pursuant to the note. The second mediation agreement stated that, except for the changes as a result of that agreement, the final judgment of dissolution between the spouses would remain in effect. The trial court agreed with former husband that because the second agreement was silent as to former wife's share of the funds, which had now been received, that she was no longer entitled to any share. Finding that the trial court had effectively modified the final judgment in a way that was contrary to the plain language of the second mediation agreement, the appellate court reversed.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/December/December%2007,%202011/2D10-1562.pdf (December 7, 2011).

Third District Court of Appeal

Byrne v. Byrne, __ So. 3d __, 2012 WL 126638 (Fla. 3d DCA 2012).

IT WAS ERROR FOR TRIAL COURT: TO ASSIGN A MARITAL HOME THAT WAS UNDERWATER TO ONE SPOUSE WITHOUT OFFSETTING IT AND WITHOUT JUSTIFICATION; TO ASSIGN A WORTHLESS ACCOUNT TO ONE SPOUSE WHEN THE OTHER SPOUSE WITHDREW THE FUNDS FROM THE ACCOUNT; TO INCREASE THE ALIMONY OF THE SPOUSE WHO WITHDREW THE FUNDS; AND TO NOT PROPERLY CONSIDER RELEVANT FACTORS UNDER SECTION 61.08.

Both former spouses appealed trial court's award of permanent alimony and scheme of equitable distribution in nine year marriage; the appellate court reversed and remanded. The appellate court agreed with former wife that assigning a marital home that was underwater by \$76,000 to her without offsetting it in the remainder of the equitable distribution amounted to an unequal distribution by the trial court without sufficient justification. The appellate court also found that the trial court's award of a joint Ameritrade account as an offsetting distribution to former husband, where the former husband had removed all funds from the account without former wife's permission, was error. The appellate court held that former wife was entitled to one-half of the proceeds. Concluding that the trial court's financial analysis was "tainted" by its failure to consider the relevant factors enumerated in Section 61.08, F.S. (2010), the appellate court reversed the alimony awards. It noted that the trial court did not take into account the pre-dissolution debts of each spouse, former husband's retirement account income, or the reduction in former wife's annual salary. The appellate court reiterated that it is "well-settled" that one spouse cannot be required to maintain the other spouse's standard of living when that maintenance stretches beyond the paying spouse's financial ability, and then concluded that the trial court "compounded its error" when it increased former husband's alimony award because the joint Ameritrade account was worthless. On remand, the trial court was instructed to reconsider: former husband's need for and former wife's ability to pay alimony; the relevant factors under Section 61.08; and the length of the marriage, in determining whether permanent alimony was appropriate, and if so, how much.

<http://www.3dca.flcourts.org/Opinions/3D10-2323.pdf> (January 18, 2012).

Messier v. Martin-Messier, __ So. 3d __, 2011 WL 6373003 (Fla. 3d DCA 2011).

MOTIONS FOR REHEARING OF NONFINAL ORDERS DO NOT TOLL THE TIME FOR FILING A NOTICE OF APPEAL; SECTION 743.07(2), F.S., AUTHORIZES CHILD SUPPORT THROUGH DATE OF HIGH SCHOOL GRADUATION FOR 18 YEAR OLD.

Holding that motions for rehearing of nonfinal orders do not toll the time for filing a notice of appeal, the appellate court dismissed former husband's appeal for lack of jurisdiction; however, it reversed the trial court's order denying his request for child support, and remanded for calculation and award of child support through the date of the child's high school graduation. <http://www.3dca.flcourts.org/Opinions/3D10-2777.pdf> (December 21, 2011).

***Khutorsky v. Ilina*, 75 So. 3d 848 (Fla. 3d DCA 2011). TRIAL COURT CANNOT AWARD RELIEF NOT PLEAD.**

Former husband appealed two issues in modification of final judgment of dissolution. The appellate court discussed one and affirmed the other without discussion. Finding that the trial court had erred in modifying the final judgment to provide that former husband pay one-half of private school tuition, expenses, and fees for the couple's younger child for the 2010-2011 school year, and continuing through 5th grade, the appellate court reversed. Former wife had not sought fees for either the 2010-2011 school year or any future years; therefore, the trial court's grant of relief not plead was error.

On remand, former husband was to be credited for payments made pursuant to the appealed order. <http://www.3dca.flcourts.org/Opinions/3D11-0798.pdf> (December 14, 2011).

Fourth District Court of Appeal

Fisher v. Fisher, ___ So. 3d ___, 2012 WL 204281 (Fla. 4th DCA 2012).

TRIAL COURT ERRED IN EXTENDING SPOUSE'S EXCLUSIVE USE AND POSSESSION OF MARITAL HOME BEYOND REMARRIAGE IN ABSENCE OF SHOWING OF SPECIAL CIRCUMSTANCES.

The appellate court agreed with former husband that former wife's exclusive use and possession of the marital residence should terminate if she remarried. The trial court had provided in its final judgment that her exclusive use and possession would terminate upon the former couple's youngest child either beginning college or otherwise becoming emancipated; the appellate court held that it was error to extend former wife's exclusive use and possession beyond her remarriage in the absence of a showing of special circumstances. Reversed and remanded.

<http://www.4dca.org/opinions/Jan%202012/01-25-12/4D10-383.op.pdf> (January 25, 2012).

Baudanza v. Baudanza, ___ So. 3d ___, 2012 WL 75217 (Fla. 4th DCA 2012).

TRIAL COURT ERRED IN CLOSING CASE OVER WHICH IT HAD JURISDICTION.

Former wife appealed the trial court's closure of her case upon its conclusion that it no longer had jurisdiction; it reasoned that the court, having entered the final order of adoption of the former couple's son by former wife's current husband, had jurisdiction. The appellate court disagreed, concluding that the trial court, which had incorporated a post-judgment agreement between the former spouses into a final order, did have jurisdiction to determine whether that agreement was valid and enforceable in light of the adoption of the child. Accordingly, the appellate court reversed and remanded.

<http://www.4dca.org/opinions/Jan%202012/01-11-12/4D10-4068.op.pdf> (January 11, 2012).

Khan v. Khan, __ So. 3d __, 2012 WL 75250 (Fla. 4th DCA 2012).

AGREEMENT BETWEEN SPOUSES THAT WAIVES OR LIMITS RIGHT TO REQUEST TEMPORARY SUPPORT OR FEES BY A SPOUSE IN NEED DURING DISSOLUTION OF MARRIAGE PROCEEDINGS IS CONTRARY TO PUBLIC POLICY; SPOUSE CANNOT CONTRACT AWAY SUPPORT OBLIGATION DURING MARRIAGE; TRIAL COURT MAY AWARD TEMPORARY FEES TO SPOUSE EVEN IF AGREEMENT HAS PREVAILING PARTY CLAUSE OR PROVIDES EACH SPOUSE WILL PAY HIS OR HER OWN FEES.

Former wife appealed the nonfinal order in which the trial court, pursuant to a marital settlement agreement (MSA) in which the spouses had agreed to pay their own fees in any dissolution proceeding, struck the notice of hearing on her motion for an increase in temporary alimony and fees and costs. The MSA had been entered into by the spouses in a prior dissolution action which was dismissed when they reconciled; although it was never approved by the court, it included a clause that it would not be invalidated by a reconciliation. Citing Belcher v. Belcher, 271 So. 2d 7 (Fla. 1972) and Lashkajani v. Lashkajani, 911 So. 2d 1154 (Fla. 2005), the appellate court reversed. It held that an agreement between spouses that either waives or limits the right to request temporary support and fees by a spouse in need in a pending dissolution action is contrary to public policy; a spouse cannot contract away his or her obligation of support during the marriage. Stating its need to continue to follow Belcher, the appellate court held that, pending dissolution, “public policy and the statutory obligation of support” permit a trial court to award temporary fees to a spouse even in cases where the agreement has a prevailing party clause if the agreement is litigated or if the agreement provides that the spouses will pay their own fees. The appellate court recommended on remand that the preliminary question to be litigated before the trial court should be the enforceability of the MSA.

<http://www.4dca.org/opinions/Jan%202012/01-11-12/4D11-460.op.pdf> (January 11, 2012).

Ross v. Ross, __ So. 3d __, 2012 WL 75253 (Fla. 4th DCA 2012).

THE NARROW EXCEPTION TO THE GENERAL RULE THAT A DISQUALIFIED JUDGE IS BARRED FROM FURTHER ACTION IN A CASE WHEN HE OR SHE PERFORMS A MINISTERIAL ACT DOES NOT APPLY IF THE JUDGE EXERCISES DISCRETION.

Former husband sought a writ of prohibition to bar the trial judge from continuing to preside over a trial from which he was disqualified; the appellate court granted the petition. The case was remanded after reversal in Ross v. Ross, 61 So. 3d 479 (Fla. 4th DCA 2011), for the trial court to enter a new order after giving former husband an opportunity to either submit his own proposed order or object to former wife’s. This was done; however, the trial judge who conducted the conference call had previously granted former husband’s motion to disqualify, prompting former husband to object to that judge taking any further action in the case. The appellate court held that, generally, a disqualified judge is barred from further participation in the case; any further orders entered by that judge are void. An exception exists when a judge who has heard the testimony and arguments and has given an oral ruling, reduces that ruling to writing. In that context, a judge retains the authority to perform a ministerial act; however, if

the proceedings require the judge to go beyond performing a ministerial act and exercise his or her discretion, the narrow exception to the disqualification rule is lost.

<http://www.4dca.org/opinions/Jan%202012/01-11-12/4D11-2707.op.pdf> (January 11, 2012).

Frady v. Deringer, __ So. 3d __, 2011 WL 6057946 (Fla. 4th DCA 2011).

ABUSE OF DISCRETION BY TRIAL COURT IN SETTING ASIDE A DEFAULT FINAL JUDGMENT OF DISSOLUTION; COMPETENT, SUBSTANTIAL EVIDENCE MUST OVERCOME PRESUMPTION OF DELIVERY RAISED BY CERTIFICATE OF SERVICE.

Former husband moved for relief from the final judgment seven years after the trial court entered its amended final judgment of dissolution of marriage upon default; trial court then set aside the default judgment with the exception of the portion dissolving the marriage. Calling it a “gross abuse of discretion,” the appellate court reversed the trial court’s order setting aside the default final judgment after concluding that there was no competent, substantial evidence to overcome the presumption of delivery reflected in the certificate of service on the notice of hearing.

Accordingly, the trial court was directed to reinstate the amended final judgment.

<http://www.4dca.org/opinions/Dec%202011/12-07-11/4D10-4166.op.pdf> (December 7, 2011).

Marshall-Beasley v. Beasley, __ So. 3d __, 2011 WL 6057910 (Fla. 4th DCA 2011).

COURT MAY IMPUTE INCOME WHERE A SPOUSE IS WILLFULLY EARNING LESS THAN HE OR SHE IS CAPABLE OF BY USE OF HIS OR HER BEST EFFORTS; STANDARD OF LIVING IS NOT A SUPER-FACTOR; ALIMONY IS NOT INTENDED TO FUND EVERY LITTLE LUXURY ENJOYED BEFORE DISSOLUTION.

In a trial which awarded one spouse the marital home in Palm Beach and the other the vacation home in Nantucket, former wife appealed the final judgment of dissolution on several grounds; the appellate court affirmed on all. Citing its holding in Schram v. Schram, 932 So. 2d 249 (Fla. 4th DCA 2005), that a court may impute income where a spouse is willfully earning less than he or she has the capability to earn by use of their best efforts, the appellate court held that here the evidence showed that former wife chose not to use her various degrees, license, and experience to “actualize” her earning capability. It upheld the imputation to former wife of \$50,000 even though she never grossed more than \$25,000. Citing its opinions in Donoff v. Donoff, 940 So. 2d 1221 (Fla. 4th DCA 2006), for its observance that “the standard-of-living is not a super-factor” overcoming other considerations, and Levine v. Levine, 954 So. 2d 741 (Fla. 4th DCA 2007), for its realization that alimony is not intended “to fund the enjoyment of every little luxury enjoyed before the divorce,” the appellate court concluded that the trial court did not abuse its discretion in awarding bridge-the-gap alimony to former wife rather than permanent periodic.

<http://www.4dca.org/opinions/Dec%202011/12-07-11/4D09-4106.op.pdf> (December 7, 2011).

Fifth District Court of Appeal

Robertson v. Robertson, __ So. 3d __, 2012 WL 162008 (Fla. 5th DCA 2012).

TRIAL COURT CORRECT THAT REGISTRATION OF DOMAIN NAME OF WEBSITE PRIOR TO MARRIAGE WAS NONMARITAL; HOWEVER, ENHANCED VALUE OF BUSINESS DUE TO SPOUSE’S

EFFORTS DURING MARRIAGE WAS MARITAL WITH BURDEN ON OTHER SPOUSE TO ESTABLISH VALUE OF ENHANCEMENT.

Former wife appealed the final judgment of dissolution on several grounds; the appellate court reversed and remanded on one. Ten days prior to their marriage, former husband had registered a domain name in order to create a website; that website, in turn, became the business from which the former couple derived most of their income. The appellate court found that the trial court had correctly concluded that both the domain and the website were former husband's nonmarital property, but held that because former husband's efforts during the marriage enhanced the value of the business, that enhancement was marital, with the burden of proof establishing the value of the enhancement falling on former wife. Due to her difficulty in obtaining an expert to evaluate the enhanced value of the website, former wife moved for continuance on the eve of trial. Her motion to continue was denied as was her motion to take the testimony of an expert by phone; the trial court did not consider the enhanced value in the scheme of equitable distribution. The appellate court ruled that the trial court's denial of her motions, "placed a manifest injustice" on former wife, because the enhanced value of the website was the primary asset in the former couple's estate. Accordingly, it remanded to allow former wife to present testimony as to the enhanced value and to reconsider the equitable distribution based upon that testimony.

<http://www.5dca.org/Opinions/Opin2012/011612/5D09-4060.op.pdf> (January 20, 2012).

Schell v. Schell, __ So. 3d __, 2012 WL 162057 (Fla. 5th DCA 2012).

IN ABSENCE OF EITHER A TRANSCRIPT OF THE HEARING OR ANY ERRORS OF LAW APPARENT ON THE FACE OF THE ORDER, NONFINAL ORDER IS AFFIRMED.

In absence of either a transcript of the hearing or any errors of law apparent on the face of the order, the appellate court affirmed a nonfinal order authorizing relocation.

<http://www.5dca.org/Opinions/Opin2012/011612/5D10-3727.op.pdf> (January 20, 2012).

Middleton v. Middleton, __ So. 3d __, 2012 WL 28274 (Fla. 5th DCA 2012).

TRIAL COURT ERRED IN CONCLUDING IT COULD NOT IMPUTE INCOME TO ONE SPOUSE WHEN OTHER SPOUSE'S EXPERT COULD NOT FIND A JOB FOR FIRST SPOUSE; TO IMPUTE, TRIAL COURT MUST CONSIDER SPOUSE'S EMPLOYMENT HISTORY, QUALIFICATIONS, AND PREVAILING EARNINGS IN COMMUNITY.

Both spouses appealed final judgment of dissolution; the appellate court agreed with former husband that the trial court had applied the wrong standard in considering whether to impute income to former wife. The appellate court found that the trial court erred in concluding that it was unable to impute income to former wife because former husband's expert had not been able to find a job for her and because former wife had not refused any specific job offer. The appellate court held that the trial court should have taken into consideration former wife's employment history and qualifications, as well as the prevailing earnings in that community for the type of work for which she was skilled. Accordingly, it remanded for reconsideration of the imputation based on evidence received at trial, and if necessary, recalculation of the award of permanent alimony.

<http://www.5dca.org/Opinions/Opin2012/010212/5D10-236.op.pdf> (January 6, 2012).

Cruz v. Cruz, __ So. 3d __, 2012 WL 162143 (Fla. 5th DCA 2012).

TRIAL COURT IMPROPERLY DENIED MOTION TO DISQUALIFY AS UNTIMELY WHERE 10TH DAY FELL ON A FRIDAY HOLIDAY (VETERAN'S DAY); MOTION FILED ON THE FOLLOWING MONDAY WAS TIMELY AND LEGALLY SUFFICIENT.

Writ of prohibition part I: the appellate court granted former husband's petition for writ of prohibition upon finding that the trial judge had improperly denied former husband's motion to disqualify as untimely; the appellate court found the motion to be otherwise legally sufficient. Florida Rule of Judicial Administration 2.330(e), requires that a motion to disqualify be filed "within a reasonable time not to exceed 10 days after discovery of the facts constituting the grounds for the motion." In this case, the tenth day fell on Veteran's Day, which was on a Friday, so petitioner's motion, which was filed on the following Monday, was not untimely. <http://www.5dca.org/Opinions/Opin2012/011612/5D11-4305.op.pdf> (January 18, 2012).

Bennett v. Bennett, __ So. 3d __, 2012 WL 162145 (Fla. 5th DCA 2012).

TRIAL COURT IMPROPERLY DENIED MOTION TO DISQUALIFY AS UNTIMELY WHERE 10TH DAY FELL ON A FRIDAY HOLIDAY (VETERAN'S DAY); MOTION FILED ON THE FOLLOWING MONDAY WAS TIMELY AND LEGALLY SUFFICIENT.

Writ of prohibition part II: the appellate court granted former wife's petition for writ of prohibition upon the same facts as the case above; in both cases, the appellate court declined petitioner's "invitation to craft a blanket order disqualifying the lower court judge from presiding over any future cases involving Petitioner's counsel." <http://www.5dca.org/Opinions/Opin2012/011612/5D11-4306.op.pdf> (January 18, 2012).

Buhler v. Buhler, __ So. 3d __, 2011 WL 6003301 (Fla. 5th DCA 2011).

STATUTE MANDATES REDUCTION IN CHILD SUPPORT WHENEVER NON-CUSTODIAL PARENT SPENDS SUBSTANTIAL AMOUNT OF TIME WITH CHILD; PARENT WHO FAILS TO SPEND TIME FORFEITS RIGHT TO REDUCTION; FAILURE TO EXERCISE VISITATION NOT "INSTANTANEOUS" OR AN OCCASIONAL MISS; CHILD SUPPORT MODIFICATION IS RETROACTIVE TO DATE REGULAR VISITATION UNDER COURT-ORDERED SCHEDULE IS FOUND TO HAVE CEASED.

In response to former husband's petition for modification to secure a more structured visitation schedule in the wake of a final judgment which had granted "liberal visitation," the trial court entered a schedule providing him with roughly 48% of the overnights—a substantial amount of time-sharing under Section 61.30(11)(b)10, F.S. (2010); however, the trial court's reduction of his child support obligation was based on his previous exercise of visitation rather than the modified schedule. Finding that the trial court had erred by not having reduced the child support obligation in accordance with the formula set forth in Section 61.30(11)b, the appellate court reversed. The appellate court held that Chapter 61 mandates a reduction in child support whenever the non-custodial parent spends substantial amount of time with the child; conversely, a parent who fails to spend time forfeits the right to reduction. The appellate court also held that the failure to exercise visitation is not "instantaneous" or that results from an occasional miss; it is something which occurs over time during which the non-residential parent still benefits from an obligation which is lower than the guidelines would have otherwise required. The appellate court held that in that event, modification of support is retroactive to "the date on which regular visitation under the court-ordered schedule was found to have

ceased.” In this case, the trial court erred by awarding it retroactive to the date former wife filed her amended counter-petition, which was a year later than the date it found that former husband had ceased to exercise visitation.

<http://www.5dca.org/Opinions/Opin2011/112811/5D10-2125.op.pdf> (December 2, 2011).

Domestic Violence Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

No new opinions for this reporting period.

Second District Court of Appeal

No new opinions for this reporting period.

Third District Court of Appeal

No new opinions for this reporting period.

Fourth District Court of Appeal

No new opinions for this reporting period.

Fifth District Court of Appeal

No new opinions for this reporting period.