

OSCA/OCI'S FAMILY COURT CASE LAW UPDATE
December 2012 - January 2013

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Baker Act/Marchman Act 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.

Delinquency Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

N.H. v. State, __ So. 3d __, 2012 WL 6603064 (Fla. 1st DCA 2012). [TRIAL COURT FAILED TO COMPLY WITH THE REQUIREMENTS OF E.A.R. V. STATE, 4 SO. 3D 614 \(FLA. 2009\), WHEN IT DEVIATED FROM THE RECOMMENDATION OF THE DEPARTMENT OF JUVENILE JUSTICE \(DJJ\).](#)

The juvenile challenged his commitment to a low-risk program. The juvenile argued that the trial court failed to comply with the requirements of E.A.R. when it deviated from the recommendation of the DJJ. The DJJ had recommended probation, attendance at Jacksonville Marine Institute, and counseling. The trial court deviated from DJJ's recommendation and committed the juvenile to a low-risk program. On appeal, the First District Court of Appeal found that the trial court's written reasons for the departure fell short of the analysis required by E.A.R. The trial court's reasons failed to demonstrate an understanding of the respective characteristics of the restrictiveness levels; they also failed to explain why a low-risk commitment better served the rehabilitative needs of the juvenile. Accordingly, the First District reversed and remanded with instructions to the trial court to enter an order in compliance with E.A.R. or else impose the probation recommended by DJJ. Judge Benton dissented without opinion.

<http://opinions.1dca.org/written/opinions2012/12-19-2012/12-3544.pdf> (December 19, 2012).

Second District Court of Appeal

State v. H.D., __ So. 3d __, 2013 WL 275583 (Fla. 2d DCA 2013). **SUPPRESSION OF EVIDENCE REVERSED WHERE THE JUVENILE'S INTERVENING TRESPASS PROVIDED THE OFFICER WITH THE AUTHORITY TO STOP THE JUVENILE AND PURGED THE TAIN OF THE UNLAWFULLY ISSUED "BE ON THE LOOKOUT" (BOLO) ALERT.** The State appealed the trial court's order granting the juvenile's motion to suppress cocaine evidence. The police had received an anonymous tip that someone was selling drugs from a red pickup truck. When the police arrived at the scene, they saw the juvenile riding a bicycle away from the truck. No one else was nearby. The police dispatched a BOLO alert for a black male fleeing the scene on a bicycle. The juvenile abandoned the bicycle and the officers chased him on foot. Another officer heard the BOLO and saw the juvenile scaling a privacy fence in back of a house. The juvenile ignored the officer's orders to stop and entered the backyard. People standing in the yard were telling the juvenile to leave. The juvenile tried to enter the house. The officer ordered the juvenile to stop and drop to the ground. The juvenile refused to comply and the officer tasered him. The juvenile was arrested, and several grams of cocaine were found in his possession. The trial court granted the juvenile's motion to suppress, finding that the BOLO was improper because the officers issuing the BOLO failed to corroborate the anonymous tip and had inadequate grounds to detain the juvenile. The trial court ruled that the unlawful BOLO tainted the arresting officer's authority to stop the juvenile even after the juvenile trespassed on private property. According to the trial court, the cocaine was inadmissible as "fruit of the poisonous tree." The State conceded that the BOLO was unlawful, but argued that the juvenile's refusal to leave the private property constituted a trespass in the arresting officer's presence that purged the taint of the improper BOLO and gave the arresting officer authority to stop the juvenile. On appeal, the Second District Court of Appeal found that the juvenile's intervening trespass provided the arresting officer with the authority to stop the juvenile and was a sufficient attenuation to purge the taint of the unlawful BOLO. Accordingly, the Second District reversed the trial court's order granting the juvenile's motion to suppress the cocaine evidence and remanded for further proceedings. http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2013/January/January%2025,%202013/2D11-5262.pdf (January 25, 2013).

J.L.T. v. State, __ So. 3d __, 2013 WL 85452 (Fla. 2d DCA 2013). **HOME DETENTION FOR JUVENILES ALLEGED TO HAVE VIOLATED PROBATION OR CONDITIONAL RELEASE WAS APPROPRIATE DESPITE RISK ASSESSMENT SCORES OF ZERO POINTS. CONFLICT CERTIFIED.** Six juveniles filed a consolidated petition for writ of habeas corpus seeking immediate release from home detention pending an adjudicatory hearing. The Second District Court of Appeal had previously denied habeas corpus relief and this opinion was issued to explain their decision. In each instance, the juvenile allegedly violated their probation or conditional release by failing to be at home according to the terms of his or her curfew. The juveniles were individually taken into custody on separate pick-up orders. The Department of Juvenile Justice (DJJ) determined that each child should be placed in home detention despite scoring a total of zero points on his or her Risk Assessment Instrument (RAI). At the detention hearings, the trial court, determining that continued detainment was appropriate, placed each juvenile on home detention with electronic monitoring for twenty-one days pending an adjudicatory hearing. The juveniles filed

emergency petitions for writ of habeas corpus, arguing that they were being illegally detained because a score of six or fewer points on the RAI mandates release. The juveniles argued that s. 985.255(1), F.S. (2012), does not permit home detention without a qualifying RAI score. On appeal, the Second District Court of Appeal found that s. 985.255(1), F.S. (2012), permits the court to continue detention as established by the probation officer and that the probation officer can only require detention if authorized by the RAI. However, the RAI allows for certain exceptions where the juvenile may be detained regardless of the risk assessment score. Under the "Admission Criteria" section of the RAI, any juvenile who meets one of the requirements in subsections (F) through (K) is subject to detention regardless of the number of points scored on the RAI. Subsection (J) provides for detention if a youth is alleged to have violated the conditions of the youth's probation or conditional release supervision. In the instant case, the juveniles were alleged to have violated the conditions of their probation or conditional release supervision. Therefore, the probation officers properly concluded that home detention was appropriate under section II.J of the RAI despite a risk assessment score of zero points. Thus, at the detention hearings, the juvenile court judge properly continued their detentions under s. 985.255(1)(h), F.S. (2012), which provides for continuing the child's placement in home detention care if the child is alleged to have violated probation or conditional release. Because it was within the court's discretion to determine that continued home detention was necessary in these circumstances, the Second District held that habeas relief was not warranted and the petitions were denied. To the extent that the opinion conflicts with S.M. v. State, Department of Juvenile Justice, 91 So. 3d 175, 175 (Fla. 4th DCA 2012), and T.K.B. v. Durham, 63 So. 3d 60, 62 (Fla. 1st DCA 2011), the Second District certified conflict.
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2013/January/January%2009,%202013/2D12-3070.pdf (January 9, 2013).

Third District Court of Appeal

L.C. v. State, __ So. 3d __, 2013 WL 238226 (Fla. 3d DCA 2013). **PAT-DOWN SEARCH WAS LAWFUL WHERE THE OFFICER HAD "REASONABLE GROUNDS TO BELIEVE" THAT THE JUVENILE WAS TRUANT.** The juvenile appealed an order withholding adjudication of delinquency and placing him on probation. The juvenile argued that the trial court erred in denying his motion to suppress marijuana found on his person following a pat-down search. An officer saw the juvenile walking down a street not far from a high school during school hours. The juvenile was carrying a book bag. The officer stopped the juvenile to investigate whether the juvenile was truant. The officer attempted to ascertain whether the child had permission to be out of school. In response to the inquiry, the juvenile gave a story that did not "sit right" with the officer. Prior to placing the juvenile into his police vehicle, the officer conducted a pat-down search for officer safety. Marijuana was discovered in the juvenile's pocket. On appeal, the juvenile argued that the officer did not have a basis to conduct a pat-down search for officer safety because the officer did not confirm that the juvenile was truant. Therefore, the officer did not have the authority to take the juvenile into "custody" as set forth in s. 984.13(1)(b), F.S. (2011). The Third District Court of Appeal found that s. 984.13(1)(b), F.S. (2011), permits a law enforcement officer to take a child into custody when the officer has "reasonable grounds to believe" that the child is truant. The State was not required to present evidence that the officer "confirmed" that the juvenile was truant. In the instant case, the Third District held that, based on the

totality of the circumstances, the officer had the necessary “reasonable grounds to believe” that the juvenile was truant. Therefore, the pat-down prior to placing the juvenile in the police vehicle in order to transport the juvenile to school was lawful. Accordingly, the trial court’s denial of the juvenile’s motion to suppress and the order withholding adjudication were affirmed.

<http://www.3dca.flcourts.org/Opinions/3D12-0704.pdf> (January 23, 2013).

Fourth District Court of Appeal

No new opinions for this reporting period.

Fifth District Court of Appeal

No new opinions for this reporting period.

Dependency Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

No new opinions for this reporting period.

Second District Court of Appeal

No new opinions for this reporting period.

Third District Court of Appeal

No new opinions for this reporting period.

Fourth District Court of Appeal

No new opinions for this reporting period.

Fifth District Court of Appeal

B.W. v. Department of Children and Families, ___ So. 3d ___, 2013 WL 183937 (Fla. 5th DCA 2013). Three children were originally sheltered for physical abuse by the mother’s paramour which resulted in a criminal charge of child abuse. Of the three, one child was placed with his father and two others were placed with their paternal grandparents. A fourth child, not a target of the abuse, stayed in the home. After substantially completing her case plan, the mother appealed an order which granted her reunification with the children that were placed with the grandparents, but which left the other child placed with his father. The mother argued that because she had substantially complied with her reunification case plan, she was entitled to have all of her children returned to her unless adequate findings of fact based on competent, evidence established that reunification would be detrimental to the child. The appellate court reversed and remanded the case for an evidentiary hearing to determine if reunification would

be detrimental to the child. <http://www.5dca.org/Opinions/Opin2013/011413/5D12-2189.op.pdf> (January 18, 2013).

Dissolution Case Law

Florida Supreme Court

In re: Amendments to the Florida Rules of Civil Procedure; Amendments to the Florida Family Law Rules of Procedure; New Florida Rules for Qualified and Court-Appointed Parenting Coordinators; New Florida Rules for Other Court-Appointed Alternative Dispute Resolution Neutrals, __So. 3d __, (Fla. 2012).

[FLORIDA FAMILY LAW RULE OF PROCEDURE 12.740\(f\), AMENDED, EFFECTIVE JANUARY 1, 2013.](http://www.floridasupremecourt.org/decisions/2012/sc11-1454.pdf)

Florida Family Law Rule of Procedure 12.740(f) was amended, effective January 1, 2013. <http://www.floridasupremecourt.org/decisions/2012/sc11-1454.pdf> (December 6, 2012).

First District Court of Appeal

Toussaint v. Toussaint, __So. 3d __, 2013 WL 264190 (Fla. 1st DCA 2013).

FACT THAT GENERAL MAGISTRATE AND TRIAL COURT READ SAME MARITAL SETTLEMENT AGREEMENT (MSA) AND REACHED OPPOSITE BUT EQUALLY REASONABLE CONCLUSIONS CONFIRMED LATENT AMBIGUITY WITHIN IT; PAROL EVIDENCE SHOULD ONLY BE CONSIDERED WHEN A CONTRACT CONTAINS A LATENT AMBIGUITY; TRIAL COURT ERRED IN NOT TAKING EVIDENCE TO “ELUCIDATE” THE AMBIGUITY; APPELLATE COURT’S STANDARD OF REVIEW ON MSA IS DE NOVO.

A general magistrate found that a plain reading of the spouses’ marital settlement agreement (MSA) created a property right for former wife of 50% of former husband’s full retirement benefits; however, the trial court concluded that former wife’s portion was limited to 50% of the benefits which had accrued during the marriage. The general magistrate reasoned that had the spouses intended to limit former wife’s share solely to those accruing during the marriage, they could have included that language in the MSA; the trial court rejected that interpretation and ruled that former wife should have included specific language in the MSA to allow access to retirement benefits accruing after dissolution. Reiterating that the standard of review on an MSA is *de novo*, the appellate court held that the pertinent provisions of the MSA were ambiguous; therefore, the trial court erred in not having taken evidence to “elucidate the ambiguity.” It held that as a general rule, parol evidence should only be considered when a contract contains a latent ambiguity. It noted that in this case, the general magistrate, the trial court, and the spouses all agreed that the paragraph in question was unambiguous and should be applied according to its plain language; however, they disagreed as to what that plain language meant. The appellate court held that both the general magistrate and the trial court incorrectly concluded that the MSA was unambiguous. The appellate court stated that, “the fact that each read the same document and came to opposite, but equally reasonable conclusions, confirms the document’s latent ambiguity.” Accordingly, the appellate court reversed and remanded for proceedings consistent with its opinion.

<http://opinions.1dca.org/written/opinions2013/01-24-2013/11-5908.pdf> (January 24, 2013).

Christ v. Christ, __ So. 3d __, 2013 WL127441, 38 Fla.L.Weekly D121 (Fla. 1st DCA 2013).

UNTIMELY OR UNAUTHORIZED APPEALS DISMISSED FOR LACK OF JURISDICTION.

The appellate court held that appeals of three post-dissolution orders were either untimely or unauthorized; therefore, it lacked jurisdiction. Accordingly the appeals were dismissed.

<http://opinions.1dca.org/written/opinions2013/01-10-2013/12-4267.pdf> (January 10, 2013).

Snyder v. Snyder, __ So. 3d __, 2013 WL 127438, 38 Fla.L.Weekly D122 (Fla. 1st DCA 2013).

APPEAL DISMISSED AS PREMATURE; APPEALABLE AFTER RENDITION OF ORDER.

The appellate court dismissed the appeal as premature, but noted that the dismissal was without prejudice; an appeal could be sought upon rendition of trial court's final order.

<http://opinions.1dca.org/written/opinions2013/01-10-2013/12-4306.pdf> (January 10, 2013).

Gray v. Gray, __ So. 3d __, 2012 WL 6554552 (Fla. 1st DCA 2012).

TRIAL COURT MUST BASE FINDINGS ON COMPETENT, SUBSTANTIAL EVIDENCE.

Former husband argued trial court error in the amount of permanent periodic alimony it awarded to former wife and in its equitable distribution. The appellate court concluded that neither the award nor the trial court's decision not to impute income to former wife was supported by competent, substantial evidence; in addition, the final judgment lacked the findings required by statute. Accordingly, it reversed and remanded. The appellate court emphasized that a trial court must determine whether either party has an actual need for alimony and whether either party has the ability to pay alimony. The appellate court declined to reach the equitable distribution issue, but held that the trial court could reevaluate its distribution if necessitated by its findings on remand.

<http://opinions.1dca.org/written/opinions2012/12-17-2012/12-0136.pdf> (December 17, 2012).

Shultz v. Shultz, __ So. 3d __, 2012 WL 6554698 (Fla. 1st DCA 2012).

CHILD BORN DURING THE COURSE OF A VALID MARRIAGE IS LEGITIMATE EVEN IF IT IS ESTABLISHED THAT HUSBAND IS NOT THE CHILD'S BIOLOGICAL PARENT.

The appellate court concluded that the trial court had erred in denying former husband's petition to disestablish paternity as he proved that he was not the biological father of the two children born during his marriage to former wife; however, it held that a child born during the course of a valid marriage is legitimate even if a paternity test conclusively establishes that the current or former husband is not the child's biological father.

<http://opinions.1dca.org/written/opinions2012/12-17-2012/12-0237.pdf> (December 17, 2012).

Mayfield v. Mayfield, __ So. 3d __, 2012 WL 6554559 (Fla. 1st DCA 2012).

VOLUNTARY OVERPAYMENT OF CHILD SUPPORT CANNOT BE USED TO OFFSET FUTURE CHILD SUPPORT; INCREASE IN CHILD SUPPORT PAYMENTS SHOULD BE RETROACTIVE TO FILING DATE OF PETITION OF MODIFICATION; REQUIRING SPOUSES TO SPLIT EXPENSES WHEN ORIGINAL JUDGMENT REQUIRED ONE SPOUSE TO PAY 100% IS ERROR IN ABSENCE OF REQUEST TO MODIFY; RECEIVED CHILD SUPPORT PAYMENTS SHOULD NOT BE INCLUDED IN SPOUSE'S INCOME.

Former wife sought a modification of child support based on a substantial increase in both former husband's income and the needs of their children in the six years since the issuance of

the final judgment. Former husband was current in child support payments and had a history of making additional payments at former wife's request to ensure that the children would have all they needed. The trial court increased the support to an amount equal to the guidelines less 5% for former husband's "history of timely and additional payments," but then reduced that amount to credit former husband for his additional payments. The appellate court held that crediting former husband against future child support obligation with prior voluntary overpayments was an abuse of discretion; the spouses never agreed that the excess payments were intended to be an advance on future child support. The appellate court found that the trial court had also abused its discretion in failing to make the increased child support award retroactive to the date of filing of the petition for modification; accordingly, it remanded with directions that the increased support be retroactive to that date. It also found that the trial court erred in requiring the former spouses to split orthodontic expenses because the original judgment had ordered former husband to pay 100%, and there was no pleading before the trial court seeking modification of that provision.

With regard to attorney's fees, the appellate court held that the trial court erred in including child support received by former wife as part of her income; only received alimony should be added.

<http://opinions.1dca.org/written/opinions2012/12-17-2012/12-0819.pdf> (December 17, 2012).

Therriault v. Therriault, __So. 3d__, 2012 WL 6098019 (Fla. 1st DCA 2012).

TRIAL COURT DID NOT ABUSE ITS DISCRETION IN AWARDING PERMANENT ALIMONY IN DISSOLUTION OF 16-YEAR MARRIAGE; ALIMONY WAS BASED ON COMPETENT AND SUBSTANTIAL EVIDENCE, AND TRIAL COURT WAS NOT REQUIRED TO FIND NO OTHER FORM OF ALIMONY WAS REASONABLE BECAUSE FINAL JUDGMENT WAS ENTERED PRIOR TO THE EFFECTIVE DATE OF SECTION 61.08(8), FLORIDA STATUTES (2011), WHICH NOW REQUIRES THAT FINDING.

The appellate court concluded that the trial court had not abused its discretion by having ordered former husband to pay former wife permanent periodic alimony after the dissolution of a "moderate-term" marriage of almost sixteen years. It held that the alimony awarded by the trial court was based on competent and substantial evidence, and that neither spouse passed "automatically from misfortune to prosperity or from prosperity to misfortune." Canakaris v. Canakaris, 382 So. 2d 1197 (Fla. 1980), quoting Brown v. Brown, 300 So. 2d 719 (Fla. 1st DCA 1974). Because the final judgment was entered prior to July 1, 2011, the trial court was not required to find that no other form of alimony was reasonable, as required by s. 61.08(8), F.S. (2011).

<http://opinions.1dca.org/written/opinions2012/12-10-2012/12-0668.pdf> (December 10, 2012).

Second District Court of Appeal

Heiny v. Heiny, __So. 3d__, 2013 WL 275567 (Fla. 2d DCA 2013).

NUMEROUS TRIAL COURT ERRORS IN EQUITABLE DISTRIBUTION SCHEME AND FEE AWARD OF 100% DUE TO MISCONDUCT REQUIRED REVERSAL AND REMAND.

Both spouses appealed the final judgment of dissolution of marriage and a final judgment of attorney's fees. The appellate court found numerous errors in the equitable distribution

scheme and with the fee award. Prior to their marriage, the spouses had signed an antenuptial agreement whose intent was to protect each spouse's premarital assets as separate property. That agreement limited former husband's interest in former wife's premarital home (which the couple improved and lived in during their marriage) to one-half of the cost of improvements to the home and one-half of the amount of principal payments made during the marriage; however, the trial court erroneously awarded him one-half of the appreciated value of the home. The trial court's valuation of the home was not based on competent, substantial evidence as required. The trial court also failed to identify, value, and equitably distribute all marital assets and liabilities, specifically on a piece of rental property encumbered by a marital mortgage. The trial court erroneously included a loan from the spouses to their pool business within the scheme of equitable distribution, although both spouses had used the money and there was no evidence that the loan to the business carried with it the intention of being repaid by the business. The trial court erred in assigning to former wife a savings account whose funds she had used for family expenses during litigation in absence of any evidence of misconduct. The appellate court reiterated that it is error to assign depleted assets to a spouse in absence of misconduct. The appellate court affirmed the trial court's finding of litigation misconduct by former husband, but concluded that it incorrectly assigned him 100% of the attorney's fees. It held that "the entirety of the wife's legal fees could not have been the direct result of husband's misconduct." Reversed and remanded with instructions to the trial court.
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2013/January/January%2025,%202013/2D09-4924%20%202D10-4408%20125.pdf (January 25, 2013).

Cooley v. Cooley, __ So. 3d __, 2013 WL 15303, 38 Fla.L.Weekly D154 (Fla. 2d DCA 2013).
DURATIONAL ALIMONY MAY NOT EXCEED THE LENGTH OF A MARRIAGE.
The appellate court reversed for the trial court to correct the period of durational alimony award to reflect the length of the marriage. The final judgment awarded alimony for 192 months although the marriage lasted 150 months; the spouses agreed this was error.
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2013/January/January%2018,%202013/2D12-2257.pdf (January 18, 2013).

Arena v. Arena, __ So. 3d __, 2013 WL 45898, 38 Fla.L.Weekly D92 (Fla. 2d DCA 2013).
TRIAL COURT MUST MAKE SPECIFIC FINDINGS OF FACT IN DETERMINING NEED AND ABILITY TO PAY ATTORNEY'S FEES AND JUSTIFYING THE AMOUNT; PARTIAL FEE AWARD MAY BE ABUSE OF DISCRETION IN CASES OF SUBSTANTIAL DISPARITY, BUT THE AWARD CANNOT BE BASED SOLELY ON THAT DISPARITY; FEE AWARD WHICH LACKS ADEQUATE FACTUAL FINDINGS IS REVERSIBLE.
Former wife appealed the trial court's award to her of bridge-the-gap alimony instead of the permanent she had requested, and the award to her of 60% of her fees and costs. The appellate court affirmed the alimony without discussion, but reversed the portion of the order granting partial fees because no factual findings supported the award. The appellate court cited Rosen v. Rosen, 696 So. 2d 697, 699 (Fla. 1997), for its requirement that the trial court look to each spouse's need for fees "versus each spouse's respective ability to pay." Although a partial award of fees may be an abuse of discretion in cases of "substantial disparity" in the spouses' incomes, a trial court cannot base its award entirely on that disparity. Need and ability must be considered. After considering all factors, a trial court must make specific findings of fact on

entitlement to an award, including the factors that justify a specific amount. The appellate court noted that a fee award which lacks adequate findings to justify its amount is reversible; “distinct” findings are necessary for meaningful appellate review. Here, the trial court’s failure to make factual findings justifying a specific amount had the effect of making the partial award appear arbitrary. Reversed and remanded for the trial court to reconsider fees and make findings of fact sufficient for review.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2013/January/January%2004,%202013/2D10-4746.pdf (January 4, 2013).

Gibellina v. Iwanowski, __ So. 3d __, 2013 WL 49782, 38 Fla.L.Weekly D92 (Fla. 2d DCA 2013).

LITIGATION CONDUCT MAY BE DISTINGUISHED FROM PARENTING SKILLS; MOTION TO DISQUALIFY TREATED AS PETITION FOR WRIT OF PROHIBITION.

After denying former husband’s motion to disqualify the trial judge, which it treated as a petition for a writ of prohibition, the appellate court found itself “not unsympathetic” to former husband’s desire for time-sharing; however, due to the limited record, it found itself unable to question the concerns expressed by the trial court regarding the child’s well-being when former husband was involved. Citing Andrews v. Andrews, 624 So. 2d 391 (Fla. 2d DCA 1993), which distinguished a parent’s litigation conduct from their parenting skills, the appellate court held that former husband’s “apparent misuse” of the judicial system did not preclude the possibility he was able to be an “appropriate” parent.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2013/January/January%2004,%202013/2D11-5632.pdf (January 4, 2013).

Weissman v. Weissman, __ So. 3d __, 2012 WL 6165772 (Fla. 2d DCA 2012).

PARENT MAY SEEK CERTIORARI REVIEW FOR MODIFICATION OF TIME-SHARING BY A TRIAL COURT IN ABSENCE OF NOTICE AND AN OPPORTUNITY TO BE HEARD.

In the wake of allegations that former husband and his girlfriend were responsible for alienating the oldest daughter from former wife, the trial court found: 1) that it was in the best interests of the children to grant former wife temporary sole decision-making authority over the health care of the children, including selection of an out-of-state residential treatment program for the oldest daughter; 2) that the oldest daughter reside with former husband until a treatment program could be chosen while the younger children remained with former wife; and 3) that former husband’s time-sharing with the younger children be reduced from the equal time-sharing ordered in the final judgment. Subsequent to that order, the trial court entered an ex parte order that former wife and all the children attend the program and that former husband have no contact with them until 90 days after their return. Former husband sought certiorari review of the ex parte order. The appellate court held that the trial court did not depart from the essential requirements of law in ordering the children to participate in the treatment program, but that the portion of the order which prevented former husband from any direct or indirect contact with his children for 90 days violated due process because he was not provided with notice and an opportunity to be heard.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2012/December/December%2012,%202012/2D12-4739.pdf (December 12, 2012).

Third District Court of Appeal

Anton v. Anton, __ So. 3d __, 2013 WL 332075 (Fla. 3d DCA 2013).

DEFENDANT MUST RECEIVE NOTICE OF THE ESSENTIAL FACTS THAT CONSTITUTE CRIMINAL CONTEMPT AND MUST HAVE AN OPPORTUNITY TO SHOW CAUSE WHY THE SENTENCE SHOULD NOT BE IMPOSED; A TRIAL COURT'S FAILURE TO COMPLY WITH RULE 3.840 IS FUNDAMENTAL ERROR.

The appellate court agreed with former husband that the trial court failed to comply with the procedural safeguards requirements set forth in Florida Rule of Criminal Procedure 3.840; notably, a defendant must receive notice of the essential facts that constitute the criminal contempt and have an opportunity to show cause why the sentence should not be imposed. Although former wife initiated the contempt proceedings, the trial court did not issue a show cause order and neither the notice of hearing on the motions for contempt nor the motions themselves placed former husband on notice that he potentially faced a criminal penalty at the contempt hearing. The trial court's finding of indirect criminal contempt was fundamental error.

<http://www.3dca.flcourts.org/Opinions/3D12-1508.pdf> (January 30, 2013).

McClain v. McClain, __ So. 3d __, 2013 WL 238219 (Fla. 3d DCA 2013).

TRIAL COURT CANNOT AWARD ALIMONY IF IT HAS NOT BEEN REQUESTED.

The appellate court vacated the portion of a final judgment of dissolution that awarded permanent periodic alimony to former wife because she never requested alimony in her pleadings. A trial court cannot award alimony if the benefitting spouse has not requested it.

<http://www.3dca.flcourts.org/Opinions/3D11-0583.pdf> (January 23, 2013).

Sueiro v. Gallardo, __ So. 3d __, 2012 WL 6682205 (Fla. 3d DCA 2012).

TRIAL COURT ABUSED ITS DISCRETION IN MODIFYING CHILD CUSTODY OF MARITAL SETTLEMENT AGREEMENT.

In another case involving alleged parental alienation, former wife appealed a post-dissolution order granting former husband's petition for modification and motion for enforcement. The question on appeal was whether the trial court abused its discretion by modifying the child custody arrangements of the marital settlement agreement, which were incorporated into the final judgment. The appellate court held that a custody provision set forth in a final judgment of dissolution can be materially modified only if facts concerning a child's welfare were unknown by the trial court at the time the judgment was entered, or if there has been a substantial change in circumstances since entry of the judgment *and* that a change in custody is in the child's best interests. It reiterated that a child's best interests are the "paramount concern." The appellate court concluded that the trial court's finding that former wife had alienated the oldest child from former husband was not based on competent, substantial evidence, that an immediate change of custody of the younger children was not in their best interests, and that the trial court had abused its discretion by modifying the child custody provisions of the settlement agreement.

<http://www.3dca.flcourts.org/Opinions/3D12-2153.pdf> (December 21, 2012).

Fourth District Court of Appeal

Zvida v. Zvida, __So. 3d__, 2013 WL 85440, 38 Fla.L.Weekly D105 (Fla. 4th DCA 2013).

TRIAL COURT HAS AUTHORITY TO REQUIRE A SPOUSE TO OBTAIN INSURANCE TO SECURE AN OBLIGATION, BUT MUST MAKE SPECIFIC FINDINGS AS TO THE CIRCUMSTANCES AND ON THE AVAILABILITY AND COST OF THE INSURANCE, INCLUDING SPOUSE'S ABILITY TO PAY FOR INSURANCE; A DEPLETED ASSET CANNOT BE INCLUDED IN EQUITABLE DISTRIBUTION OR ASSIGNED TO A SPOUSE WITHOUT A FINDING OF INTENTIONAL MISCONDUCT BY THAT SPOUSE.

Former husband raised four issues in his appeal of a final judgment of dissolution. Two were affirmed without comment; the remaining two were reversed after a review for abuse of discretion. Recognizing a trial court's authority to order a spouse to obtain life insurance to secure alimony or child support obligations, the appellate court held that here the trial court erred in imposing that requirement without having made the requisite findings of any special circumstances justifying the requirement or any findings regarding the availability and cost of the insurance and whether former husband had the ability to pay that cost. The trial court also erred by naming former wife as the beneficiary of the life insurance policy securing child support rather than the children and by assigning a depleted asset to former husband without a finding of intentional misconduct.

<http://www.4dca.org/opinions/Jan%202013/01-09-13/4D11-2891.op.pdf> (January 9, 2013).

Morrell v. Morrell, __So. 3d__, 2012 WL 6600751 (Fla. 4th DCA 2012).

TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING LIFE INSURANCE PROVISION OF MARITAL SETTLEMENT AGREEMENT WAS SUPPORT OBLIGATION ENFORCEABLE BY CONTEMPT.

The appellate court affirmed a trial court order which had found former husband in contempt for failing to maintain the amount of life insurance required under the settlement agreement and final judgment of dissolution of marriage. The trial court ordered former husband to either secure the insurance or deposit cash of an equal amount into an account in the event he predeceased former wife. He had argued that because the final judgment did not provide alimony or other support for former wife, the life insurance was part of the equitable distribution; therefore, a breach of that obligation was not enforceable by contempt. Former wife countered that the provision of life insurance was in the nature of support. The appellate court concluded that the trial court did not abuse its discretion in determining that the life insurance provision was a support obligation enforceable by contempt; accordingly, it affirmed the trial court's order.

<http://www.4dca.org/opinions/Dec%202012/12-19-12/4D11-3114.op.pdf> (December 19, 2012).

Giorlando v. Giorlando, __So. 3d__, 2012 WL 6600346 (Fla. 4th DCA 2012).

TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO CONSIDER SPOUSE'S IMPUTED INCOME AGREED UPON IN MARITAL SETTLEMENT AGREEMENT IN MODIFICATION PROCEEDINGS.

The appellate court agreed with former husband that the trial court abused its discretion in failing to consider, in modification proceedings, the imputed income of former wife agreed to in the marital settlement agreement. The appellate court distinguished its holding in this case from that in Schmachtenberg v. Schmachtenberg, 34 So. 3d 28 (Fla. 3d DCA 2010), in which the

3d DCA found error in the trial court's reliance on former wife's imputed income in modification proceedings, as opposed to that former wife's actual income, based upon the fact that the other spouse petitioned for modification and therefore had the burden of proof. Here, because former wife sought modification, she should have "shouldered the burden of establishing why the agreed upon imputed income should not have been considered."

<http://www.4dca.org/opinions/Dec%202012/12-19-12/4D12-1220.op.pdf> (December 19, 2012).

Fifth District Court of Appeal

Gorny v. St. Leger, __ So. 3d __, 2013 WL 132458, 38 Fla.L.Weekly D129 (Fla. 5th DCA 2013).
REVERSED AND REMANDED FOR DETERMINATION OF SERVICE OF PROCESS.

Former wife, attempting to domesticate a foreign order from Tennessee and collect almost \$200,000 in unpaid child support, encountered difficulty serving former husband. Service was attempted at a Florida address, although former husband was living and working in the Cayman Islands at that time. Ultimately, the trial court found that service of process on former husband had been effectuated; the appellate court disagreed, and reversed and remanded for the trial court to hold a hearing to determine the issue of service of process.

<http://www.5dca.org/Opinions/Opin2013/010713/5D11-4123.op.pdf> (January 11, 2013).

Sotis v. Sotis, __ So. 3d __, 2012 WL 6629895 (Fla. 5th DCA 2012).

TRIAL COURT ERRED IN NOT HAVING INCLUDED SPOUSE'S MARITAL RETIREMENT ACCOUNTS IN CALCULATION OF EQUITABLE DISTRIBUTION.

Both former spouses appealed various issues relating to equitable distribution. The appellate court found error in the trial court's finding that former wife's three marital retirement accounts were minimal in value, and in its failure to include them in the equitable distribution. Reversed and remanded for determination of the value of the accounts and inclusion in equitable distribution.

<http://www.5dca.org/Opinions/Opin2012/121712/5D11-1654.op.pdf> (December 21, 2012).

Liberatore v. Liberatore, __ So. 3d __, 2012 WL 6213456 (Fla. 5th DCA 2012).

ABSENT A FINDING OF MISCONDUCT, IT IS ERROR FOR A TRIAL COURT TO INCLUDE A DEPLETED ASSET IN THE SCHEME OF EQUITABLE DISTRIBUTION.

Reiterating that it is error to include a depleted asset in the scheme of equitable distribution absent a finding of misconduct, the appellate court agreed with former wife that the trial court erred in having allocated to her depleted assets which she had used to pay her attorney during proceedings.

<http://www.5dca.org/Opinions/Opin2012/121012/5D11-82.op.pdf> (December 14, 2012).

Futcher v. Futcher, __ So. 3d __, 2012 WL 6213261 (Fla. 5th DCA 2012).

APPELLATE COURT CANNOT REWEIGH EVIDENCE; CAN ONLY DECIDE WHETHER COMPETENT, SUBSTANTIAL EVIDENCE SUPPORTS THE TRIAL COURT'S FINDINGS.

The appellate court cannot reweigh evidence considered by a trial court; it can only decide whether competent, substantial evidence exists to support the trial court's findings. <http://www.5dca.org/Opinions/Opin2012/121012/5D11-2999.op.pdf> (December 14, 2012).

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

Waddell v. Delorenzo, ___ So. 3d ___, 2012 WL 6719451 (Fla. 5th DCA 2012). **REPEAT INJUNCTION REVERSED**. The appellant appealed from the entry of a Final Judgment of Injunction for Protection Against Repeat Violence, which prohibited him from having any contact with his neighbor. During the full hearing on the petition for protection, the appellee did not testify to a single act of violence by appellant against him; however, the trial judge still issued the injunction. Because petitioner's evidence was legally insufficient to support the entry of a repeat violence injunction, the court reversed.

<http://www.5dca.org/Opinions/Opin2012/122412/5D12-2100.op.pdf> (December 28, 2012).

Reyes v. Reyes, ___ So. 3d ___, 2012 WL 6213134 (Fla. 5th DCA 2012). **DENIAL OF MOTION TO DISSOLVE AN INJUNCTION AFFIRMED**. The father appealed the trial court's order that denied his motion to modify or dissolve his domestic violence injunction. In 2004, the trial court entered an injunction in favor of the mother. The father's motion to modify the injunction challenged the original injunction and made several other claims, but failed to allege any change in circumstances; thus the trial court denied the motion. The appellate court held that "for a movant to be entitled to obtain relief on a motion to modify or dissolve a domestic violence injunction, the movant must prove a change in circumstances." Because the father's motion failed to allege any change in circumstances, the court affirmed the lower court's decision. <http://www.5dca.org/Opinions/Opin2012/121012/5D11-4082.op.pdf> (December 14, 2012).

Drug Court/Mental Health Court 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.