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

Florida Supreme Court

E.A.R. v. State, __ So.2d __, 2009 WL 217979 (Fla. 2009). WHEN DEPARTING FROM THE DEPARTMENT OF JUVENILE JUSTICE'S DISPOSITION RECOMMENDATION PURSUANT TO S. 985.433(7)(B), F.S., THE CIRCUIT COURTS MUST SPECIFICALLY IDENTIFY THE CHARACTERISTICS OF THE RESTRICTIVENESS LEVEL IMPOSED VIS-À-VIS THE NEEDS OF THE JUVENILE. During disposition, s. 985.433(7)(b), F.S. provides that a circuit court can depart from the Department of Juvenile Justice's (DJJ) restrictiveness level recommendation, but the court must state the reasons by a preponderance of the evidence why the court is disregarding the assessment and recommendation of DJJ. The District Courts of Appeal were split on what standard satisfied this requirement. The First, Second and Fifth District Courts of Appeal required the judge to specifically identify the characteristics of the restrictiveness level imposed vis-à-vis the needs of the juvenile. The Fourth District held that such a requirement did not apply. The Florida Supreme Court by a 4-3 decision held that the current statutory scheme requires the circuit courts to specifically identify the characteristics of the restrictiveness level imposed vis-à-vis the needs of the juvenile when departing from DJJ's recommendation. http://www.floridasupremecourt.org/decisions/2009/sc08-506.pdf (January 30, 2009).

First District Court of Appeal

No new opinions for this reporting period.

Second District Court of Appeal

L.B.B. v. State, __ So.2d __, 2009 WL 211929 (Fla. 2d DCA 2009). THE TRIAL COURT ERRED IN DENYING JUVENILE'S MOTION TO SUPPRESS. The juvenile appealed the denial of his motion to suppress marijuana found incident to arrest. The juvenile was arrested pursuant to a city ordinance which made it a second-degree misdemeanor to ride a bicycle without a bell or some other audible warning device. Marijuana was found incident to a search. The juvenile was charged with possession of marijuana. The juvenile argued that traffic offenses are not subject to arrest. Thus, any evidence discovered incident to arrest for that infraction should have been suppressed. The trial court, relying on Thomas v. State, 614 So.2d 468 (Fla.1993), denied the motion, finding that although the city ordinance could not criminalize conduct which was a civil infraction under Florida Statutes, the evidence from the unlawful arrest did not have to be suppressed because the officer had arrested the juvenile in reliance on the ordinance. The Second District Court of Appeal held that the trial court erred in its application of Thomas. Thomas had also been arrested on a city ordinance for riding a bicycle without a bell. Incident to search the police discovered a gun in Thomas's pocket. The Florida Supreme Court held that an individual could not be arrested and searched for violating a bicycle-related city ordinance. However, the trial court correctly denied Thomas's motion to suppress because the officer

arrested Thomas in reliance on the city ordinance. In Thomas, the Florida Supreme Court invalidated the penalties contained in the city ordinance *after* Thomas was arrested. In the instant case, the Second District found that the officer could not have relied upon a virtually identical city ordinance that had effectively been invalidated fourteen years earlier in Thomas. The case was reversed and remanded.
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/January/January%2030,%202009/2D07-3804.pdf (January 30, 2009).

J.L.D. v. State, __ So.2d __, 2009 WL 211928 (Fla. 2d DCA 2009). TRIAL JUDGE'S DEPARTURE FROM ROLE AS NEUTRAL ARBITER WAS HARMLES ERROR IN THIS CASE. The juvenile was observed trying to steal a minivan. The juvenile was adjudicated for grand theft auto. A restitution order for $1480.30 was entered. At the restitution hearing, the judge took over examining the witnesses including the questioning of the victim as to her lost wages and in laying the predicate for the damage appraiser to refresh his recollection with documents. The juvenile appealed the restitution order arguing that the trial judge erred in departing from his role as neutral arbiter. The Second District Court of Appeal found that the trial judge had departed from his proper role of neutrality. However, in this case, any error was harmless. The restitution order did not compensate the victim for her lost wages and the trial judge's questioning of two witnesses did not contribute to any portion of the restitution award. Nothing in the record suggested that the State could not have established the admissibility of the evidence if the trial judge had allowed the assistant state attorney to do her job. The juvenile also challenged the inclusion of $125 of towing costs in the restitution order. The Second District found that the appraiser testified that the insurer had paid $125 to have the victim's vehicle towed on two occasions. On cross-examination, the appraiser revealed that he obtained this figure through the insurer's computer system. The appraiser acknowledged that he lacked personal knowledge that the vehicle was towed or why it was towed. The victim had not testified that the car had been towed on even one occasion, and the damage caused by the attempted theft was not the type of damage that obviously would result in the vehicle's requiring a tow. Defense counsel raised a hearsay objection to the appraiser's testimony regarding the amount of towing costs. The Second District found that the objection should have been sustained because the State produced no documentary evidence to support the cost of the towing services, and these amounts were not based on the knowledge of the witness. The State presented no evidence that the vehicle had been towed or reasonably needed to be towed. Accordingly, the part of the restitution order awarding $125 for the towing of the victim's vehicle was reversed.
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/January/January%2030,%202009/2D07-5696.pdf (January 30, 2009).

E.A.D. v. State, __ So.2d __, 2009 WL 323335 (Fla. 2d DCA 2009). TRIAL COURT'S ERRED IN THE AMOUNT OF COURT COSTS IMPOSED. The juvenile appealed his adjudication for four counts of burglary of a conveyance. The Second District Court of Appeal affirmed the trial court's final order in all respects except for the imposition of $115 in costs pursuant to ss. 775.083(2) and 983.03(1), F.S. The Second District found that the State correctly conceded error in that these statutes each authorized the imposition of $50 in costs for a total of $100. Accordingly, the part of the order assessing costs was remanded for correction. http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/February/February%2011,%202009/2D08-814.pdf (February 11, 2009).

L.D.K. v. State, __ So.2d __, 2009 WL 331662 (Fla. 2d DCA 2009). THE SECOND DISTRICT COULD NOT ADDRESS DISPOSITION ERROR ON APPEAL BECAUSE THE JUVENILE DID NOT PRESERVE THE ISSUE FOR APPELLATE REVIEW. The juvenile appealed her adjudications for felony fleeing or attempting to elude and resisting an officer without violence. Appellate counsel filed an Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967) brief suggesting error in denying the juvenile's motion for judgment of dismissal and disposition error. The juvenile had been found guilty of felony fleeing or attempting to elude and resisting an officer without violence and the trial court ordered a disposition on both counts of 5 years juvenile probation. The Second District Court of Appeal found no error in the denial of motion for judgment of dismissal. However, the Second District detected error as to the disposition for resisting an officer without violence. Section 985.435(5), F.S., provides that a juvenile probation period may not exceed the term for which a sentence could be imposed if the child were committed for the offense. Section 985.455(3), F.S., provides that a juvenile's period of commitment may not exceed the maximum term of imprisonment that an adult may serve for the same offense. Resisting an officer without violence is a first-degree misdemeanor punishable by a term of imprisonment not exceeding one-year. Therefore, juvenile probation for resisting an officer without violence cannot exceed one-year. Although it appeared that the trial court erred, the Second District could not address this disposition error on appeal because the juvenile did not preserve the issue for appellate review. Accordingly, the Second District affirmed the judgments and sentences without prejudice to the juvenile's right to file an appropriate motion for collateral relief addressing the sentence for resisting an officer without violence. http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/February/February%2010,%202009/2D08-454.pdf (February 10, 2009).

Third District Court of Appeal
No new opinions for this reporting period.

Fourth District Court of Appeal
No new opinions for this reporting period.

Fifth District Court of Appeal
J.M. v. State, __ So.2d __, 2009 WL 413433 (Fla. 5th DCA 2009). CONVICTION FOR TWO OFFENSES OF LEWD AND LASCIVIOUS CONDUCT, WHERE BOTH INCIDENTS OCCURRED SEQUENTIALLY AND INVOLVED THE SAME VICTIM VIOLATED THE PROHIBITION AGAINST DOUBLE JEOPARDY. The juvenile appeals his disposition order. The trial court found that the juvenile committed six offenses on a school bus. Two of the offenses involved lewd and lascivious conduct involving the same victim. The juvenile argued that conviction on both counts violated double jeopardy. The juvenile had filed a timely Florida Rules of Judicial Procedure 8.135(b)(1)(B) motion to correct disposition. The trial court agreed with the juvenile's double jeopardy argument and tried to grant the motion, but did not act for 40 days. Rule 8.135(b)(1)(B) requires the trial court to file an order on the motion within 30 days or else the motion is deemed denied. Therefore, the motion was deemed denied by virtue of the passage of time. The Fifth District Court of Appeal agreed that the two incidents of lewd conduct was the same criminal act and therefore violated the prohibition against double jeopardy. The touching involved the same victim and both incidents occurred sequentially on the school bus. Accordingly, the Fifth District reversed and remanded with instructions to vacate one of the lewd or lascivious conduct convictions and to resentence the juvenile. http://www.5dca.org/Opinions/Opin2009/021609/5D08-1453.op.pdf (February 20, 2009).

J.C. v. State, __ So.2d __, 2009 WL 275302 (Fla. 5th DCA 2009). JUVENILE HAS A CONSTITUTIONAL RIGHT TO BE PRESENT AT RESTITUTION HEARING UNLESS THE RIGHT IS KNOWINGLY AND VOLUNTARILY WAIVED. The juvenile appealed the trial court's restitution order. The juvenile argued that the trial court erred by conducting the restitution hearing in her absence. The Fifth District Court of Appeal found that a defendant's waiver of the right to be present at the restitution hearing may be express, or it may be implied from the defendant's voluntary absence. In order for a defendant to be voluntarily absent from a hearing, the defendant must have notice of the hearing and intentionally avoided it or left the court during the proceeding. In the instant case, there was no competent substantial evidence to show that the juvenile voluntarily absented herself from the restitution hearing. Accordingly, the restitution order was reversed and remanded for a new hearing. http://www.5dca.org/Opinions/Opin2009/020209/5D08-2963.op.pdf (February 2, 2009).

Dependency Case Law

Florida Supreme Court

In re: Amendments to Florida Rule of Juvenile Procedure 8.255, ___ So. 2d ____, 2009 WL 485113 (Fla. 2009). (No. SC08-1236) PROPOSED RULE AMENDMENT NOT ADOPTED
The Florida Supreme Court declined to adopt an amendment to Juvenile Rule 8.255. The rule had been proposed by the Florida Supreme Court Steering Committee on Families and Children in the Court and would have required the presence at dependency hearings of children 16 years of age or older unless the child's presence was excused by a showing of good cause why the child should not attend.
http://www.floridasupremecourt.org/decisions/2009/sc08-1236.pdf (February 27, 2009).

First District Court of Appeal

Diaz v. Department of Children and Families, ___ So. 2d ____, 2009 WL 400375 (Fla. 1st DCA 2009). (No. 1D08-3835) MANDAMUS DENIED
Because the circuit court had conducted a hearing regarding the dependency matter, had directed the Department to investigate certain factual issues, and had scheduled additional proceedings, the court denied the petition for a writ of mandamus.
http://opinions.1dca.org/written/opinions2009/02-19-2009/08-3835.pdf (February 19, 2009).

J.B., II v. Department of Children and Families,___ So. 2d ____, 2009 WL 331012, 34 Fla.L.Weekly D363 (Fla. 1st DCA 2009). (No. 1D08-4302) CASE REMANDED
The court quashed the judgment terminating parental rights and remanded the case for adjudication of the petition.
http://opinions.1dca.org/written/opinions2009/02-12-2009/08-4302.pdf (February 12, 2009).

Second District Court of Appeal

F.B. v. Department of Children and Family Services and Guardian ad Litem Program, ___ So. 2d ____, 2009 WL 277208 (Fla. 2nd DCA 2009).
(No. 2D08-3209) TERMINATION OF PARENTAL RIGHTS REVERSED
The father appealed the termination of his parental rights to his daughter, whom he had never seen. The court reversed the judgment because: 1) the termination order was legally insufficient because it contained only a conclusory statement that termination of the father's parental rights was in the child's manifest best interests; and 2) insufficient evidence. The father testified that he first learned that the child was dependent in December 2007 (the child was sheltered in 2006). Department failed to introduce evidence at trial to show when the father first learned of his child, what he had been doing in the intervening years, or whether he had been able to provide for the child. The trial court found that the father had abandoned the child. On appeal, the court held that the Department failed to prove that the father was able but failed to provide for the child. The court noted that it may be possible for the Department to prove abandonment by clear and convincing evidence but the evidence it presented had not

done so. The case was reversed and remanded for further proceedings. http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/February/February%2006,%202009/2D08-3029.pdf (February 6, 2009).

Third District Court of Appeal

E.K. v. Department of Children and Family Services,___ So. 2d ____, 2009 WL 249228, 34 Fla.L.Weekly D280 (Fla. 3rd DCA 2009). (No. 3D08-1931) TERMINATION OF SUPERVISION AFFIRMED AND REMANDED

The father appealed an order placing his child in permanency guardianship and terminating supervision. The trial court's oral pronouncement ordered the father and custodian to work out a visitation arrangement but the written order stated that visitation was at the discretion of the custodian. On appeal, the court affirmed the final order but remanded the case for the trial court to enter an written order consistent with the oral pronouncement.

http://www.3dca.flcourts.org/Opinions/3D08-1931.pdf (February 4, 2009).

Justice Administrative Commission v. Berry,___ So. 2d ____, 2009 WL 249231, 34 Fla.L.Weekly D272 (Fla. 3rd DCA 2009). (No. 3D08-2541) ORDERS TO PAY ATTORNEYS' FEES QUASHED

The locations of fathers in separate termination of parental rights proceedings were unknown and the fathers were served by publication. After the fathers failed to appear at their respective advisory hearings, their parental rights were terminated by consent pursuant to section 39.801(3)(d), Florida Statutes. Even though neither parent appeared in court, they were found to indigent and counsel was appointed to represent them. The orders appointing counsel were sent to the Justice Administrative Commission (JAC) and the appointed attorneys sought payment for bills, which the JAC rejected. On appeal the court agreed with the JAC that the trial court departed from the essential requirements of the law because the fathers were not properly determined to be indigent. The court noted that the statutes discuss the appointment of counsel for *indigent* parents. The court rejected arguments based on the decision SS. v. Department of Children and Families, 976 So. 2d 41 (Fla. 3rd DCA 2008) and on estoppels. The orders requiring the payment of the attorneys' fees were quashed.
http://www.3dca.flcourts.org/Opinions/3D08-2541.pdf (February 4, 2009).

Fourth District Court of Appeal

No new opinions for this reporting period.

Fifth District Court of Appeal

P.S. v. Department of Children and Families,___ So. 2d ____, 2009 WL 482280 (Fla. 5th DCA 2009). (No. 5D08-3140) CASE PLAN REQUIREMENTS UPHELD
The mother had consented to dependency of the minor children and an evidentiary hearing was subsequently held at which the court entered a "second" order of adjudication of the children as dependent due to findings of fact that the children (two sons and a step-daughter) were at risk of neglect from their father. On appeal, the court noted that section 39.507(7)(a), Florida Statutes, provides that only one order adjudicating a child dependent is to be entered. The court noted that the purpose of the evidentiary hearing should have been to determine whether the father had abused or neglected the children and not whether the children were at substantial risk of harm. The court further noted that competent substantial evidence supported the trial court's finding that the father had sexually abused his step-daughter but the evidence did not support a finding that the father had abused his sons. The court concluded that the trial court did not abuse its discretion in requiring the father to complete a case plan and that the tasks were reasonable given the sexual abuse of his step-daughter and the sporadic involvement in his sons' lives.
http://www.5dca.org/Opinions/Opin2009/022309/5D08-3140.op.pdf (February 24, 2009).

J.B. v. Department of Children and Families,___ So. 2d ____, 2009 WL 275320, 34 Fla.L.Weekly D289 (Fla. 5th DCA 2009). (No. 5D08-3701) SUMMARY REVERSAL
The court summarily reversed pursuant to Rule 9.315(b) in light of the Department's confession of error.
http://www.5dca.org/Opinions/Opin2009/020209/5D08-3701.op.pdf (February 3, 2009).

Dissolution 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

King v. Taylor, __So. 2d __, 2009 WL 277608 (Fla. 2nd DCA, February 06, 2009) (NO. 2D07-5549)
SANCTIONS; APPELLANT'S COURSE OF CONDUCT GROUNDS FOR DISMISSAL OF APPEAL
Former husband appealed a series of postjudgment orders entered to enforce a marital settlement (MSA) which was incorporated into the final judgment of dissolution of marriage. In response, former wife moved to dismiss the appeal as a sanction for former husband's

fraudulent conduct during the appeal. Appellate court commented that, "It is rare that an appellant's conduct during an appeal sinks to the level where dismissal of the appeal is appropriate," and then concluded "this is one of the rare cases in which that sanction is merited." The dispute had centered on a provision in the MSA which obligated former husband to pay a monthly amount until former wife's death. Former husband paid for four years, quit paying for two years, then paid less than half of the amount for another 1 ½ years, resulting in an arrearage in excess of $20,000.00. In response to orders entered by the trial court intending to enforce the final judgment, former husband wrote the entity responsible for distributing military retirement benefits advising them that, "for some unknown reason" former wife was ineligible for certain payments; he then created a fictitious court order and attempted to get that entity to enforce it. Following a lengthy explanation of former husband's actions, the appellate court cited Hanono v. Murphy, 723 So. 2d 892 (Fla. 3rd DCA 1998), for its holding that a party guilty of fraud or misconduct in a civil proceeding should not be permitted to continue to employ the institution it has subverted; and accordingly, dismissed former husband's appeal. http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/February/February%2006,%202009/2D07-5549.pdf (February 20, 2009).

Brewer v. Brewer, __So. 2d __, 2009 WL 416539 (Fla. 2nd DCA, February 20, 2009) (NO. 2D07-4686)

REVERSAL IS REQUIRED WHERE JUDGMENT IS INCONSISTENT WITH ORAL PRONOUNCEMENTS

Former husband appealed an order awarding former wife retroactive alimony, arguing that the award was based on calculations which differed from the oral announcements made by the trial court judge at the hearing on former wife's request for retroactive alimony. Appellate court agreed and reversed, holding that reversal is required where the final judgment is inconsistent with the trial court's oral pronouncements. Mahaffey v. Mahaffey, 614 So. 2d 649 (Fla. 2nd DCA 1993); Gallardo v. Gallardo, 593 So. 2d 522 (Fla. 3rd DCA 1991. The appellate court remanded for the trial court to recalculate the proper amount of alimony and its repayment. http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/February/February%2020,%202009/2D07-4686.pdf (February 20, 2009).

Boone v. Boone, __So. 2d__, 2009 WL 277069 (Fla. 2nd DCA, February 06, 2009) (NO. 2D07-4973)

IN ABSENCE OF TRANSCRIPT, SCOPE OF REVIEW LIMITED TO ERRORS ON FACE OF JUDGMENT; TRIAL COURT MUST MAKE SPECIFIC FINDINGS RE NEED OF ONE SPOUSE AND ABILITY OF OTHER TO PAY

Former husband appealed trial court's order which reduced, but did not terminate, his alimony obligation; appellate court reversed and remanded. After noting that in absence of a transcript,

the scope of its review was limited to error found on the face of the order, the appellate court found such error and reversed. The marriage was dissolved in 1996 with former wife then receiving $800 per month as alimony; in 2003, this amount was reduced to $500. In September 2005, former husband petitioned for modification and requested termination based on his deteriorating health; in September 2007, the trial court reduced the monthly amount from $500 to $400. The appellate court reiterated that once a spouse's entitlement to permanent alimony is established, the primary basis for setting the amount is the need of that spouse and the ability of the other spouse to pay; this same process is relied on during modification proceedings. The appellate court held that the trial court's order failed to make specific findings regarding either former wife's need or former husband's ability to pay and also found that the record did not otherwise support a finding that former husband was able to pay $400 per month; accordingly, it ordered the trial court to enter an order reducing alimony to $1 per annum.
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/February/February%2006,%202009/2D07-4973.pdf (February 06, 2009).

White v. White, __So.2d__, 2009 WL 277055 (Fla. 2nd DCA, February 06, 2009) (NO. 2D07-5013)
TRIAL COURT'S RELIANCE ON AFFIRMATIVE DEFENSE NOT RAISED AT TRIAL ABUSE OF DISCRETION
Former husband appealed an order denying his petition to either reduce or eliminate his alimony obligation based on a change in financial circumstances and the existence of a supportive relationship between former wife and a man with whom she resided. Although it found a supportive relationship existed, the trial court denied former husband's petition owing to his "unclean hands." Finding that the trial court had improperly relied on an affirmative defense (clean hands) which was neither plead nor otherwise brought before it, the appellate court concluded that the trial court had abused its discretion; accordingly, the appellate court reversed and remanded for entry of an order consistent with the finding regarding the supportive relationship and either reducing or terminating former husband's alimony obligation.
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/February/February%2006,%202009/2D07-5013.pdf (February 06, 2009).

Third District Court of Appeal

Walker v. Walker, __ So. 2d __, 2009 WL 321612 (Fla. 3rd DCA, February 11, 2009) (NO. 3D08-2183)
DISMISSAL OF APPEAL FOR LACK OF JURISDICTION; UNTIMELY FILING OF NOTICE OF APPEAL

Appellate court dismissed for lack of jurisdiction following an untimely appeal by former wife. After recounting the events preceding the filing of the notice of appeal, the appellate court held that under the facts before it, which indicated all parties were aware of the date the order on appeal was rendered, and where there was no showing of either mistake or excusable neglect, that vacating and re-entering the order to toll the time for appeal was not authorized. http://www.3dca.flcourts.org/Opinions/3D08-2183.pdf (February 11, 2009).

Symons v. Symons, __So. 2d __, 2009 WL 249110 (Fla. 3rd DCA, February 04, 2009) (NO. 3D07-2737)
FAILURE TO LIST ITEM AS MARITAL ASSET DOES NOT RESULT IN WAIVER OF CLAIM TO THAT ASSET
Both former husband and wife appealed the amended final judgment of dissolution of marriage; appellate court reversed and remanded on the issue of distribution of property. A premarital contract drafted by the former spouses provided for division of household goods in the event of a dissolution. Former wife identified art, jewelry, and a piano as marital assets; former husband did not list these items. The trial court found that by not listing the items, former husband had waived any claim to them and awarded the items to former wife. Former husband moved for rehearing and for the court to divide the goods pursuant to the contract; the trial court denied the motion because the issue had not been raised at trial. The appellate court held that it was "unaware of any rule that when one party lists a marital asset and the other party fails to list the same asset in his or her financial affidavit, this results in an automatic waiver of any claim by the party who failed to list the asset."
http://www.3dca.flcourts.org/Opinions/3D07-2737.pdf (February 04, 2009).

Fourth District Court of Appeal

Carter v. Carter, __So. 2d __, 2009 WL 249210 (Fla. 4th DCA, February 04, 2009) (NO. 4D08-3756) REQUEST TO PRODUCE; WHEN PRIVATE FINANCIAL INFORMATION REMAINS PRIVATE
Subsequent to former wife having filed a petition for dissolution of marriage, both former husband and wife, in the presence of their counsel, entered into a handwritten settlement agreement resolving their financial and custody issues; however, a final judgment incorporating the agreement was never entered. Flash forward two years: former wife, having retained new counsel, served a request to produce on former husband and sought to set aside the settlement agreement, based in part on allegations that former husband had made fraudulent disclosures of his income on the financial affidavit. Question before the appellate court was whether the trial court should have ordered former husband to comply with former wife's request to produce. Appellate court concluded that until such time as the trial court invalidated the

settlement agreement, former husband's private financial information should remain private; accordingly, it quashed the order directing discovery.
http://www.4dca.org/opinions/Feb%202009/02-04-09/4D08-3756.op.pdf (February 04, 2009).

Fifth District Court of Appeal

No new opinions for this reporting period.

Domestic Violence Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

Miller v. State, --- So.2d ----, 2009 WL 485024 (Fla. 1st DCA 2009) AGGRAVATED STALKING CONVICTION REVERSED DUE TO JURY INSTRUCTIONS The trial court gave an additional special instruction that stated that malice may be inferred when a defendant disregards an injunction for protection against domestic violence pursuant to 784.048(4), Florida Statutes. The trial court therefore instructed the jury that it could find the defendant guilty of acting maliciously even if it found only that he acted in disregard of an injunction. The special instruction effectively eliminated the element of malice that the State had the burden to prove. The statute requires more than simple disregard of an injunction. The appellate court reversed the aggravated stalking conviction and sentence, and remanded the case for retrial on the aggravated stalking count under the revised standard instructions.
http://opinions.1dca.org/written/opinions2009/02-27-2009/07-5428.pdf (February 27, 2009).

Second District Court of Appeal

J.C. v. Department of Children and Family Services, --- So.2d ----, 2009 WL 454580 (Fla. 2d DCA 2009) ALLEGED DOMESTIC VIOLENCE DID NOT SUPPORT FINDING OF TERMINATION OF PARENTAL RIGHTS The appellate court reversed a termination of parental rights decision because DCF did not prove a ground for termination by clear and convincing evidence. Although not the primary issue, the court determined that the alleged domestic violence in this case did not support termination of parental rights under s. 39.806(1)(c), Florida Statutes. The children were not adjudicated dependent based on the alleged domestic violence, and DCF did not establish that the alleged domestic violence harmed the children or threatened their lives, safety, or health. According to the facts, the children were not present when the alleged domestic violence occurred and there was no evidence that they were otherwise aware of it. The court further determined that termination under s. 39.806(1)(c) was not appropriate because DCF did not demonstrate a nexus or predictive relationship between the past domestic violence and future harm to the children. The court also noted that there was no testimony

that stated that the alleged domestic violence could not be remedied with the provision of services.
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/February/February%2025,%202009/2D08-1409%20%20-1416.pdf (February 25, 2009).

Third District Court of Appeal

No new opinions for this reporting period.

Fourth District Court of Appeal

Cocco v. Pritcher, --- So.2d ----, 2009 WL 321580 (Fla. 4th DCA 2009) MALPRACTICE IN CRIMINAL VIOLENCE DOMESTIC VIOLENCE RELATED CASES Cocco was charged with domestic battery of his girlfriend. The criminal court issued a written no contact order as a condition of Cocco's bond. In addition, a civil restraining order for protection against domestic violence was issued by a different court. This restraining order prohibited Cocco from having any contact with his girlfriend. The criminal court later revoked Cocco's bond because of allegations that he had contact with his girlfriend in violation of the conditions of his bond. He subsequently pled guilty to the domestic violence battery charge and was adjudicated guilty. In 2006, he obtained an agreed order exonerating him from that conviction because there was no factual basis for the domestic nature of the charge. In place of the domestic battery charge he pled guilty to simple battery. In 2007, Cocco sued his attorney for legal malpractice arising out of both the criminal and the civil injunction cases. The trial court dismissed the counts of Cocco's malpractice action in which he alleged malpractice arising out of the criminal case against him because he could not show that the underlying criminal case had been finally disposed of in his favor. The appellate court held that it was error, however, for the trial court to dismiss the portion of Cocco's complaint in which he alleged that his attorney committed malpractice in connection with the civil injunction case. Cocco did not need to meet the exoneration requirement in the counts of his complaint dealing with the civil injunction because that requirement applies only to legal malpractice cases arising out of criminal cases. However, the appellate court noted that Cocco could maintain that portion of the legal malpractice action only insofar as he can show that he suffered damages that arose solely from the civil injunction. He may not get around the exoneration requirement by recovering damages that arose both from the criminal case and from the civil injunction.
http://www.4dca.org/opinions/Feb%202009/02-11-09/4D08-1083.op.pdf (February 11, 2009).

Fifth District Court of Appeal

No new opinions for this reporting period.