

OSCA/OCI'S FAMILY COURT CASE LAW UPDATE
February 2010

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Delinquency Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

N.S. v. State, __ So.3d __, 2010 WL 547155 (Fla. 1st DCA 2010). [RESTITUTION ORDER WAS REVERSED BECAUSE THE TRIAL COURT FAILED TO OBTAIN A WRITTEN WAIVER OF COUNSEL AS REQUIRED BY FLORIDA RULE OF JUVENILE PROCEDURE 8.165](#). The juvenile appealed from a final disposition order which withheld adjudication of delinquency and a restitution order requiring restitution in the amount of \$5,217.49. The First District Court of Appeal found that although the trial court advised the juvenile at the disposition hearing (at which the state presented its restitution evidence) of his right to have counsel appointed, the trial court failed to obtain the necessary written waiver as required by Florida Rule of Juvenile Procedure 8.165(a). Further, there was no indication that the juvenile discussed the pros and cons of waiver with his counsel or with his mother, who was the only qualified adult present at the hearing. Lastly, the juvenile's mother did not verify in writing that she had discussed waiving counsel with the juvenile or that his decision to do so appeared to her to be knowing and voluntary as required by Florida Rule of Juvenile Procedure 8.165(b) 3. The First District found that because the trial court had withheld adjudication, placed the juvenile on probation and subsequently entered an order terminating his supervision, reversal of the final disposition order was not warranted. Therefore, only the restitution order was reversed and remanded for a new restitution hearing.

<http://opinions.1dca.org/written/opinions2010/02-18-2010/08-2630.pdf> (February 18, 2010).

Second District Court of Appeal

S.G. v. State, __ So.3d __, 2010 WL 476636 (Fla. 2d DCA 2010). [DISPOSITION ORDER REVERSED AND REMANDED FOR FURTHER PROCEEDINGS IN ACCORDANCE E.A.R. V. STATE, 4 SO.3D 614 \(FLA.2009\)](#). The juvenile appealed his disposition into a moderate-risk detention facility rather than the low-risk facility recommended by the Department of Juvenile Justice (DJJ). The juvenile was on juvenile probation when he committed a new offense. The juvenile admitted both the new offense and the resulting probation violation. The DJJ recommended that the juvenile should be continued on probation, but the trial court committed him to a low-risk facility. The juvenile did not challenge that placement. While awaiting placement to a low-risk facility, the juvenile was placed on in-home detention. The juvenile subsequently violated the detention order by being absent from his home. At a hearing to reevaluate the juvenile's placement, the State asked that the juvenile be sent to a moderate-risk facility. The DJJ recommended that he continue with the low-risk commitment status. The trial court committed the juvenile to a moderate-risk facility. The trial court's stated reason for doing so was: "if you can't follow the preplacement supervision that tells me that you need a more restrictive program...." The Second District Court of Appeal found that the circuit court's brief explanation did not meet the legal standard enunciated in E.A.R. Further, the Second District also questioned whether the

circuit court's brief explanation was supported by a preponderance of the evidence. Accordingly, the Second District reversed and remanded for further proceedings in accordance with E.A.R. The Second District reiterated that if on remand the court again elects to depart from the DJJ's placement recommendation, its reasons for doing so must be supported by a preponderance of the evidence.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2010/February/February%2012,%202010/2D08-4653.pdf (February 12, 2010).

A.R. v. State, __ So.3d __, 2010 WL 478014 (Fla. 2d DCA 2010). **THE ORIGINAL DISPOSITION ORDER WAS REMANDED TO THE TRIAL COURT FOR ENTRY OF NEW DISPOSITION ORDERS AS TO EACH CASE AS REQUIRED BY FLORIDA RULE OF JUVENILE PROCEDURE 8.115(C).** The juvenile appealed from the order adjudicating him delinquent for aggravated assault, trespass, and disorderly conduct; and committing him to a high-risk residential facility. The original commitment order adjudicated the juvenile delinquent and committed him to the Department of Juvenile Justice (DJJ) for offenses committed in two separate cases. The juvenile filed a motion to correct disposition error pursuant to Florida Rule of Juvenile Procedure 8.135(b)(2). The juvenile argued that the trial court erred in not entering separate disposition orders as to each offense. The trial court entered amended orders of commitment reflecting the juvenile's delinquency adjudication and commitment for aggravated assault and trespass in one case and disorderly conduct in the other case. However, the trial court did not enter its amended orders until more than thirty days after the juvenile's motion was filed. Rule 8.135(b)(2)(B) refers to rule 8.135(b)(1)(B) and provides that if no order ruling on the motion is filed within 30 days of the filing of the motion, the motion shall be deemed denied. Thus, the amended orders were nullities. Accordingly, the Second District Court of Appeal affirmed the adjudication and disposition without comment, but reversed the original disposition order and remanded to the trial court for entry of new disposition orders as to each case as required by Florida Rule of Juvenile Procedure 8.115(c).

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2010/February/February%2012,%202010/2D08-5250.pdf (February 12, 2010).

Third District Court of Appeal

E.J v. State, __ So.3d __, 2010 WL 445726 (Fla. 3d DCA 2010). **THE THIRD DISTRICT AFFIRMED THE TRIAL COURT'S ORDER REVOKING THE JUVENILE'S PROBATION.** The juvenile entered a plea of nolo contendere to several charges and an adjudication of delinquency was withheld. Based upon the juvenile's plea, the State nolle prossed numerous other counts and the juvenile was placed on probation. Thereafter, a probation affidavit was filed, alleging that the juvenile violated his probation by: failing to reside in the home of his mother; violating his curfew; failing to attend school; and failing to appear for his scheduled intake at the Dade Marine Institute. The trial court found that the State proved by a preponderance of the evidence each of the violations alleged in the affidavit, and adjudicated the juvenile delinquent. The Third District Court of Appeal found that the trial court erred in finding that the juvenile violated his probation by failing to reside with his mother or to attend school. A review of the probation orders reflected that the juvenile was not advised that as a condition of his probation he must

live with his mother and regularly attend school. The probation order specified that the juvenile live and reside in the home of "parent(s)." The juvenile testified that he lived and resided with his father when he did not live with or reside with his mother. Because his testimony was unrefuted and the probation order did not require that he live with and reside in only his mother's home, the trial court erred when it included this ground as one of the conditions of probation the juvenile violated. Likewise, while the probation order specifically listed attending school every day as a condition of probation, this condition, unlike many of the other listed conditions of probation contained in the order, was not checked off, thereby inferring that the trial court did not intend to make school attendance a condition of the juvenile's probation.

The Third District recognized that general conditions of probation explicitly authorized or mandated by Florida Statutes need not be orally pronounced at sentencing. However, where, as here, a juvenile probationer is given a form order of probation and some of the conditions are checked off and others are not, it is unclear that the probationer was being required to comply with the unchecked conditions. Although the trial court erred by finding that the juvenile violated his probation by failing to reside in his mother's home and by not regularly attending school, the Third District affirmed the portion of the trial court's order finding that the juvenile willfully violated his probation by failing to comply with his curfew and by failing to attend the scheduled intake appointment for the Dade Marine Institute. The Third District found that these violations were proven by a preponderance of the evidence. Because failure to report to the Dade Marine Institute is a substantial violation of the juvenile's probation, and this violation alone was sufficient to sustain a revocation of his probation, remand for reconsideration by the trial court was not required. Accordingly, the Third District affirmed the trial court's order revoking the juvenile's probation.

<http://www.3dca.flcourts.org/Opinions/3D09-1597.pdf> (February 10, 2010).

Fourth District Court of Appeal

F.E.H. v. State, __ So.3d __, 2010 WL 624193 (Fla. 4th DCA 2010). **CONVICTION FOR POSSESSION OF CANNABIS REVERSED AND REMANDED WHERE THE INTERACTION WITH THE DETECTIVE WAS NOT A CONSENSUAL ENCOUNTER.** Late at night, a detective saw the juvenile and another male standing in the parking lot of a closed daycare center. The detective got out of his car to investigate why the pair was on the property. At the same time, four or five other officers jumped out of their vehicles and walked past the juvenile to focus on other persons. When the juvenile walked away from the parking lot, the detective called him back. The area was a high narcotics area, so the detective asked the juvenile, "Is there anything I should know about? Is there anything on you I need to know about?" The juvenile responded, "Yes, I have a bag of marijuana," and handed it to the detective. The juvenile moved to suppress the seizure of the marijuana. The trial court denied the motion, holding that the stop was a consensual encounter and that the juvenile's responses to the detective's questions were voluntary. The juvenile entered a plea of no contest to possession of less than 20 grams of cannabis and reserved the right to appeal the issue in a motion to suppress. On appeal, the Fourth District Court of Appeal found that the interaction between the juvenile and the detective was not a consensual encounter because, under the circumstances, a reasonable person would not have believed that he was free to disregard the order of a detective and leave the area. Therefore,

the stop and subsequent search violated the Fourth Amendment. In the instant case, the detective stated that when he saw appellant walk down the street, "that's when I got out of my car and I called out to him." The juvenile testified that the detective said, "Yo, come here" and that the detective "told me to come here." The juvenile did not feel free to disobey that directive, because he knew the detective was an officer in the middle of a police sweep involving other officers. A police action involving a number of officers is a fact that can influence a person's perception that he is not free to ignore an officer's command. In this case, the convergence of the police officers combined with the detective's order created a display of authority sufficient to convince a reasonable juvenile that he had no choice but to comply with the detective's direction. Lastly, the Fourth District rejected the State's alternative argument that the detective had reasonable suspicion to make an investigatory stop of appellant for trespassing. The parking lot where appellant was standing was an open parking lot on a corner, and people walking down the street often cut the corner by walking through the unenclosed lot. The state did not present sufficient evidence that the lot was "posted" within the meaning of subsections 810.09(1) (a) and 810.011(5) (a), F.S. (2008). The Fourth District reversed the conviction and remanded to the circuit court to discharge the juvenile.

<http://www.4dca.org/opinions/Feb%202010/02-24-2010/4D09-740.op.pdf> (February 24, 2010).

J.T.F. v. Housel, Superintendent, Regional Juvenile Detention Center, St. Lucie County, ___ So.3d ___, 2010 WL 366601 (Fla. 4th DCA 2010). **JUVENILE COMMITTED TO MODERATE-RISK RESIDENTIAL PROGRAM COULD ONLY BE HELD IN SECURE DETENTION FOR A TOTAL OF 15 DAYS WHILE AWAITING PLACEMENT.** The juvenile filed a petition for writ of habeas corpus seeking his immediate release from secure detention. The juvenile alleged he was illegally detained because the trial court impermissibly stacked his detention in violation of s. 985.27(1) (b), F.S. (2007). The disposition order was entered on October 26, 2009. The juvenile was placed on home detention while awaiting placement in a moderate-risk residential program. The juvenile then twice violated his home detention, and was permissibly ordered to be held in secure detention for five days for each occurrence. Following those violations, the trial court ordered the juvenile held for additional time in secure detention until December 14, 2009. The Fourth District Court of Appeal held that pursuant to s. 985.27(1) (b), F.S. (2007), the trial court could not order the juvenile, who had already been held in secure detention for ten days, held in secure detention for more than five additional days. While the petition was pending, the juvenile was transferred to a moderate-risk commitment program on November 24, 2009. Had the juvenile not been transferred, his petition for habeas corpus relief would have been granted. However, since the petition was rendered moot by the transfer, the Fourth District denied the petition.

<http://www.4dca.org/opinions/Feb%202010/02-03-2010/4D09-4708.op.pdf> (February 3, 2010).

Fifth District Court of Appeal

S.G. v. State, __ So.3d __, 2009 WL 667956 (Fla. 5th DCA 2009). [TRIAL COURT ERRED IN APPLYING THE TRANSFERRED INTENT DOCTRINE TO ENHANCE THE SEVERITY OF THE JUVENILE'S CRIME](#). The juvenile was charged with committing battery in violation of s. 784.03, F.S. (2008), a first degree misdemeanor. The State sought to reclassify the charge to a third degree felony pursuant to s. 784.081(2), F.S. (2008) based on the fact that the victim of the crime was a school employee. The juvenile testified that she was engaged in a verbal altercation with another student. A school employee attempted to escort the other student out of the classroom. As the employee was removing the other student, the juvenile threw a stapler in the student's direction with the intent to strike the student. However, the stapler struck the employee. The juvenile argued that the simple battery charge could not be reclassified as a felony absent proof of her specific intent to strike the victim. The trial court disagreed and found the juvenile guilty of battery on a school employee. The Fifth District Court of Appeal found that the doctrine of transferred intent transfers the defendant's intent as to the intended victim to the unintended victim. However, Florida courts have expressly held that the transferred intent doctrine is inapplicable to enhance the severity of a crime against an unintended victim. Accordingly, the Fifth District held that the State properly conceded that the trial court reversibly erred in reclassifying the juvenile's battery conviction from a first degree misdemeanor to a third degree felony and reversed.

<http://www.5dca.org/Opinions/Opin2010/022210/5D09-2203.op.pdf> (February 26, 2010).

B.C v. State, __ So.3d __, 2009 WL 667958 (Fla. 5th DCA 2009). [DECISION ON WHETHER A SENTENCE SHOULD BE CONCURRENT OR CONSECUTIVE IS WELL WITHIN THE COURT'S TRADITIONAL DISCRETION AND IS NOT PROHIBITED BY E.A.R. V. STATE, 4 SO.3D 614 \(FLA.2009\)](#). The juvenile appealed his adjudication of delinquency and his commitment to a high-risk residential facility. The juvenile was charged with battery upon a district school board employee and disruption or interference with an educational institution, both of which occurred while he was already in a high-risk facility for prior crimes. The juvenile pled guilty to the charges. The Department of Juvenile Justice (DJJ) recommended that the juvenile be committed to a concurrent high-risk program followed by direct release. At the sentencing, the trial judge agreed with the State that sentencing the juvenile to a concurrent term would send a message to others in the high-risk commitment program that there are no consequences for committing a new offense while already placed in a high-risk facility. The trial court ordered the juvenile's commitment to the high-risk commitment program be consecutive, not concurrent. The juvenile's appellate counsel filed a motion for correction of the disposition order because the trial court failed to provide reasons for its departure from the recommendation of the DJJ. In denying this motion, the trial court found that it sentenced the juvenile at the same level recommended by the DJJ and the decision on whether a sentence should be concurrent or consecutive with a previously imposed sentence is well within the Court's traditional discretion and is not prohibited by E.A.R. v. State, 4 So.3d 614 (Fla.2009). On appeal, the juvenile argued that the trial court erred by sentencing him to consecutive terms, contrary to the recommendation of the DJJ. The Fifth District Court of Appeal agreed with the succinct conclusion of the trial court below and affirmed.

<http://www.5dca.org/Opinions/Opin2010/022210/5D09-2474.op.pdf> (February 26, 2010).

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

E.M. v. Department of Children and Family Services, ___ So. 3d ____, 2010 WL 624141 (Fla. 3d DCA 2010). [CITATION OPINION](#)

By citation opinion, the district court per curiam affirmed termination of the father's parental rights. <http://www.3dca.flcourts.org/Opinions/3D09-1988.pdf> (February 24, 2010).

M.S. v. Department of Children and Family Services, ___ So. 3d ____, 2010 WL 364115, 35 Fla. L. Weekly D318 (Fla. 3d DCA 2010). [CITATION OPINION](#)

By citation opinion, the district court per curiam affirmed the trial court.

<http://www.3dca.flcourts.org/Opinions/3D09-2202.pdf> (February 3, 2010).

Fourth District Court of Appeal

L.M.B. v. Department of Children and Families, ___ So. 3d ____, 2010 WL 624212 (Fla. 4th DCA 2010). [PARENT HAS RIGHT TO PRESENT EVIDENCE AT SHELTER HEARING](#)

The district court denied a mother's petition for a writ of certiorari which sought to quash an order that sheltered her three year-old child with the father. The trial court had conducted a shelter hearing but had refused to allow the mother to present evidence on regarding the issue of removal, instead determining probable case based on the "four corners" of the shelter petition. The district court found that the trial court's refusal was a departure from the essential requirements of the law. However, the court also noted that the mother had subsequently consented to an adjudication of dependency of the child and that ordering a new shelter hearing would be ineffectual. The court therefore withheld issuance of the writ but issued an opinion because the issue was capable of repetition yet evading review. The court analyzed the pertinent statutory and rule provisions and sections and noted that if a parent is not permitted to be heard at the shelter hearing, and the only the Department's evidence is considered, the hearing would be a "pointless formality" which is not what the statute and rule contemplate. The court acknowledged the concern of trial courts as to the time required to

conduct evidentiary shelter hearings but noted, without deciding, that in some circumstances the right to present evidence at the shelter hearing maybe be satisfied by providing sufficient notice and permitting the parent or guardian an opportunity to present evidence in the form of affidavits.

<http://www.4dca.org/opinions/Feb%202010/02-24-2010/4D09-3088.op.pdf> (February 24, 2010).

C.A. v. Department of Children and Families, ___ So. 3d ____, 2010 WL 532820 (Fla. 4th DCA 2010). **PERMANENT GUARDIANSHIP REVERSED AND REMANDED**

The district court reversed an order placing a thirteen year-old child in a permanent guardianship with her maternal grandparents and remanded the case for the child to be reunified with the mother. The trial court had placed the child with the grandparents based on the mother's failure to complete her case plan. However, the district court had heard a previous appeal in the same case in which it noted that a parent's non-compliance with a case plan is not a statutory ground for placement of a child in a permanent guardianship, although it was relevant factor to the court's inquiry regarding the parent's fitness to care for the child and whether reunification is possible. (<http://www.4dca.org/opinions/Aug%202008/08-27-08/4D08-1297.op.pdf>) The mother's case plan required her to obtain individual and family counseling; undergo psychological, substance abuse, and psychiatric evaluations; attend parenting classes; obtain stable housing and income; and complete a medical evaluation to evaluate non-narcotic alternatives. The mother completed all of the tasks except for individual and family counseling. In addition, the mother had not sufficiently complied with a requirement to produce a prescription log. Subsequent to the district court's previous remand of the case, the mother completed her medical evaluation and the evaluator concluded that the mother's pain medication regimen was appropriate and recommended that the mother continue. The Guardian ad Litem recommended reunification of the child with the mother. On appeal, the district court observed that the Department has the burden of proof that reunification of the child with the parent would endanger the child and further noted that the trial court made no findings that reunification would endanger the child nor was there competent substantial evidence in the record. Due to the protracted proceedings, the court declined to remand the case to permit what it felt was delay in permanency. Therefore the court reversed the order placing the child in permanent guardianship and remanded the case for reunification of the child with the mother under the Department's supervision.

<http://www.4dca.org/opinions/Feb%202010/02-17-2010/4D09-3578.op.pdf> (February 17, 2010).

Fifth District Court of Appeal

C.K. v. Department of Children and Families, ___ So. 3d ____, 2010 WL 668014 (Fla. 5th DCA 2010). **REVERSED AND REMANDED BASED ON CONFESSION OF ERROR**

Based on the appellee's confession of error, the district court reversed and remanded the trial court's order closing dependency case and terminating supervision.

<http://www.5dca.org/Opinions/Opin2010/022210/5D09-2901.op.pdf> (February 25, 2010).

Justice Administrative Commission v. Gayden, ___ So. 3d ____, 2010 WL 475204, 35 Fla. L. Weekly D362 (Fla. 5th DCA 2010). [JUSTICE ADMINISTRATIVE COMMISSION ENTITLED TO OPPORTUNITY TO BE HEARD ON ATTORNEY'S FEES](#)

The district court granted a petition for a writ certiorari sought by the Justice Administrative Commission ("JAC") to quash an order awarding attorney's fees to a lawyer representing the mother in a termination of parental rights proceeding. The attorney was appointed to represent the mother in a dependency case and was paid \$1,000 for her representation. The attorney's involvement would have then ended except that the Department filed a petition to terminate the mother's parental rights. The mother was personally served but failed to appear at the advisory hearing. The court appointed the same attorney to represent the mother with regard to termination of the mother's parental rights and the attorney argued on the mother's behalf. The trial court terminated the mother's parental rights based on the mother's failure to appear at the hearing. The attorney then submitted a bill for \$1,000 for representation in the termination proceeding and the JAC objected, instructing the attorney to note to the court the JAC's objection along with a request for a hearing. The attorney petitioned the trial court for attorney's fees, noted the JAC's objection, and requested a hearing. However, the trial court entered an order directing the JAC to pay the attorney the \$1,000 without holding a hearing. In reviewing the petition for certiorari, the district court recounted the JAC's authorization to pay fees and noted its entitlement to participate in proceedings related to those fees. The trial court's failure to provide the JAC an opportunity to be heard constituted a departure from the essential requirements of the law. The court therefore quashed the order awarding attorney's fees. <http://www.5dca.org/Opinions/Opin2010/020810/5D09-3053.op.pdf> (February 12, 2010).

R.T. v. Department of Children and Families, ___ So. 3d ____, 2010 WL 475184, 35 Fla. L. Weekly D363 (Fla. 5th DCA 2010). [PERMANENT GUARDIANSHIP ORDER REMANDED FOR FACTUAL FINDINGS](#)

The father appealed an order terminating protective supervision over his daughter and placing the child in the permanent guardianship of her older half-brother. Although the record contained sufficient evidence to support the trial court's ruling, the district court reversed and remanded the case for entry of an order containing factual findings regarding the issue of reunification to comply with the statutory requirements in section 39.6221, Florida Statutes. The district court noted that section 39.6221, Florida Statutes requires written findings by the trial court to support placement of a child in a permanent guardianship, including an explanation of why the parent is not fit to care for the child. The court agreed with the father, that the order on appeal failed to comply with the statutory requirement. The order's findings were legally insufficient because they did not refer to specific findings of fact set forth in the dependency order nor did it contain separate findings of fact on the issue of reunification. <http://www.5dca.org/Opinions/Opin2010/020810/5D09-2130.op.pdf> (February 8, 2010).

R.G. v. Department of Children and Families, ___ So. 3d ____, 2010 WL 522813 (Fla. 5th DCA 2010). **REVERSED AND REMANDED BASED ON CONFESSION OF ERROR**

Based on the appellee's confession of error, the district court reversed and remanded the trial court's order terminating the father's parental rights.

<http://www.5dca.org/Opinions/Opin2010/020110/5D09-3869.op.pdf> (February 5, 2010).

Dissolution Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

Mistretta v. Mistretta, __So.3d__, 2010 WL (Fla. 1st DCA 2010).

TRIAL COURT ERRED IN ORDERING REHEARING BASED ON ECONOMIC RECESSION.

Former wife appealed the trial court order for a rehearing on all issues; appellate court reversed and remanded. At issue was whether the trial court erred in deciding to revisit equitable distribution of property due to the economic recession. The final judgment, issued in August 2008, relied on October 2007 as the date for valuing assets. In April 2009, the trial court ordered a rehearing due to an unforeseen downturn in the economy at the time of the final hearing in April 2008. With regard to the shifting economic conditions, the appellate court held that a "cloudy crystal ball is no basis for a new trial" and commented that the recession tended to prove a change in circumstances. This case contains a dissent opining that the trial court did not err in deciding to open up judgment.

<http://opinions.1dca.org/written/opinions2010/02-18-2010/09-2049.pdf> (February 18, 2010).

Jonsson v. Dickinson, __So.3d__, 2010 WL (Fla. 1st DCA 2010).

LUMP SUM ALIMONY AWARD AFFIRMED BY THE APPELLATE COURT WHERE IT WAS ACTUALLY INTENDED AS AN EQUITABLE AWARD TO REIMBURSE FORMER WIFE FOR PREMARITAL FUNDS INVESTED IN THE MARITAL HOME WHICH WAS FORECLOSED ON DUE TO FORMER HUSBAND'S FAILURE TO PAY THE MORTGAGE.

Appellate court affirmed all portions of the final judgment of dissolution of marriage, including one ordering former husband to pay \$30,000 as lump sum alimony, reasoning that because that payment was intended to reimburse former wife for premarital funds she had invested in the marital home and the home had been foreclosed on due to former husband's failure to pay the mortgage, the award was actually an equitable award for which the court found support within the record.

<http://opinions.1dca.org/written/opinions2010/02-12-2010/09-5311.pdf> (February 12, 2010).

Connors v. Mullins, __ So. 3d __, 2010 WL 445673, (Fla. 1st DCA 2010).

TRIAL COURT'S FOCUS ON HOW IT WOULD HAVE RULED ON THE ISSUE OF RELOCATION IF FORMER WIFE RELOCATED WAS MISPLACED AS THE RELOCATION HAD ALREADY OCCURRED; FOCUS SHOULD HAVE BEEN ON WHETHER THE ACTUAL RELOCATION WAS IN THE CHILD'S BEST INTEREST.

Former wife appealed a final judgment of dissolution of marriage; appellate court agreed with her that the trial court relied on an incorrect legal standard when it ordered her to return with the couple's child. The appellate court held that the trial court's focus on how it would have ruled on the issue of relocation if former wife were to move out of state was misplaced.

Because the relocation had already occurred when the former husband's petition for relief was filed, the focus should have been on whether the actual relocation was in the child's best interest pursuant to the factors enumerated in section 61.13001(7), Florida Statutes.

Accordingly, the appellate court reversed and remanded for the trial court to reconsider the relocation issue.

<http://opinions.1dca.org/written/opinions2010/02-10-2010/09-2292.pdf> (February 10, 2010).

Seawell v. Hargarten, __ So.3d __, 2010 WL 445624, (Fla. 1st DCA 2010).

TRIAL COURT CANNOT MODIFY PROPERTY SETTLEMENT INCORPORATED INTO THE FJ OF DOM, PROPERTY RIGHTS ESTABLISHED BY FJ OF DOM ARE FIXED AS A MATTER OF LAW UNLESS THE TRIAL COURT EXPRESSLY RESERVES JURISDICTION; WHEN A FJ CALLS FOR TRANSFER OF ASSETS, THE SPOUSE IN POSSESSION OF THE ASSETS IS RESPONSIBLE FOR EFFECTUATING THE TRANSFER; FAILURE TO DO SO MAY RESULT IN AWARD OF ECONOMIC DAMAGES TO THE OTHER SPOUSE.

Former wife appealed the trial court's order denying her motion to enforce the parties' consent final judgment. At issue was whether the trial court had erred when it ordered former husband to transfer 100% of shares in a mutual fund, which had depreciated in value, to satisfy former husband's financial obligations; former wife had argued that former husband should have transferred 50% of the shares prior to depreciation in addition to making a cash payment.

Former husband partially satisfied his debts; his plan was to transfer a higher percentage of the stock to former wife in an attempt to satisfy the remaining debt. Although the trial court ordered former husband to transfer 100% of the shares and pay the balance in cash, the appellate court held that a property settlement agreement that has been incorporated into a final judgment of dissolution cannot be modified regardless of either spouse's financial position. Furthermore, the appellate court held that when property rights have been established by a final judgment of dissolution, they are fixed as a matter of law unless the trial court expressly reserves jurisdiction. The appellate court stated that when the final judgment provides for transfer of assets, it is the responsibility of the spouse in possession of the assets to effectuate a transfer; therefore, the appellate court ordered the trial court on remand to award economic damages to former wife resulting from former husband's failure to comply with the final judgment.

<http://opinions.1dca.org/written/opinions2010/02-10-2010/09-2602.pdf> (February 10, 2010).

Second District Court of Appeal

Norris v. Norris, __ So.3d __, 2010 WL (Fla. 2d DCA 2010).

ENTERING A FINAL JUDGMENT OF DISSOLUTION WITHOUT EXPRESSLY STATING THAT THE MARRIAGE BETWEEN THE PARTIES IS DISSOLVED IS RISKY BUSINESS.

Trial court's order which had approved the general magistrate's report and recommendations was appealed. Appellate court affirmed, but cautioned the trial court that entering an order approving a general magistrate's report and recommendations without stating that the marriage between the parties is dissolved is risky. The appellate court advised the trial court that parties to a dissolution should receive a final judgment, signed by a circuit judge, expressly stating that their marriage is dissolved.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2010/February/February%2024,%202010/2D08-6420.pdf (February 24, 2010).

Drew v. Drew, __ So.3d __, 2010 WL 569849, (Fla. 2d DCA 2010).

TRIAL COURT ERRED BY NOT INCLUDING FORMER HUSBAND'S REGULAR AND CONTINUOUS BONUSES WHEN CALCULATING HIS INCOME FOR PURPOSES OF ALIMONY AND CHILD SUPPORT.

Former wife appealed an amended final judgment of dissolution of marriage arguing that the trial court erred by not including former husband's annual bonus income in calculating his income for purposes of alimony and child support; appellate court agreed and accordingly reversed. The appellate court held that pursuant to Section 61.30(2), Florida Statutes, a trial court must consider bonuses when calculating a spouse's income for purposes of child support; pursuant to Section 61.08(2)(g), a trial court must consider "all sources of income available to either party" when determining the amount of an alimony award. Reiterating that a trial court may not exclude from its consideration bonuses which are regular and continuous, and noting that in this case former husband had received bonuses for the preceding nine years, the appellate court concluded that the trial court had erred in not taking the bonuses into account.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2010/February/February%2019,%202010/2D08-3330.pdf (February 19, 2010).

George v. George, __ So.3d __, 2010 WL (Fla. 2d DCA 2010).

APPELLATE COURT AFFIRMED TRIAL COURT'S NONFINAL ORDER BUT ENCOURAGED IT TO BRING CLOSURE IN EVENT TEMPORARY AWARDS PROVED EITHER EXCESSIVE OR UNNECESSARY.

Former husband appealed a nonfinal order almost doubling former wife's temporary alimony due to her undergoing treatment for a serious illness affecting her ability to work. Although the appellate court affirmed the order, it cautioned the trial court to bring the case to closure in the event the temporary award proved to have been either unnecessary or too high leaving the trial court with limited options with regard to making equitable adjustments in the final judgment.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2010/February/February%2019,%202010/2D09-2907.pdf (February 19, 2010).

Halbert v. Morico, __ So.3d __, 2010 WL 476692, (Fla. 2d DCA 2010).

TRIAL COURT ABUSED ITS DISCRETION IN MODIFYING ROTATING CUSTODY AGREEMENT.

Former husband appealed an order modifying the rotating custody agreement of the final judgment to provide that the former couple's 14 year old son reside primarily with former wife during the school week. Appellate court agreed with former husband that the trial court had abused its discretion in finding that a substantial change in circumstances had occurred; the evidence presented at the hearing was insufficient to support the modification. Although former husband had changed jobs and relocated, his new home was only 45 miles from former wife's home. The appellate court held that there was no evidence that former husband's move would cause "significant interference" with former wife's time with their son.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2010/February/February%2012,%202010/2D09-2210.pdf (February 12, 2010).

Arias v. Arias, __ So.3d __, 2010 WL 446889, (Fla. 2d DCA 2010).

ABSENCE OF EITHER A TRANSCRIPT OR A STATEMENT OF EVIDENCE AND PROCEEDINGS PRECLUDES APPELLATE REVIEW.

Appellate court held that former husband's failure to provide either a transcript of the final hearing or a statement of the evidence and proceedings precluded appellate review.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2010/February/February%2010,%202010/2D09-194.pdf (February 10, 2010).

Palumbo v. Butler, __ So.3d __, 2010 WL (Fla. 2d DCA 2010).

ANNUAL GIFTS TO FORMER HUSBAND FROM HIS MOTHER FOR CHILDREN'S TUITION SHOULD NOT HAVE BEEN INCLUDED IN HIS INCOME FOR PURPOSES OF CALCULATING CHILD SUPPORT.

Former spouses each appealed the final judgment of dissolution of marriage. The appellate court found that the trial court erred when it included within former husband's income for purposes of calculating child support, annual gifts received from his mother for tuition for the minor children. Although the trial court reasoned that these gifts would continue, the appellate court reached a different conclusion regarding inclusion of the gifts in former husband's income; accordingly, it reversed in part.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2010/February/February%2010,%202010/2D08-2980.pdf (February 10, 2010).

Diehl v. Diehl, __ So.3d __, 2010 WL 364533, (Fla. 2d DCA 2010).

APPELLATE COURT'S DIFFICULTY IN RECONCILING TRIAL COURT'S FINDINGS REGARDING EQUITABLE DISTRIBUTION RESULTS IN REMAND; TRIAL COURT ERRONEOUSLY CLASSIFIED AS MARITAL DEBT FUNDS DRAWN FROM NONMARITAL INSURANCE POLICY BY FORMER HUSBAND AND ENDORSED OVER TO HIS FATHER.

Appealed final judgment of dissolution of marriage; appellate court concluded that the trial court had erred in fashioning its scheme of equitable distribution. Former husband's primary source of income was derived from dividends he received as a shareholder in a tomato packing corporation. Pursuant to the shareholder's agreement, former husband was only entitled to profits for a crop if he produced that crop. Shortly after filing her petition for dissolution, former wife withdrew roughly \$100,000 from a line of credit on the marital home. When she

declined former husband's request to give him one-half of that amount to plant tomatoes, he chose not to plant and the shareholders subsequently voted to redeem his shares. The trial court rejected former husband's argument that former wife's withdrawal of funds prevented him from planting, found that the shareholders had wrongfully redeemed his shares, and concluded that former husband and his father were trying to "temporarily demolish assets." Reiterating that a party's misconduct justifies unequal distribution only when the evidence demonstrates a sufficient relationship between the misconduct and the dissipation of assets, the appellate court held that although there appeared to be evidence in the record to support unequal distribution, it could not reconcile the trial court's findings regarding former husband's failure to plant tomatoes and those regarding redemption of his shares. Accordingly, it remanded the issue of equitable distribution to the trial court. The appellate court also found that the trial court had erred in classifying funds borrowed against a life insurance policy as a marital debt where the policy itself had been properly classified as nonmarital and the funds were withdrawn by former husband and endorsed over to his father.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2010/February/February%2003,%202010/2D08-3682.pdf (February 3, 2010).

Third District Court of Appeal

McHugh v. Schmachtenberg, __So.3d__, 2010 WL 624200, (Fla. 3d DCA 2010).

ALIMONY SHOULD NOT BE REDUCED SIMPLY BECAUSE PAYING SPOUSE VOLUNTARILY TAKES ON OTHER FINANCIAL OBLIGATIONS; MONEY GIVEN TO A SPOUSE TO MAKE ENDS MEET SHOULD NOT BE IMPUTED AS INCOME UNLESS EVIDENCE SHOWS GIFTS WILL BE CONTINUED IN THE FUTURE.

Former wife appealed an order modifying the child support and permanent periodic alimony awards of the final judgment of dissolution. Appellate court reversed both modifications, finding with regard to the child support that because the marital settlement agreement incorporated into the final judgment was clear and unambiguous, there was no basis for modification, and finding with regard to the alimony that the trial court had erred in calculating the amount by which the award was to be modified. The appellate court concluded that modification of the alimony award was warranted; however, the record did not support the "drastic reduction" ordered by the trial court. The appellate court held that alimony may not be reduced simply because the spouse seeking reduction has voluntarily taken on financial obligations which make it difficult for him or her to meet the alimony obligations. The appellate court also held that money given to a spouse by his or her parents to make ends meet should not be imputed as income unless the gifts will continue and be ongoing rather than sporadic and the evidence shows that they will be continued in the future.

<http://www.3dca.flcourts.org/Opinions/3D08-1544.pdf> (February 24, 2010).

Zarate v. Zarate, __So.3d__, 2010 WL (Fla. 3d DCA 2010).

TRIAL COURT'S FAILURE TO DEDUCT ALIMONY AWARD FROM PAYING SPOUSE'S CHILD SUPPORT OBLIGATION, AND CORRESPONDING FAILURE TO ADD THE AWARD TO RECEIVING SPOUSE'S MONTHLY INCOME WAS ERROR; UNDER FLORIDA LAW, PERIODIC ALIMONY TERMINATES UPON RECEIVING SPOUSE'S REMARRIAGE IN ABSENCE OF AN AGREEMENT TO THE CONTRARY.

Former husband appealed final judgment of dissolution of marriage, arguing that the trial court had miscalculated his child support obligation by failing to deduct the amount of periodic alimony awarded to former wife and then failing to add that award to former wife's monthly income; former husband also argued that the trial court's statement regarding alimony was ambiguous. The trial court had stated that the alimony was a lifetime award unless former wife remarried, died, or "there are other circumstances." The appellate court held that under Florida law, in absence of an agreement to the contrary, periodic alimony terminates upon remarriage of the receiving spouse.

<http://www.3dca.flcourts.org/Opinions/3D08-1544.pdf> (February 10, 2010).

Fourth District Court of Appeal

Sallaberry v. Sallaberry, __So.3d__, 2010 WL 532793, (Fla. 4th DCA 2010).

IMPUTATION OF INCOME MUST BE SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE.

Former husband appealed final judgment of dissolution of marriage; appellate court affirmed except as to the trial court's calculation of imputed income. The appellate court held that the trial court may impute income to a spouse for the purpose of calculating a support award and that if a trial court determines that a spouse's income has declined due to voluntary actions, it may impute a higher income to that spouse. Imputation of income must be supported by competent, substantial evidence.

<http://www.4dca.org/opinions/Feb%202010/02-17-2010/4D08-2124.op.pdf> (February 17, 2010).

Leonardis v. Leonardis, __So.3d__, 2010 WL 532795, (Fla. 4th DCA 2010).

TRIAL COURT'S RELIANCE ON THE FILING DATE AS THE VALUATION DATE OF THE MARITAL HOME IN AN ECONOMIC RECESSION WAS ABUSE OF DISCRETION.

Former wife appealed final judgment of dissolution of marriage in which the trial court awarded alimony to former husband, ordered the marital home to be sold when the youngest child reached majority, and provided former wife with an option to buy out former husband's interest in the home. The appellate court reversed as to the disposition of the marital home. It also held that the trial court abused its discretion in relying on the date of filing as the valuation date and that the trial court's written final judgment did not appear to reflect what it intended in its oral rulings. Although the date of filing of the dissolution petition is generally the latest date used for identifying and classifying marital assets, the appellate court held that a trial court may value the assets on a date it determines is just and equitable. In this case, the appellate court reasoned that the trial court intended to rely on the filing date as the date of identifying the marital home as an asset, but for the trial court to rely on that date as the date of valuation in an economic recession constituted abuse of discretion. Accordingly, the appellate court

remanded to the trial court to reconsider the date of valuation and disposition of the marital home.

<http://www.4dca.org/opinions/Feb%202010/02-17-2010/4D08-2310.op.pdf> (February 17, 2010).

Inman v. Inman, __So.3d__, 2010 WL 445425, (Fla. 4th DCA 2010).

WHERE TRIAL JUDGE HAD RESERVED JURISDICTION WITHIN THE FJ OF DOM TO DETERMINE HOW ALIMONY AWARD WOULD BE SECURED, THE FJ WAS NOT APPEALABLE AS A FINAL ORDER.

Appeal dismissed without prejudice because trial judge had reserved jurisdiction within final judgment of dissolution of marriage to determine which item of former husband's property would be subject to a lien to secure the alimony award. Although the final judgment terminated the marriage and adjudicated certain issues, as a procedural matter, it did not bring to an end the "judicial labor" required in the case; therefore, it was not appealable as a final order.

<http://www.4dca.org/opinions/Feb%202010/02-10-2010/4D09-194.op.pdf> (February 10, 2010).

Crespo v. Crespo, __So.3d__, 2010 WL 366586, (Fla. 4th DCA 2010).

APPELLATE COURT AFFIRMED TRIAL COURT'S FINDING THAT SPOUSES INTENDED THAT PAYMENT TO FORMER WIFE FROM FORMER HUSBAND WOULD COME FROM PROCEEDS OF SALE OF BUILDING.

Pursuant to the marital settlement agreement incorporated into the final judgment of dissolution, former husband was to pay former wife \$141,000; however, no date for payment was specified. Former wife moved to enforce the marital settlement agreement a few months after entry of the judgment. Former husband countered that it was understood by both former spouses that the payment was to come from the proceeds of sale of his one asset—a building in New York. The trial court denied former wife's motion, stating that so long as the property was offered for sale at a reasonable price and former husband made a good faith effort to pay anything towards equitable distribution, he was satisfying the terms of the agreement. The appellate court, in affirming, concluded that the facts supported the trial court's finding that the parties intended that payment would be derived from proceeds of the sale.

<http://www.4dca.org/opinions/Feb%202010/02-03-2010/4D08-4171.op.pdf> (February 3, 2010).

Fifth District Court of Appeal

Eckert v. Eckert, __So.3d__, 2010 WL 667952, (Fla. 5th DCA 2010).

RETRIAL NECESSARY WHERE THERE HAS BEEN A LONG DELAY BETWEEN TRIAL AND JUDGMENT AND CIRCUMSTANCES SUGGEST PASSAGE OF TIME MAY HAVE AFFECTED ACCURACY OF THE JUDGMENT.

Former wife appealed the alimony award in the supplemental final judgment of dissolution of marriage. Evidence at the trial in August 2006, showed that the former spouses enjoyed a comfortable lifestyle; at issue was the amount of former wife's need for alimony and former

husband's ability to pay. Appellate court found the final judgment entered January 2009, to be "sparse" and ultimately inadequate, with regard to its findings. After noting the case law, which requires a retrial where there has been a long delay between the trial and the judgment, and the circumstances that suggest that the passage of time may have affected the accuracy of the judgment, the appellate court concluded that a retrial was necessary. Accordingly, it vacated the judgment and remanded for a new hearing on the issue of alimony.

<http://www.5dca.org/Opinions/Opin2010/022210/5D09-605.op.pdf> (February 26, 2010).

Fuller v. Fuller, __So.3d __, 2010 WL, (Fla. 5th DCA 2010).

TRIAL COURT ERRED IN DENYING FEES TO FORMER WIFE UNDER CIRCUMSTANCES OF CASE.

This is round two for this case; round one resulted in a reversal of the trial court's order regarding child custody and imputation of income. (Fuller v. Fuller, 13 So. 3d, 1108 (Fla. 5th DCA 2009)). On remand, the trial court conducted a hearing on the issue of appellate attorney's fees and then entered an order that, although former wife had demonstrated her need for assistance with payment of the fees, she had not demonstrated that former husband had the ability to pay those fees. The appellate court held that need and ability to pay are the prime considerations in determining entitlement to attorney's fees in a dissolution proceeding with the goal of ensuring that each spouse has similar access to competent legal counsel. Upon review of the equitable distribution of assets, the relative financial resources of each spouse, and the disparity in incomes between former husband and former wife, the appellate court concluded that the trial court had erred in denying fees to former wife; accordingly, it reversed and remanded. <http://www.5dca.org/Opinions/Opin2010/022210/5D08-3211.op.pdf> (February 24, 2010).

Domestic Violence Case Law

Florida Supreme Court

Inquiry Concerning a Judge, No. 07-64 re Ralph E. Eriksson, __So.3d __, 2010 WL 455267 (Fla. 2010) **JUDGE VIOLATES CODE OF JUDICIAL CONDUCT IN DOMESTIC VIOLENCE CASES.** Several issues were raised in this case, however, in regards to domestic violence; the JQC filed an Amended Notice of Formal Charges alleging that Judge Eriksson employed an overly technical and rigid approach in conducting the proceedings seeking domestic violence injunctions in violation of the Code of Judicial Conduct. All of his conduct penalized pro se petitioners for being unfamiliar with the judicial system. First, Judge Eriksson dismissed injunction petitions because petitioners did not know they were allowed to testify in connection with their own cases and implied that some independent witness was necessary. After the petitioners failed to produce independent witnesses, Judge Eriksson dismissed the petitions. This occurred even though each petitioner could have testified in his or her own case. Additionally, cases had statements under oath already in the files. Judge Eriksson asserted that no statute or prior case required him to inform petitioners of their rights. Instead, Judge Eriksson claimed he was unable to inform them of their rights because this would be assuming an adversarial role. Judge Eriksson eventually did assist some petitioners by asking them if they would like to testify, but

only after dismissing a number of injunctions for failing to produce any independent, separate evidence

Judge Eriksson also dismissed a number of petitions that, in his opinion, relied on hearsay evidence. Inconsistent with Judge Eriksson's assertion that he must remain neutral, Judge Eriksson refused to allow police reports to be used by petitioners as evidence because he, without any objection raised by the opposing party, deemed the reports hearsay. Judge Eriksson refused to insert himself into the controversy when petitioners did not know they had a right to testify on their behalf, but had no problem with rejecting potential hearsay evidence sua sponte. The Supreme Court held that the JQC's finding that Judge Eriksson violated the Code of Judicial Conduct was supported by clear and convincing evidence and ordered Judge Eriksson to appear for a public reprimand.

<http://www.floridasupremecourt.org/decisions/2010/sc07-1648.pdf> (February 11, 2010).

First District Court of Appeal

No new opinions for this reporting period.

Second District Court of Appeal

Muse v. Muse, __ So.3d __, 2010 WL 532806 (Fla. 2d DCA 2010) [FINAL JUDGMENT OF INJUNCTION REVERSED](#). The respondent appealed from a final judgment of injunction for protection against domestic violence with minor children. The appellate court held that the trial court's record did not contain any evidence that would have permitted the requisite finding that the minor children were "in imminent danger of becoming a victim of domestic violence." The petitioner did not present any sworn testimony or evidence, and the unsworn assertions that provided the basis for his motion could only be characterized as his subjective fear that "something bad might happen" to his children because of the respondent's alleged relationships with third parties. The petitioner's subjective fear was insufficient to warrant the entry of an injunction under S. 741.30.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2010/February/February%2017,%202010/2D08-3372.pdf (February 17, 2010).

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.