

# OSCA/OCI'S FAMILY COURT CASE LAW UPDATE

## February 2012

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## Delinquency Case Law

### ***Florida Supreme Court***

No new opinions for this reporting period.

### ***First District Court of Appeal***

T.W.R. v. State, \_\_ So. 3d \_\_, 2012 WL 603551 (Fla. 1st DCA 2012). [TRIAL COURT'S REASONS FOR UPWARD DEPARTURE FROM THE DEPARTMENT OF JUVENILE JUSTICE'S \(DJJ\) DISPOSITION RECOMMENDATION WERE INSUFFICIENT TO SATISFY E.A.R. V. STATE, 4 SO. 3D 614 \(FLA. 2009\)](#).

The juvenile had pled guilty to sexual battery. The trial court withheld adjudication and placed him on conditional probation. The juvenile violated his probation and was adjudicated delinquent for sexual battery. The DJJ recommended continued probation with added conditions. The trial court rejected the recommendation and placed the juvenile in a moderate-risk residential program. The trial court expressed concern about what the juvenile did when people were not watching him. The court justified its decision by stating only that: "The child willfully violated probation with full knowledge of the consequences. The public safety can best be served in residential treatment." The juvenile appealed. The First District Court of Appeal held that the trial court did not follow the requirements for imposing an upward departure found in E.A.R. v. State, 4 So. 3d 614 (Fla. 2009). First, the trial court did not articulate an understanding of the respective characteristics of the opposing restrictiveness levels. Second, the trial court failed to logically and persuasively explain why, in light of these differing characteristics, one level was better suited to serving the rehabilitative needs of the juvenile in the least restrictive setting while maintaining the ability of the State to protect the public. Accordingly, the First District reversed and remanded with instructions to either make the necessary findings to support departure or enter a new order imposing the probation originally recommended by the DJJ.

<http://opinions.1dca.org/written/opinions2012/02-27-2012/11-0618.pdf> (February 27, 2012).

### ***Second District Court of Appeal***

M.A.F. v. State, \_\_ So. 3d \_\_, 2012 WL 516186 (Fla. 2d DCA 2012). [ADJUDICATION FOR THE INTRODUCTION OF CONTRABAND INTO A COUNTY DETENTION FACILITY WAS REVERSED WHERE THE JUVENILE DID NOT HAVE THE ABILITY TO MAINTAIN CONTROL OVER THE CONTRABAND](#).

The juvenile was adjudicated delinquent for the introduction of contraband into a county detention facility and the possession of not more than twenty grams of marijuana. The juvenile appealed. The record indicated that the juvenile was stopped outside of a movie theater because he was observed smoking a cigar. The deputy asked for identification with the intention of issuing a citation for underage possession of tobacco products. The deputy found there was an outstanding juvenile pick-up order. The juvenile was searched, handcuffed, and put in a patrol car. The deputy took custody of the juvenile's backpack. The backpack was searched but no contraband was found. The backpack was placed in the front seat of the patrol car. On the way to the jail, the deputy warned the juvenile that if he was carrying any drugs he should reveal them because he could be charged with introducing contraband into a county jail.

The juvenile indicated that he had no drugs. At the jail, a small amount of marijuana was found concealed in a pocket of the backpack. Defense counsel moved to dismiss the introduction of contraband charge, arguing that the juvenile did not possess the backpack when he came to the jail; rather, it was the deputy who brought the backpack (and the marijuana) into the jail. The court rejected the argument. The Second District Court of Appeal found that the trial court had essentially found that the juvenile was in constructive possession of the marijuana when entering the jail. Constructive possession exists when the accused, without physical possession of the controlled substance, knows of its presence and has the ability to maintain control over it. While the juvenile's awareness that his backpack was coming into the facility tended to prove the element of knowledge of the presence of contraband, it did not establish that he had the ability to maintain control over it. On the contrary, once the deputy placed the juvenile in the patrol car, the juvenile was separated from the backpack and did not have access to the bag again. Accordingly, the finding of guilt of possession of marijuana was affirmed and the finding of guilt of introduction of contraband into a correctional facility was reversed.

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2012/February/February%2017,%202012/2D10-5196.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2012/February/February%2017,%202012/2D10-5196.pdf) (February 17, 2012).

### ***Third District Court of Appeal***

*F.R. v. State*, \_\_ So. 3d \_\_, 2012 WL 637169 (Fla. 3d DCA 2012). **KNIFE CARRIED BY JUVENILE DID NOT FALL WITHIN COMMON POCKETKNIFE EXCLUSION TO S. 790.01(1), F.S.** While in school, the juvenile, a twelve year-old, told the victim that because he was wearing a blue shirt, he was a "Crip" and that the juvenile was going to stab him. Two days prior to this incident, the juvenile told the victim that he had previously been in jail for stabbing someone. The victim asked what the juvenile intended to use to stab him. The juvenile produced a folding knife from his pocket. The juvenile opened the blade and held it inches from the victim's thigh. The victim raised his hand and asked to be excused from class, and immediately reported the incident to the school principal. The juvenile was subsequently convicted for possession of a concealed weapon pursuant to s. 790.01(1), F.S. The juvenile appealed and argued that the trial court should have granted his motion for judgment of dismissal because s. 790.001(13), F.S., excludes from the definition of weapon "a common pocketknife." The Third District Court of Appeal found that the question of whether a knife falls within the exception is a question of fact for the fact finder. In the instant case, the blade of the knife was just shy of three inches long, with serrations along a portion of one side. The handle was curved, with grooves to accommodate a user's fingers (a "notched grip"). There was a long screw protruding from the handle, which served as a makeshift hilt guard. When opened, the blade of the knife locked in an open position. These characteristics have been found by various Florida courts to be those of a knife that does not qualify for the exception. The juvenile conceded that the knife would not qualify for the exception while it was out, open, and being used to assault the victim, but insisted that while the knife was closed and in the juvenile's pocket, it would not constitute a weapon for the purposes of a conviction of possession of a concealed weapon. The Third District rejected this argument and held that the indelible characteristics of this particular knife, which were its notched grip, its locking blade mechanism, and its hilt guard, remained present even when the knife was concealed, thus eliminating this knife from the realm of ordinary pocketknives.

Accordingly, the conviction and the trial court's denial of the juvenile's motion for judgment of dismissal were affirmed.

<http://www.3dca.flcourts.org/Opinions/3D11-0186.pdf> (February 29, 2012).

H.W. v. State, \_\_ So. 3d \_\_, 2012 WL 280235 (Fla. 3d DCA 2012). **ADJUDICATION FOR ASSAULT ON A SCHOOL ADMINISTRATOR WAS REVERSED WHERE THE STATE FAILED TO PROVE A WELL-FOUNDED FEAR THAT VIOLENCE WAS IMMINENT.** The juvenile appealed an order denying his motion for judgment of dismissal and adjudicating him guilty of assault on a school administrator. The juvenile threatened the school administrator, saying that something would happen "that day." The Third District Court of Appeal found that assault requires: (1) an intentional, unlawful threat; (2) an apparent ability to carry out the threat; and (3) creation of a well-founded fear that the violence is imminent. The juvenile's threat that something would happen "that day" was insufficient to show violence was imminent, and juvenile's words did not create a well-founded fear that he would do something to the administrator at that time. Further, assault requires not just proof of a threat, but also proof of some physical act directed toward the victim. The mere intent to commit an assault is not enough; there must be some overt act sufficient to demonstrate a threat directed at the person placed in fear. The school administrator's "thought" that the juvenile would reach across her desk and hit her and the juvenile's threat that something would happen "that day" were insufficient to show violence was imminent. Accordingly, the adjudication was reversed and remanded with directions to the trial court to enter an order granting the motion for judgment of dismissal.

<http://www.3dca.flcourts.org/Opinions/3D10-1839.pdf> (February 1, 2012).

### ***Fourth District Court of Appeal***

M.M. v. State, \_\_ So. 3d \_\_, 2012 WL 636946 (Fla. 4th DCA 2012). **OFFICERS LACKED REASONABLE SUSPICION TO STOP AND FRISK JUVENILE.** An officer was dispatched in reference to an armed robbery to an area described as a "high crime area" known for "robberies, burglaries and narcotics." The only information he had was a BOLO ("be on the lookout") stating that "two white males had just robbed the victim at gunpoint and fled the area on foot." At about 12:30 a.m., the officer encountered the juvenile and another individual about three blocks from the area of the alleged robbery. They were walking away from the area of the alleged robbery less than three minutes from the time of the dispatch. The officer detained the two individuals and told them to put their hands on the hood of his car. The officer testified that he "had no clue in knowing if these were the guys that were involved in this or if we still had people out on the loose." The officer did not observe any bulges in the juvenile's clothing. The officer acknowledged there were other people outside on the street when he stopped the two individuals. Another officer who arrived to the scene patted down the juvenile and felt a bulge in the juvenile's right pocket. The officer could not say whether the bulge was a weapon. The officer asked the juvenile if he could take out the bulge from the juvenile's pocket. The juvenile agreed and the officer discovered a bag of marijuana. The juvenile filed a motion to suppress that was denied.

The Fourth District Court of Appeal, in determining the legality of a stop as a consequence of a BOLO, has previously looked to factors such as the length of time and distance from the

offense, the specificity of the description of the alleged perpetrator(s), the source of the BOLO information, the time of day, the absence of other persons in the vicinity of the sighting, the suspicious conduct, and any other activity consistent with guilt. In the instant case, the BOLO lacked sufficient specificity to provide the officer with reasonable suspicion to justify the stop. The BOLO informed the officers to look for two white males fleeing the scene on foot. It lacked any other descriptive information and did not indicate a speed or direction of travel. Further, the officer did not observe the juvenile engaging in any suspicious conduct or behavior consistent with participation in a recent armed robbery. Indeed, the officer testified that he “had no clue” whether the juvenile was involved in a crime. Lastly, the juvenile and the other individual were not the only people in the vicinity that night. The limited description in the BOLO could have fit many men. Therefore, the Fourth District held that the BOLO did not provide the officer with the reasonable suspicion necessary to justify stopping and frisking the juvenile. Accordingly, the trial court's denial of the motion to suppress was reversed with directions to discharge the juvenile. <http://www.4dca.org/opinions/Feb%202012/02-29-12/4D11-532.op.pdf> (February 29, 2012).

E.W. v. State, \_\_ So. 3d \_\_, 2012 WL 637165 (Fla. 4th DCA 2012). **ORDER GRANTING MOTION TO SUPPRESS REVERSED BECAUSE JUVENILE WAS NOT IN CUSTODY FOR MIRANDA PURPOSES.** The state appealed the trial court's non-final order granting the juvenile's motion to suppress statements made during police interview. The juvenile was charged with grand theft. He moved to suppress his recorded statements made to a detective. The trial court conducted an evidentiary hearing on the motion where the following facts were adduced. The detective contacted the juvenile's mother and informed her of the allegations against her son. He asked her if the juvenile would come in to speak with the police and told her that the juvenile could possibly be arrested if he did not speak with him. Thereafter, the juvenile, accompanied by his mother, went to the police station. At the start of the interview, the juvenile was advised that he was not under arrest or being detained and was free to leave. He was also informed that he did not have to speak with the detective and was assured that he was “not going to jail today or anything like that.” The juvenile's mother was present with the juvenile the entire time and engaged in conversation during the interview. Although the juvenile ultimately confessed to committing the crime, he was not placed under arrest that day, and he left with his mother. At the conclusion of the hearing, the trial court granted the motion, concluding that the juvenile was in custody for Miranda v. Arizona, 384 U.S. 436 (1966), purposes. The state appealed and argued that a reasonable person in the juvenile's position would not believe that he was in custody. The Fourth District Court of Appeal found that custody is determined by an objective, reasonable person standard -- whether a reasonable person placed in the same position would believe that his or her freedom of action was curtailed to a degree associated with actual arrest. Further, Florida courts have applied the following four factors to determine whether one is in custody for purposes of Miranda: (1) the manner in which police summon the suspect for questioning; (2) the purpose, place, and manner of the interrogation; (3) the extent to which the suspect is confronted with evidence of his or her guilt; and (4) whether the suspect is informed that he or she is free to leave the place of questioning. Applying these factors, the Fourth District concluded that the juvenile's encounter with the police was entirely consensual. The detective first contacted the juvenile's mother and informed her of the purpose of the

meeting. Moreover, the mother voluntarily brought the juvenile to the police station, was present with the juvenile throughout the interview, and was advised that the juvenile did not have to speak to the police. Furthermore, the juvenile was informed that he was free to leave at any time, was not under arrest, and would not be arrested that day. The juvenile pointed out that some of the evidence presented by the detective during the interview was false. However, even though the detective provided the juvenile with false evidence against him, this was a proper form of deception. The Fourth District held that a reasonable fifteen-year-old would have believed that he was free to leave. Accordingly, the order granting the motion to suppress was and remanded. <http://www.4dca.org/opinions/Feb%202012/02-29-12/4D11-1110.op.pdf> (February 29, 2012).

R.L.L. v. State, \_\_ So. 3d \_\_, 2012 WL 469847 (Fla. 4th DCA 2012). **NO FUNDAMENTAL ERROR IN UNPRESERVED CLAIM THAT STATE'S EVIDENCE FAILED TO REBUT THE LEGAL DEFENSE OF SELF-DEFENSE.** The juvenile appealed a disposition order finding him guilty of felony battery. The Fourth District Court of Appeal found that the state correctly conceded that the disposition order incorrectly stated that the juvenile was guilty of felony battery although the trial judge orally found him guilty of domestic battery, and that the trial court erroneously assessed court costs because adjudication had been withheld. The Fourth District found no fundamental error in the juvenile's unpreserved claim that the state's evidence did not rebut the legal defense of self-defense. Accordingly, the Fourth District affirmed in part, reversed in part, and remanded for entry of a corrected order consistent with this decision. <http://www.4dca.org/opinions/Feb%202012/02-15-12/4D10-4195.op.pdf> (February 15, 2012).

### ***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***

S.B. v. Department of Children and Family Services and Guardian ad Litem Program, \_\_ So. 3d \_\_, 2012 WL 556167 (Fla. 2d DCA 2012). **TERMINATION OF PARENTAL RIGHTS AFFIRMED.**

The Second District Court of Appeal affirmed the termination of a mother's parental rights based on previous termination of her parental rights to three of the subject-child's half-siblings. The court held that because the department was only required to prove one ground for

termination of parental rights, it did not need to decide whether the trial court correctly relied on the ground in s. 39.806(1)(l), F.S., as an alternate ground for termination. That section became effective after the filing of the dependency case but before the filing of the termination of parental rights case.

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2012/February/February%2022,%202012/2D11-4782.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2012/February/February%2022,%202012/2D11-4782.pdf) (February 22, 2012).

### ***Third District Court of Appeal***

G.U. v. Department of Children & Families, \_\_\_ So. 3d \_\_\_\_, 2012 WL 634851 (Fla. 3d DCA 2012). **ADJUDICATION OF DEPENDENCY AFFIRMED.**

The Third District Court of Appeal affirmed an order adjudicating children dependent based on allegations that the father sexually abused the children. On appeal, the court found competent substantial evidence supported the adjudication under s. 39.01(15)(a) & (32)(f), F.S. The mother had admitted that she did not believe her husband abused the girls. Neither did the mother believe she or her daughters needed therapy. A court-appointed psychologist testified that the children were harmed by the mother's refusal to believe the allegations. The District Court also noted that the likelihood that the mother would allow the father to return to the home placed the children's emotional health in danger of significant impairment.

<http://www.3dca.flcourts.org/Opinions/3D11-2557.pdf> (February 29, 2012).

G.R. v. Department of Children & Families, 77 So. 3d 926, 37 Fla.L.Weekly D297, 2012 WL 280244 (Fla. 3d DCA 2012). **CONFESSION OF ERROR.**

The Third District Court of Appeal reversed and remanded an adjudication of dependency based on the department's confession of error. The trial court had entered the adjudication based on the appellant's failure to appear without proper notice under s. 39.506(3), F.S., and Rule 8.330(c). <http://www.3dca.flcourts.org/Opinions/3D11-2560.pdf> (February 1, 2012).

D.M. & B.A. v. Department of Children & Families, \_\_\_ So. 3d \_\_\_\_, 37 Fla.L.Weekly D295, 2012 WL 280750 (Fla. 3d DCA 2012). **TERMINATION OF PARENTAL RIGHTS REVERSED AS TO ONE PARENT AND AFFIRMED AS TO THE OTHER PARENT.**

The Third District Court of Appeal reversed the termination of a mother's parental rights while also affirming the termination of the father's rights. The department had become involved with the family for reasons of domestic violence in the home and alleged abuse and abandonment. The mother was the victim of the father's alleged violence. Although the children were initially left with the mother, two of them were subsequently placed in a foster home and the other was placed in a therapeutic home away from his siblings. The case plan required, *inter alia*, that the parents complete evaluations and therapy. The father was required to attend anger management and therapy, and the mother was required to attend therapy to understand and resist further domestic violence threats to protect herself and the children. After less than a year, the department filed a petition for termination of parental rights. At the TPR hearing, the trial court heard testimony from, among others, a case coordinator about her interview of the children as well as the results of testing and evaluation. Also, a psychologist testified about concerns with the father's manner of addressing the incidents of domestic violence. A substance abuse counselor testified regarding the father's failure to admit inflicting any abuse.

The guardian ad litem ("GAL") testified that one of the children wanted to return to the mother and that he observed positive traits in the children's personalities. After noting the provisions of the TPR ground in s. 39.806(1)(e), F.S., as well as the standard of review on appeal, the District Court held the trial court record included substantial competent evidence regarding termination of the father's parental rights. Expert witness testimony established the father's difficulty in accepting, and even denial of, his role in the children's abuse. The father also denied and rationalized the domestic violence in the case, and had little positive development in the program. One expert testified that such denial would risk additional harm because of a failure to confront the problem that led to the harm. The court therefore rejected the father's argument that his non-compliance was the department's fault. However, the District Court concluded there was not clear and convincing proof that the mother's parental rights should be terminated. The mother made consistent efforts at improvement and was on track for additional progress. There were specific examples of positive interactions with the children, and there was not substantial competent evidence that the mother failed to materially comply with the case plan or that any non-compliance with the case plan was due to the mother. Finally, the court also rejected the argument of one of the children that the GAL improperly participated in the proceedings because the GAL's recommendation regarding termination was contrary to the child's express wishes. The court noted that the statute does not make the child's wishes the sole governing factor. The court found no reversible error from the GAL's performance of his duties.

<http://www.3dca.flcourts.org/Opinions/3D11-1578.pdf> (February 1, 2012)

### ***Fourth District Court of Appeal***

R.B. v. Department of Children & Families, \_\_\_ So. 3d \_\_\_\_, 2012 WL 469856 (Fla. 4th DCA 2012). **TERMINATION OF PARENTAL RIGHTS AFFIRMED.**

The Fourth District Court of Appeal affirmed the termination of a mother's parental rights based on grounds in s. 39.806(1)(b) & (1)(c), F.S. The mother had argued that the trial court erred by failing to make a finding that reunification posed a substantial risk of significant harm to the child. However the appellate court held that because the trial court found that "the mother lacks the capacity to care for her children to the extent that his safety, well-being, physical, mental, and emotional health would be endangered if he was returned to her home," the trial court had met the standard set forth in Padgett v. Department of Health & Rehabilitative Services, 577 So. 2d 565 (Fla. 1991). On appeal, the court's review of the record showed evidence supporting termination of parental rights, found that the mother's continued involvement threatened the well-being of her child, irrespective of the provision of services under section 39.806(1)(c), and found that the mother had abandoned the child within the statutory meaning under section 39.806(1)(b). Judge Conner dissented as to whether abandonment had been proven.

<http://www.4dca.org/opinions/Feb%202012/02-15-12/4D11-2613.op.pdf> (February 15, 2012).

### ***Fifth District Court of Appeal***

T.M.W. v. T.A.C., \_\_\_ So. 3d \_\_\_\_, 2012 WL 591671 (Fla. 5th DCA 2012). **TERMINATION OF PARENTAL RIGHTS REVERSED.**

The Fifth District Court of Appeal reversed the termination of a father's parental rights because he was not provided with appointed counsel. The petition for termination of parental rights was filed by the mother, not the department, and alleged that the father hadn't visited the child since 2005, hadn't telephoned the child for a year prior to the filing of the petition, had never paid child support, and in 2010 was sentenced to life in prison for attempted first degree murder. The father entered a denial and moved to dismiss the petition. At a telephonic hearing on the motion to dismiss and the TPR petition, the trial court did not advise the father of his right to counsel and denied the father counsel when he requested it even though he advised the court he was indigent. The court subsequently terminated his parental rights under s. 39.806(1)(d), F.S. The trial court also held that the father did not have standing because he was not on the putative father registry, was not on the birth certificate, hadn't been named as the father by a court, and had never paid child support. However, the record contained a 2004 final judgment of paternity establishing that he was the father based on consent of the parties. The trial court also denied the father's timely motion for rehearing. On appeal, the District Court noted that s. 39.807(1), F.S., requires the trial court to advise the parent of the right to counsel and to appoint counsel for indigent parents. Also, the trial court must enter writing findings with respect to the appointment or waiver of counsel for indigent parents. The District Court found that the trial court failed to appoint counsel for the father and failed to make written findings of any waiver of that right. Because the father was entitled to appointed counsel, the failure to appoint counsel was reversible error. On the standing issue, the court concluded that the father had standing to contest the order. The termination order was reversed and the case was remanded for a new termination hearing where the trial court would consider the request for counsel and make findings.

<http://www.5dca.org/Opinions/Opin2012/022012/5D11-3399.op.pdf> (February 22, 2012).

G.L. v. Department of Children and Families, \_\_\_ So. 3d \_\_\_, 2012 WL 511444 (Fla. 5th DCA 2012). **TERMINATION OF PARENTAL RIGHTS REVERSED DUE TO FAILURE TO COMPLY WITH ICWA NOTICE REQUIREMENTS.**

The Fifth District Court of Appeal reversed the termination of parental rights because the department failed to comply with the notice requirements of the Indian Child Welfare Act (ICWA). The department had filed an expedited petition for termination of parental rights regarding the child. In response, the mother filed a notice alleging ICWA's applicability because both she and the child were of Indian ancestry. The trial did not determine ICWA's applicability, and at the TPR hearing none of the parties raised the issue. After the court terminated the parents' rights, the father appealed, arguing for reversal due to failure to comply with ICWA. The appellate court rejected the department's argument that the issue could not be raised on appeal after not being raised below, because ICWA's provision permitting post-judgment challenges to termination preempted traditional rules regarding preservation of error. The court then recounted ICWA's tribal notice requirements and stated that the record had no proof of notice to the potentially applicable tribes and that the trial court did not determine whether the child was an Indian child. Because the court had reason to believe the child might be an Indian child, ICWA's notice provisions were mandatory. The explicit language of ICWA precluded a finding that the failure to comply was harmless. The court therefore remanded the case for the trial court to determine whether the child was an Indian child under ICWA and

either conduct a new trial applying ICWA (if applicable) or re-enter the termination order if ICWA did not apply.

<http://www.5dca.org/Opinions/Opin2012/021312/5D11-1502.op.pdf> (February 14, 2012).

D.G. v. Department of Children and Families, \_\_\_ So. 3d \_\_\_\_, 2012 WL 511450 (Fla. 5th DCA 2012). **IMPROPER ADJUDICATION PROCEDURE REVERSED.**

The Fifth District Court of Appeal reversed an order entered in violation of the requirements of s. 39.507(7), F.S. The department had filed a dependency petition regarding the parents' two surviving children after their third child, an infant, died. The petition's allegations included parental abuse of drugs and the infant's death (without alleging parental wrongdoing), as well as a substantial risk of prospective abuse, abandonment, and neglect. Both parents denied the allegations and an adjudicatory hearing was set. When the mother failed to appear at the hearing, the trial court held that she consented to dependency under s. 39.506(3), F.S., and the court rescheduled the father's adjudicatory hearing. The court then held a disposition hearing and entered an "Order of Adjudication, Disposition, Acceptance of Case Plan, and Notice of Hearing," found the children dependent with almost-verbatim language from the petition's allegations, and entered a case plan with a reunification goal. After the father's hearing, the trial court made contradictory findings. The court found that the department failed to prove that the father abused or neglected the children despite substantial evidence to the contrary, yet specifically found the evidence insufficient that the father had a substance abuse problem. The trial court also found the children to be at substantial risk of *prospective* harm by the father because he left the children unsupervised with the mother while being aware of the mother's substance abuse. On appeal, the court reviewed the requirements of s. 39.507(7) and noted that the trial court was required to hold an evidentiary hearing to determine whether the father had *actually* abused, abandoned, or neglected the children. Applying the language in s. 39.507(7)(b) and its own previous ruling in P.S. v. Department of Children and Families, 4 So. 3d 719 (Fla. 5th DCA 2009), the District Court noted that the trial court found that the father did not abuse or neglect the children and that the trial court had improperly considered the issue of prospective abuse or neglect. The court noted that the finding of dependency defines the legal status of the children, not the parents, and reversed and remanded the case.

<http://www.5dca.org/Opinions/Opin2012/021312/5D11-2374.op.pdf> (February 14, 2012).

J.C. v. Department of Children and Families, \_\_\_ So. 3d \_\_\_\_, 37 Fla. L. Weekly D312, 2012 WL 315873 (Fla. 5th DCA 2012). **PERMANENT GUARDIANSHIP REVERSED.**

The Fifth District Court of Appeal reversed an order placing five children in permanent guardianship with the paternal aunt and terminating supervision. Although the father had complied with his case plan, the trial court denied reunification with him without evidentiary support. It improperly relied on issues from the initiation of the dependency case, without regard to the father's progress in overcoming those issues, as well as upon a failed prior reunification attempt. The appellate court reversed and remanded with instructions for the trial court to grant reunification.

<http://www.5dca.org/Opinions/Opin2012/013012/5D11-2275.op.pdf> (January 30, 2012).

## Dissolution Case Law

### *Florida Supreme Court*

No new opinions for this reporting period.

### *First District Court of Appeal*

Brown v. Brown, \_\_ So. 3d \_\_, 2012 WL, 473465 (Fla. 1st DCA 2012).

**IRREPARABLE INJURY MUST BE SHOWN IN PETITION FOR CERTIORARI.**

The appellate court dismissed former husband's petition for certiorari to review a final judgment of indirect civil contempt, in part due to his failure to show any irreparable injury on the two non-child support issues and in part, with regard to his child support obligation, on the merits.

<http://opinions.1dca.org/written/opinions2012/02-09-2012/11-5138.pdf> (February 9, 2012).

Justice v. Justice, \_\_ So. 3d \_\_, 2012 WL 400537 (Fla. 1st DCA 2012).

**TRIAL COURT'S FINAL JUDGMENT OF DISSOLUTION MUST BE INTERNALLY CONSISTENT; TRIAL COURT'S FAILURE TO MAKE STATUTORILY REQUIRED FACTUAL FINDINGS PRECLUDES MEANINGFUL REVIEW, LEADS TO REVERSAL.**

Former husband raised four points in his appeal of the final judgment of dissolution of marriage. The appellate court affirmed on two counts, remanded one for clarification, and reversed and remanded on the fourth. The appellate court found that the trial court had abused its discretion by entering a final judgment that was "internally inconsistent" with regard to time-sharing; accordingly, it remanded for the trial court to enter a more consistent order. On the issue of alimony, the appellate court held that, in granting permanent, periodic alimony after a marriage which fell into the "grey area," the trial court "clearly failed to include the factual findings required by section 61.08," specifically with regard to former wife's needs, former husband's corresponding ability to pay, and former wife's earning capabilities. Reversed and remanded for further findings, to address former husband's request certain items be awarded as nonmarital, and to distribute other marital assets.

<http://opinions.1dca.org/written/opinions2012/02-09-2012/10-5539.pdf> (February 9, 2012).

### *Second District Court of Appeal*

Phillips v. Phillips, \_\_ So. 3d \_\_, 2012 WL 592895 (Fla. 2d DCA 2012).

**TRIAL COURT DID NOT ERR IN AWARDING MARITAL HOME TO FORMER WIFE FOR USE BY HER AND MINOR SON; HOWEVER, FORMER HUSBAND COULD SEEK PARTITION OF HOME IF IT HAD NOT BEEN SOLD BY THE TIME SON TURNED 18.**

Former husband appealed the final judgment of dissolution of marriage, arguing that the trial court erred in awarding exclusive use of the marital home to former wife for use by her and their minor son until he was no longer dependent. The appellate court affirmed, but clarified that a plain reading of the judgment allowed former husband to seek partition of the marital home if it had not been sold by the time the son turned eighteen--the same time his child support obligation terminated.

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2012/February/February%2024,%202012/2D10-3147.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2012/February/February%2024,%202012/2D10-3147.pdf) (February 24, 2012).

Gulledge v. Gulledge \_\_ So. 3d \_\_, 2012 WL 638995 (Fla. 2d DCA 2012).

**IF TRIAL COURT ORDERS SALE OR REFINANCE OF MARITAL HOME, IT MUST SET A REASONABLE DEADLINE; OTHERWISE, JUDGMENT IS DEFICIENT; THERE IS A PRESUMPTION OF PERMANENT, PERIODIC ALIMONY IN MARRIAGES OVER 30 YEARS; TRIAL COURT ABUSED ITS DISCRETION IN FINDING NO NEED FOR ALIMONY; ITS FINDING THAT SPOUSE WAS UNDEREMPLOYED WAS NOT ABUSE; IN ALIMONY, TRIAL COURT MUST CONSIDER NEED OF ONE SPOUSE AND ABILITY OF OTHER TO PAY; FAILURE OF TRIAL COURT TO ADDRESS REQUEST FOR FEES OR RESERVE JURISDICTION REQUIRES ENTRY OF CORRECTED JUDGMENT.**

Former husband appealed the final judgment of dissolution of a 31-year marriage for the trial court's failure to: 1) set a deadline for refinance or sale of the marital home; 2) award alimony; and 3) reserve jurisdiction to award attorney's fees. The appellate court concluded that the trial court erred on all three points; accordingly, it reversed and remanded for further proceedings. As to the first point, the appellate court held that if a trial court orders a marital home to be sold, it must set a reasonable deadline by which the sale must take place, otherwise the judgment is deficient. As to alimony, the appellate court noted there is a presumption in favor of permanent, periodic alimony in a marriage of over 30 years. In considering whether to award alimony, the trial court must take into account the needs of the requesting spouse and the ability of the other spouse to pay, in addition to the factors enumerated in s. 61.08, F.S. Here, the trial court determined that former husband was voluntarily underemployed before concluding he had no need for alimony. Noting that the record was clear that former husband's income was significantly less than former wife's, the appellate court concluded that the trial court had not abused its discretion in finding that former husband was underemployed; however, it found that the trial court had abused its discretion in finding that former husband had no need of alimony. The appellate court held that at least nominal alimony should have been awarded. As to fees and costs, the appellate court held that when a trial court fails to address a request for fees or to reserve jurisdiction to consider the issue, the final judgment should be reversed and remanded for entry of a corrected judgment reserving jurisdiction to address the request.

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2012/February/February%2029,%202012/2D11-472.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2012/February/February%2029,%202012/2D11-472.pdf) (February 24, 2012).

DiNardo v. DiNardo, \_\_ So. 3d \_\_, 2012 WL 385484 (Fla. 2d DCA 2012).

**TRIAL COURT MUST CONSIDER ALL INCOME SOURCES AVAILABLE TO SPOUSES.**

Former wife appealed a trial court order denying her motion for fees and costs after the entry of a final judgment of dissolution of marriage; former husband cross-appealed the denial of his post-judgment motion for fees and costs. The appellate court held that the trial court's failure to take into account former husband's bonus income "dramatically understated his income relative to the Wife's more modest income," and rendered incorrect its conclusion that the spouses' financial resources were relatively equal; therefore, it reversed and remanded the trial court's denial of costs and fees to former wife. The appellate court found that the trial court

had not abused its discretion in denying former husband's motion for fees and costs; accordingly, it affirmed the trial court's denial of the cross-appeal.

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2012/February/February%2008,%202012/2D10-3427.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2012/February/February%2008,%202012/2D10-3427.pdf) (February 8, 2012).

Melton v. Melton, \_\_ So. 3d \_\_, 2012 WL 335631 (Fla. 2d DCA 2012).

**IN DETERMINING ALIMONY, TRIAL COURT MUST BALANCE NEEDS OF ONE SPOUSE WITH ABILITY OF OTHER TO PAY SO THAT NEITHER PASSES FROM PROSPERITY TO MISFORTUNE NOR MISFORTUNE TO PROSPERITY.**

Former wife appealed a permanent, periodic alimony award in the final judgment of dissolution of marriage. The appellate court reversed due to the trial court's failure to include former husband's voluntary contributions to bond and retirement accounts in his net income figures, and to the fact that the amount awarded would leave former wife largely unable to meet her basic needs. Citing its case Cleary v. Cleary, 872 So. 2d 299, 304 (Fla. 2d DCA 2004), the appellate court reiterated that in considering whether to award permanent, periodic alimony, a trial court must "balance the needs of one spouse with the ability of the other spouse to provide the necessary funds" to ensure that neither "passes from prosperity to misfortune," nor "from misfortune to prosperity." The appellate court held that the "all sources of income" language in s. 61.08, F.S., includes the paying spouse's voluntary contributions to investments, savings, and retirement plans. It concluded that, under the circumstances of this case, the trial court abused its discretion when it set the amount of alimony; accordingly, it reversed for reconsideration by the trial court.

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2012/February/February%2003,%202012/2D10-4995.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2012/February/February%2003,%202012/2D10-4995.pdf) (February 3, 2012).

King v. King, \_\_ So. 3d \_\_, 2012 WL 279656 (Fla. 2d DCA 2012).

**TRIAL COURT ERRED IN ITS CONCLUSION IT HAD LOST JURISDICTION TO ENFORCE FINAL JUDGMENT; JURISDICTION WAS INHERENT.**

Former wife appealed a denial of her motion for contempt and enforcement of the marital settlement agreement (MSA) for lack of jurisdiction. She had sought to require former husband to make interest payments on the equitable jurisdiction award until it was paid in full or the marital home was sold. In reversing, the appellate court noted that the trial court, in addition to incorporating the MSA into its final judgment dissolving the parties' eleven-year marriage, had specifically reserved jurisdiction to enforce the provisions of its final judgment. The appellate court held that the trial court had erred in its conclusion that it had "lost jurisdiction"; it had inherent jurisdiction to enforce its judgment. What former wife sought in her motion—interest payments on her equitable distribution award—was contemplated and expressly addressed in both the MSA and the final judgment. Accordingly, the appellate court reversed and remanded with directions that the trial court consider former wife's motion for enforcement on its merits.

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2012/February/February%2001,%202012/2D10-2564.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2012/February/February%2001,%202012/2D10-2564.pdf) (February 1, 2012).

Reveiro v. Mason, \_\_ So. 3d \_\_, 2012 WL 279659 (Fla. 2d DCA 2012).

**IN ABSENCE OF ANY AGREEMENT IN THE RECORD, TRIAL COURT ERRED IN IMPOSING CHARGING LIEN AGAINST REAL PROPERTY OWNED BY SPOUSE OR AWARDED IN DISSOLUTION PROCEEDINGS; TRIAL COURT DID NOT ERR IN IMPOSING LIEN AGAINST SPOUSE'S PERSONAL PROPERTY.**

In what the appellate court termed "a proceeding ancillary to the dissolution action," former wife appealed a trial court order finding that the two law firms she hired were entitled to a charging lien plus prejudgment interest. The trial court ordered that the lien attach to former wife's interest on any and all real or personal property she owned relating to assets obtained or subject to the dissolution proceeding. The appellate court affirmed in part and reversed in part. Finding nothing in the record as to any agreement that the law firms' fees would be secured by any real property former wife might be awarded in the dissolution action, the appellate court held that the trial court erred in imposing a charging lien against the real property; however, it found no error in the trial court having imposed a charging lien against her personal property. [http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2012/February/February%2001,%202012/2D10-4122.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2012/February/February%2001,%202012/2D10-4122.pdf) (February 1, 2012).

Peterson v. Peterson, \_\_ So. 3d \_\_, 2012 WL 279660 (Fla. 2d DCA 2012).

**AN ORDER FAILING TO DISPOSE OF INTEGRALLY RELATED ISSUES IS NONFINAL.**

Former husband appealed the final judgment of dissolution of marriage, arguing that the trial court did not make specific findings regarding equitable distribution and alimony. The appellate court concluded that the "final judgment" was not a final, appealable order; accordingly, it remanded for the entry of a final order. In doing so, it cited the holding in one of its most recent cases, El Gohary v. El Gohary, 76 So. 3d 355, (Fla. 2d DCA 2011): "an order that purports to be a final judgment of dissolution but fails to dispose of integrally related issues is nonfinal." [http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2012/February/February%2001,%202012/2D10-4723.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2012/February/February%2001,%202012/2D10-4723.pdf) (February 1, 2012).

Crick v. Crick, \_\_ So. 3d \_\_, 2012 WL 279671 (Fla. 2d DCA 2012).

**UNJUSTIFIED DISTRIBUTION TO ONE SPOUSE RESULTED FROM TRIAL COURT CREDITING AND ASSIGNING SAME AMOUNT TO OTHER SPOUSE; TRIAL COURT ABUSES ITS DISCRETION IN IMPOSING OBLIGATIONS ON SPOUSE THAT EXCEED NET MONTHLY INCOME; RECALCULATION OF EQUITABLE DISTRIBUTION AND ALIMONY REQUIRE RECONSIDERATION OF FEES; TRIAL COURT MUST TAKE INTO ACCOUNT SPOUSES' NEEDS AND ABILITY TO PAY GIVEN THEIR NET INCOMES.**

Former husband appealed several components of the magistrate's report and recommendations which were adopted by the trial court in its judgment dissolving his marriage. The appellate court reversed on the issues of equitable distribution, alimony, and attorney's fees. Although it found that the trial court had made findings sufficient to justify its unequal distribution, the appellate court found that the trial court had abused its discretion by taking an amount it had ordered former wife to repay (after she redeemed marital CDs and spent most of the proceeds), and then crediting it to former husband as an asset and assigning it to him as a liability, with the upshot of creating an unjustified distribution to former wife. With regard to alimony, the appellate court found that although the findings were supported by competent, substantial evidence, they did not support the court's alimony award. In addition,

the appellate court found that the trial court had abused its discretion in having imposed obligations on former husband in excess of his net monthly income. The appellate court instructed the trial court on remand to conduct further proceedings to determine the spouses' need and ability to pay, given their respective net incomes. This in turn would require a reconsideration of attorney's fees.

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2012/February/February%2001,%202012/2D11-627.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2012/February/February%2001,%202012/2D11-627.pdf) (February 1, 2012).

### ***Third District Court of Appeal***

Dolan v. Dolan, \_\_ So. 3d \_\_, 2012 WL 555396 (Fla. 3d DCA 2012).

**OBJECTION TO IMPROPER SERVICE OF PROCESS IS WAIVED IF NOT RAISED IN PARTY'S RESPONSIVE PLEADING; SUBSEQUENT MOTION CANNOT RESURRECT IT.**

Former husband appealed an order granting former wife's motion to dismiss for lack of service of process and dismissing with prejudice his petition for modification regarding child support; the appellate court reversed. In March 2009, former husband filed his second verified petition for modification. In September 2009, former wife moved to dismiss the petition on the merits without raising the issue of insufficiency of notice and service of process; in her second motion to dismiss filed in September 2010, she argued former husband failed to serve her with the second petition. In response, former husband obtained permission from the court to allow him to amend his petition and personally serve her; however, when he was unable to serve the petition, the trial court granted former wife's motion dismissing his petition with prejudice. The appellate court found that former wife had waived service in her 2009 motion to dismiss. It reiterated that an objection to improper service of process is waived if not raised in a party's responsive pleading or motion. Here, there was no dispute that former wife did not raise the issue in her first motion; her subsequent motion to dismiss could not "resurrect the issue."

<http://www.3dca.flcourts.org/Opinions/3D11-0036.pdf> (February 22, 2012).

Dahari v. Dahari, \_\_ So. 3d \_\_, 2012 WL 386294 (Fla. 3d DCA 2012).

**IRREPARABLE HARM MUST BE SHOWN IN PETITION FOR CERTIORARI.**

Petition for certiorari denied for failure to show irreparable harm sufficient to warrant relief.

<http://www.3dca.flcourts.org/Opinions/3D11-2007.pdf> (February 8, 2012).

Toral v. Toral, \_\_ So. 3d \_\_, 2012 WL 280387 (Fla. 3d DCA 2012).

**SPOUSE CONTENDING NO GIFT WAS INTENDED HAS BURDEN OF PROOF.**

The appellate court affirmed the trial court's determination that commingled funds, which former husband had transferred to his mother-in-law to earn a higher interest rate, were marital.

Citing Hay v. Hay, 944 So. 2d 1043, 1046 (Fla. 4th DCA 2006), the appellate court found that the trial court did not abuse its discretion in concluding former husband failed to carry his burden of proof that no gift was intended. <http://www.3dca.flcourts.org/Opinions/3D11-0109.pdf> (February 1, 2012).

### ***Fourth District Court of Appeal***

Hallac v. Hallac, \_\_ So. 3d \_\_, 2012 WL 635111 (Fla. 4th DCA 2012).

**NEED AND ABILITY TO PAY ARE THE PRIMARY FACTORS FOR TRIAL COURT TO CONSIDER IN AWARDING FEES BUT RELEVANT CIRCUMSTANCES MAY ALSO BE CONSIDERED; REFUSAL TO ACCEPT A SETTLEMENT OFFER, STANDING ALONE, IS NOT A BASIS FOR ASSESSING FEES AGAINST THE REFUSING SPOUSE;**

Former wife appealed the trial court's attorney's fees award denying her attorney's fees and assessing a portion of former husband's attorney's fees against her for an unreasonable refusal of a favorable settlement offer. The appellate court affirmed the denial of attorney's fees to former wife on the basis of Rosen v. Rosen, 696 So. 2d 697 (Fla. 1997), which permits a trial court to consider all circumstances surrounding the proceedings in determining whether to award fees; however, it reversed the award of attorney's fees to former husband, concluding that former wife's failure to accept a reasonable offer, standing alone, did not justify an award of fees to him. The appellate court held that although need and ability to pay remain the primary factors for the trial court to consider in determining whether to award attorney's fees, settlement offers are a "relevant circumstance" which may also be considered. It also held that Rosen allows a "diminution of an award based upon the results obtained." The appellate court concluded that the trial court had not abused its discretion in denying former wife the portion of her fees incurred after the last settlement offer; however, it found that the award of fees to former husband could not be justified under Rosen. "Refusal to settle a case in and of itself cannot be the basis for an award of attorney's fees against the refusing party" in the absence of "vexatious conduct" or "bad faith litigation." <http://www.4dca.org/opinions/Feb%202012/02-29-12/4D10-4450.op.pdf> (February 29, 2012).

Walker v. Walker, \_\_ So. 3d \_\_, 2012 WL 632590 (Fla. 4th DCA 2012).

**TRIAL COURT HAS CONTINUING JURISDICTION TO ENFORCE AND MODIFY ALIMONY AWARD EVEN IF IT HAS NOT EXPRESSLY RESERVED JURISDICTION.**

Former wife appealed the trial court's dismissal of her petition to modify alimony for lack of subject matter jurisdiction; the appellate court reversed. The appellate court held that chapter 61, F.S., vests a trial court with continuing jurisdiction to enforce and modify its alimony awards--whether or not the court has expressly reserved jurisdiction in its final judgment. <http://www.4dca.org/opinions/Feb%202012/02-29-12/4D10-5158.op.pdf> (February 29, 2012).

MacLeod v. MacLeod, \_\_ So. 3d \_\_, 2012 WL 555421 (Fla. 4th DCA 2012).

**TRIAL COURT ERRED IN DESIGNATING FAMILY COTTAGE AS MARITAL; WHEN TERMS OF AGREEMENT ARE CLEAR, PARTIES' INTENT MUST BE GLEANED FROM FOUR CORNERS OF DOCUMENT; HERE, AGREEMENT REQUIRED CONVERSION OF NONMARITAL ASSET INTO TANGIBLE ASSET TO BECOME MARITAL; USE AND EXPENDITURE OF MARITAL FUNDS FOR PROTECTED ASSET DID NOT TRANSFORM IT BUT FACTORED INTO CONSIDERATION OF ITS APPRECIATION IN VALUE.**

The appellate court agreed with former husband that the trial court's designation of a cottage in Nova Scotia as a marital asset was not authorized by the spouses' post-marital agreement. That agreement provided in part that any asset obtained by either spouse through inheritance

or parental gift would be the separate property of that spouse. An exception was made for separate assets converted into tangible assets for use by the spouses. After inheriting one-fourth interest in a cottage built by his family, former husband bought out his siblings. Although title to the cottage remained in his name throughout the marriage, the spouses used it during their marriage. Marital funds were used to cover its taxes, insurance, and improvements. The trial court concluded that the cottage lost its nonmarital status through marital use and expense of marital funds. The appellate court disagreed. Citing its opinion in Jones v. Treasure, 984 So. 2d 634,636 (Fla. 4th DCA 2008), the appellate court noted that where the terms of a marital settlement agreement are clear and unambiguous, the intent of the parties must be gleaned from the four corners of the document. Here, the plain language of the agreement required conversion, rather than use, to change a nonmarital asset into a marital one. The appellate court held that neither use by the spouses nor expenditure of marital funds were enough to transform the cottage from nonmarital to marital. The appellate court noted a distinction between inherited real property and money, which can more easily lose its nonmarital status when commingled with marital funds. It instructed the trial court on remand to determine the amount of appreciation in value of the cottage resulting from expenditure of marital funds and to reconsider the equitable distribution.

<http://www.4dca.org/opinions/Feb%202012/02-22-12/4D10-697.op.pdf> (February 22, 2012).

Preudhomme v. Bailey, \_\_\_ So. 3d \_\_\_, 2012 WL 555433 (Fla. 4th DCA 2012).

**TRIAL COURT MUST CLEARLY IDENTIFY ASSETS AS MARITAL OR NONMARITAL; COURT ABUSED ITS DISCRETION IN IMPOSING REQUIREMENTS IN PARENTING PLAN WHICH WERE NOT SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE.**

In what the appellate court called a “highly contentious” dissolution case, former wife appealed numerous components of the final judgment; the appellate court reversed on three. First, the appellate court found that the trial court had failed to resolve whether former husband’s original acquisition of one-half million shares of stock was a purchase or a gift; therefore, it had failed to determine whether that asset was marital or nonmarital. On remand, the trial court was ordered to make that determination and to apportion the additional acquisition of one-quarter million shares. Second, the appellate court found that the trial court failed to clearly identify real property in Jamaica as either marital or nonmarital; it instructed the trial court on remand to make the necessary statutory findings. Third, the appellate court concluded that the trial court had abused its discretion by prohibiting former wife from petitioning to modify the parenting plan until after she completed twelve months of individual therapy followed by six months of therapy with the minor children. The appellate court held that no competent, substantial evidence supported the type and duration of therapy imposed by the trial court. Accordingly, it reversed this portion of the parenting plan for reconsideration by the trial court; it noted that the trial court could reconsider the entire plan and take additional testimony if it deemed appropriate.

<http://www.4dca.org/opinions/Feb%202012/02-22-12/4D10-3262.op.pdf> (February 22, 2012).

Garcia-Lawson v. Lawson, \_\_\_ So. 3d \_\_\_, 2012 WL 469833 (Fla. 4th DCA 2012).

**TRIAL COURT WITHOUT JURISDICTION TO ENTER FINAL ORDER DISPOSING OF CASE IF INTERLOCUTORY APPEALS ARE PENDING; TRIAL COURT AUTHORIZED TO REENTER ITS PREVIOUSLY DISMISSED FINAL JUDGMENT ON REMAND.**

The trial court entered its final judgment of dissolution of marriage while two interlocutory appeals, termed “frivolous” by the appellate court, were pending. The appellate court reversed the final judgment because the trial court did not have jurisdiction to render one disposing of the case.

The appellate court stated that courts have interpreted Florida Rule of Appellate Procedure 9.130(f), “to mean that a trial court lacks jurisdiction to render a final order while an appeal from a non-final order in the same case is pending and, if the trial court does so, the final order is a nullity.”

Noting that jurisdiction “is not a question a court can take or leave,” the appellate court held that a trial court is authorized on remand to reenter its previously dismissed final judgment, once any interlocutory appeals that prevented the trial court from disposing of the case have been resolved.

<http://www.4dca.org/opinions/Feb%202012/02-15-12/4D10-2540.op.pdf> (February 15, 2012).

Drdek v. Drdek, \_\_\_ So. 3d \_\_\_, 2012 WL 469840 (Fla. 4th DCA 2012).

**SUCCESSOR TRIAL JUDGE MAY NOT CORRECT ERRORS OF HIS OR HER PREDECESSOR; AGGRIEVED PARTIES MUST INSTEAD APPEAL THE ORDER.**

Former wife appealed a trial court order denying her motion for contempt. The final judgment had incorporated a marital settlement agreement (MSA), providing in part that: 1) former husband would pay permanent, non-modifiable alimony to former wife; and 2) each spouse would waive any interest in the other’s life insurance, pension, IRA, 401(k), profit sharing, or retirement benefits. Former wife moved for contempt based on former husband’s non-payment of alimony several months after the entry of the final judgment; former husband responded that the money he received monthly from social security was a retirement benefit not subject to be used for alimony. Former wife’s contempt motion wound its way through two magistrates on its way to the trial judge. After discussing the law of the case doctrine, the appellate court stated there was no question former husband owed former wife all accrued alimony payments; the question to be determined on remand was how she could recover the arrearages; accordingly, it remanded for further proceedings to determine whether former husband had the ability to pay the alimony from assets other than the various retirement accounts described in waiver provision in the MSA.

<http://www.4dca.org/opinions/Feb%202012/02-15-12/4D10-3082.op.pdf> (February 15, 2012).

Norberg v. Norberg, \_\_\_ So. 3d \_\_\_, 2012 WL 469844 (Fla. 4th DCA 2012).

**TRIAL COURT MUST MAKE FINDING OF ABILITY TO PAY THE PURGE IN CONTEMPT ORDER IF INCARCERATION IS DEEMED APPROPRIATE; FINDING IS NOT REQUIRED IF INCARCERATION IS NOT CONTEMPLATED; AN ORDER ADJUDICATING AN ISSUE NOT PLEAD VIOLATES DUE PROCESS.**

Former wife appealed a contempt order for lack of a finding that she had the ability to pay the purge. The appellate court held that a finding of an ability to pay is not required if incarceration is not contemplated. The appellate court affirmed the contempt order, but reversed the order

modifying visitation. It held that because that issue was not plead, an order adjudicating it violated former wife's due process; accordingly, the order was remanded to strike the modification portion.

<http://www.4dca.org/opinions/Feb%202012/02-15-12/4D10-3260.op.pdf> (February 15, 2012).

Knowles v. Knowles, \_\_ So. 3d \_\_, 2012 WL 385544 (Fla. 4th DCA 2012).

**TRIAL COURT ERRED IN CONCLUDING THAT A 2006 DISSOLUTION FINAL JUDGMENT SUPERSEDED A 2007 AGREED ORDER REGARDING CUSTODY BECAUSE THE 2007 ORDER WAS MISFILED WITH THE PARTIES' 2004 DISSOLUTION FINAL JUDGMENT; CASE REMANDED FOR DETERMINATION OF WHETHER MODIFICATION OF 2007 ORDER WAS IN BEST INTERESTS OF THE CHILDREN.**

In a post-dissolution action between spouses who married and divorced twice, former husband appealed a trial court order denying his petition to modify custody and visitation. The second dissolution resulted in the trial judge finding that neither parent be designated primary residential custodian, but that they share parental responsibility. An agreed order entered a year later named former husband as the primary residential custodian; however, this order was misfiled with the first dissolution order. This error led the magistrate and the trial court to erroneously conclude that the 2007 agreed order was superseded by the 2006 dissolution final judgment. The appellate court held that the misfiling of the 2007 agreed order with the 2004 dissolution final judgment instead of the 2006 one did not change its legal effect; modification of the 2007 order should have required a showing of substantial, material, and unanticipated change in circumstances. The trial court's conclusion that the 2006 judgment superseded the 2007 order was reversible error, leading the appellate court to remand for a new evidentiary hearing for the trial court to determine whether modification of the custody in the 2007 order would be in the children's best interests.

<http://www.4dca.org/opinions/Feb%202012/02-08-12/4D10-3737.op.pdf> (February 8, 2012).

Leo v. Leo, \_\_ So. 3d \_\_, 2012 WL 385602 (Fla. 4th DCA 2012).

**PARTY FACING CONTEMPT DESERVES NOTICE AND OPPORTUNITY TO BE HEARD; TRIAL COURT ERRED IN ENTERING CONTEMPT ORDER WITHOUT A HEARING.**

Former wife appealed an order of contempt; the appellate court reversed and remanded because the order was entered without an evidentiary hearing. Although a hearing had been scheduled on former husband's motion for civil contempt, his counsel advised opposing counsel that the hearing had been cancelled because the court had already ruled. Former husband's counsel then provided the trial court with two proposed orders, both of which found former wife in contempt; one of those proposed orders was adopted by the trial court. Reiterating that a party facing civil contempt sanctions is entitled to notice and an opportunity to be heard, the appellate court reversed.

<http://www.4dca.org/opinions/Feb%202012/02-08-12/4D10-5127.op.pdf> (February 8, 2012).

### ***Fifth District Court of Appeal***

McClune v. McClune, \_\_ So. 3d \_\_, 2012 WL 407099 (Fla. 5th DCA 2012).

## EVIDENTIARY HEARING TO ASCERTAIN MEANING OF TERMS IN MSA REQUIRED; TRIAL COURT ERRED IN ORDERING TRANSFER OF STOCK WITHOUT A HEARING.

In an action stemming from a dispute over the meaning of certain terms in a mediated settlement agreement (MSA), which had been incorporated into a final judgment of dissolution, former husband appealed a nonfinal trial court order denying his motion for clarification, finding him in indirect civil contempt, and awarding former wife attorney's fees. One paragraph within the MSA awarded former wife as lump sum alimony: 50% of the marital portion of the pension, retirement accounts and IRAs; and 100% of all Bank of America stock in existence at the time of filing. At issue was whether the paragraph contemplated her receipt of 100% of the Bank of America stock in former husband's retirement accounts as well. The appellate court stated that while the terms of the MSA, "appear clear on their face," with regard to an equitable distribution of the IRAs and transfer of the stock account to former wife, the trial judge had interpreted it differently based on the fact that each of the IRAs contained bank stock. The appellate court concluded that the trial court had erred in ordering former husband to transfer all the stock in the IRAs to former wife without first holding an evidentiary hearing to ascertain the meaning of the paragraph in question; accordingly, it reversed and remanded to the trial court for an evidentiary hearing.

<http://www.5dca.org/Opinions/Opin2012/020612/5D10-4160.op.pdf> (February 10, 2012).

## Domestic Violence Case Law

### *Florida Supreme Court*

No new opinions for this reporting period.

### *First District Court of Appeal*

Carty v. State, --- So. 3d ----, 2012 WL 516167 (Fla. 1st DCA 2012). **BATTERER'S INTERVENTION PROGRAM REMOVED FROM PROBATION**. The appellant was convicted of resisting an officer without violence and was sentenced to probation, which included a special condition requiring him to complete a batterer's intervention program (BIP). The appellant claimed the BIP condition was invalid because it was not reasonably related to his rehabilitation.

He was originally charged with battery, burglary of a conveyance with assault, and resisting an officer without violence. The jury acquitted him of the battery and burglary charges, but returned a guilty verdict on the resisting charge. However, the trial court still included the batterer's intervention program as a special condition of appellant's probation. Since the batterer's intervention program had no relationship to the appellant's conviction for resisting an officer without violence and there was nothing in the record to suggest that Appellant had a propensity towards domestic violence, the court reversed.

<http://opinions.1dca.org/written/opinions2012/02-17-2012/11-3512.pdf> (February 17, 2012).

Achurra v. Achurra, --- So. 3d ----, 2012 WL 513023 (Fla. 1st DCA 2012). **ENTRY OF DOMESTIC VIOLENCE INJUNCTION REVERSED**. The wife filed a petition for an injunction for protection from domestic violence against her husband. The trial court issued an ex parte temporary injunction and scheduled an evidentiary hearing, and the husband filed a response denying the material

allegations in the petition. During the hearing, the wife's counsel asked the court to take judicial notice of a previous dissolution of marriage proceeding to avoid presenting redundant testimony. The circuit judge stated that he had retained his notes of the dissolution proceeding and announced his intent to review the other file and to allow the transcript from the earlier proceeding to be filed in the injunction case. The respondent neither objected to the request to take judicial notice nor complained of a lack of prior notice. At the close of the domestic violence hearing, the court ordered that the temporary injunction would remain in effect until all pertinent investigations were concluded, but made no oral findings of fact to support his ruling. Subsequently, a different circuit judge issued a final judgment of injunction against domestic violence, and the husband appealed, claiming that the final judgment was not supported by competent, substantial evidence.

The appellate court noted that the petitioner had the initial burden to prove entitlement to relief, and in this case she presented no evidence at the petition hearing. The record also showed no proof that the trial court ever received and considered a copy of the transcript from the dissolution proceedings of which it agreed to take judicial notice. The court stated that "(j)ust as the petitioner has the right to allege and prove the grounds for injunctive protection at a full and fair evidentiary hearing, the respondent is entitled to a fair hearing and protection from the effects of a final judgment of injunction that lacks any evidentiary support." Since the record was deficient of any proof to support the petitioner's allegations, the court reversed. <http://opinions.1dca.org/written/opinions2012/02-17-2012/11-2126.pdf> (February 17, 2012).

### ***Second District Court of Appeal***

Barile v. Gayheart, --- So. 3d ----, 2012 WL 516183 (Fla. 2d DCA 2012). **PETITION FOR REPEAT VIOLENCE REVERSED**. The petitioner requested an injunction against repeat violence against her former employer to whom she is related by neither blood nor marriage. After an evidentiary hearing the trial court entered an injunction against domestic violence, and the respondent appealed, claiming that the trial court erred in sua sponte issuing an injunction against domestic violence when the petitioner sought an injunction against repeat violence. The notice for the hearing informed the respondent that he would be defending himself against a charge of repeat violence; however, without notice, the trial court switched issues to one which the respondent was not expecting and for which he was unprepared. Because the hearing went forward on the petitioner's petition as amended on the spot by the trial court, the respondent was denied due process and the injunction entered was reversed and vacated. [http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2012/February/February%2017,%202012/2D10-3816.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2012/February/February%2017,%202012/2D10-3816.pdf) (February 17, 2012).

Sauriol v. Sauriol, --- So. 3d ----, 2012 WL 413811 (Fla. 2d DCA 2012). **CIVIL COTEMPT OF COURT ORDER REVERSED**. The respondent appealed an order holding him in contempt for sending an email to his wife in violation of a domestic violence injunction. The court reversed this order because it was not a proper order of civil contempt, but rather punished the respondent as a criminal contempt order would do. Civil contempt orders are used to coerce the respondent into compliance, or to compensate the petitioner.

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2012/February/February%2010,%202012/2D09-4346.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2012/February/February%2010,%202012/2D09-4346.pdf) (February 10, 2012).

### ***Third District Court of Appeal***

D.M. and B.A. v. Department of Children and Families, --- So. 3d ----, 2012 WL 280750 (Fla. 3d DCA 2012). **TERMINATION OF PARENTAL RIGHTS AFFIRMED.** The trial court terminated the parental rights of both parents and the parents appealed. The appellate court found that there was substantial competent evidence to support the order terminating the father's rights. The father denied his behavior was domestic violence and experts testified that the father had difficulty accepting his role in the children's abuse. Therefore, the court found that substantial harm to the children could occur if the father's rights were not terminated.

<http://www.3dca.flcourts.org/Opinions/3D11-1578.pdf> (February 1, 2012).

### ***Fourth District Court of Appeal***

No new opinions for this reporting period.

### ***Fifth District Court of Appeal***

No new opinions for this reporting period.