

OSCA/OCI'S FAMILY COURT CASE LAW UPDATE
February-March 2013

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Baker Act/Marchman Act Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

No new opinions for this reporting period.

Second District Court of Appeal

No new opinions for this reporting period.

Third District Court of Appeal

No new opinions for this reporting period.

Fourth District Court of Appeal

No new opinions for this reporting period.

Fifth District Court of Appeal

No new opinions for this reporting period.

Delinquency Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

D.E.M. v. State, __ So. 3d __, 2013 WL 1235900 (Fla. 1st DCA 2013). **RESTITUTION AWARD WAS REVERSED AND REMANDED WHERE ESTIMATE OF VALUE FOR COIN COLLECTION WAS WITHOUT EVIDENTIARY BASIS.** The juvenile appealed the amount of restitution awarded for a residential burglary. The victim testified that he had a written appraisal of \$4,200.00 for a portion of a coin collection that was lost when the collection was stolen. The victim was asking \$4,000.00 for the coin collection based on that appraisal. The victim was seeking total restitution of \$8,689.56, which included the coin collection, some jewelry, a laptop, and a cell phone, which were also stolen. The appraiser was not available to testify. The victim testified that his appraiser gave him “a guesstimated value” of \$20,000 or \$30,000 for the entire collection, for which the victim settled on a value of \$20,000.00. Defense counsel objected to the entire amount as based on hearsay and argued that the victim could not testify concerning the absent appraiser's independent opinion of the coin collection's value. The court stated that the owner of property can opine as to its value, and the only opinion given by the victim was \$20,000. Defense counsel challenged the \$20,000 figure as not a credible estimate. The trial court sustained the objection as to the appraiser's \$4,000 figure, but overruled it as to the victim's \$20,000 figure. The trial court then ordered total restitution of \$24,689.06. On appeal,

the First District Court of Appeal found that the State had the burden to demonstrate, by a preponderance of the evidence, the amount of the loss sustained by a victim as a result of the offense. The standard of review was an abuse of discretion. It was within the trial court's discretion to take into account any appropriate factor in arriving at a fair amount which would adequately compensate a victim for his or her loss and further the purposes of restitution. Generally, a victim/owner is qualified to testify concerning the fair market value of his property. However, the victim must have a sufficient predicate on which to base an opinion regarding the value of the items taken. In the instant case, the victim testified that an appraiser gave him a "guesstimated value" of \$20,000 or \$30,000 for the entire coin collection, from which the victim came up with the \$20,000 figure. The record contained no supporting documentation or other predicate for this speculative opinion of the value of the lost coin collection. A mere estimate of value, without any evidentiary basis, is insufficient to prove an amount for restitution purposes. Accordingly, the First District reversed the \$24,689.06 restitution award and remanded with instructions to conduct a new evidentiary hearing to determine the appropriate amount of restitution.

<http://opinions.1dca.org/written/opinions2013/03-28-2013/12-3491.pdf> (March 28, 2013).

D.S. v. State, ___ So. 3d ___, 2013 WL 598397 (Fla. 1st DCA 2013). **TEMPORARY DETENTION OF JUVENILE WAS JUSTIFIED WHERE SUBSEQUENT INVESTIGATION OF CHILD NEGLECT WAS SUFFICIENTLY DISTINGUISHABLE FROM THE INITIAL INVESTIGATION TO PURGE THE TAIN OF ILLEGALITY.** The juvenile appealed his finding of guilt for resisting an officer without violence. The juvenile argued that the officer was not exercising a lawful duty at the time he resisted. Police officers were dispatched to a residence in response to an anonymous telephone tip informing them that a person with an outstanding warrant was at the residence. The only description given was that the alleged fugitive was a black male. While investigating the tip, the police discovered that children were living in the house -- which did not have any water or electricity. The juvenile was then seen leaving the house. He was approached and asked for identification. The officer explained to the juvenile that they were looking for a fugitive and that they were now investigating a felony case of child neglect. Therefore, the officer needed to identify the juvenile. If he could not provide identification, the officer would have to fingerprint him for identification. The juvenile did not respond and the officer grabbed him under the arm to escort him to the police cruiser. The juvenile "jerked away" and was arrested for resisting. The juvenile moved for a judgment of dismissal, arguing that the officers were not exercising a lawful duty at the time he resisted. The motion was denied. On appeal, the First District Court of Appeal found that the need to investigate a child neglect case was sufficient grounds to stop the juvenile. Regardless of whether the officers were justifiably at the house, after discovering the presence of children and that the house lacked any water or electrical service, the police had a legitimate basis for temporarily detaining the juvenile based on a reasonable suspicion that he was either a child neglect victim or the parent of a child neglect victim and thus subject to arrest. Even if the initial investigation was unlawful, the subsequent investigation of child neglect was lawful and sufficiently distinguishable from the initial investigation to purge the taint of illegality. Accordingly, the trial court's order was affirmed.

<http://opinions.1dca.org/written/opinions2013/02-18-2013/12-1475.pdf> (February 18, 2013).

J.H. v. State, __ So. 3d __, 2013 WL 692968 (Fla. 1st DCA 2013). **CONDITION OF PROBATION PROHIBITING THE JUVENILES FROM PARTICIPATING IN ORGANIZED SPORTS WAS INVALID BECAUSE IT WAS NOT “REASONABLY RELATED TO REHABILITATION.”** Two juveniles appealed their adjudications for first-degree felony arson of a dwelling. The First District Court of Appeal found that the evidence failed to negate the juveniles’ reasonable hypothesis of innocence that the incident was purely accidental. The adjudications were reversed and remanded with directions that the juveniles be discharged. Simultaneous to their adjudications and sentencing for arson, the juveniles were also found guilty of and sentenced for criminal mischief. The juveniles also challenged the legality of two of the conditions of probation that were imposed in all four cases. The First District affirmed one of the conditions without further comment but found that the State properly conceded error as to a condition prohibiting the appellants from participating in organized sports, as not being “reasonably related to rehabilitation.” See Stephens v. State, 659 So. 2d 1303 (Fla. 1st DCA 1995)(Trial courts have broad discretion to impose various conditions of probation, but a condition cannot be imposed if it is not reasonably related to rehabilitation.). Accordingly, the circuit court’s orders were affirmed in part, reversed in part, and remanded for further proceedings.
<http://opinions.1dca.org/written/opinions2013/02-27-2013/12-2518.pdf> (February 27, 2013).

Second District Court of Appeal

D.D.B. v. State, __ So. 3d __, 2013 WL 1165144 (Fla. 2d DCA 2013). **WITHHOLDING OF ADJUDICATION FOR THE DELINQUENT ACT OF “FALSE 911 CALL” REVERSED AND REMANDED BECAUSE THE JUVENILE COURT ADMITTED AN AUDIO RECORDING THAT WAS NOT PROPERLY AUTHENTICATED.** The juvenile appealed her disposition order for the delinquent act of “false 911 call.” Over objection, the State was allowed to introduce an audio recording of two calls purportedly made by the juvenile to the 911 system. The second call was allegedly improper. The only witness to testify was one of two police officers who had been dispatched to the juvenile’s home, apparently as a result of a 911 call. Although the officer was still within eyeshot when the juvenile allegedly made the second 911 call, and she saw the juvenile on the phone, she did not see the child dial 911 and did not actually hear the call in progress. The officer could merely identify the juvenile's voice on the audio recording. The Second District Court of Appeal found that the court allowed the State to introduce the audio recording without sufficient authentication. The identification of the juvenile's voice on the recording was helpful to the State's case, but authentication also required other predicate evidence, including that the recording was of a telephone call received and handled by the 911 system on the relevant date. The Second District also found that the erroneous admission was not harmless error. The audio recording was critical to establish that the juvenile actually called 911, which was an essential component of the proof required to establish that she committed the delinquent act. Accordingly, the Second District reversed and remanded for a new adjudicatory hearing.
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2013/March/March%2022,%202013/2D12-2518.pdf (March 22, 2013).

L.D. v. State, __ So. 3d __, 2013 WL 561487 (Fla. 2d DCA 2013). **DISPOSITION ORDER WAS**

REVERSED AND REMANDED FOR ENTRY OF A CORRECTED ORDER THAT ACCURATELY REFLECTED THE COURT'S ORAL PRONOUNCEMENT. The juvenile challenged a disposition order that found her guilty of battery on a school employee and revoked her probation. The Second District Court of Appeal found that the disposition order directed that the juvenile be continued on probation for a term of five years. However, at the revocation hearing, the court pronounced a maximum period of supervision not to exceed five years or the juvenile's nineteenth birthday. Further, the disposition order also reflected that the juvenile's curfew was during daytime rather than nighttime hours, which was not consistent with the court's oral pronouncement. Because a trial court's written disposition must be consistent with its oral pronouncement, the Second District reversed the disposition order and remanded for entry of a corrected order that accurately reflected the court's oral pronouncement. Finally, The Second District found that the court erred by not entering a written revocation order specifying the conditions of probation that the juvenile violated. On remand, the court was directed to enter such an order.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2013/February/February%2015,%202013/2D11-4076.pdf (February 15, 2013).

X.G. v. State, ___ So. 3d ___, 2013 WL 466211 (Fla. 2d DCA 2013). **REVOCAION OF JUVENILE PROBATION REVERSED WHERE THE CONDITION VIOLATED WAS NEVER ACTUALLY IMPOSED IN THAT CASE.** The juvenile appealed the revocation of juvenile probation in case 10–CJ–6275. In that case, the juvenile had been placed on twelve months' probation for criminal mischief. The plea agreement specifically stated that no restitution would be ordered. The disposition order, entered February 11, 2011, did not list restitution as a condition of the juvenile's probation. Subsequently, the State filed an affidavit/petition for violation of probation in two case numbers, 10–CJ–6275 and 10–CJ–5510. Restitution was ordered in case number 10–CJ–5510. The trial court found that the juvenile had failed to pay restitution. The parties and the trial court agreed that supervision had lapsed in case 10–CJ–5510. However, the court proceeded to revoke the juvenile's probation in case 10–CJ–6275, adjudicating him delinquent and placing him on probation for another twelve months. The defense informed the court that restitution was not ordered in case 10–CJ–6275 and that the court could not revoke probation on that basis in that case. The court then stated that it had already found the juvenile in violation for failing to pay the restitution that was ordered in case 10–CJ–5510 and that the restitution was “a condition of his overall supervision and sanctions for both cases.” The trial court’s revocation order specifically stated that “the monthly restitution payments were imposed based on a stipulation of all parties and incorporated into the disposition order entered ... on February 11, 2011.” The Second District Court of Appeal found that, contrary to the circuit court's finding in the order of revocation, restitution was not stipulated to by the parties in case 10–CJ–6275 or incorporated into the disposition order for that case. In fact, the record was clear that restitution was intentionally excluded as a condition of probation in case 10–CJ–6275. Therefore, the trial court erred in revoking the juvenile's probation in case 10–CJ–6275 for failure to pay the restitution ordered in case 10–CJ–5510. Accordingly, the revocation of the juvenile's probation and resulting adjudication of delinquency in case 10–CJ–6275 was reversed and remanded.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2013/February/February%2008

[,%202013/2D11-4330.pdf](#) (February 8, 2013).

A.D. v. State, __ So. 3d __, 2013 WL 439786 (Fla. 2d DCA 2013). **ADJUDICATIONS FOR BURGLARY AND GRAND THEFT WERE REVERSED BECAUSE THE STATE FAILED TO REBUT THE JUVENILE'S HYPOTHESIS OF INNOCENCE.** The juvenile appealed his adjudications for grand theft of a motor vehicle, burglary of a conveyance, petit theft, criminal mischief, and trespass. The Second District Court of Appeal reversed the juvenile's grand theft adjudication; reversed and remanded the burglary conviction to reduce the adjudication to trespass in a conveyance; and affirmed the criminal mischief, petit theft, and trespass adjudications. All the charges stemmed from an incident where the juvenile and two other boys jumped over a fence onto posted private property. One of the boys took a four-wheel all-terrain vehicle (ATV) and drove it into a fence. The ATV was found smashed against the gate near a broken mailbox. The other boy took a minivan, drove it through the fence, picked up the other boy and the juvenile, who were running away, and drove off. The stolen minivan was seen swerving and speeding away by a deputy. The three boys were apprehended after the minivan hit a culvert and rolled over. The juvenile contended that after trespassing on the property, the other two boys acted independently and, after becoming frightened, he fled and subsequently made the bad decision to enter the stolen van. As to the grand theft adjudication, the Second District found that nothing in the record indicated that the juvenile knew that the other boy planned to steal the van. In fact, the juvenile and the other youth ran away after the ATV crash and entered the van only after it had already been driven from the property. Therefore, the State failed to present evidence inconsistent with the juvenile's hypothesis of innocence. Accordingly, the Second District reversed the adjudication for grand theft of a motor vehicle. As to the burglary charge, the Second District found that even though the juvenile entered the van without the owner's permission, the State still had to prove that the juvenile entered with the intent to commit a crime. There was no evidence in the record that the juvenile entered the van with the intent to commit a crime. Accordingly, the Second District reversed and remanded the burglary conviction to reduce the burglary in a conveyance charge to the lesser-included offense of trespass in a conveyance. As to the petit theft of the ATV, the Second District found that the juvenile's statement to the police that "[w]e didn't get the four-wheeler all the way through [the fence]" was inconsistent with his theory of innocence that the other boy acted completely on his own in stealing and smashing the ATV. Further, the statement was sufficient, competent evidence of both the juvenile's intent and participation in the theft. Therefore, the trial court properly denied the motion for judgment of acquittal regarding the theft of the ATV, and the adjudication for theft of the ATV was affirmed. The juvenile was also charged with criminal mischief for the damage to the van, ATV, gate, and mailbox. The juvenile claimed that the court could not adjudicate him delinquent for criminal mischief without specific intent because he did not commit the crimes that caused the damage. The Second District found that the juvenile's statement to the police was sufficient, competent evidence that the juvenile intended for the youth to willfully damage the gate and the ATV. Because the juvenile never had control of the van, and there was no evidence that he encouraged the one boy to hit the mailbox or the other boy to crash the van, the juvenile was not responsible for the damage to the mailbox or the van. The State did not charge the juvenile separately for each type of damage, and the trial court previously reduced the charge from first-degree to second-degree criminal mischief based

on the lack of proof of value. Thus, based on the State's evidence for the damage to the gate and ATV alone, the trial court properly denied the juvenile's motion for judgment of acquittal. Therefore, the adjudication for criminal mischief was affirmed. Accordingly, the Second District reversed the juvenile's grand theft adjudication; reversed and remanded the burglary conviction to reduce the adjudication to trespass in a conveyance; and affirmed the criminal mischief, petit theft, and trespass adjudications.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2013/February/Ferbruary%2006,%202013/2D11-222.pdf (February 6, 2013).

Third District Court of Appeal

M.B. v. State, __ So. 3d __, 2013 WL 811667 (Fla. 3d DCA 2013). **ADJUDICATION FOR RESISTING ARREST WITHOUT VIOLENCE REVERSED.** The juvenile appealed his adjudication for resisting arrest without violence. On appeal, the Third District Court of Appeal found that the trial court erred in denying the juvenile's motions for judgment of dismissal. The detention of the juvenile was unlawful because it was based on an unreliable, anonymous tip that was not corroborated, and there was no evidence that the officer had the reasonable suspicion necessary to detain the juvenile for trespass or any other crime. Moreover, the juvenile's flight, standing alone, was not sufficient to support the adjudication for resisting without violence. The State did not introduce any evidence to demonstrate that the flight took place in a high crime area. Accordingly, the adjudication of delinquency was reversed.

<http://www.3dca.flcourts.org/Opinions/3D12-0705.pdf> (March 6, 2013).

J.H. v. State, __ So. 3d __, 2013 WL 616499 (Fla. 3d DCA 2013). **POLICE OFFICER LACKED REASONABLE SUSPICION TO CONDUCT A TERRY V. OHIO, 392 U.S. 1, 88 S.CT. 1868, 20 L.ED.2D 889 (1968), STOP BASED ON AN ANONYMOUS TIP.** The juvenile appealed from an order withholding adjudication for carrying a concealed weapon and possession of a firearm by a minor. The juvenile's motion to suppress the firearm was denied by the trial court. The arresting officer was dispatched based on an anonymous tip that there was a fight between several males, one of whom was wearing black clothing and carrying a taser. When the officer arrived, there were about thirty people milling around. The officer did not observe a fight and did not see anyone except the juvenile wearing black clothing. The officer testified that the juvenile was "sweating and attempting to catch his breath," and appeared "nervous." Because the juvenile's clothing matched the description provided and he appeared to be anxious, the officer ordered him to come towards her and to place his hands on a car. The officer then proceeded to pat him down for safety reasons (the dispatch indicated that the male had a taser). The officer did not see any suspicious bulges on the juvenile that might indicate a weapon. During the pat down, the officer felt a cylindrical object in the juvenile's pocket. Believing it to be a revolver, the officer stuck her hand in the pocket to retrieve the object. The juvenile grabbed her arm, pushed her, and ran. Another officer stopped and arrested the juvenile. The Third District Court of Appeal found that the police officer lacked reasonable suspicion to conduct a Terry stop. Anonymous tips justify Terry stops only when sufficiently corroborated by independent police investigation that confirms some details of the tip. Here, the arresting officer only saw the juvenile walking away from a gathering of people. She

observed him sweating and catching his breath. She did not see any bulge in his clothing indicative of a weapon, nor did she observe any illegal, suspicious, or furtive behavior. The sole basis for the officer's search and seizure was the anonymous tip, which the officer failed to corroborate. This was insufficient to generate reasonable suspicion to believe the juvenile was armed and dangerous. Accordingly, the Third District reversed the trial court's denial of the motion to suppress the gun and remanded for the trial court to reverse the withheld adjudication of delinquency as to the counts of carrying a concealed weapon and possession of a firearm by a minor and to discharge the juvenile as to those counts.

<http://www.3dca.flcourts.org/Opinions/3D11-2447.pdf> (February 20, 2013).

J.P. v. State, __ So. 3d __, 2013 WL 440187 (Fla. 3d DCA 2013). **ADJUDICATION FOR TRESPASS IN A CONVEYANCE WAS REVERSED BECAUSE THE CHARGING DOCUMENT FAILED TO EXPLICITLY ALLEGE THE ELEMENTS OF THE LESSER INCLUDED OFFENSE.** The juvenile appealed an order adjudicating him delinquent for trespass in a conveyance as a lesser included offense of the charge of grand theft. The Third District Court of Appeal found that well-established law precludes a finding of guilt on a lesser included offense where the charging document fails to explicitly allege all the elements of the lesser offense. In the instant case, the State correctly conceded that the petition failed to allege an essential element of the offense. Accordingly, the adjudication was reversed.

<http://www.3dca.flcourts.org/Opinions/3D11-2596.pdf> (February 6, 2013).

G.W. v. State, __ So. 3d __, 2013 WL 440559 (Fla. 3d DCA 2013). **SECTION 784.081(2)(c), F.S. (2010), DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSES OF THE UNITED STATES CONSTITUTION AND THE FLORIDA CONSTITUTION.** In consolidated appeals, three juveniles challenged the constitutionality of s. 784.081, F.S. (2010), asserting that the sentencing enhancement violated the equal protection clauses of the United States Constitution and the Florida Constitution. Each juvenile was adjudicated for simple battery against a school district employee, which was then enhanced by the statute. The Third District Court of Appeal found that in the absence of a fundamental right or a protected class, equal protection demands only that a distinction which results in unequal treatment bear some rational relationship to a legitimate state purpose. This is known as the rational basis test. Application of the rational basis test consists of two prongs: 1) whether the statute serves a legitimate government purpose, and 2) whether the legislature was reasonable in its belief that the classification would promote that purpose. The Third District held that the statute in question met the rational basis test. Therefore, there was no constitutional infirmity to s. 784.081(2)(c), F.S. (2010). Accordingly, the Third District affirmed the adjudications in the consolidated appeals.

<http://www.3dca.flcourts.org/Opinions/3D11-3262.pdf> (February 6, 2013).

Fourth District Court of Appeal

M.A.L. v. State, __ So. 3d __, 2013 WL 1222771 (Fla. 4th DCA 2013). **TRIAL COURT'S FAILURE TO GIVE THE JUVENILE AND HER FATHER AN OPPORTUNITY TO COMMENT ON THE ISSUE OF DISPOSITION, PRIOR TO ITS DETERMINATION, CONSTITUTED FUNDAMENTAL ERROR.** After finding the juvenile had violated her juvenile probation, the trial court conducted a lengthy

sidebar, outside of the presence of the child and her father. The court discussed the predisposition report and the recommended disposition with the attorneys and a Department of Juvenile Justice (DJJ) representative. Upon conclusion of the sidebar, without soliciting comments from the juvenile or her father on the proposed disposition, the court announced the probation revocation, the adjudication, and the commitment in accordance with the DJJ's recommendation. The Fourth District Court of Appeal found that the trial court's failure to give the juvenile and her father an opportunity to comment on the issue of disposition prior to its determination constituted fundamental error. Section 985.433(4), F.S. (2011), requires that before a court determines and announces a disposition, it shall give all parties involved in the case that are present an opportunity to comment on the issue of disposition and any proposed rehabilitative plan. Further, under the Florida Rules of Juvenile Procedure, juveniles have a right to be physically present at all stages of the proceedings except when there has been a waiver of the right to be present made personally by the juvenile or when the court makes specific findings regarding the child's physical or mental condition that precludes physical presence. In the instant case, the juvenile did not personally waive her right to be present or heard during these discussions. The Fourth District found that the trial court also erred by finding that she violated her probation by using drugs based solely on hearsay testimony, and by failing to enter a written order specifying the conditions of probation that were violated. Although the record contained sufficient evidence upon which the trial court found that the juvenile violated her probation on two other counts, the Fourth District reversed and remanded for the trial court to reconsider whether it would have imposed the same disposition if faced only with the remaining two supported violations. Additionally, the court was instructed to enter a written order of revocation of probation specifying the conditions the juvenile was found to have violated. Reversed and remanded for proceedings consistent with this opinion.
<http://www.4dca.org/opinions/Mar%202013/03-27-13/4D11-4603.op.pdf> (March 27, 2013).

E.F. v. State, ___ So. 3d ___, 2013 WL 1136336 (Fla. 4th DCA 2013). **LOITERING AND PROWLING ADJUDICATION REVERSED AND REMANDED BECAUSE THE ELEMENTS OF THE OFFENSE WERE NOT COMMITTED IN THE OFFICER'S PRESENCE.** The juvenile appealed the disposition order that found him guilty of loitering and prowling. A police detective observed the juvenile walking slowly while looking into carports and the sides of houses. He was carrying a "large black satchel bag," and had a yellow flashlight hanging out of his front pants pocket. The detective initiated contact. The juvenile acknowledged that he did not live in the neighborhood. A citizen testified that he observed the juvenile look at a vacant house, look across from the vacant house to his neighbor's house, and walk around his neighbor's house. The detective asked the juvenile what was in his satchel bag. The juvenile responded that it contained "scrap items." Upon request, he opened his bag, which revealed pieces of copper piping, a pair of bolt cutters, a pair of gloves, screwdrivers, and a hammer. During the adjudicatory hearing, the court granted the juvenile's motion for judgment of dismissal on his other charge for possession of burglary tools. The juvenile also moved for a judgment of dismissal on the loitering and prowling charge, arguing that the State failed to present evidence sufficient to prove either of the two elements of the crime as set forth in s. 856.021, F.S. (2011). The court denied that motion. On appeal, the juvenile argued that the elements of the offense were not committed in the officer's presence. The Fourth District Court of Appeal found that, to establish the crime of

loitering and prowling, the State must prove that: (1) the defendant loitered or prowled in a place, at a time, or in a manner not usual for law-abiding individuals, and (2) the loitering was under circumstances that warranted a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity. Further, because loitering or prowling is a misdemeanor, both elements of the offense must be committed in the officer's presence prior to arrest. In the instant case, the Fourth District held that the State failed to meet its burden with regard to either element of the offense. Even when viewed in the light most favorable to the State, the juvenile's conduct was not unusual or indicative of incipient criminal activity required to satisfy the first element. Likewise, the conduct was not the type that would warrant a finding that a breach of peace was imminent or that public safety was threatened, which is necessary to prove the second element. Moreover, the items found in the juvenile's satchel bag could not be considered under the facts of this case. Possession of suspicious tools may support a suspicion of imminent criminal activity after the fact, but the offense of loitering and prowling must be completed prior to any police action. Accordingly, the finding of guilt was reversed and remanded for the trial court to vacate the disposition order.

<http://www.4dca.org/opinions/Mar%202013/03-20-13/4D11-2883.op.pdf> (March 20, 2013).

K.A.A. v. State, __ So. 3d __, 2013 WL 1136332 (Fla. 4th DCA 2013). **TRIAL COURT ERRED IN NOT ALLOWING THE JUVENILE TO CROSS-EXAMINE THE STATE'S JUVENILE WITNESS ABOUT CRIMINAL CHARGES PENDING AGAINST THE WITNESS.** The juvenile appealed his adjudication for unlawfully possessing a gun on school grounds. The juvenile argued that the trial court erred in not allowing him to cross-examine the State's juvenile witness about the criminal charges pending against the witness. The Fourth District Court of Appeal noted that in Tuell v. State, 905 So. 2d 929 (Fla. 4th DCA 2005), they held that a defendant has the right to examine a juvenile prosecution witness about his/her pending criminal charges to show bias, motive, or self-interest. The right to cross-examine witnesses outweighed the State's interest in preserving the confidentiality of juvenile delinquency records. Accordingly, the juvenile's adjudication was reversed and remanded.

<http://www.4dca.org/opinions/Mar%202013/03-20-13/4D11-4063.op.pdf> (March 20, 2013).

D.H. v. State, __ So. 3d __, 2013 WL 949879 (Fla. 4th DCA 2013). **APPEAL OF ORDER GRANTING MOTION IN LIMINE TREATED AS A PETITION FOR WRIT OF CERTIORARI.** The Fourth District Court of Appeal found that an order granting a defendant's pretrial motion in limine was not appealable under Florida Rule of Appellate Procedure 9.140, but the order was reviewable by common-law certiorari. Therefore, the State's appeal of the order granting the motion in limine was treated as a petition for writ of certiorari. The Fourth District denied the petition.

<http://www.4dca.org/opinions/Mar%202013/03-13-13/4D12-1520.op.pdf> (March 13, 2013).

R.V. v. State, __ So. 3d __, 2013 WL 614077 (Fla. 4th DCA 2013). **DISPOSITION REVERSED AND REMANDED WHERE TRIAL COURT FAILED TO COMPLY WITH THE REQUIREMENTS SET FORTH IN E.A.R. V. STATE, 4 SO. 3D 614 (FLA. 2009).** The juvenile appealed the trial court's disposition order placing him in a moderate-risk commitment program. The juvenile argued that the trial court erred in departing from the Department of Juvenile Justice's (DJJ) recommended placement in a low-risk commitment program because the trial court failed to comply with the

requirements set forth in E.A.R. The Fourth District Court of Appeal found that the trial court committed the juvenile to the moderate-risk program due to the nature of the offenses committed and because he presented a danger to himself and the community that could not be adequately addressed by a low-risk facility. However, the trial court failed to articulate why a moderate-risk program was better suited to serving the juvenile's rehabilitative needs in the least restrictive setting, and protecting the public as required by E.A.R. Accordingly, the Fourth District reversed and remanded with directions to either amend the disposition order to include the required findings or, if such findings could not be made, enter a new order imposing the DJJ's recommendation of a low-risk commitment program.

<http://www.4dca.org/opinions/Feb%202013/02-20-13/4D11-1753.op.pdf> (February 20, 2013).

K.J. v. State, __ So. 3d __, 2013 WL 613328 (Fla. 4th DCA 2013). **EVIDENCE WAS INSUFFICIENT TO SUPPORT CHARGE OF TRESPASSING.** The juvenile was charged with trespass on property. The incident occurred at a city park. The park's entrances contained signs stating that the park was closed from sunset to sunrise and that a violation was punishable as a trespass. The park was patrolled by law enforcement because of numerous crimes that had occurred there. After sunset, officers observed a group of ten people, including the juvenile, inside the park. The people were not doing anything illegal or dangerous. However, when the officers approached, the people ran. The officers detained them and warned them to “stay out of the park” and “don't come back.” The following afternoon, while the park was open, the officers saw some of the same people, including the juvenile, inside the park. The juvenile was arrested for trespass. The juvenile moved for a judgment of dismissal arguing that, at the time of the arrest, the park was open. The trial court denied the juvenile’s motion, found him guilty, withheld adjudication, and issued a stern judicial warning to “stay out of the park.” The juvenile appealed. The Fourth District Court of Appeal held that the evidence was insufficient to support the disposition of guilt. The officers did not see the juvenile engaging in any activity while the park was closed which justified warning him to “stay out of the park” while the park was open. Accordingly, the Fourth District reversed and remanded for dismissal of the trespass charge.

<http://www.4dca.org/opinions/Feb%202013/02-20-13/4D12-515.op.pdf> (February 20, 2013).

Fifth District Court of Appeal

State v. A.R.R., __ So. 3d __, 2013 WL 461539 (Fla. 5th DCA 2013). **ORDER DISMISSING DELINQUENCY PETITION CHARGING ONE COUNT OF RESISTING WITH VIOLENCE AND THREE COUNTS OF BATTERY ON A LAW ENFORCEMENT OFFICER WAS REVERSED AND REMANDED.** The State appealed the trial court's order of dismissal of its delinquency petition, which charged the juvenile with one count of resisting a law enforcement officer with violence and three counts of battery on a law enforcement officer. The State argued that the trial court erred in its finding that the law enforcement officers were not engaged in the performance of a legal duty. According to the State, the juvenile's mother reported to the Sheriff's Department that the juvenile was involved in sexual activity with another juvenile. In response, two deputies went to the juvenile's home and, with her mother's consent, went inside to speak with the juvenile. During the course of that discussion, the juvenile became very upset with the deputies and her mother. She began screaming and became highly agitated. Her behavior led the lead deputy to

believe that if he left the juvenile alone with her mother, the situation would escalate into a physical altercation. After trying to calm the juvenile without success, the deputy reached out to take the juvenile by the arm and guide her to a chair. She responded by kicking him. The deputy then handcuffed the juvenile and placed her under arrest. When the two deputies, along with a third deputy called to the scene, attempted to place the juvenile in the rear of a caged vehicle, she bit and kicked at them, and was ultimately secured with a hobble strap. The State charged the juvenile with one count of resisting a law enforcement officer with violence and three counts of battery on a law enforcement officer. The juvenile filed a motion to dismiss, arguing that the deputies were not engaged in the performance of a legal duty when they used force to restrain or arrest her. The trial court granted the motion, and dismissed all four counts against the juvenile. On appeal, the Fifth District Court of Appeal found that the deputies were within their authority in responding to the juvenile's mother's call, which alleged sexual activity by the twelve-year-old child. Once inside the home, the situation evolved, requiring the deputy to grab the juvenile's arm in order to prevent her from assaulting her mother. Viewed in the light most favorable to the State, the deputy was in the lawful performance of a legal duty. Therefore, the State established a prima facie case of resisting a law enforcement officer with violence against the juvenile for purposes of withstanding a dismissal of the delinquency petition. Further, the dismissal of the battery charges based on the juvenile's violence after being arrested was clear error. A person is not entitled to use physical force to contest even an illegal arrest. The juvenile committed the subsequent violence on the deputies in response to their attempt to arrest her. Hence, even if her arrest was illegal, the juvenile was not justified in using force against the deputies. Accordingly, the Fifth District reversed the trial court's order dismissing the delinquency petition and remanded for further proceedings.

<http://www.5dca.org/Opinions/Opin2013/020413/5D12-1306.op.pdf> (February 8, 2013).

Dependency Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

No new opinions for this reporting period.

Second District Court of Appeal

No new opinions for this reporting period.

Third District Court of Appeal

No new opinions for this reporting period.

Fourth District Court of Appeal

No new opinions for this reporting period.

Fifth District Court of Appeal

C.C. v. Department of Children and Families, ___ So. 3d ___, 2013 WL 1007487 (Fla. 5th DCA 2013). **TERMINATION OF PARENTAL RIGHTS AFFIRMED**. The mother appealed the termination of her parental rights as to four children. The appellate court affirmed the lower court's ruling; however, it also noted that the trial court admitted two hearsay statements made by one of her children without following s. 90.803(23), F.S. (2011), which requires the court to conduct a preliminary inquiry into the reliability of the child hearsay statements. Although the inquiry wasn't done, the court decided the error was harmless and affirmed. <http://www.5dca.org/Opinions/Opin2013/031113/5D12-1236.op.pdf> (March 14, 2013).

Dissolution Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

Lampert-Sacher v. Sacher, __ So. 3d ___, 2013 WL 950710 (Fla. 1st DCA 2013). **ONE SPOUSE'S CONFESSION OF ERROR FOUND TO BE PROPER IN THE CIRCUMSTANCES IN THE OTHER SPOUSE'S APPEAL; REVERSED AND REMANDED**. In her appeal of two trial court orders, one of which established a temporary time-sharing schedule, the other of which found her in contempt and imposed sanctions, former wife argued that the trial court's failure to allow her sufficient time to present her case was reversible error and that the contempt order was erroneous on its face. The appellate court found former husband's confession of error to be "proper in the circumstances," and accordingly reversed and remanded. <http://opinions.1dca.org/written/opinions2013/03-13-2013/12-5609.pdf> (March 13, 2013).

Payton v. Payton, __ So. 3d ___, 2013 WL 811803 (Fla. 1st DCA 2013). **ARREARAGE AMOUNT AND REQUIREMENT OF LIFE INSURANCE TO SECURE AN OBLIGATION MUST BE SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE; INCONSISTENCY ON FACE OF RECORD REQUIRES TRIAL COURT TO FIND ACTUAL COST OF HEALTH INSURANCE; ALIMONY AWARD SHOULD NOT RESULT IN SIGNIFICANT DISPARITY BETWEEN SPOUSES; ONE SPOUSE SHOULD NOT BE LEFT "SHORT-CHANGED" BY MARITAL OBLIGATIONS TO THE OTHER SPOUSE**. Former husband appealed final judgment of dissolution of marriage on numerous grounds. The appellate court found merit in the appeals regarding: amount of arrearage, former wife's alimony award and monthly health insurance expenses, and the requirement that former husband obtain and maintain a \$50,000 life insurance policy to secure his alimony obligation. Although former husband conceded at trial that he had not paid the full amount of the temporary support ordered, the appellate court found no competent, substantial evidence to support the arrearage amount in the final judgment; therefore, it reversed and remanded for more specific findings. It reversed and remanded the life insurance requirement for the same reason. Finding an inconsistency regarding health insurance, the appellate court directed the trial court to make findings regarding the actual cost of former wife's health insurance obligation. Noting the general rule

that one spouse should not be left “short-changed” by marital obligations to the other spouse, the appellate court affirmed that former wife was entitled to permanent alimony, but reversed the amount with instructions to the trial court to either award an amount that would not result in “significant disparity between the parties’ net incomes” or make specific findings as to why a different amount was appropriate.

<http://opinions.1dca.org/written/opinions2013/03-06-2013/12-0604.pdf> (March 6, 2013).

Broemer v. Broemer, __ So. 3d __, 2013 WL 811819 (Fla. 1st DCA 2013). **KEY TO IMPUTATION OF INCOME IS VOLUNTARINESS OF UNEMPLOYMENT OR UNDEREMPLOYMENT; COMPETENT, SUBSTANTIAL EVIDENCE MUST SUPPORT IMPUTATION; BURDEN OF PROOF IS ON SPOUSE SEEKING IMPUTATION; TRIAL COURT MUST EXPLAIN WHY PRESUMPTION OF PERMANENT ALIMONY AWARD AFTER MARRIAGE OF LONG DURATION WAS OVERCOME OR DID NOT APPLY.** Former wife argued that the trial court abused its discretion in the dissolution of a 27-year marriage by: imputing income to her; denying her motion for additional attorney’s fees and costs; and awarding durational rather than permanent alimony. (Former wife was also awarded bridge-the-gap alimony for the 24-month period preceding durational alimony.) The appellate court affirmed the imputation of income and denial of her motion, but reversed the alimony award and remanded for specific factual findings. The appellate court reiterated that a trial court can impute income to a voluntarily unemployed or underemployed spouse in determining the spouses’ earning capacities, sources of income, and financial circumstances; the trial court must make specific findings as to the source and amount of imputed income, which must be supported by competent, substantial evidence. Key to the determination is the voluntariness of the unemployment or underemployment. The burden of proof is on the spouse seeking to impute income to the other spouse. The appellate court concluded that in this case former husband presented evidence to allow imputation, and the record supported imputation of income. Noting that an appellate court will not disturb an alimony award where it is supported by competent, substantial evidence, the appellate court concluded here that the absence of the required findings of fact left it unable to conduct a meaningful review; accordingly, it remanded for the trial court to correctly determine former husband’s monthly income and to explain why the statutory presumption for an award of permanent alimony following a marriage of long duration had been overcome or did not apply. The appellate court found no abuse of discretion in the trial court’s denial of former wife’s motion on fees and costs, but noted that if the spouses’ respective financial circumstances were altered on remand, the trial court could reconsider her motion.

<http://opinions.1dca.org/written/opinions2013/03-06-2013/12-0976.pdf> (March 6, 2013).

Hawkins v. Hawkins, __ So. 3d __, 2013 WL 709790 (Fla. 1st DCA 2013). **SPOUSE CONCEDED TRIAL COURT ERROR IN AMOUNT OF CREDIT AWARDED; REVERSED AND REMANDED FOR CORRECTION OF THE AMOUNT CREDITED.** Former husband raised nineteen issues on appeal of two trial court orders; the appellate court affirmed except as to the credit awarded to former wife in the order which determined the spouses’ proportionate share of expenses. Former wife conceded that each spouse was responsible for one-half of the expenses and that the trial court erred in crediting her for the total amount rather than half. Reversed and remanded for

correction of the amount credited to her. <http://opinions.1dca.org/written/opinions2013/02-28-2013/12-2539.pdf> (February 28, 2013).

Palmer v. Palmer, __ So. 3d __, 2013 WL 599130 (Fla. 1st DCA 2013). **BECAUSE MARITAL SETTLEMENT AGREEMENT WAS “MERELY VOIDABLE,” THE JUDGMENT INCORPORATING IT IS NO LONGER SUBJECT TO COLLATERAL CHALLENGE; ONE JUDGE DISSENTS.** Former husband appealed an order that enforced a supplemental final judgment and required that he pay former wife a stipulated amount of money for his failure to obtain refinancing on the marital home within a agreed upon time. He argued that that provision of the marital settlement agreement (MSA) amounted to a penalty and was unenforceable. The appellate court held that a provision which might render a contract voidable is not subject to collateral challenge once it has been incorporated into a final judgment. It noted that former husband neither appealed the judgment nor sought to modify or vacate it, but attempted to raise the issue as a defense to enforce the judgment by contempt. The appellate court held that because the MSA was “merely voidable,” the judgment incorporating it was no longer subject to collateral challenge; however, one of the judges, concurring in part and dissenting in part, noted that the question of whether enforcement of an illegal penalty clause in an MSA incorporated into a judgment can be collaterally attacked has not been addressed by any Florida court and that courts “around the country are split.” <http://opinions.1dca.org/written/opinions2013/02-18-2013/11-5663.pdf> (February 18, 2013).

Second District Court of Appeal

Capote v. Capote, __ So. 3d __, 2013 WL 1222955 (Fla. 2d DCA 2013). **ONCE MONEY IS COMMINGLED, IT LOSES ITS SEPARATE CHARACTER; COMPETENT SUBSTANTIAL EVIDENCE SUPPORTED FINDING THAT SPOUSE’S BUSINESS WAS A MARITAL ASSET; ERROR TO ASSIGN ONE SPOUSE 100% OF RISK OF NONPAYMENT OF A LOAN BUT TO ENTITLE OTHER SPOUSE TO 50% OF ANY REPAYMENT; INSURANCE PROCEEDS FROM BURGLARY PROPERLY ASSIGNED TO SPOUSE WHO DISSIPATED THEM; TRIAL COURT DID NOT ERR IN NOT INCLUDING CREDIT CARD BALANCE IN EQUITABLE DISTRIBUTION WHERE BALANCES WERE MINIMAL AND SPOUSE USED CARDS FOR PERSONAL AND BUSINESS EXPENSES.** Both spouses disputed the trial court’s equitable distribution assignments. The appellate court affirmed in part, reversed in part, and remanded for further proceedings. It found that the trial court had erred in initially assigning the entire value and outstanding mortgage on two pieces of property to former husband even though the spouses each owned a 50% interest in each property and were responsible for one-half of the mortgage on each. Although the ownership interest was corrected on rehearing, the mortgage amounts and the property tax liabilities were not; the appellate court remanded for further correction. The appellate court found the evidence supported the trial court’s conclusion that former husband’s dry cleaning business was a marital asset. It affirmed the trial court’s ruling that any nonmarital part of the business lost that distinction due to former husband’s use of the business operating account to pay the family’s personal expenses. Citing Belmont v. Belmont, 761 So. 2d 406, 408 (Fla. 2d DCA 2008), the appellate court reiterated, “money is fungible, and once commingled, it loses its separate character.” It found the trial court’s valuation of the business was based on competent, substantial evidence, but remanded

for correction of a miscalculation. It affirmed the trial court's finding that insurance proceeds from a home burglary were properly assigned to former husband because he spent the funds without former wife's knowledge or consent. It also affirmed the trial court's exclusion of credit card debt in the equitable distribution scheme because the balances were minimal at the time of filing and former husband used the cards for business and personal expenses. The appellate court remanded to the trial court its assignment to former husband of the entire value of a loan he had made against former wives' wishes and entitlement to former wife of one-half of any repayment; that assignment resulted in former husband bearing 100% of the risk of nonpayment, and former wife receiving 50% of any repayment.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2013/March/March%2027,%202013/2D09-5387.pdf (March 27, 2013).

Fazzaro v. Fazzaro, __ So. 3d __, 2013 WL 845231 (Fla. 2d DCA 2013). **TRIAL COURT ABUSED ITS DISCRETION IN GRANTING FINAL DECISION-MAKING AUTHORITY TO SPOUSE; NO LOGIC OR JUSTIFICATION FOR THAT AUTHORITY.** The appellate court agreed with former husband that the trial court had abused its discretion in giving former wife final decision-making authority over matters concerning their minor child, and reversed the portions of the parenting plan and final judgment granting that authority. Both the parenting plan and the final judgment provided for shared parental responsibility; however, each granted final decision-making authority to former wife. The parenting plan limited her "ultimate" authority to decisions regarding education and non-emergency health care. The appellate court found "no logic or justification" for former wife to have sole authority. It noted that the evidence at trial focused on her request to relocate to Texas, in which no abuse of discretion was found.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2013/March/March%2013,%202013/2D11-5714.pdf (March 8, 2013).

George v. George, __ So. 3d __, 2013 WL 765004 (Fla. 2d DCA 2013). **TRIAL COURT WAS WITHOUT JURISDICTION TO MODIFY ITS FINAL JUDGMENT.** Former husband appealed two final orders which attempted to modify an award from his pension to former wife. The appellate court held that the trial court did not have jurisdiction to modify the final judgment, and reversed. The final judgment of dissolution had equally distributed the marital portion of former husband's pension; however, the trial court did not reserve jurisdiction to modify the percentage shares of the pension as part of the scheme of equitable distribution. Problems arose when former husband retired and former wife's monthly benefit from the pension was reduced; former husband received his entire social security benefit plus a reduced monthly benefit from his pension. In the post-dissolution orders, the trial judge explained that it was not his intention to have former wife's income be reduced, and that the "windfall" to former husband and deficit to former wife was not what he had ordered in the final judgment. Recognizing that the trial court's ruling was equitable, the appellate court found itself "compelled to reverse" because a court has no jurisdiction to modify property rights once they have been adjudicated in a final judgment of dissolution. The final judgment distributed former husband's pension benefit, but not his social security benefit, and, in the appellate court's words, "regrettably," did not contain a provision indicating that the distribution would be any different.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2013/March/March%2001,%202013/2D11-6193.pdf (March 1, 2013).

Van Weelde v. Van Weelde, __ So. 3d __, 2013 WL 466213, 38 Fla. L. Weekly D313 (Fla. 2d DCA 2013). TRIAL COURT USED INCORRECT LEGAL STANDARD WITH SPOUSE WHO WAS THE LEGAL, BUT NOT BIOLOGICAL, PARENT; THERE MUST BE A CLEAR AND COMPELLING REASON, BASED ON CHILD'S BEST INTERESTS, TO OVERCOME THE PRESUMPTION OF LEGITIMACY WHERE LEGAL PARENT IS NOT THE BIOLOGICAL PARENT; TRIAL COURT MUST APPOINT GUARDIAN AD LITEM FOR CHILD. Former husband, who was the legal, but not biological, parent, appealed an order which granted former wife's motion for summary judgment, an order that had the effect of removing him as the legal father of their minor child. Although both spouses signed a voluntary Acknowledgement of Paternity pursuant to s. 382.013(2)(c), F. S. (2006), naming former husband as the child's father, the trial court concluded that former husband's admission that he was not the biological father was dispositive; therefore, it denied his request for a time-sharing schedule and determination of child support. The appellate court cited Department of Health and Rehabilitative Services v. Privette, 617 So. 2d 305 (Fla. 1993), for the need for a clear and compelling reason, based on the child's best interests, to overcome the presumption of legitimacy *even after* the legal father is proven not to be the biological father. The appellate court concluded that once the Acknowledgement of Paternity was signed and former husband's name was on the birth certificate, he became the child's legal father. The trial court erred by "focusing solely on biology and failing to consider whether there was a clear and compelling reason" to remove former husband as the legal father. Reversed and remanded for the trial court to reconsider the issue of former husband's rights as the legal father under the correct legal standard and to appoint a guardian ad litem to represent the child's interests during its consideration.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2013/February/February%2008,%202013/2D11-4277.pdf (February 8, 2013).

Doganiero v. Doganiero, __ So. 3d __, 2013 WL 440001, 38 Fla. L. Weekly D284 (Fla. 2d DCA 2013). MONTHLY AMOUNT OF DURATIONAL ALIMONY WHICH "NO REASONABLE COURT WOULD IMPOSE" CONSTITUTED ABUSE OF DISCRETION; TRIAL COURT MUST SET FORTH RATIONALE FOR AWARD TO ENSURE MEANINGFUL REVIEW. Both spouses argued trial court error in the dissolution of an almost seventeen-year marriage, during which they enjoyed a "lavish" lifestyle. The appellate court affirmed on all issues except the alimony award to former wife. It held that the trial court had failed to make specific factual findings based upon the income it imputed to former husband. The appellate court found that durational alimony of \$100 per month was an amount "no reasonable court would impose"; thus, the trial court abused its discretion. The appellate court also questioned whether permanent alimony would have been more appropriate under the circumstances. Reversed and remanded with instructions for the trial court to: determine whether former wife should receive permanent alimony; to award alimony of a "legally sufficient amount"; and to set forth a rationale for the alimony award which would ensure meaningful appellate review should that become necessary.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2013/February/Ferbruary%2006,%202013/2D11-6432.pdf (February 6, 2013).

Boese v. Boese, __ So. 3d __, 2013 WL 379948, 38 Fla. L. Weekly D264 (Fla. 2d DCA 2013). **LANGUAGE IN FINAL JUDGMENT CONTROLS OVER LANGUAGE IN PARENTING PLAN.** The appellate court affirmed the final judgment of dissolution, but clarified that the language of the judgment requiring that the spouses share the cost of uncovered medical expenses in their proportional shares would control over language to the contrary in the parenting plan; the parenting plan required former husband to pay those expenses. On remand, the trial court could amend the parenting plan if the spouses believed such amendment would help avoid confusion.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2013/February/February%2001,%202013/2D12-2438.pdf (February 1, 2013).

Third District Court of Appeal

Schechter v. Schechter, __ So. 3d __, 2013 WL 811625 (Fla. 3d DCA 2013). **TRIAL COURT ABUSED ITS DISCRETION IN TERMINATING TEMPORARY FEES AND COSTS WHEN AGREEMENT CALLED FOR PAYMENT WHILE MATTER WAS PENDING; STATUTE AUTHORIZES TRIAL COURT TO TERMINATE TEMPORARY SUPPORT FOR GOOD CAUSE SHOWN UPON OR PRIOR TO ENTERING ITS ORDER; AN ORDER GRANTING TEMPORARY SUPPORT IS INTERLOCUTORY AND REMAINS WITHIN JURISDICTION OF TRIAL COURT UNTIL FINAL JUDGMENT IS ENTERED, IN ABSENCE OF INTERVENING APPELLATE JURISDICTION.** Former wife appealed an order that terminated agreed-upon temporary alimony and attorney's fees. The appellate court approved the termination of the temporary alimony, but found the trial court had abused its discretion in terminating the temporary fees and costs. Pursuant to a prenuptial agreement, former wife would receive slightly over ¼ of a million dollars in the event of a divorce. Former husband sought to enforce the agreement when he filed for divorce; former wife sought to set it aside. They reached agreement as to what support he would provide for her during the litigation; the terms were generous. At the conclusion of the trial, the trial court orally announced its decision that the agreement was valid, but stated that it would be several months before it could enter a written judgment. Former husband then moved to terminate the temporary support and fees because they exceeded the amount of alimony former wife would receive under the agreement; the trial court terminated both obligations. The appellate court held that s. 61.14(11)(a), F.S. (2012), authorizes a trial court to modify, vacate, or set aside a temporary support order, for good cause shown, before or upon entering its final order. It noted that an order granting temporary support is interlocutory; absent intervening appellate jurisdiction, it remains within the jurisdiction of the trial court until the final judgment is entered. The issue of fees and costs, however, was a different matter. The appellate court concluded that the spouses had agreed former wife would receive temporary fees every month so long as the matter was pending. As there was no dispute that the matter was still pending and that an "ultimate reckoning" of the fees and costs had yet to be determined, former wife was entitled to receive them unless former husband could demonstrate that the spouses' financial circumstances or other equitable consideration, "mandates termination of those payments." Finding no such showing, the appellate court held that the trial court had abused its discretion

in terminating his obligation. <http://www.3dca.flcourts.org/Opinions/3D12-1714.pdf> (March 6, 2013).

Fourth District Court of Appeal

Smith v. Smith, __ So. 3d __, 2013 WL 1136327 (Fla. 4th DCA 2013). **MARITAL SETTLEMENT AGREEMENT (MSA) STATING THAT ALIMONY WAS NON-MODIFIABLE AND PROVIDED FOR TERMINATION ONLY UPON DEATH OF EITHER SPOUSE OR REMARRIAGE OF FORMER WIFE PRECLUDED TERMINATION OR MODIFICATION UNDER S. 61.14.** The question before the appellate court was whether a party to a marital settlement agreement (MSA) may seek to terminate or modify an alimony obligation, pursuant to s. 61.14, F.S. (2011), notwithstanding an express agreement to the contrary. Its answer was no. The MSA provided that the alimony obligation was “non-modifiable by the parties, in either amount or duration, regardless of any change in circumstances of either party.” Termination of alimony was limited to death of either spouse or former wife’s remarriage. The appellate court held that the “concept of a supportive relationship as a possible termination event” could have been contemplated by the spouses at the time they entered into the MSA; they chose not to include it.

<http://www.4dca.org/opinions/Mar%202013/03-20-13/4D11-4462.op.pdf> (March 20, 2013).

Carrillo-Jimenez v. Carrillo, __ So. 3d __, 2013 WL 1136319 (Fla. 4th DCA 2013). **S. 90.503, F.S. (2003), PRIVILEGE DIDN’T EXTEND TO PARENT; WRIT OF CERTIORARI DENIED.** The appellate court denied former husband’s petition for a writ of certiorari based on Hughes v. Schatzberg, 872 So. 2d 996 (Fla. 4th DCA 2004), in which it held that a parent lacks standing to assert the statutory privilege afforded in s. 90.503, F.S. (2003), where a parent is pursuing their own interests in litigation and the minor child is not a party to that litigation.

<http://www.4dca.org/opinions/Mar%202013/03-20-13/4D12-4512.op.pdf> (March 20, 2013).

Gaudette v. Gaudette, __ So. 3d __, 2013 WL 950081 (Fla. 4th DCA 2013). **TRIAL COURT ERRED IN ITS FINDING THAT NO EVIDENCE WAS PRESENTED AS TO COST AND AFFORDABILITY OF SPOUSE’S HEALTH INSURANCE; REMANDED.** The appellate court affirmed the final judgment of dissolution of marriage except for the trial court’s finding that no evidence was presented as to the cost of former wife’s health insurance and whether that cost would be affordable to former husband. The appellate court found the monthly cost of her insurance in former husband’s financial affidavit; it remanded for the trial court to reconsider its findings.

<http://www.4dca.org/opinions/Mar%202013/03-13-13/4D10-2910.op.pdf> (March 13, 2013).

Eckert v. Eckert, __ So. 3d __, 2013 WL 692082 (Fla. 4th DCA 2013). **TRIAL COURT MUST MAKE REQUIRED STATUTORY FINDINGS ON RELOCATION; FAILURE TO IMPUTE INCOME FOR CHILD SUPPORT PURPOSES BASED ON FINDING UNSUPPORTED IN RECORD; INSURANCE TO SECURE CHILD SUPPORT MUST BE REASONABLY RELATED TO THE SUPPORT AMOUNT; TRIAL COURT MUST MAKE FINDING OF NEED AND DETERMINE AVAILABILITY AND COST OF INSURANCE; NO AUTHORITY TO REQUIRE DISABILITY OR RETIREMENT INSURANCE.** In a dissolution case it termed “acrimonious,” the appellate court reversed the trial court’s final judgment on several grounds: (1) the trial court failed to make the requisite statutory findings regarding relocation, including a finding that relocation was in the child’s best interests, when it permitted former

wife to relocate from Broward County to Vero Beach; (2) the trial court's failure to impute income to former wife for child support purposes, based on its finding that the spouses had agreed that former wife not work during the child's early years, was error because that finding was not supported by any evidence in the record; (3) the trial court failed to determine the proper amount of insurance necessary to secure former husband's child support obligation, as well as the availability and cost of the insurance, when it ordered that he provide two million dollars in life insurance to secure his obligation; and (4) the trial court had no authority to order former husband to provide insurance in the event of his disability or retirement. Holding that the trial court abused its discretion in permitting relocation, the appellate court stated that the relocation statute required a "far more thorough analysis." The fact that a "parent has a home in another location cannot be the sole basis for permitting relocation under the statutory provisions." The appellate court reiterated that there must be a reasonable relationship between the amount required to secure an obligation and the obligation itself. Disability may be a ground for downward modification of child support; voluntary retirement is not. A parent has no obligation to secure child support for "all future circumstances that may befall the parent."

<http://www.4dca.org/opinions/Feb%202013/02-27-13/4D12-2943.op.pdf> (February 27, 2013).

Moforis v. Moforis, __ So. 3d __, 2013 WL 440115, 38 Fla. L. Weekly D297 (Fla. 4th DCA 2013). **REVERSED AND REMANDED FOR TRIAL COURT TO READDRESS TIME-SHARING.** Reversed and remanded for the trial court to address vacation and holiday time-sharing in the final judgment. See Todd v. Gillaume-Todd, 972 So. 2d 1003 (Fla. 4th DCA 2008).

<http://www.4dca.org/opinions/Feb%202013/02-06-13/4D11-31.op.pdf> (February 6, 2013).

Fifth District Court of Appeal

Oliver v. Oliver, __ So. 3d __, 2013 WL 1007674 (Fla. 5th DCA 2013). **ABSENT AN EXPRESS AGREEMENT OR COURT ORDER, SPOUSE WAS NOT RESPONSIBLE FOR CHILDREN'S ELECTIVE MEDICAL PROCEDURES.** Former husband appealed the final judgment of dissolution of marriage; the appellate court affirmed with one modification. The final judgment required former husband to reimburse former wife 75% of the cost of any medical expenses incurred by the minor or dependent children; the appellate court modified this provision to apply only to non-elective reasonable and necessary medical expenses. Citing Hill v. Hill, 706 So. 2d 406 (Fla. 5th DCA 1998), the appellate court held that absent an express agreement or court order, former husband was not responsible for elective medical procedures.

<http://www.5dca.org/Opinions/Opin2013/031113/5D11-2770.op.pdf> (March 15, 2013).

Sweeney v. Sweeney, __ So. 3d __, 2013 WL 4706416 (Fla. 5th DCA 2013). **NEITHER TRIAL COURT'S FINDINGS NOR EVIDENCE JUSTIFIED REQUIRING SPOUSE TO SECURE ALIMONY OBLIGATION WITH LIFE INSURANCE; INCLUSION OF TRAVEL TIME FOR CPA AND VOCATIONAL EXPERT AND CANCELLATION FEE FOR ATTORNEY WAS ERROR; TRIAL COURT TO DELETE COSTS ON REMAND.** Former husband appealed the final judgment of dissolution of marriage and a post-judgment award of fees and costs to former wife. The appellate court affirmed the judgment with two exceptions: 1) the requirement that former husband secure his alimony

obligation with life insurance; and 2) the reimbursement to former wife for the travel costs of her CPA and vocational expert as well as a cancellation fee for her attorney. The appellate court noted that requiring security for an alimony obligation is justified only if there is a demonstrated need to protect the alimony recipient; in such cases, the trial court is required to make specific findings regarding the circumstances underlying the justification. The appellate court concluded that neither the trial court's findings nor the evidence supported the requirement; accordingly, it struck it from the final judgment.

The appellate court held that the trial court erred when it included travel time for former wife's CPA and vocational expert plus a cancellation fee for her attorney. Accordingly, it instructed the trial court on remand to enter an amended fee and cost order deleting those amounts.

<http://www.5dca.org/Opinions/Opin2013/031113/5D11-1248.op.pdf> (March 15, 2013).

Dybalski v. Dybalski, __ So. 3d __, 2013 WL 842944 (Fla. 5th DCA 2013). **A TRIAL COURT ABUSES ITS DISCRETION IN AWARDING FEES TO SPOUSES ON EQUAL FINANCIAL FOOTING AFTER DISSOLUTION OF MARRIAGE UNLESS THE CONDUCT OF ONE SPOUSE CAUSES THE OTHER TO UNREASONABLY INCUR FEES; IF SO, THE TRIAL COURT MUST MAKE SPECIFIC FINDINGS TO SUPPORT ITS AWARD.**

Former husband appealed an order awarding attorney's fees to former wife. Finding his conduct "not sufficiently vexatious" to justify the award, the appellate court reversed. Although generally it is an abuse of discretion for a trial court to award attorney's fees if the dissolution leaves both spouses on equal financial footing, it may award them if the conduct of one spouse causes the other spouse to unreasonably incur fees. In that event, the trial court is required to make specific findings to support the award. The appellate court concluded in this case that there was no evidence that former husband engaged in "unnecessary or vexatious litigation"; accordingly, it reversed.

<http://www.5dca.org/Opinions/Opin2013/030413/5D12-557.op.pdf> (March 8, 2013).

Lane v. Lane, __ So. 3d __, 2013 WL 756348 (Fla. 5th DCA 2013). **WITH NO TRIAL TRANSCRIPT AND NO ERROR ON THE FACE OF JUDGMENT, THE APPELLATE COURT IS OBLIGATED TO AFFIRM TRIAL COURT'S FINAL JUDGMENT.** With no trial transcript and no clear error apparent on the face of the judgment, the appellate court found itself obligated to affirm the trial court's final judgment of dissolution of marriage.

<http://www.5dca.org/Opinions/Opin2013/022513/5D12-3270.op.pdf> (March 1, 2013).

Davis v. Davis, __ So. 3d __, 2013 WL 461875, 38 Fla.L.Weekly D329 (Fla. 5th DCA 2013). **TRIAL COURT'S ADMISSION OF DEPARTMENT OF CHILDREN AND FAMILIES (DCF) INVESTIGATIVE REPORTS WAS "CUMULATIVE" AND HARMLESS ERROR; FEE REQUEST SHOULD HAVE BEEN BASED ON SPOUSES' FINANCIAL RESOURCES AT TIME OF FINAL JUDGMENT.** Former wife appealed the award of majority time-sharing to former husband and the equitable distribution in the dissolution of a twenty-one year marriage. Time-sharing was based in part on the trial court's consideration of DCF investigative reports. Former husband neither called the authors of the reports to testify nor laid a predicate for their admission. The appellate court held that admitting the reports was harmless error; the reports were "cumulative" and there was "ample evidence to support the trial court's findings, including Former Husband's testimony." The trial

court erred in awarding former husband a one-half interest in a condo in Virginia that former wife inherited during the marriage. Title to the condo was in former wife's mother's name with former wife having right of survivorship. The title was never changed and no marital funds were used to purchase it; thus, it was nonmarital. Former husband failed to prove he was entitled to enhancement; therefore, the condo should not have been part of equitable distribution. With regard to fees, the appellate court concluded that it appeared that the trial court had based its denial of former wife's request on her access to nonmarital bank stocks and on speculation that the spouses would be on "near-equal footing" when former husband retired, as expected, a few months after trial. The appellate court held that the trial court should have evaluated former wife's fee request based on the spouses' financial resources at the time of the final judgment. It held that the trial court could consider the "reasonableness of the fees in the context of Former Wife's repeated changes of counsel," as her fee request pertained to the fifth attorney to represent her.

<http://www.5dca.org/Opinions/Opin2013/020413/5D11-1634.op.pdf> (February 8, 2013).

Quintero v. Rodriguez, __ So. 3d __, 2013 WL 557191 (Fla. 5th DCA 2013). **TRIAL COURT'S ALIMONY RULINGS AFFIRMED; ABUSE OF DISCRETION IN DENYING FEES TO SPOUSE LEFT WITH "NEGLIGIBLE" SURPLUS OF AVAILABLE FUNDS MONTHLY WHILE OTHER SPOUSE WAS LEFT WITH HEALTHY SURPLUS.** Former wife argued that the trial court's imputation of income to her had cost her permanent alimony; in the alternative, she argued that the trial court abused its discretion by failing to award her nominal permanent periodic alimony. She also argued that the trial court had abused its discretion in denying her fees and costs. The appellate court found no reason to reverse the trial court's alimony rulings; however, it agreed with former wife that the trial court had abused its discretion in denying fees. The appellate court concluded that even with her imputed income, former wife was left with a "negligible" surplus of available funds monthly, while former husband was left with a healthy surplus; under these circumstances, denial of fees was an abuse of discretion.

<http://www.5dca.org/Opinions/Opin2013/021113/5D11-3457.op.pdf> (February 15, 2013).

Ashby v. Murray, __ So. 3d __, 2013 WL 557180 (Fla. 5th DCA 2013). **IN TEMPORARY MODIFICATIONS, MOVING PARTY HAS THE BURDEN OF PROVING THAT (1) A SUBSTANTIAL CHANGE IN CONDITION HAS OCCURRED, AND (2) THE BEST INTERESTS OF THE CHILD WILL BE PROMOTED BY THE CHANGE.** Although not a dissolution of marriage case, this case is included because of the appellate courts cite to language in an earlier opinion, Wilson v. Roseberry, 669 So. 2d 1152,1154 (Fla. 5th DCA 1996), that, "to prevail on a request for a temporary modification of custody, the moving party must meet the burden of proving that (1) a substantial change in the condition of one or both of the parties has occurred, and (2) the best interests of the child will be promoted by the change."

<http://www.5dca.org/Opinions/Opin2013/021113/5D11-3650.op.pdf> (February 15, 2013).

Domestic Violence Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

No new opinions for this reporting period.

Second District Court of Appeal

No new opinions for this reporting period.

Third District Court of Appeal

Santiago v. Ryan, ___ So. 3d ____, 2013 WL 870375 (Fla. 3d DCA 2013). **WRIT OF HABEAS CORPUS DENIED**. The defendant was arrested and charged with aggravated stalking of his ex-wife. While being processed, he was served with a temporary domestic violence injunction which prohibited him from contact with her. During the first appearance, the court entered a stay away order that also prohibited contact with his ex-wife. While incarcerated, the defendant made threatening phone calls to her. The next day, the defendant went to a first appearance for the new charges based upon the calls. He posted bond for both offenses and was released. When he was arraigned for the first case, his bond was revoked because he had violated the conditions of his pretrial release by committing the new crimes, and the defendant filed a petition for a writ of habeas corpus. The court denied the writ and held that the statute governing revocation of pretrial release did apply to a defendant who committed new felonies from jail during the period between setting a bond for the prior offense and his release. <http://www.3dca.flcourts.org/Opinions/3D13-0420.pdf> (March 11, 2013).

Fourth District Court of Appeal

No new opinions for this reporting period.

Fifth District Court of Appeal

Bacchus v. Bacchus, ___ So. 3d ____, 2013 WL 756350 (Fla. 5th DCA 2013). **TEMPORARY INJUNCTION REVERSED**. The husband appealed an order that extended a temporary injunction against domestic violence for one year. The appellate court reversed and noted that the purpose of extending a temporary injunction is to preserve the status quo until a final evidentiary hearing can be held. In this case, the temporary injunction was extended in lieu of a full hearing on a permanent injunction, which is not authorized by the Florida Statutes. The court also noted that there was not enough evidence presented to support issuing a permanent injunction; however, since the wife was limited by the court in her ability to present evidence, the case was remanded for a full hearing. <http://www.5dca.org/Opinions/Opin2013/022513/5D12-1939.op.pdf> (March 1, 2013).

Drug Court/Mental Health Court Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

No new opinions for this reporting period.

Second District Court of Appeal

No new opinions for this reporting period.

Third District Court of Appeal

No new opinions for this reporting period.

Fourth District Court of Appeal

No new opinions for this reporting period.

Fifth District Court of Appeal

No new opinions for this reporting period.