

**OSCA/OCI'S FAMILY COURT CASE LAW UPDATE**  
**July 2010**

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## Delinquency 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***

T.T.N. v. State, \_\_ So. 3d \_\_, 2010 WL 2867873 (Fla. 2d DCA 2010). **THE TRIAL COURT'S FINDING THAT TUBE CONTAINING COCAINE WAS "VOLUNTARILY ABANDONED" BY THE JUVENILE WAS NOT SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE.** The juvenile filed a motion to suppress, arguing that the evidence was the product of an illegal stop. The trial court denied the motion under the reasoning of State v. Oliver, 368 So. 2d 1331, 1335 (Fla. 3d DCA 1979), holding that the tube of cocaine was voluntarily abandoned by the juvenile and therefore admissible regardless of the lawfulness of the stop. In the instant case, the police had initiated a traffic stop. The driver got out and fled on foot. The remaining passengers drove away in the vehicle. The driver was apprehended and arrested. The officers obtained the registered owner's address based on the vehicle's tag. The officers then drove to the vehicle owner's residence which was just outside of their jurisdiction. When the police pulled up to the residence, three individuals were standing by the vehicle. Two of the individuals ran inside the house while the third, a juvenile, ran to the side of the house. The juvenile was identified by one of the officers as one of the passengers in the vehicle involved in the traffic stop. One of the officers followed the juvenile to the side of the house and located him hiding behind a bush. The officer testified that he asked the juvenile to show his hands. The juvenile stood up, moved a little bit, and then the narcotics (contained in a green M & M tube) came out from either a pocket or inside his shirt, and dropped to the ground. The officer placed the juvenile in custody and retrieved the tube from the ground. The Second District Court of Appeal found that the officer had no reasonable suspicion to justify a stop, and the tube was abandoned after the juvenile submitted to the officer's authority. The officers were outside their jurisdiction and had no authority to initiate an investigation at the vehicle's registered address. The general rule is that a municipal police officer may conduct investigations beyond the municipal limits; however, that authority is limited to those instances where the subject matter of the investigation originates inside the city limits. Once the driver, who fled on foot, was apprehended and arrested, there was no new crime or incident to investigate. The officer testified at the suppression hearing that the police did not know whether the vehicle was stolen. The Second District found this hypothesis to be insufficient to justify an ongoing investigation outside the officers' jurisdiction because the vehicle was never reported stolen and was located at the address to which it was registered. Thus, there was no basis for the arresting officer to stop the juvenile. Further, in order to justify an investigatory stop, a police officer must have a reasonable, articulable suspicion that a person has committed, is committing, or is about to commit a crime. There was no reasonable indication that the juvenile was involved in or about to be involved in a crime at the time the

police officers arrived at the vehicle's registered address. The juvenile's attempt to run away was not sufficient to justify an investigatory stop. Finally, the Second District held that the trial court's factual finding that the tube was voluntarily abandoned was not supported by the record. The testimony supported a finding that the juvenile submitted to the officer's authority after he was ordered to show his hands, and at that time the tube containing cocaine fell from the juvenile's body. Therefore, the trial court erred in denying the motion to suppress. Accordingly, the adjudication and sentence were reversed.

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2010/July/July%2023,%202010/2D09-856.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2010/July/July%2023,%202010/2D09-856.pdf) (July 23, 2010).

T.D.S. v. State, \_\_\_ So. 3d \_\_\_, 2010 WL 2788878 (Fla. 2d DCA 2010). [THE JUNE 2010 OPINION WAS WITHDRAWN AND A NEW OPINION WAS SUBSTITUTED](#). The Second District Court of Appeal, on its own motion, withdrew the June 2010 opinion which was summarized in the June 2010 Delinquency Case Law summary, and substituted a new opinion. The only change in the substituted opinion was the removal of the final paragraph from the original opinion. The final paragraph had noted for the trial court that the juvenile's disposition order placed him on juvenile probation for an indefinite period not to exceed his nineteenth birthday even though his offense of gambling was only punishable by a maximum term of six months' supervision. No explanation for the removal of the final paragraph was provided by the Second District. The remainder of the opinion is identical to the June 2010 opinion which affirmed the withholding of adjudication without discussion and held that in the context of a delinquency proceeding there was no confusion about the statutory source of the \$50 mandatory cost and any error in failing to cite a statutory basis was harmless.

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2010/July/July%2016,%202010/2D08-6047rh.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2010/July/July%2016,%202010/2D08-6047rh.pdf) (July 16, 2010).

W.B. v. State, \_\_\_ So. 3d \_\_\_, 2010 WL 2634429 (Fla. 2d DCA 2010). [CASE REMANDED FOR THE LIMITED PURPOSE OF CORRECTING THE ORDER TO REFLECT THE STATUTORY AUTHORITY FOR THE \\$3 "TEEN COURT FEE" IMPOSED UNDER S. 938.19, F.S. \(2008\)](#). The Second District Court of Appeal affirmed the trial court's decision to withhold adjudication of delinquency and impose probation. However, the Second District remanded the case for the limited purpose of correcting the order to reflect the statutory authority for the \$3 "Teen Court fee" imposed under s. 938.19, F.S. (2008), in accordance with Ayoub v. State, 901 So.2d 311, 315 (Fla. 2d DCA 2005).

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2010/July/July%2002,%202010/2D08-6374.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2010/July/July%2002,%202010/2D08-6374.pdf) (July 2, 2010).

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

No new opinions for this reporting period.

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

T.M. v. State, \_\_ So. 3d \_\_, 2010 WL 2882612 (Fla. 4th DCA 2010). [PETITION FOR WRIT OF HABEAS CORPUS GRANTED BECAUSE RECORD DID NOT A SUPPORT FINDING THAT THE JUVENILE WAS AN “ABSCONDER”](#). The juvenile filed a petition for a writ of habeas corpus, alleging that he was being illegally detained in secure detention. The juvenile took issue with the court's finding that he was an “absconder.” See s. 985.255(1)(a), F.S. (2009). The Fourth District Court of Appeal found that the detention of juveniles in Florida is governed entirely by statute. The relevant statutes do not define the term “absconder.” See s. 985.03, F.S. (2009).

After reviewing the record and the Third District Court of Appeals’ decision in B.M. v. Dobuler, 979 So. 2d 308 (Fla. 3d DCA 2008), the Fourth District granted the petition and remanded the case with instructions for the trial court to conduct a hearing within 24 hours on the petition alleging a violation of a probation program. After such hearing, the trial court could consider the remedies set forth in s. 985.439, F.S. (2009), including whether the juvenile should be released.

The Fourth District was persuaded by the Third District's analysis of the Florida Department of Juvenile Justice's “Probation & Community Corrections Handbook” and its criteria for classifying a child as an “absconder” when completing a risk assessment instrument. The criteria suggested there must be a “clandestine” absence with intent to avoid the legal process. B.M. at 314-15. The Fourth District held that nothing in the record indicated that the juvenile’s conduct in leaving the guardian's house was done with the intent to avoid the legal process.

<http://www.4dca.org/opinions/July2010/07-22-10/4D10-2938.op.pdf> (July 22, 2010).

B.N. v. State, \_\_ So. 3d \_\_, 2010 WL 2675301 (Fla. 4th DCA 2010). [CASE REVERSED AND REMANDED BECAUSE THE TRIAL COURT'S REASONS FOR DEPARTING FROM THE DEPARTMENT OF JUVENILE JUSTICE’S RECOMMENDATIONS WERE INADEQUATE UNDER E.A.R. V STATE, 4 SO. 3D 614 \(FLA. 2009\)](#). The juvenile appealed his commitment to a moderate risk residential program arguing that the trial court's reasons for departing from the Department of Juvenile Justice’s (DJJ) recommendation were inadequate under E.A.R. v State, 4 So. 3d 614 (Fla. 2009). The juvenile was on juvenile probation for burglary. The juvenile violated his probation. The DJJ recommended that the juvenile be placed back on probation. The trial court rejected the DJJ's recommendation and committed him to a moderate risk residential program. After reciting the requirements and guidelines set forth in E.A.R., the court orally explained its reasons for departing from the DJJ's recommendation. The trial court then issued a written disposition order listing the reasons for departing from the DJJ's recommendation. The Fourth District Court of Appeal held that the trial court did not logically and persuasively explain why the moderate risk commitment was better suited to serving both the rehabilitative needs of the juvenile – in the least restrictive setting – and maintaining the ability of the State to protect the public from further acts of delinquency. Nor did the court identify significant information that DJJ overlooked, failed to sufficiently consider, or misconstrued with regard to the child's programmatic, rehabilitative needs along with the risks that the unrehabilitated child posed to the public. Therefore, the trial court's reasons for departure were inadequate under E.A.R. Accordingly, the case was reversed and remanded for a new disposition hearing.

<http://www.4dca.org/opinions/July2010/07-07-10/4D09-1852.op.pdf> (July 7, 2010).

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

J.W. v. State, \_\_\_ So. 3d \_\_\_, 2010 WL 2695660 (Fla. 5th DCA 2009). [CASE REVERSED AND REMANDED BECAUSE ATTEMPTED ASSAULT UPON A SCHOOL EMPLOYEE IS A NON-EXISTENT CRIME IN FLORIDA](#). The juvenile was found guilty of attempted assault upon a school employee. The Fifth District Court of Appeal held that this was a non-existent crime in Florida. See J.S. v. State, 925 So. 2d 438 (Fla. 5th DCA 2006) (section 784.07's enhancement of punishment for assault, aggravated assault, battery, or aggravated battery committed against law enforcement officials or other specified public officials did not apply to "attempt to commit" crimes enumerated therein). The Fifth District found that a conviction for a non-existent crime constituted fundamental error. Accordingly, the case was reversed and remanded. The trial court was directed to hold a new disposition hearing and to resentence the juvenile for the crime of attempted assault.

<http://www.5dca.org/Opinions/Opin2010/070510/5D09-3985.op.pdf> (July 9, 2010).

## **Dependency Case Law**

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

No new opinions for this reporting period.

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

C.S. v. Department of Children And Families, --- So. 3d ----, 2010 WL 2925051 (Fla. 1st DCA 2010) [PERMANENT GUARDIANSHIP](#). The mother appealed an order placing her son in permanent guardianship. The mother had completed most of her case plan tasks except attending substance abuse classes and obtaining housing and a job. The appellate court reversed and remanded because the lower court's written order did not comply with §39.6221(2), which requires case-specific findings, and because the record did not contain competent, substantial evidence to support the order of permanent guardianship. The court also noted that removal of a child from his or her parent for abuse, neglect, or abandonment cannot be established based on the parent's homelessness derived solely from a custodian's financial inability unless the department offers services to the homeless custodian and those services are rejected. In this case, the record showed no evidence showing that the department had offered the mother services and had been refused. In fact, the mother had clearly made efforts to improve her situation with the goal of reunification with her son.

<http://opinions.1dca.org/written/opinions2010/07-28-2010/10-1922.pdf> (July 28, 2010).

J.P.H. v. Florida Department of Children And Families/ J.H. v. Florida Department of Children and Families, --- So. 3d ----, 2010 WL 2873139 (Fla. 1st DCA 2010) [TERMINATION OF PARENTAL RIGHTS REVERSED – ICWA](#). The court consolidated the appeals of an order terminating appellants' parental rights and reversed and remanded the case. The department conceded that because the proceedings involved Indian children within the meaning of the Indian Child Welfare Act, 25 U.S.C. § 1912, et seq., the trial court erred in not applying the standards and

requirements of the Act. Most notably, the trial court did not apply 25 U.S.C. § 1912(f), which requires that any order terminating parental rights to an Indian child be supported "by evidence beyond a reasonable doubt," rather than the clear and convincing evidence standard set forth in Chapter 39, Florida Statutes. In addition, the trial court erred when it denied the affected tribe's petition to intervene because the tribe was not represented by a Florida attorney. The court held that the tribe had a clear right to intervene pursuant to section 1911(c) of the Act, and is not required to be represented by a member of the state bar, since enforcement of state prohibitions on the unauthorized practice of law interfere with and are thus preempted in the narrow context of state court proceedings subject to the Indian Child Welfare Act.

<http://opinions.1dca.org/written/opinions2010/07-23-2010/10-1725.pdf> (July 23, 2010).

J.M. v. Florida Department of Children and Families, --- So. 3d ----, 2010 WL 2636090 (Fla. 1st DCA 2010) **TERMINATION OF PARENTAL RIGHTS AFFIRMED**. The father appealed the order terminating his parental rights to his minor children by challenging the sufficiency of the evidence produced at the termination hearing by the Department of Children and Families. However, the court noted that the father had not preserved this issue for appellate review because he failed to move for judgment of dismissal at the close of the department's case. Even had the issue been properly preserved, the court stated that there was competent, substantial evidence in the record to support the termination order.

<http://opinions.1dca.org/written/opinions2010/07-01-2010/10-0201.pdf> (July 1, 2010).

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

R.M. v. Department of Children and Family Services and Attorney Ad Litem for the Child, --- So. 3d ----, 2010 WL 2976764 (Fla. 2d DCA 2010) **ADJUDICATION OF DEPENDENCY AFFIRMED**. The mother appealed the adjudication of dependency of her son which was based on prospective neglect under §39.01(15)(f), Fla. Stat. (2009). The circuit court found that the child was "at grave, imminent risk of harm" and that the harm was highly predictable based on the mother's recent behavior. The court observed a significant danger posed by the mother's persistent anger management problems, her pervasive marijuana smoking, and her frequent drug-induced apathy concerning her son's well being. The appellate court held that there was no abuse of discretion in the trial court's decision to adjudicate the child dependent.

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2010/July/July%2030,%202010/2D10-1195.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2010/July/July%2030,%202010/2D10-1195.pdf) (July 30, 2010).

E.J.G. v. Department of Children and Family Services and Guardian Ad Litem Program, --- So. 3d ----, 2010 WL 2790982 (Fla. 2d DCA 2010) **DEPENDENCY REVERSED**. The father appealed the finding of dependency as to his two biological children. The trial court found that the father abused and neglected his children by failing to protect them from the mother's neglect and by permitting the children to live in a hazardous environment. Because the trial court's findings were not supported by competent, substantial evidence, the court reversed the amended final judgment as to the father.

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2010/July/July%2016,%202010/2D09-4961.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2010/July/July%2016,%202010/2D09-4961.pdf) (July 16, 2010).

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

W.G. v. S.A., --- So. 3d ----, 2010 WL 2925355 (Fla. 3d DCA 2010) [APPOINTMENT OF COUNSEL FOR PARENTS](#). The father sought certiorari review of an order denying his motion for appointment of counsel after the child was taken into shelter care and DCF filed a verified dependency petition charging the mother (the custodial parent) with abuse. No charges were brought against the father, yet he established that he was indigent and requested that he be appointed counsel. DCF and the GAL agreed with the father's motion and asserted that failure to appoint counsel for the father could affect the permanency and best interest of the child. The court denied the motion, finding that it was required to do so under C.L.R. v. Department of Children & Families, 913 So. 2d 764 (Fla. 5th DCA 2005). The trial court then entered a withholding of adjudication as to the mother. The appellate court found that the trial court departed from the essential requirements of law in denying the father's motion. The court also noted that §39.013(1), Florida Statutes (2010), does not add to the definition of "parent" the restriction imposed by the Fifth District in C.L.R., that only a parent actually threatened with termination or dependency is eligible for appointed counsel. The court stated that the statutes in this case are clear and unambiguous. In all instances the statutes refer to "parents" without any distinction between an "offending" and "non-offending" parent, and therefore, both parents are to be treated the same. The court also noted that the Supreme Court promulgated Florida Rule of Juvenile Procedure 8.320, which provides in sub-part (a)(2), "The court shall appoint counsel to indigent parents or others who are so entitled as provided by law, unless appointment of counsel is waived by that person." The language in the Rule, like the statute, has no limitation or qualification. Under the plain meaning of this Rule, there is no basis for restricting appointment of counsel to "offending" parents. The court certified conflict with C.L.R. v. Department of Children & Families, 913 So. 2d 764 (Fla. 5th DCA 2005), granted certiorari, and quashed the order under review. <http://www.3dca.flcourts.org/Opinions/3D10-1265.pdf> (July 28, 2010).

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

No new opinions for this reporting period.

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

No new opinions for this reporting period.

## **Dissolution Case Law**

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

No new opinions for this reporting period.

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

No new opinions for this reporting period.

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

N.W. v. M.W., \_\_ So. 3d \_\_, 2010 WL 2976708, (Fla. 2d DCA 2010).

**TRIAL COURT ERRED BY FAILING TO FOLLOW STATE V. TOWNSEND.**

Appellate court agreed with former wife that the trial court had erred in denying her motion to admit the hearsay statements of the couple's five year old daughter regarding sexual abuse at the hearing on former husband's motion for unsupervised visitation. The dissolution proceedings had involved allegations of abuse. Appellate court held that the trial court had failed to follow State v. Townsend, 635 So. 2d 949 (Fla. 1994); accordingly, it remanded with instructions that the trial court reconsider former wife's motion in light of that case.

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2010/July/July%2030,%202010/2D10-63.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2010/July/July%2030,%202010/2D10-63.pdf) (July 30, 2010).

Valentine v. Van Sickle, \_\_ So. 3d \_\_, 2010 WL 2925098, (Fla. 2d DCA 2010).

**TRIAL COURT MUST MAKE FINDINGS OF FACT REQUIRED BY SECTION 61.08, F.S.; PER DIEM REIMBURSEMENTS SHOULD NOT BE INCLUDED IN SPOUSE'S MONTHLY INCOME UNLESS THEY ARE SHOWN TO REDUCE LIVING EXPENSES; RETROACTIVE ALIMONY SHOULD BE BASED ON NEED OF ONE SPOUSE AND ABILITY TO PAY OF THE OTHER; REIMBURSEMENT OF MORTGAGE PAYMENTS IS WITHIN TRIAL COURT'S DISCRETION; TRIAL COURT HAS DISCRETION TO CHOOSE ONE SPOUSE'S VALUATION OF MARITAL ASSETS OVER THE OTHER, BUT ERRS IF IT ACCEPTS FIGURE OFFERED BY SPOUSE'S COUNSEL IF THAT SPOUSE DOES NOT TESTIFY.**

Lengthy opinion in which former husband appealed the final judgment of dissolution of marriage on several grounds, including: alimony and child support; classification of his personal injury settlement as a marital asset; and the equitable distribution scheme. Appellate court affirmed in part, reversed in part, and remanded for further proceedings. As to alimony, the appellate court held that the trial court's failure to make findings of fact required by section 61.08, Florida Statutes, was not harmless error; it pointed out that in its judgment the trial court failed to explain why it awarded former wife double the alimony she sought. It concluded that the trial court needed to determine whether former wife was capable of earning the same income as she had in the years prior to the dissolution. Appellate court held that former husband's per diem reimbursements should not have been included in his monthly income unless they were shown to reduce his personal living expenses. Appellate court reiterated that any award of retroactive alimony must be based on the receiving spouse's need and the paying spouse's ability; here, the judgment lacked those findings. In response to former husband's request for a credit for mortgage payments made during separation, the appellate court held that prior to the final judgment of dissolution, the marital home is held by the spouses as tenants in the entirety; therefore, both are obligated. Appellate court held that reimbursement is within the trial court's discretion and was unable to conclude that the trial court had abused that discretion in denying reimbursement to former husband. Appellate court pointed out, however, that if the proceeds from former husband's personal injury settlement were determined on remand to be nonmarital, the trial court would need to determine whether former husband was due either a full or partial setoff, as former wife had used funds from that settlement for household expenses. Concluding that the trial court had relied on an incorrect legal standard in finding the settlement proceeds to be marital, appellate court held that the

fact that the bank account bore former wife's name was not necessarily determinative of whether the funds in the account were marital. It held that former husband's decision to use some of his nonmarital assets to benefit the family did not transform the asset into a marital one, and noted that the trial court failed to make any findings regarding whether the settlement proceeds were commingled with marital funds. Commenting that parties in a dissolution proceeding take a calculated risk in presenting only their own opinions as to the value of marital assets, the appellate court found no error in the trial court having chosen to accept former wife's valuation instead of former husband's; however, it did find error in the trial court having valued a condo at the figure offered by former wife's counsel when only former husband had testified.

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2010/July/July%2028,%202010/2D09-1634.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2010/July/July%2028,%202010/2D09-1634.pdf) (July 28, 2010).

Grigsby v. Grigsby, \_\_So. 3d\_\_, 2010 WL 2671284, (Fla. 2d DCA 2010).

**WHEN A TRIAL COURT APPROPRIATELY EXERCISES ITS DISCRETION TO RESTRICT OR DENY TIME-SHARING, IT MUST PROVIDE THE PARENT WITH A KEY TO RECONNECTING WITH HIS OR HER CHILDREN.**

In a case the appellate court termed "troubling", former wife appealed a nonfinal order from the trial court awarding sole parental responsibility to former husband and temporarily suspending her time-sharing with their four minor children. Appellate court held that while the trial court did not abuse its discretion in making that determination, it had erred by not having set forth the specific conditions former wife must satisfy to reestablish time-sharing, and it had abused its discretion by delegating to former husband when and whether time-sharing could be reestablished. Appellate court held that when a trial court exercises its discretion to restrict or deny visitation to protect the welfare of the children, it must give the restricted parent the "key" to reconnecting with his or her children. An order which fails to provide a parent with the key is deficient because it prevents that parent from knowing what is expected and a successor judge from monitoring any progress. Appellate court concluded that depriving former wife of the key to reconnect with her children rendered the order erroneous, and that placing the key in former husband's hands constituted abuse of discretion.

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2010/July/July%2007,%202010/2D09-5255.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2010/July/July%2007,%202010/2D09-5255.pdf) (July 7, 2010).

Smith v. Smith, \_\_So. 3d\_\_, 2010 WL 2671285, (Fla. 2d DCA 2010).

**ABSENCE OF A TRANSCRIPT DOES NOT PRECLUDE REVERSAL IF ERRORS ARE APPARENT ON FACE OF JUDGMENT; ADULTERY SHOULD NOT BE TAKEN INTO CONSIDERATION IN DETERMINING CUSTODY IF TRIAL COURT FINDS IT HAS NO BEARING ON CHILDREN'S WELFARE.**

In an appeal by former wife to the final judgment of dissolution and order on rehearing, neither of which was transcribed, appellate court found that the trial court's errors in calculations were apparent on the face of the judgment. Appellate court reiterated that the absence of a transcript does not preclude reversal where legal errors are apparent on the face of a judgment. Commenting that the trial court had "unduly focused" on the allegations of former wife's infidelity, the appellate court stated that when alleged adultery becomes an issue in the proceedings, "the act of adultery should not be taken into consideration in determining custody

if the trial court finds that the spouse's adultery does not have any bearing on the children's welfare." The appellate court concluded that the absence of a transcript did preclude it from determining whether the trial court had abused its discretion as to the parenting plan and time-sharing schedule.

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2010/July/July%2007,%202010/2D09-2064.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2010/July/July%2007,%202010/2D09-2064.pdf) (July 7, 2010).

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

Aulet v. Castro, \_\_So. 3d\_\_, 2010 WL 2925386, (Fla. 3d DCA 2010).

**LANGUAGE IN SECTION 742.18, F.S., IS CLEAR AND UNAMBIGUOUS; A FATHER HAS 90 DAYS FROM THE RECEIPT OF RESULTS OF A PATERNITY TEST TO FILE A PETITION TO DISESTABLISH PATERNITY.**

Former husband appealed the dismissal of his petition to disestablish paternity and terminate child support due to his failure to comply with section 742.18, Florida Statutes – specifically, his failure to include with the petition a DNA test administered within 90 days prior to the filing of the petition. Former husband argued in his petition that the two paternity tests were taken more than 90 days prior to the petition because he did not have access to the child. Trial court found the language of section 742.18 to be “clear and unambiguous” and pointed out that the 90 day period runs after the test is administered. Appellate court agreed with trial court that the statutory language is plain and unambiguous, and held that once a father receives the results of the test, he has 90 days to choose whether to act on those results. Appellate court did not agree with former husband's argument that there is no time limit for the filing of a petition, only a limitation on the age of the paternity test. A lengthy dissent opines that the 90 day period in section 742.18 is a statute of limitations rather than a jurisdictional time limit.

<http://www.3dca.flcourts.org/Opinions/3D08-0775.pdf> (July 28, 2010).

Boyd v. Alonso-Boyd, \_\_So. 3d\_\_, 2010 WL (Fla. 3d DCA 2010).

**AWARD OF TEMPORARY CHILD SUPPORT BASED ON TESTIMONY OF FORMER HUSBAND WAS AFFIRMED.**

Former husband appealed a nonfinal order denying his exceptions to the general magistrate's report and recommendations, arguing that the magistrate was without authority to rule on the issue of attorney's fees and that the child support award was based on income imputed to former husband without the requisite findings being contained in the report. Appellate court reversed and remanded the denial of exceptions as to the award for temporary attorney's fees for the trial court to hear that issue *ab initio*, but affirmed the denial of exceptions as to the award of temporary child support. With regard to the child support, the appellate court held that the magistrate's report did not reflect that he had imputed income to former husband, but that he had based the award on former husband's testimony. Appellate court also stated that because former husband's repeated failures to comply with discovery and disclosure of his financial records hampered the magistrate in making his calculations, former husband could not then be heard to complain about those calculations.

<http://www.3dca.flcourts.org/Opinions/3D09-2442.pdf> (July 7, 2010).

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

Mondello v. Torres, \_\_So. 3d\_\_, 2010 WL 2882461, (Fla. 4th DCA 2010).

TRIAL COURT HAS BROAD DISCRETION IN DOM CASES TO DO EQUITY AND TO AWARD FEES; TRIAL COURT'S TASK IN EVALUATING ASSETS INHERITED BY A SPOUSE IS WHETHER THAT SPOUSE INTENDED THAT THEY REMAIN NONMARITAL OR BE GIFTED TO OTHER SPOUSE; ISSUE MAY BE TRIED BY CONSENT WHEN THERE IS NO OBJECTION AT TRIAL TO THE INTRODUCTION OF THE EVIDENCE; TRIAL COURT ERRED BY NOT REQUIRING ONE SPOUSE TO REPAY LOAN TO THE OTHER AS PART OF SCHEME OF EQUITABLE DISTRIBUTION AND BY FAILING TO DETERMINE VALUE OF SPOUSE'S LIFE INSURANCE POLICY.

Former husband appealed the final judgment of dissolution of marriage and former wife cross-appealed. Although there were numerous issues on appeal, much of the opinion focused on: 1) whether the trial court correctly determined that accounts derived from funds inherited by former wife upon the death of an earlier husband were nonmarital; 2) whether the trial court erred in failing to require former husband to repay a loan to former wife as part of its equitable distribution; and 3) whether the trial court erred in failing to value former husband's life insurance policy. Appellate court affirmed in part and reversed in part. Appellate court reiterated that a trial court's conclusion as to whether an asset is marital is subject to *de novo* review; it then held that the trial court had not erred in classifying as nonmarital accounts whose funds derived from money inherited by former wife where there was no intent to create a marital asset. Appellate court held that a trial court's task with regard to evaluating assets inherited by a spouse is to determine whether that spouse intended that the assets remain nonmarital or be gifted to the other spouse. In this case, the funds inherited by former wife had remained titled in her name throughout the marriage; appellate court held that because former wife had overcome the presumption that a gift was intended, the trial court had properly exercised its discretion in awarding her those accounts. Appellate court reiterated that a trial court has broad discretion to do equity in dissolution of marriage cases; it noted that trial courts also have broad discretion in awarding attorney's fees. Appellate court held that here the trial court had erred in not having made any special findings as to why a lump sum alimony award to former husband was appropriate; accordingly, this issue was remanded for the trial court to make those findings. Appellate court held that issues are tried by consent if there is no objection to the introduction of evidence on that issue; in this case, the issue of interest on a promissory note between the former spouses was tried by consent. Appellate court concluded that the trial court had erred in failing to require former husband to repay that loan as part of the scheme for equitable distribution and in failing to determine the value of former husband's life insurance policy.

<http://www.4dca.org/opinions/July2010/07-21-10/4D08-4525.op.pdf> (July 21, 2010).

Singer v. Singer, \_\_So. 3d\_\_, 2010 WL 2882537,(Fla. 4th DCA 2010).

COHABITATION CLAUSE MAY BE APPLIED RETROACTIVELY AND REQUIRE REPAYMENT OF ALIMONY AND FEES; ISSUE WAS REMANDED BECAUSE TRIAL COURT FAILED TO ADDRESS OR RESERVE JURISDICTION.

Brief case in which appellate court reiterated that a cohabitation clause in a final judgment of dissolution of marriage, which allows for the termination of alimony for cohabitation, can be applied retroactively and require repayment. In this case, the trial court failed to either reserve jurisdiction or address former husband's request for overpayment of alimony and attorney's fees; therefore, the appellate court remanded for an evidentiary hearing on the issues of retroactive repayment of alimony and fees. <http://www.4dca.org/opinions/July2010/07-14-10/4D09-2469.op.pdf> (July 14, 2010).

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

Engesser v. Engesser, \_\_So. 3d\_\_, 2010 WL 2695646, (Fla. 5th DCA 2010).

**IN ABSENCE OF TRANSCRIPT, APPELLATE REVIEW IS LIMITED TO ERRORS ON FACE OF JUDGMENT; 5TH DCA RECEDES FROM ITS PRIOR DECISIONS REJECTING BRIDGE-THE-GAP ALIMONY; INTENT OF BRIDGE-THE-GAP ALIMONY IS TO SMOOTH THE TRANSITION OF A SPOUSE FROM MARRIED TO SINGLE LIFE.**

Former husband appealed the final judgment of dissolution of marriage, arguing that the trial court erred in awarding permanent and bridge-the-gap alimony to former wife. Due to the absence of a transcript, the appellate court's review was limited to errors on the face of the judgment. The appellate court considered the case en banc in order to recede from its "prior decisions rejecting the use of bridge-the-gap alimony." Appellate court noted that the parties' seven-year marriage fell into the gray area in which there is no presumption for or against permanent alimony; whether permanent alimony is appropriate is based on the trial court's review of the factors set forth in section 61.08(2), Florida Statutes. Commenting that while that section does not specifically provide for bridge-the-gap alimony, but that every other district court of appeal in Florida does with the exception of its own, the appellate court held that section 61.08(2) grants trial courts the discretion to award short-term alimony when necessary to do equity between the parties. It also noted that the intent of bridge-the-gap alimony is to smooth the transition of a spouse from married to single life. Appellate court found that former wife had both "adequate employment skills and an exemplary employment record" and that nothing in the record indicated that she would not be able to sustain the standard of living enjoyed by the parties during their marriage after a twelve-month period of bridge-the-gap alimony.

<http://www.5dca.org/Opinions/Opin2010/070510/5D09-871.op.pdf> (July 9, 2010).

McNamara v. McNamara, \_\_So. 3d\_\_, 2010 WL 2695642 (Fla. 5th DCA 2010).

**TRIAL COURT ERRED IN CREDITING SPOUSE FOR EXPENSES INCURRED DURING SEPARATION TO MAINTAIN THE MARITAL HOME; TRIAL COURT'S FINDINGS REGARDING THE ANTENUPTIAL AGREEMENT EXECUTED IN GEORGIA WERE BASED ON COMPETENT, SUBSTANTIAL EVIDENCE; TRIAL COURT DID NOT ERR IN NOT AWARDING RETROACTIVE TEMPORARY SUPPORT TO SPOUSE AS SHE HAD NOT REQUESTED IT.**

Appellate court found error in trial court having credited former husband for expenses incurred during the parties' separation to maintain the marital home; it affirmed the remainder of the final judgment of dissolution of marriage and the order upholding the validity of the antenuptial agreement executed in Georgia where the parties married and lived for ten years before

moving to Florida. The appellate court concluded that competent, substantial evidence supported the trial court's findings that former husband adequately disclosed his assets, that former wife signed the agreement freely and voluntarily, that she was cognizant of her rights, and that she was given a general and approximate value of former husband's worth by him. Appellate court found no error in trial court not awarding retroactive temporary support to former wife as she had not requested it.

<http://www.5dca.org/Opinions/Opin2010/070510/5D08-3130.op.pdf> (July 9, 2010).

Hood v. Hood, \_\_\_ So. 3d \_\_\_, 2010 WL 2976708, (Fla. 5th DCA 2010).

**TRIAL COURT ERRED IN ADJUDICATING WHETHER SPOUSE'S FATHER WAS ENTITLED TO A LIEN WHERE THE FATHER WAS NOT A PARTY; TRIAL COURT LACKS JURISDICTION OVER FEDERAL BANKRUPTCY ISSUES.**

Former husband appealed the final judgment of dissolution of marriage which had unequally distributed assets due to what his counsel termed "dissipation of significant marital assets." Appellate court found the unequal distribution to be appropriate due to former husband's "egregious behavior" but held that the trial court had erred in adjudicating whether former wife's father was entitled to a lien because the father had not been joined as a party to the dissolution proceedings. Appellate court reiterated that the trial court lacked jurisdiction to decide federal bankruptcy issues in a state dissolution proceeding.

<http://www.5dca.org/Opinions/Opin2010/072610/5D09-593.op.pdf> (July 30, 2010).

## **Domestic Violence Case Law**

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

No new opinions for this reporting period.

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

Olin v. Roberts, --- So. 3d ----, 2010 WL 2976936 (Fla. 1st DCA 2010) Appellant challenges the trial court's final judgment of injunction for protection against domestic violence, due to the insufficiency of the evidence to support the injunction. Because the appellee presented sufficient evidence that he was the victim of domestic violence, specifically battery and assault, the final judgment was affirmed. The court clarified that the definition of "domestic violence" does not include "stalking by law enforcement" or "stalking by use and threat of court." In this case, it was alleged in the proceedings that one party frequently called law enforcement officers to complain about the other party merely for harassment purposes. However, the crime of "harassment" does not include filing reports and complaints to law enforcement agencies as a matter of law under section 784.048(1)(b), Florida Statutes, because constitutionally protected activities such as petitioning the government for redress are exempted from the definition. A report to an arm of government, concerning a matter within the purview of the agency's responsibilities, serves a 'legitimate purpose' within the meaning of section 784.048(1)(a), regardless of the subjective motivation of the reporter.

Because reporting a violation of law or an existing injunction, even with malicious intent towards the supposed violator, does not constitute harassment, it also cannot qualify as

stalking for purposes of section 784.048, or domestic violence under section 741.28, Florida Statutes. Abuse of court processes and filing false reports with law enforcement are serious matters to be discouraged or even prosecuted. However, the statutorily created actions for injunction against violence are not the proper remedies to sanction these acts. Unfounded reports to authorities or requests for judicial relief, even if repeated or for malicious purposes, do not support the entry of an injunction against domestic or other violence.

<http://opinions.1dca.org/written/opinions2010/07-30-2010/09-3675.pdf> (July 30, 2010).

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

Coe v. Coe, --- So. 3d ----, 2010 WL 1461580 (Fla. 2d DCA 2010) **INJUNCTION AGAINST DOMESTIC VIOLENCE REVERSED**. (REPLACES THE APRIL 14<sup>TH</sup>, 2010 OPINION) The petitioner appealed a final judgment of injunction for protection against domestic violence entered in favor of his former wife. The parties were also involved in a divorce and custody dispute being heard by the same judge. The appellate court reversed the order granting the petition because it was entered based on evidence from the custody hearing that was not a part of the injunction hearing record. In essence, the court's decision was based on impermissible extrajudicial knowledge. This case demonstrated that trial judges assigned to dissolution proceedings who also handle interrelated petitions for domestic violence must exercise care in ensuring that their rulings are supported by an adequate record. The court also noted that there is considerable merit in having the judge assigned to a dissolution proceeding also handle claims of domestic violence that arise during the pendency of those proceedings. The court stated that it is likely that a judge handling a dissolution will have a better sense of whether a domestic violence injunction is actually necessary, whether the petition has been filed for genuine reasons or primarily as a tactic within the divorce, and whether matters that could be resolved in one case or the other are better decided in the dissolution proceeding.

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2010/July/July%2016,%202010/2D09-92rh.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2010/July/July%2016,%202010/2D09-92rh.pdf) (July 16, 2010).

Grigsby v. Grigsby, --- So. 3d ----, 2010 WL 2671284 (Fla. 2d DCA 2010) **TIME SHARING ORDER REVERSED**. The mother appealed from the non-final order awarding sole parental responsibility for her four minor children to their father and suspending her time-sharing with the children. The mother and father were married and later separated, after which the mother filed a petition for injunction for protection against domestic violence on behalf of the parties' four minor children, alleging that the father was using inappropriate corporal punishment to discipline the children. While the circuit court granted this petition and entered the injunction, it nevertheless also permitted the Father to have regular unsupervised visitation with the children. The Father exercised this visitation, apparently without incident, and the Mother subsequently had the injunction dissolved. A dissolution of marriage action was later filed, and the trial court held a four-day evidentiary hearing, during which the evidence established that after the injunction was dissolved the mother refused to encourage the children to participate in scheduled time-sharing and also refused to allow the father to see the children at other times. When the father attended the children's school functions and sports activities, the mother threatened to obtain a new injunction against him. After the petition for dissolution was filed, the mother refused to comply with the court's temporary order regarding time-

sharing. Instead, she reported to the Department of Children & Family Services that the father was sexually abusing the children. The Department determined this report to be unfounded, but the mother's actions succeeded in preventing the father from seeing the children for a period of time. The evidence also showed that the mother filed various police reports alleging criminal activity by the father, including a report that the father should be investigated in connection with a high-profile case involving the disappearance of a young girl. All of the complaints underlying these police reports were determined to be unfounded as well. The mother also refused to cooperate with the parenting coordinator appointed by the court, and filed complaints with the state against the licenses of the psychologists and social workers appointed by the court to assist it in determining the parental responsibility and time-sharing issues, contending that these professionals were biased and acting unethically. These complaints were also determined to be unfounded. After hearing four days of testimony and observing the demeanors of both parents, the trial court found that the mother had "actively interfered with the love and emotional ties that previously existed between the Father and the children." The court characterized the mother's actions as the worst case of parental alienation that it had ever seen. Based on the mother's egregious behavior, the trial court assigned sole parental responsibility for all four children to the father and completely suspended the mother's time-sharing with the children. While the trial court designated the suspension of the mother's time-sharing as temporary, the court's order did not set forth what steps the mother could take to reestablish time-sharing with the children. Instead, the court ordered that the father, after consultation with "professionals," could determine when the mother's time-sharing would be reinstated. Therefore, the appellate court reverse the trial court's order on narrow grounds and stated that on remand, the trial court must set forth the specific steps that the mother must take in order to reestablish time-sharing, and it must provide guidance concerning what proof of parental rehabilitation it is seeking from the mother. [http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2010/July/July%2007,%202010/2D09-5255.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2010/July/July%2007,%202010/2D09-5255.pdf) (July 7, 2010).

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

No new opinions for this reporting period.

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

Bienaime v. State, --- So. 3d ---, 2010 WL 2675315 (Fla. 4th DCA 2010) **EVIDENCE- EXCITED UTTERANCE**. The defendant appealed his conviction and sentence on charges of false imprisonment, aggravated assault with a firearm, and battery involving a domestic violence incident. During the case, the officer testified that the victim stated that the defendant said "he didn't want to go back to prison." The defendant argued that the trial court erred in admitting the officer's testimony as to what the victim told her as an excited utterance and in denying the motions for mistrial. The appellate court agreed and reversed on two grounds. First, the victim's statements to the officer did not constitute an excited utterance, as sufficient time had passed to allow the victim to reflect on what had transpired. The trial court recognized its error, but then allowed the trial to continue in hopes the victim would testify consistently, rendering the error harmless. However, the opposite occurred. Second, the trial court should have granted

the mistrial based upon having twice improperly admitted the "prison" statement. Since the "prison" testimony implied the defendant was a convicted felon, the errors were not harmless. <http://www.4dca.org/opinions/July2010/07-07-10/4D08-2058.op.pdf> (July 7, 2010).

***Fifth District Court of Appeal***

No new opinions for this reporting period.