

OSCA OCI Case Law Update June - July 2013

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Baker Act/Marchman Act Case Law

Florida Supreme Court

No new opinion for this reporting period.

First District Court of Appeal

No new opinion for this reporting period.

Second District Court of Appeal

No new opinion for this reporting period.

Third District Court of Appeal

No new opinion for this reporting period.

Fourth District Court of Appeal

No new opinion for this reporting period.

Fifth District Court of Appeal

No new opinion for this reporting period.

Delinquency Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

C.L.L. v. State, __ So. 3d __, 2013 WL 3358929 (Fla. 1st DCA 2013). [ENTRY INTO JUVENILE'S HOME WAS WITHIN THE EMERGENCY AID EXCEPTION TO THE FOURTH AMENDMENT'S PROHIBITION AGAINST UNREASONABLE SEARCHES AND SEIZURES](#). The juvenile appealed the denial of his motion to suppress cannabis and paraphernalia. The juvenile and his friend got into a fight with another resident of the juvenile's home. Someone made a 911 hang-up call. Two deputies were dispatched and they encountered the other resident outside of the residence with blood on his hands, but no injury. The other resident was uncooperative, evasive, angry, and irate while talking with the deputies. He told the deputies that he had been in a fight at the residence, but that the other participants had left. Concerned about the safety of the other participants, the officers entered the residence. The deputies observed the juvenile and his friend asleep in the living room. A bong pipe and a baggie of marijuana were on the coffee table. As the deputies approached, they observed that the juvenile's friend had a black eye and the juvenile had a laceration on his head. The juvenile was awakened and apprised of

his Miranda rights. The juvenile admitted to possessing the marijuana. At the adjudicatory hearing, the juvenile moved to suppress the cannabis and drug paraphernalia, arguing that any exigency “evaporated” when the other resident told the deputies that the other participants in the fight had left. The trial court denied the motion. On appeal, the First District Court of Appeal found that the deputies' entry into the home fit within the emergency aid exception to the Fourth Amendment's prohibition against unreasonable searches and seizures. In order to justify an emergency entry, the State must demonstrate an objectively reasonable basis to believe that a person was in danger and that entry was necessary to provide aid. In the instant case, the 911 call indicated that a physical altercation had occurred. The deputies found an agitated, angry, and uncooperative man with blood on his hands, who told them he had been in a fight. These facts indicated that another person could be seriously hurt and in need of medical attention. The totality of the circumstances gave the deputies reasonable grounds to believe that an emergency existed. Although the other resident stated that the other participants had left, he also stated that the fight had occurred at the home. Where the location of a potentially injured party is uncertain, and a witness is evasive or uncooperative, it is entirely reasonable to begin looking at the location where the injury is believed to have been incurred. When officers are in a home because of an exigent circumstance, any evidence which is in plain view during the duration of the exigency can be seized. As the deputies entered the living room, they immediately observed the contraband, before ascertaining the actual condition of the juvenile and his friend. As the deputies approached the two young men, they observed that both had sustained injuries. Therefore, the exigency was not yet over when the deputies observed the contraband in plain view. Thus, the seizure was proper under the Fourth Amendment. Accordingly, the trial court's adjudication of delinquency was affirmed.

<http://opinions.1dca.org/written/opinions2013/07-05-2013/12-6132.pdf> (July 5, 2013).

D.H. v. State, __ So.3d __, 2013 WL 2462120 (Fla. 1st DCA 2013). **JUVENILE COULD ONLY BE COMMITTED, AT MOST, TO A MODERATE OR LOW-RISK FACILITY FOR A MISDEMEANOR BATTERY PURSUANT TO S. 985.441(2), F.S.** The juvenile was charged with third degree felony grand theft of a motor vehicle and misdemeanor battery. The juvenile was only found guilty of the misdemeanor battery. The Department of Juvenile Justice (DJJ) completed a Pre-Disposition Report (PDR) that considered a number of factors, including that the juvenile was being held pursuant to a juvenile detention order pending his commitment to a high-risk residential program in accordance with an earlier delinquency disposition. Ultimately, the PDR recommended committing the juvenile to a high-risk facility followed by conditional release, to run concurrent with the terms of his previous adjudications. The trial court agreed with the DJJ's recommendation and committed the juvenile to a high-risk residential facility, concurrent with the dispositions already administered. The juvenile appealed and argued that the trial

court impermissibly committed him to a high-risk juvenile facility for the misdemeanor offense. The First District Court of Appeal found that the trial court's order was contrary to law. Pursuant to s. 985.441(2), F.S. (2012), the juvenile could be committed, at the most, to a moderate or low-risk facility for the misdemeanor battery. Accordingly, the disposition was reversed and remanded to allow the trial court to enter a disposition order in compliance with the Florida Statutes.

<http://opinions.1dca.org/written/opinions2013/06-10-2013/12-4806.pdf> (June 10, 2013).

Second District Court of Appeal

B.B. v. State, __ So. 3d __, 2013 WL 3449546 (Fla. 2d DCA 2013). **EVIDENCE WAS INSUFFICIENT TO SUPPORT ADJUDICATIONS FOR POSSESSION OF ALCOHOL AND PROVIDING FALSE IDENTIFICATION TO A LAW ENFORCEMENT OFFICER RESULTING IN ADVERSE CONSEQUENCES TO ANOTHER.** The juvenile appealed her adjudications for possession of alcohol and providing false identification resulting in adverse consequences to another. The juvenile was the front-seat passenger during a traffic stop. The driver exited the vehicle and fled. The deputy approached the vehicle with her gun drawn and observed two other occupants in the vehicle. The juvenile identified herself as S.B., which the police later discovered was the juvenile's sister's name. During a search of the vehicle, the deputy found an open can of Four Loco, a common brand of alcoholic beverage, located between the front seats. The can was cold and dewy. The deputy did not see the juvenile drink from the can. The deputy did not check the juvenile's hands to determine whether they felt cold. The deputy did not detect an odor of alcohol emanating from the juvenile, and she did not conduct a breathalyzer test to determine whether the juvenile had consumed alcohol. Additionally, the deputy did not test the contents of the can to determine whether it contained alcohol. The deputy issued a citation in S.B.'s name for possession of an open container in a vehicle. After the police discovered that the juvenile had provided the deputy with her sister's name, the citation was amended. On appeal, the Second District Court of Appeal found that the State failed to present evidence that the Four Loco can actually contained alcohol. The juvenile denied she possessed the can and did not admit or stipulate that the can contained alcohol. Even if the State established that the can contained alcohol, the State failed to establish a prima facie case because it presented inadequate evidence of the juvenile's constructive possession of the alcohol in a jointly-occupied vehicle. Next, s. 901.36(2), F.S., required the State to prove that providing the false name resulted in adverse consequences to the individual whose name was unlawfully provided. In the instant case, the State presented no evidence that the victim suffered any adverse consequences. Accordingly, the Second District reversed the adjudications for possession of alcohol by a person under age twenty-one and for providing false identification to a law

enforcement officer resulting in adverse consequences to another, and remanded with instructions to adjudicate the juvenile delinquent on the lesser-included delinquent act of providing a false name to a law enforcement officer in accordance with s. 901.36(2), F.S. http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2013/July/July%2010,%202013/2D12-4050.pdf (July 10, 2013).

C.B.H. v. State, ___ So. 3d ___, 2013 WL 3455570 (Fla. 2d DCA 2013). **REVOCAION OF PROBATION REVERSED WHERE IT WAS BASED SOLELY UPON HEARSAY.** During the violation of probation hearing, a police officer testified that he went to the juvenile's home in response to a report for a runaway juvenile. The officer testified that he spoke with the juvenile's mother and that she told him the juvenile was not home, in violation of his curfew. The officer also testified that he did not search the house. The juvenile's mother did not testify at the hearing. As a result, the trial court found the juvenile to be in violation of his probation for failing to adhere to his curfew. The Second District Court of Appeal found that while hearsay testimony is admissible to assist in establishing a probation violation, the revocation finding cannot be based solely upon hearsay testimony. In the instant case, the only evidence offered to prove the violation was hearsay. Accordingly, the Second District reversed the revocation of the juvenile's probation.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2013/July/July%2010,%202013/2D12-3874.pdf (July 10, 2013).

K.M.A. v. State, ___ So.3d ___, 2013 WL 3240075 (Fla. 2d DCA 2013). **REVOCAION OF PROBATION REVERSED WHERE THE CHARGING DOCUMENT DID NOT STATE WHAT CONDITIONS OF PROBATION WERE VIOLATED AND THE REVOCAION ORDER DID NOT INCLUDE SPECIFIC FINDINGS.** The juvenile appealed the trial court's order revoking her probation, adjudicating her delinquent, and committing her to a moderate risk facility. Adjudication was withheld and the juvenile placed on six months of probation for possession of cannabis in December 2011. The juvenile was placed out of state with an aunt. The placement did not work out and the juvenile was returned to Florida in April 2012. As her case manager drove her from the airport to her residence, the juvenile jumped out of the car at a stoplight and fled. Ten days later she was picked up and placed into secure detention for twenty-one days. Meanwhile, an affidavit of violation of probation was filed, which described the juvenile's escape but failed to charge her with violating any specific terms or conditions of probation. The circuit court revoked her probation and committed her to a moderate risk facility. The circuit court concluded that when the juvenile jumped out of her guardian's car, she knew that she was violating probation conditions prohibiting her from leaving home without permission and requiring her to keep her

parents advised of her whereabouts at all times. The Third District Court of Appeal found that these specific violations were not alleged in the affidavit, and the trial court committed error when it found that the juvenile violated her probation based on uncharged conduct. Furthermore, because the affidavit failed to cite any specific conditions that the juvenile allegedly violated, the juvenile appeared at the hearing without adequate notice of the charges against her. Finally, even if the juvenile had been adequately charged and found to have violated specific conditions, the failure of the trial court to specify the conditions violated in the revocation order would have been reversible error. Accordingly the Third District reversed the order revoking the juvenile's probation and committing her to a moderate risk facility and remanded for reinstatement of the juvenile's probation. http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2013/June/June%2028,%202013/2D12-2809.pdf (June 28, 2013).

C.A.G. v. State, __ So.3d __, 2013 WL 3240122 (Fla. 2d DCA 2013). **ORDER OF PROBATION REVERSED AND REMANDED BECAUSE IT FAILED TO STATE THE TERM OF THE PROBATION IMPOSED.** The juvenile challenged the finding that he violated a city ordinance prohibiting assemblies obstructing streets and sidewalks. The Third District Court of Appeal affirmed the ordinance violation without further comment. However, the Third District reversed the court's order of probation because it failed to state the term of the probation imposed. The order was remanded with directions to enter a corrected probationary order. http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2013/June/June%2028,%202013/2D12-1281.pdf (June 28, 2013)

D.B. v. State, __ So.3d __, 2013 WL 2663775 (Fla.2d DCA 2013). **THE TRIAL COURT ERRED IN FAILING TO AMEND THE JUVENILE'S DISPOSITION ORDERS TO SPECIFY THE MAXIMUM PENALTIES FOR THE OFFENSES AND THE AMOUNT OF TIME SERVED IN SECURE DETENTION PRIOR TO DISPOSITION.** The juvenile was adjudicated delinquent for carrying a concealed firearm, possession of a firearm by a minor, possession of a firearm with an altered serial number, and four counts of robbery with a firearm. The juvenile was committed to a high-risk residential facility until his nineteenth birthday on the felony charges of carrying a concealed firearm and robbery. As to the remaining misdemeanor charges, the trial court committed the juvenile to the facility for a period not to exceed one year. Thereafter, the juvenile filed a motion under Florida Rule of Juvenile Procedure 8.135(b)(2) to correct his disposition. After holding a hearing on the motion, the trial court amended the disposition orders to reflect a commitment of five years on the felony charges and 365 days on the misdemeanor charges with five years of post commitment probation on the felony charges and one-year of post

commitment probation on the misdemeanor charges. The juvenile then filed a second motion to correct his disposition orders, arguing that the amended orders had to be corrected to state that he was to be committed until his nineteenth birthday or the statutory maximum, whichever occurred first; to specify the amount of time spent in secure detention and the maximum penalty for the offenses; and that he trial court erred in amending the orders to reflect periods of post commitment probation. The trial court did not rule on the second motion. The Second District Court of Appeal found that the trial court erred in failing to correct the juvenile's disposition orders to specify the amount of time spent in secure detention prior to disposition and the maximum penalty for the offenses as required by Florida Rule of Juvenile Procedure 8.115(d)(2). The Second District found the juvenile's other arguments were without merit. Accordingly, the Second District reversed the amended disposition orders and remanded for correction of the orders.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2013/June/June%2014,%202013/2D11-1456.pdf (June 14, 2013).

R.A. v. State, __ So.3d __, 2013 WL 2501976 (Fla.2d DCA 2013). **THE TRIAL COURT'S REASONS FOR DEVIATING FROM THE DEPARTMENT OF JUVENILE JUSTICE'S (DJJ) DISPOSITION RECOMMENDATION WERE INSUFFICIENT UNDER E.A.R. V. STATE, 4 SO.3D 614 (FLA. 2009).** The juvenile was adjudicated delinquent based on the juvenile's pleas to solicitation to commit robbery, theft of a firearm, misdemeanor battery, and resisting without violence. The juvenile was committed to a moderate-risk facility despite a recommendation of probation by the DJJ. The juvenile appealed. The Second District Court of Appeal found that the juvenile correctly contended, and the State correctly conceded, that the circuit court's reasons for the deviation were insufficient under E.A.R. v. State, 4 So.3d 614 (Fla. 2009). Accordingly, the disposition was reversed and remanded with instructions that the court must make the findings required by E.A.R. or else place the juvenile on probation as recommended by the DJJ.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2013/June/June%2012,%202013/2D12-4819.pdf (June 12, 2013).

J.G. v. State, __ So.3d __, 2013 WL 2494714 (Fla. 2d DCA 2013). **TRESPASS ADJUDICATION REVERSED BECAUSE THE STATE FAILED TO ESTABLISH THAT THE POLICE HAD BEEN GIVEN AUTHORITY TO ISSUE TRESPASS WARNINGS.** The juvenile was adjudicated delinquent for committing trespass on property other than a structure or a conveyance after warning. At the adjudicatory hearing, both the officer who gave the initial trespass warning and the officer who subsequently arrested the juvenile testified. The arresting officer testified that the police had a trespass affidavit on file from the housing authority. The warning officer testified that he was an agent of the housing project through an agreement the project management had signed

with the city giving the police the authority to issue trespass warnings and that this agreement was on file at his substation. The housing project manager did not testify and no evidence subject to a hearsay exception, such as a properly authenticated business record, was introduced. Defense counsel made proper hearsay objections to both officer statements. At the close of the evidence, defense counsel moved for dismissal, arguing that without the inadmissible hearsay evidence from the officers about their authority to issue trespass warnings, there was no evidence that the juvenile was lawfully excluded from the housing project. The motion was denied. On appeal, the Second District Court of Appeal found that the officers' testimony was inadmissible hearsay. Thus, the State failed to provide sufficient evidence of the arresting officer's authority to arrest the juvenile for trespass after warning and the juvenile's adjudication for such offense could not stand. Accordingly, the adjudication was reversed and the disposition vacated with instructions to dismiss the charge against the juvenile.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2013/June/June%2012,%202013/2D12-907.pdf (June 12, 2013).

Third District Court of Appeal

W.G. v. State, __ So. 3d __, 2013 WL 3815605 (Fla. 3d DCA 2013). **MOTION TO SUPPRESS THE FIREARM SHOULD HAVE BEEN GRANTED BECAUSE THERE WAS NO REASONABLE SUSPICION TO JUSTIFY STOP AND DETENTION.** The juvenile was adjudicated delinquent for possession of a firearm discovered after an allegedly consensual search of her backpack. The search followed a detention based solely on her being in the company of seven males described in a BOLO as involved in a robbery. On appeal, the Third District Court of Appeal found that the juvenile's motion to suppress the firearm should have been granted. There was no founded or reasonable suspicion to justify stopping and detaining a person of a different gender than those described in the BOLO. Therefore, the confinement was unlawful and irremediably tainted the purported consent. Accordingly, the cause was remanded for dismissal of the petition.

<http://www.3dca.flcourts.org/Opinions/3D12-2356.pdf> (July 24, 2013).

C.H. v. State, __ So. 3d __, 2013 WL 3336861 (Fla. 3d DCA 2013). **TRIAL COURT DID NOT ABUSE ITS DISCRETION BY FAILING TO CONDUCT A FULL NELSON INQUIRY AFTER THE JUVENILE REQUESTED NEW COUNSEL.** The sole issue on appeal was whether the trial court conducted a sufficient inquiry pursuant to Nelson v. State, 274 So. 2d 256 (Fla. 4th DCA 1973), after the juvenile, who was being represented by court-appointed counsel, requested "a new lawyer." In the instant case, the trial court conducted the requisite preliminary Nelson inquiry to ascertain the juvenile's reasons for the request. The preliminary inquiry revealed that the juvenile's

request was not based on an assertion of incompetency. Rather, the juvenile's request was based on his belief that he did not "see eye to eye" with his court-appointed counsel. The juvenile's counsel suggested that he should accept the State's plea, and after the juvenile indicated he wanted a trial, the appointed counsel reiterated her belief that the juvenile should accept the plea offer. As a result of this interaction, the juvenile did not feel comfortable with the court-appointed counsel representing him at trial. On appeal, the Third District Court of Appeal found that the record demonstrated that the juvenile's grievances were nothing more than his frustration over counsel's recommendation that the juvenile should accept the State's plea offer and not based on counsel's incompetence. Therefore, the trial court did not abuse its discretion by failing to conduct a full Nelson inquiry. A review of the record also reflected that the trial court's preliminary Nelson inquiry was sufficient. After the trial court determined that the juvenile's request to discharge his court-appointed counsel was unequivocal, the trial court properly ascertained the reasons for the request, which were not based on counsel's incompetence. Based on the nature of the juvenile's objection to his court-appointed counsel, the trial court was not required to inquire further or to appoint substitute counsel. Accordingly, the Third District affirmed and held that trial court did not abuse its discretion by failing to conduct a full Nelson inquiry after juvenile requested new counsel.

<http://www.3dca.flcourts.org/Opinions/3D12-2895.pdf> (July 3, 2013).

J.P. v. State, __ So.3d __, 2013 WL 3197157 (Fla. 3d DCA 2013). **ADJUDICATION FOR AGGRAVATED ASSAULT WITH A DEADLY WEAPON REVERSED BECAUSE THE EVIDENCE FAILED TO ESTABLISH THAT THE WEAPONS WERE USED IN A MANNER LIKELY TO CAUSE GREAT BODILY HARM.** The juvenile appealed his adjudication for aggravated assault with a deadly weapon for throwing rocks at another individual. The testimony was that the juvenile was "tossing [rocks] softly with one hand," not "throwing [them] hard" but merely "flick[ing]" quarter-sized rocks at the victim. The Third District Court of Appeal found that to prove aggravated assault, the state had to show that the juvenile committed an assault with a deadly weapon without intent to kill. A deadly weapon is an item, which when used in the ordinary manner contemplated by its design, will or is likely to cause death or great bodily harm; or any instrument likely to cause great bodily harm because of the way it was used during a crime. The items at issue here, quarter-sized rocks, are not ordinarily likely to cause death or great bodily harm. Based on the evidence presented, the rocks in this case were not used in a way likely to cause great bodily harm and in fact caused no harm. Therefore, the Third District held that the testimony was legally insufficient to sustain an adjudication for aggravated assault with a deadly weapon. The evidence was, however, sufficient to establish that the juvenile was guilty of assault. Accordingly, the Third District reversed the adjudication for aggravated assault and remanded for the trial court to adjudicate the juvenile for assault with directions to impose a sentence

appropriate to that offense. <http://www.3dca.flcourts.org/Opinions/3D12-2273.pdf> (June 26, 2013).

Fourth District Court of Appeal

L.S. v. State, __ So. 3d __, 2013 WL 3811672 (Fla. 4th DCA 2013). **THE STATE FAILED TO PROVE THAT THE JUVENILE WAS GUILTY OF GRAND THEFT OF A FIREARM BASED SOLELY ON POSSESSION OF THE GUN FIVE MONTHS AFTER ITS THEFT.** The juvenile appealed his adjudications for grand theft of a firearm and carrying a concealed weapon. A police officer's off-duty firearm was stolen from his residence. Almost six months later, another officer saw a crowd of juveniles leaving a music festival. As the officer followed the crowd, the group dispersed, leaving one person standing with a gun raised in the air. The officer identified the juvenile as the person with the gun. Ultimately, the juvenile was stopped by the police. A detective seized a loaded gun from the juvenile's pocket. At the adjudicatory hearing, the burglary victim identified the gun as the gun that was stolen from his residence. The State offered no evidence to support the charge that the juvenile stole the firearm other than the provision of s. 812.022(2), F.S. (2011), which provided that possession of recently stolen property gives rise to the presumption that the possessor stole the property. The Fourth District Court of Appeal found that few Florida cases have addressed the "recently stolen" presumption. The Fourth District agreed with the Illinois Supreme Court in People v. Taylor, 182 N.E.2d 654, 656 (Ill. 1962), that guns are highly saleable and are in fact transferred with relative ease. What constitutes "recently stolen" sufficient to apply the legislative presumption must be construed with that transferability in mind. In the instant case, the Fourth District concluded that the gun was not recently stolen for purposes of the presumption. Accordingly, the Fourth District reversed the juvenile's adjudication for grand theft of a firearm. Next, the Fourth District affirmed the juvenile's adjudication for carrying a concealed firearm, rejecting the claim that s. 790.22(3), F.S. (2011), which restricts the right of minors to carry firearms, was unconstitutional. The juvenile had argued that he was improperly convicted for possession of a firearm by a minor because that statutory provision was unconstitutional as a violation of the Second Amendment. He argued that that the Second Amendment right is a fundamental right that cannot be violated by state legislatures. The juvenile argued that there was no juvenile "exception" to the Second Amendment. The Fourth District found that the juvenile overlooked the fact that the constitutional rights of children cannot be equated with those of adults because of the child's inability to make decisions in an informed and mature manner. Therefore, the State may restrict a juvenile's right to possess a firearm. Accordingly, the Fourth District affirmed the juvenile's adjudication for carrying a concealed weapon.

<http://www.4dca.org/opinions/July%202013/07-24-13/4D12-1988.op.pdf> (July 24, 2013).

T.P. v. State, __ So. 3d __, 2013 WL 3717092 (Fla. 4th DCA 2013). **TRIAL COURT ERRED IN ITS LEGAL CONCLUSION THAT FLORIDA'S "STAND YOUR GROUND" LAW DID NOT APPLY TO A FIGHT ON A SCHOOL BUS.** In finding the juvenile guilty of battery, the trial court rejected the juvenile's self-defense claim based upon s. 776.032, F.S., Florida's "Stand Your Ground" law. The alleged battery occurred while the juvenile was riding a school bus. There was conflicting testimony as

to a physical altercation between the juvenile and another youth. The defense argued that the Stand Your Ground law applied and that the juvenile was lawfully entitled to defend himself. Believing that the law applied only to the defense of home or a vehicle, the trial court denied the juvenile's motions to dismiss. On appeal, the Fourth District Court of Appeal found that s. 776.013(3), F.S., adopted as part of the Stand Your Ground law, provided:

A person who is not engaged in an unlawful activity and who is attacked in any other place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a forcible felony.

In the instant case, the juvenile was not engaged in an unlawful activity and had the right to be on the bus going home from school. He had no duty to retreat and, despite the trial court's misgivings, had the right to "meet force with force" if he reasonably believed that such force was necessary to prevent great bodily harm to himself. Therefore, the juvenile had the right to assert a defense under s. 776.013(3), F.S., and the trial court erred in its construction of the statute. Whether he was faced with "force" from the other youth and whether he reasonably believed that such force was necessary to prevent harm to himself were factual matters for the trial court to determine. Accordingly, the Fourth District reversed and remanded with instructions. If the trial court found in favor of the juvenile on both of the foregoing issues, the juvenile was entitled to a dismissal of the delinquency petition. If, on the other hand, the trial court determined that the juvenile had not proved both issues in his favor, then the court could re-impose its adjudication and disposition.

<http://www.4dca.org/opinions/July%202013/07-17-13/4D12-1421.op.pdf> (July 17, 2013).

C.B. v. State, __ So.3d __, 2013 WL 3014147 (Fla. 4th DCA 2013). **TERMINATION OF PROBATION REMANDED TO DETERMINE WHETHER THE JUVENILE'S PROBATION WOULD HAVE BEEN TERMINATED FOR THE REMAINING WILLFUL VIOLATIONS FOUND BY THE APPELLATE COURT.**

The juvenile was found to have violated his probation by failing to keep a curfew; failing to perform community service work; and by not attending all court ordered scheduled treatment appointments. On appeal, the juvenile conceded the curfew violation, but challenged the revocation based upon his failure to perform community service work and failure to attend court ordered treatment. The juvenile argued that he did not willfully violate these terms and that he was not given notice of the terms associated with community service work. The probation officer acknowledged that the juvenile had submitted a letter from a business stating he had completed eighty-five hours of service. The probation officer testified that she could not

accept these hours because they did not benefit a non-profit organization and the juvenile had not sought preapproval from her. She further testified that she told the juvenile about the non-profit restriction at the beginning of his probation and gave him a list of approved organizations. The juvenile argued that a commonsense reading of the words “community service” does not require that the organization be non-profit, and therefore, a probation officer's request to perform court ordered community service hours at an approved non-profit organization amounts to a new condition of probation. The Fourth District Court of Appeal found that the juvenile had received sufficient notice to apprise him of the terms of his probation, and his willful choice to refuse to perform according to those terms was an appropriate basis for a violation. Next, the juvenile’s treatment therapist testified that because the juvenile lacked transportation, she agreed to provide individual therapy to him while at school twice a month. However, she refused to give notice of when she intended to meet with the juvenile and instead showed up randomly. Further, the juvenile and his mother testified that the juvenile missed school either because he was sick or because his mother was recovering from surgery and she kept him out of school to assist her. The Fourth District found that the trial court abused its discretion in finding that the juvenile willfully violated his probation by failing to attend scheduled individual therapy sessions. The missing of his therapy sessions could not have been willful as they were not scheduled and he did not know when they were to occur. Accordingly, the Fourth District affirmed the trial court's finding that the juvenile willfully violated the terms associated with community service; and reversed the trial court's finding that the juvenile willfully violated his probation by failing to attend scheduled individual therapy sessions. The Fourth District remanded to determine whether the juvenile's probation would have been terminated for the remaining willful curfew and community service violation. <http://www.4dca.org/opinions/June%202013/06-19-13/4D11-2769.op.pdf> (June 19, 2013).

T.D.C. v. State, __ So.3d __, 2013 WL 3014067 (Fla. 4th DCA 2013). **TRIAL COURT ABUSED ITS DISCRETION IN IMPOSING RESTITUTION WITHOUT PROOF OF FAIR MARKET VALUE.** The juvenile had challenged that portion of the restitution order awarding \$265 for a netbook that was stolen and never returned. The juvenile argued that the award was based on the purchase price of the netbook rather than its value at the time it was stolen. The Fourth District Court of Appeal found that the amount of restitution must be supported by competent, substantial evidence. Generally, the amount of restitution is established through evidence of the fair market value at the time of the theft. However, a trial court is not tied to fair market value as the sole standard for determining the amount of restitution, and may, in fact, exercise discretion in determining the amount. The evidence at trial reflected that the netbook was purchased new for \$265, was ten months old at the time it was stolen, and was in perfect

condition, although it was used several times a week. During the restitution hearing, the State presented the purchase receipt for the netbook. The owner's testimony acknowledged that it would cost less than the purchase price to replace the netbook, although he was unable to find the same model on eBay. The court stated that because the netbook was in new condition, the replacement cost would be the same as the original purchase price. Although the court was aware of the purchase price, purchase date, and condition of the netbook, it did not have any evidence of fair market value at the time of the theft. Further, the court's finding disregarded the property owner's testimony regarding replacement cost. Although there may have been circumstances supporting use of a measure of value other than fair market value, no such circumstances were presented. Accordingly, the Fourth District found held that the trial court abused its discretion in imposing restitution without proof of fair market value and reversed and remanded for a hearing on that sole issue. <http://www.4dca.org/opinions/June%202013/06-19-13/4D12-3534.op.pdf> (June 19, 2013).

A.L.M. v. State, ___ So.3d ___, 2013 WL 2493970 (Fla. 4th DCA 2013). **THE TRIAL COURT ERRED IN ORDERING RESTITUTION FOR THE THEFT OF ITEMS FOR WHICH THE JUVENILE HAD BEEN ACQUITTED.** The circuit court ordered restitution of \$220.00, which the probable cause affidavit alleged the victim would have to pay to recover a stolen camera and jewelry from a pawnshop. The circuit court had found the juvenile guilty of grand theft as to a recovered laptop computer, but not as to unrecovered items including a camera and jewelry. The juvenile argued that the trial court fundamentally erred in ordering her to pay restitution for items she was acquitted of stealing. The Fourth District Court of Appeal agreed citing Acosta v. State, 856 So.2d 1143, 1145 (Fla. 4th DCA 2003) (A court cannot order restitution for damages arising out of a crime for which the defendant was acquitted.) Accordingly, the Fourth District reversed and remanded with directions to vacate that portion of the disposition which ordered the juvenile to pay \$220.00 in restitution. <http://www.4dca.org/opinions/June%202013/06-12-13/4D12-122.op.pdf> (June 12, 2013).

T.K. v. State, ___ So.3d ___, 2013 WL 2493764 (Fla. 4th DCA 2013). **AGGRAVATED FLEEING AND ELUDING WAS NOT A VIOLENT SECOND DEGREE FELONY THAT WOULD JUSTIFY SECURED DETENTION PRIOR TO ADJUDICATION.** An officer determined that the juvenile was driving in an inappropriate manner and commenced efforts to have the juvenile stop the car. The juvenile then ran a stop sign, made quick turns, and drove at high speeds in a residential neighborhood. The incident happened at approximately 3:00 a.m. and there was no evidence that there were any other vehicles on the road or that any individuals were in danger of physical harm during the chase. The juvenile was arrested and charged with marijuana possession, possession of alcohol by a minor, and aggravated fleeing and eluding. The juvenile was ordered detained

prior to an adjudicatory hearing. The juvenile probation officer had included 12 points on the risk assessment instrument (RAI) for the aggravated fleeing and eluding charge. A score of 12 points or more authorizes secure detention. The juvenile filed a petition for writ of habeas corpus seeking his immediate release arguing that the offense should not have been scored as a “violent” second degree felony, but as an “all other second degree felon[y],” that scored 8 points. The Fourth District Court of Appeal found that Section IIIA.2 of the RAI form requires the juvenile probation officer to score 12 points when the most serious current offense is a violent second degree felony. By contrast, second degree felony drug charges earn 10 points; second degree felony charges for dealing in stolen property earn 7 points; and “all other second degree felonies” earn 8 points. There are no rules, statutes, case law, or anything on the RAI itself, that define violent second degree felonies or how these felonies are differentiated from the all other second degree felonies that score 8 points. The Fourth District held that aggravated fleeing and eluding was not a violent second degree felony such as would justify secured detention prior to adjudication. Whether looking at the elements of the charge or the facts in the case, the aggravated fleeing and eluding was not a “violent” offense within the plain meaning of that term, in contrast to other second degree felonies, such as aggravated battery and homicide. Here, there was no “strong physical force” or “intense or vehement threat to persons or property,” nor did the juvenile's conduct result in “serious bodily injury or death to another person.” Therefore, 12 points should not have been added to the RAI score. Accordingly, the petition for writ of habeas corpus was granted. <http://www.4dca.org/opinions/June%202013/06-12-13/4D13-1456.op.pdf> (June 12, 2013).

B.E. v. State, __ So.3d __, 2013 WL 2420423 (Fla. 4th DCA 2013). **REVOCAION OF PROBATION REVERSED AND REMANDED TO DETERMINE WHETHER PROBATION WOULD HAVE BEEN VIOLATED AND THE JUVENILE COMMITTED TO A LEVEL SIX FACILITY BASED ON THE ONLY SUPPORTED VIOLATION OF PROBATION.** The State filed an affidavit for violation of probation alleging that the juvenile failed to obey all laws by committing the offense of possession of marijuana in an amount less than twenty grams and that the juvenile failed to obey his parents' reasonable controls “as evidenced by email provided by the [juvenile's] mother.” The circuit court orally found that the juvenile willfully and substantially violated his probation. In its oral findings, the circuit court stated that the juvenile failed to obey his parents' reasonable controls, did not cooperate with his anger management therapist, did not attend school, did not complete any community service hours, and broke the law. The juvenile appealed the revocation of his probation and his commitment to a level six facility. The juvenile argued that the circuit court erred in finding that he violated probation by failing to obey his parents' reasonable controls based solely upon hearsay; and revoking his probation based upon uncharged violations. At the violation of probation hearing, the juvenile's probation officer

testified about communications with the juvenile's mother. The juvenile's counsel objected to such communications as being hearsay. The objection was overruled and the probation officer was allowed to read from the mother's e-mail. According to the mother's e-mail, the juvenile stayed out one night without permission and had been skipping school. However, the State did not call the mother as a witness to verify the e-mail's contents. The probation officer also testified about two uncharged violations, namely that the juvenile failed to complete any community service hours and failed to complete an anger management program. The Fourth District Court of Appeal held that finding that juvenile violated probation by failing to obey his parents' reasonable controls was improperly based solely upon hearsay evidence and that the revocation of juvenile's probation based upon uncharged violations constituted fundamental error. Accordingly, the Fourth District reversed the revocation of the juvenile's probation and remanded for the circuit court to determine whether it would have revoked the juvenile's probation and committed the juvenile to a level six facility based on the only supported violation of probation, the failure to obey all laws.

<http://www.4dca.org/opinions/June%202013/06-05-13/4D12-776.op.pdf> (June 5, 2013).

Fifth District Court of Appeal

No new opinions for this reporting period.

Dependency Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

No new opinions for this reporting period.

Second District Court of Appeal

No new opinions for this reporting period.

Third District Court of Appeal

A.D. v. Department of Children and Families, ___ So. 3d ____, 2013 WL 3742775 (Fla. 3d DCA 2013). [STANDING IN A TERMINATION OF PARENTAL RIGHTS PROCEEDING](#). The father sought to reverse the trial court's final judgment terminating the parental rights of the child's mother. The father argued that "he was denied due process when the trial court refused to appoint counsel for him at the mother's termination of parental rights proceedings and as a result, he was also denied his right to be heard at her trial." Since the father was not affected by the court's order that terminated the mother's parental rights, the appellate court dismissed the

appeal for lack of standing. The court noted that although the father was a party to the child's dependency case, he was not a party to the mother's TPR proceeding. <http://www.3dca.flcourts.org/Opinions/3D13-0800.pdf> (July 17, 2013).

I.D. v. Department of Children and Families, ___ So. 3d ____, 2013 WL 3336896 (Fla. 3d DCA 2013). **DEPENDENCY REVERSED**. The Department confessed error and admitted that the dependency was based upon the mother's lack of financial resources. Therefore, the adjudication of dependency was reversed and remanded. <http://www.3dca.flcourts.org/Opinions/3D13-0376.pdf> (July 3, 2013).

Fourth District Court of Appeal

P.O. v. Department of Children and Families, ___ So. 3d ____, 2013 WL 3716899 (Fla. 4th DCA 2013). **TERMINATION OF PARENTAL RIGHTS AFFIRMED**. A mother and father's parental rights were terminated, based in part on the father's continued contact with the mother, who was found to be a danger to the children. The father appealed and claimed that his constitutional rights were violated because he was not allowed to freely associate with the mother. The appellate court affirmed the judgment terminating the father's parental rights and ruled that the trial court did not violate the father's constitutional rights. The father's right to free association was not absolute and infringing upon the father's right to associate with others could be justified by the State's compelling interest in protecting the children. <http://www.4dca.org/opinions/July%202013/07-17-13/4D13-1252.op.pdf> (July 17, 2013).

Fifth District Court of Appeal

No new opinions for this reporting period.

Dissolution Case Law

Florida Supreme Court

In re: Amendments to the Florida Supreme Court Approved Family Law Forms, __ So. 3d __, (Fla. 2013). **FAMILY LAW FORMS REVISED IN RESPONSE TO COMMENT BY DEPARTMENT OF REVENUE**. The Court adopted revisions to a number of family law forms in response to a comment filed by the Department of Revenue (DOR) regarding family law forms that were revised to implement legislative changes to various alimony and child support provisions within chapter 61, Florida Statutes. See In Re: Amendments to the Florida Supreme Court Approved Family Law Forms, 96 So. 3d 217 (Fla. 2012). The revised forms took effect on July 3, 2013. <http://www.floridasupremecourt.org/decisions/2013/sc11-945.pdf> (July 3, 2013).

In re: Amendments to the Florida Family Law Rules of Procedure-Form 12.996(d), __ So. 3d __, (Fla. 2013). **RULE OF PROCEDURE FORM 12.996(d) REVISED IN RESPONSE TO COMMENT**. Florida Rules of Procedure Form 12.996(d), which is intended to supplement a federal income withholding form, OMB 0970-0154, and render it compliant with Florida statutory

requirements, was revised in response to a comment. The form was initially adopted in 2012 in In Re: Amendments to Florida Family Law Rules of Procedure-Form 12.996(d), 94 So. 3d 558 (Fla. 2012). The Court declined to amend paragraph 13 of the form as requested in the comment but corrected an error in paragraph 17. The revised form took effect July 3, 2013. <http://www.floridasupremecourt.org/decisions/2013/sc12-618.pdf> (July 3, 2013).

First District Court of Appeal

Nassirou v. Nassirou, __So. 3d__, 2013 WL 3578523 (Fla. 1st DCA 2013). **STARTING POINT OF EQUITABLE DISTRIBUTION IS 50-50 SPLIT; UNEQUAL DISTRIBUTION REQUIRES SUPPORTING FINDINGS OF FACT AND VALUATION OF ASSETS; IT IS NOT PERMITTED FOR MARITAL MISCONDUCT.** The trial court based its distribution of the entire value of former husband's 401(k) account to former wife on former husband's failure to contribute his share of private school education for the couple's oldest child and on the acts of domestic violence he committed against former wife. The appellate court held that the account was properly subject to distribution to satisfy the tuition arrearage, but should not have been distributed to former wife for "punitive reasons." The appellate court reiterated that the "starting point of equitable distribution" is an equal division of marital assets and liabilities. It held that unequal distribution is permitted for "relevant factors," including dissipation of marital assets, or as necessary to do equity between the spouses; however, marital misconduct is not a valid basis for distribution. It noted that any distribution of marital assets or debts requires supporting findings of fact and valuation of assets. As such, the appellate court reversed the holding. <http://opinions.1dca.org/written/opinions2013/07-15-2013/12-3804.pdf> (July 15, 2013).

Allen v. Allen, __So.3d__, 2013 WL 2662726, (Fla.1st DCA 2013).

TRIAL COURT INSTRUCTED ON REMAND: TO CLARIFY INCONSISTENT PROVISIONS ON CHILD SUPPORT AND CHILD-RELATED EXPENSES; TO RECONSIDER SCHEME OF EQUITABLE DISTRIBUTION; AND TO RECONSIDER ENTITLEMENT TO FEES IN LIGHT OF RECALCULATED EQUITABLE DISTRIBUTION.

Reversed and remanded for correction of errors and inconsistencies in the trial court's second amended final judgment of dissolution. With regard to inconsistent provisions on child support and child-related expenses, appellate court instructed the trial court to clarify which items fell within one category and which items fell within the other. With regard to the equitable distribution portion, appellate court found that the trial court had under-valued former wife's retirement account by half. Correction of this error would require reconsideration by the trial court of the its equitable distribution scheme. Appellate court found that the trial court had erred in awarding former wife fees and costs without having articulated findings as to her need and former husband's ability to pay. The trial court was instructed on remand to "reconsider entitlement to attorney's fees in light of the recalculated equitable distribution."

<http://opinions.1dca.org/written/opinions2013/06-13-2013/12-2825.pdf> (June 13, 2013).

Milton v. Milton, __So.3d__, 2013 WL 2421040, (Fla.1st DCA 2013).

AN ORDER OF MAKE-UP TIME DOES NOT NECESSITATE HOLDING PARENT IN VIOLATION OF TIME-SHARING AGREEMENT IN CONTEMPT; RELOCATION STATUTE REQUIRES, IN ABSENCE OF

AGREEMENT BETWEEN PARENTS, THAT A PETITION FOR RELOCATION BE FILED BY ONE PARENT AND SERVED ON OTHER PARENT BEFORE A TRIAL COURT MAY PERMIT EVEN TEMPORARY RELOCATION.

Former husband sought review of a trial court order which did not hold the former wife in contempt or otherwise order the return of the couple's minor child from New York to Florida. Citing *Cummings v. Cummings*, 723 So.2d 898 (Fla.4th DCA 1998), for its holding that an order of make-up time does not necessitate holding a party in contempt, and given the record before it, appellate court concluded that the trial court had not abused its discretion in not holding former wife in contempt for violation of the time-sharing agreement. It concluded, however, that the trial court had erred in permitting the child's relocation to New York because former wife had not complied with the relocation statute. That statute requires, in the absence of an agreement between the parents, that a petition for relocation must be filed by one parent and served on the other parent, before a trial court may permit even temporary relocation. Reversed and remanded for the trial court to take evidence on the best interests of the child, the appropriate relief for former wife's unauthorized relocation, and former husband's entitlement to make-up time

<http://opinions.1dca.org/written/opinions2013/06-05-2013/13-1310.pdf> (June 5, 2013).

Ingram v. Ingram, __ So.3d __, 2013 WL 2395081, (Fla.1st DCA 2013).

TRIAL COURT'S ENTRY OF JUDGMENTS AWARDING FEES AND COSTS TO SPOUSE BEFORE EXPIRATION OF OTHER SPOUSE'S TIME TO RESPOND WAS PREMATURE.

Appellate court agreed with former husband that the trial court's judgments awarding fees and costs to former wife were entered before his chance to respond had run. After having granted former wife's motion for rehearing to consider the issue of her attorney's fees, the trial court had given her counsel ten days from the date of rehearing to document his hourly rate, the number of hours expended, and the reasonableness of those fees. It then gave former husband ten days from the filing of that documentation to respond. Documentation was filed and e-mailed to former husband's counsel on September 25, 2012; the judgments were entered October 4, 2012. Under Florida Rule of Judicial Administration 2.514(a)(1), former husband would have had until October 5th to respond; in accordance with Florida Rule of Judicial Administration 2.514(b), he would have had until October 10th due to service by e-mail. Appellate court held entry of the judgments was premature and counter to the trial court's own directive. Reversed and remanded.

<http://opinions.1dca.org/written/opinions2013/06-03-2013/12-5732.pdf> (June 3, 2013).

Second District Court of Appeal

Busciglio v. Busciglio, __ So. 3d __, 2013 WL 3335028, 38 Fla.L.Weekly D1449 (Fla. 2d DCA 2013).

TRIAL COURT MAY REQUIRE SPOUSE TO PAY EXPENSES IMPOSED BY SCHOOL CHOSEN BY PARENTS, BUT A PARENT'S VOLUNTARY CONTRIBUTION SHOULD REMAIN VOLUNTARY; BOTH THE SPECIAL CIRCUMSTANCES JUSTIFYING NEED FOR LIFE INSURANCE AS SECURITY FOR AN OBLIGATION AND HOW PROCEEDS SHOULD BE PAID IN THE EVENT OF OBLIGOR'S DEATH SHOULD BE SPECIFIED. Both spouses argued trial court error; the appellate court concluded two issues had merit. On the first issue, former wife argued that the trial court's requirement that

she pay all private school expenses until high school graduation, unless otherwise agreed, was based on an incorrect finding that the children attended a private school. Because they actually attended a charter school with a suggested annual contribution, the appellate court held that the final judgment on remand should be corrected to read that former wife would be required to pay all *required* expenses imposed by any school the parents chose to let their children attend; a voluntary contribution should remain voluntary. (Emphasis in the original). As to the second issue, the appellate court held that the trial court's requirement that former wife secure her alimony obligation with a one million dollar life insurance policy did not provide the special circumstances justifying the security, nor did it specify how the proceeds would be paid in the event of former wife's death. Reversed and remanded.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2013/July/July%2003,%202013/2D11-6481.pdf (July 3, 2013).

Harris v. Harris, __ So.3d __, 2013 WL 2501986, (Fla.2d DCA 2013).

TRIAL COURT IS REQUIRED TO INCLUDE PROVISIONS ON HEALTH INSURANCE FOR MINOR CHILDREN AND PAYMENT OF NONCOVERED EXPENSES IN ORDERS.

Appellate court reversed and remanded the final judgment of dissolution for its failure to include provisions addressing health insurance for the minor children and payment of noncovered medical, dental, and prescription medication expenses for the children; it affirmed the remainder of the judgment. Appellate court held that section 61.13(1)(b), Florida Statutes (2009), requires a trial court to include both provisions in its orders. Appellate court noted that although the child support guidelines worksheet indicated the amount former husband paid for the children's health insurance, there was no language in the final judgment mandating that he continue to pay it. Concluding that this was not harmless error, appellate court remanded for further proceedings.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2013/June/June%2012,%202013/2D11-1341.pdf (June 12, 2013).

Pisciotta v. Pisciotta, __ So.3d __, 2013 WL 2501973, (Fla.2d DCA 2013).

TRIAL COURT ABUSED ITS DISCRETION IN THE AMOUNT IT LEFT SPOUSE AFTER PAYMENT OF ALIMONY ORDERED; TRIAL COURT FAILED TO FIND THAT SPOUSE HAD THE ABILITY TO PAY THE ALIMONY IT ORDERED; A SUPPORTIVE RELATIONSHIP REFERS TO AN OBLIGEE'S RELATIONSHIP, NOT AN OBLIGOR'S.

Former husband appealed a trial court final judgment denying his motions for a downward modification of alimony--due to a reduction in his income and former wife's supportive relationship. Appellate court reversed the judgment which awarded former wife an amount of alimony that was "beyond the former husband's ability to pay." Finding that former wife was in a supportive relationship which reduced her monthly need and that former husband had suffered a permanent reduction in income beyond his control, the trial court imputed minimum wage to former husband and ordered that he pay a reduced amount of alimony; however, it failed to make a finding that former husband had the ability to pay the reduced amount. Appellate court held that the trial court abused its discretion in the amount former husband was left with to live on. Noting that former wife had argued that former husband had a "significant income source" above minimum wage and that he was supported by his girlfriend,

appellate court pointed out that the “potential financial support” of the girlfriend should not factor into the trial court’s consideration in setting alimony. A supportive relationship refers to an obligee’s relationship, not an obligor’s.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2013/June/June%2012,%202013/2D12-678.pdf (June 12, 2013).

Third District Court of Appeal

Moya v. Moya, __So. 3d__, 2013 WL 3927678 (Fla. 3d DCA 2013). **FEE AWARD MUST BE DIRECTLY RELATED TO FEES AND COSTS INCURRED.** Former husband appealed an order finding him in contempt for his intentional failure to comply with a prior order regarding time-sharing; ordering make-up time-sharing for former wife as a sanction; and awarding fees and costs as a sanction. The appellate court found no merit in his time-sharing argument, but reversed and remanded the order on fees because the record did not demonstrate compliance with s. 61.16, F.S. (2012) or with Florida case law. The appellate court reiterated that the amount of the fee award must be directly related to the fees and costs incurred as a result of the bad faith conduct. It noted that the record did not refer to former husband’s financial resources, did not consider the number of hours worked by former wife’s counsel, and failed to demonstrate any apportionment as required.

<http://www.3dca.flcourts.org/Opinions/3D12-1471.pdf> (July 31, 2013).

Fourth District Court of Appeal

Addie v. Coale, __So. 3d__, 2013 WL 3811700 (Fla. 4th DCA 2013). **CHILD SUPPORT AWARDS MUST BE SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE; TRIAL COURT MUST DETERMINE NET INCOME OF EACH SPOUSE AND INCLUDE ADEQUATE FINDINGS IN FINAL JUDGMENT; TRIAL COURT ABUSED ITS DISCRETION IN DENYING ANY ALIMONY TO SPOUSE IN LIGHT OF INCOME DISPARITY; TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING FEES BECAUSE SPOUSE REQUESTING THEM HAD NOT MET HIS BURDEN OF PROOF.** In the flip side of the above case, former husband appealed a final judgment of dissolution of marriage. The appellate court reiterated that child support awards must be supported by competent substantial evidence. A trial court is required to determine the net income of each parent and include adequate findings in the final judgment. Here, determination of former wife’s income was not supported by competent substantial evidence; she had testified that her income was understated in her financial affidavits. The appellate court reversed and remanded for the trial court to correctly determine former wife’s income and recalculate the child support. The appellate court held that the trial court had abused its discretion in denying any alimony to former husband. It concluded that even if former wife’s expert’s figures regarding former husband’s reasonable monthly expenses were relied on, former husband would be running a “significant monthly deficit” and was “shortchanged” by the trial court’s denial of alimony. The appellate court found that the trial court had not abused its discretion in denying former husband’s request for fees, even in light of the disparity in the spouses’ incomes, because he had failed to meet his burden of proof.

<http://www.4dca.org/opinions/July%202013/07-24-13/4D12-1748.op.pdf> (July 24, 2013).

Tobin v. Tobin, __So. 3d__, 2013 WL 3811640 (Fla. 4th DCA 2013). TRIAL COURT ERRED IN STRIKING PLEADINGS WITHOUT HOLDING HEARING; STRIKING PLEADINGS IS SEVERE PENALTY WHICH SHOULD ONLY BE USED IN EXTREME CIRCUMSTANCES; ALTERNATIVE SHOULD BE IMPOSED IF POSSIBLE. Former wife appealed the final judgment of dissolution of marriage entered after the trial court struck her pleadings for her refusal both to comply with certain discovery orders and to attend a video deposition. She claimed that her refusal to furnish her work and home addresses on the interrogatories stemmed from her fear of further abuse from former husband, against whom she had obtained temporary and permanent injunctions for protection against domestic violence. She failed to attend the video deposition after learning that former husband could be aware of the location where she would be appearing. The appellate court agreed with former wife that the trial court erred by striking her pleadings without a hearing to determine if her conduct warranted such an extreme sanction. It held that the striking of pleadings is the most severe of penalties, which should only be exercised in “extreme circumstances.” If a viable alternative exists, a trial court should impose it instead. The appellate court reversed and remanded for an evidentiary hearing to determine whether former wife’s failure to comply with discovery orders rose to the level of disobedience which would justify striking her pleadings or whether a lesser sanction would suffice.

<http://www.4dca.org/opinions/July%202013/07-24-13/4D12-2613.op.pdf> (July 24, 2013).

Osiyemi v. Osiyemi, __So. 3d__, 2013 WL 3811801 (Fla. 4th DCA 2013). TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO AWARD SPOUSE A LEAST A PORTION OF FEES AND COSTS IN LIGHT OF SUBSTANTIAL INCOME DISPARITY. Former wife appealed the final judgment of dissolution of marriage. The appellate court reversed the trial court’s denial of any attorney’s fees to her, because the denial created an inequitable depletion of her assets and former husband had the ability to pay attorney’s fees. Reiterating that the standard of review for attorney’s fees is abuse of discretion, the appellate court held that the trial court had abused its discretion in failing to award former wife at least a portion of her fees and costs. It concluded that even after the equalization payment and deduction of alimony and child support from former husband’s income and addition of them to former wife’s income, “the husband still has more than twice as much income as the wife.” The appellate court distinguished this case from its opinion in Derrevere v. Deverre, 899 So. 2d 1152 (Fla. 4th DCA 2005).

<http://www.4dca.org/opinions/July%202013/07-24-13/4D11-3375.op.pdf> (July 24, 2013).

Schmidt v. Schmidt, __So. 3d__, 2013 WL 3448937 (Fla. 4th DCA 2013). ENTERPRISE GOODWILL IS A MARITAL ASSET SUBJECT TO EQUITABLE DISTRIBUTION; PERSONAL OR PROFESSIONAL GOODWILL IS NOT AND THUS MUST BE EXCLUDED WHEN A VALUE IS ASSIGNED TO A BUSINESS FOR PURPOSES OF EQUITABLE DISTRIBUTION; ALIMONY MUST BE SUPPORTED BY EVIDENCE; SPOUSE’S NET INCOME MUST BE DETERMINED FOR CHILD SUPPORT PURPOSES. Both spouses claimed error in the final judgment dissolving their twenty-nine year marriage. The appellate court agreed, finding the valuation of former husband’s business and the alimony award as the most significant errors. The appellate court reiterated that enterprise goodwill, defined as the value of a business exceeding its tangible assets and representing the tendency of clients or

patients to return to the business irrespective of the reputation of the individual practitioner, is a marital asset subject to equitable distribution. Personal or professional goodwill attributed to an individual is not a marital asset; it must be excluded when a value is assigned to a business for purposes of equitable distribution. A noncompete clause factors into valuing enterprise goodwill. If a business only has value over and above its assets if its practitioner refrains from competing within the area he or she has traditionally worked, then the value is attributable to the personal reputation of that practitioner. Here, the appellate court noted former wife's expert had not determined the value the business would have if former husband did not sign a noncompete; thus, there was a component of personal goodwill within the valuation which resulted in reversal and remand. The appellate court concluded that the alimony award to former wife of \$25,000 per month was not supported by the evidence; accordingly, it reversed. Other issues were remanded for clarification, including a determination of former husband's net income for child support purposes.

<http://www.4dca.org/opinions/July%202013/07-10-13/4D11-3379.op.pdf> (July 10, 2013).

Wrieden v. Wrieden, __So.3d__, 2013 WL 3335049, 38 Fla.L.Weekly D1457 (Fla. 4th DCA 2013). **TRIAL COURT ERRED IN ACCEPTING MAGISTRATE'S RECOMMENDATION THAT SPOUSE PAY RENT AT A LOCATION OTHER THAN THAT SPECIFIED IN MARITAL SETTLEMENT AGREEMENT.** Former husband appealed an order which granted former wife's motion for civil contempt and overruled his exceptions to the magistrate's report. The appellate court found merit in his appeal of the order to pay former wife's rent at a location other than the one specified in the marital settlement agreement (MSA). It concluded that because the MSA was unambiguous in requiring former husband pay rent at a specific location, the trial court erred in accepting the magistrate's recommendation that former husband pay rent at a different one. Reversed in part.

<http://www.4dca.org/opinions/July%202013/7-03-13/4D12-1936.op.pdf> (July 3, 2013).

Canino v. Canino, __So.3d __, 2013 WL 3197133, (Fla.4th DCA 2013).

SECTION 61.13002, F.S., APPLIES TO SITUATIONS IN WHICH A PARENT IS "ACTIVATED, DEPLOYED, OR TEMPORARILY ASSIGNED TO MILITARY SERVICE"; IT CANNOT BE USED IF NEITHER PARENT WAS IN THE MILITARY AT THE TIME.

Section 61.13002, Florida Statutes (2012), applies to situations in which a parent is "activated, deployed, or temporarily assigned to military service"; it cannot be used to reinstate a time-sharing arrangement if neither parent was in the military during the relevant period of time.

<http://www.4dca.org/opinions/June%202013/06-26-13/4D12-3500.op.pdf> (June 26, 2013).

Khan v. Khan, __So.3d __, 2013 WL 3014126, (Fla.4th DCA 2013).

TRIAL COURT ERRED IN TREATING FINAL JUDGMENT OF DOM AS NONFINAL; BECAUSE THE JUDGMENT DISPOSED OF SPOUSE'S CLAIM AND RETAINED JURISDICTION, IT WAS FINAL AND SUBJECT TO A 1.540(b) MOTION TO VACATE.

Husband moved to vacate a final judgment of dissolution, entered in 2010, pursuant to Florida Rule of Civil Procedure 1.540(b). In its 2012 order denying the motion to vacate, the trial court repeated some of the testimony of the witnesses, then found that the final judgment was actually not final because the wife's petition for dissolution had been dismissed; however, it

failed to address the motion to vacate on its merits. During the dissolution final hearing, the wife had withdrawn her petition for dissolution, proceeding instead on a claim for alimony and child support unconnected with dissolution. She had also requested that the trial court bar the husband from selling marital property subject to equitable distribution. The 2010 judgment dismissed the petition for dissolution and awarded alimony and child support to the wife; in it, the trial court also ordered the husband to execute a quitclaim deed for marital real property in his name to both spouses as tenants by the entireties. Appellate court concluded that because the 2010 judgment disposed of the wife's claim for support and alimony and retained jurisdiction to enforce it, the trial court had erred in its finding that the judgment was not final; accordingly, it reversed the denial of the motion to vacate and remanded for the trial court to address it on its merits.

<http://www.4dca.org/opinions/June%202013/06-19-13/4D12-904%20op.pdf> (June 19, 2013).

Sacket v. Sacket, __So.3d__, 2013 WL 3014118, (Fla.4th DCA 2013).

NEITHER SPOUSE DEFAULTED UNDER MSA; NO TRIGGER OF FEE PROVISION.

Appellate court concluded that neither spouse defaulted under their marital settlement agreement (MSA); therefore, the attorney's fees provision within it should not have been triggered. Accordingly, it reversed the trial court's order as to fees. Acknowledging that the provision in the MSA was not a prevailing party provision, the trial court had awarded fees and costs to former husband after having found he should not be held in contempt. It reasoned that former wife's motion for contempt was in the nature of enforcement of a provision in the MSA and that former husband's successful defense of the motion entitled him to fees and costs. Appellate court held that the clause in the MSA obligating a spouse to pay fees was tied to a default of one of his or her obligations; the fact that former husband had prevailed in defending against former wife's motion for contempt did not mean she had defaulted in one of her obligations under the MSA.

Reversed and remanded for trial court to redetermine former wife's entitlement to fees.

<http://www.4dca.org/opinions/June%202013/06-19-13/4D12-1872.op.pdf> (June 19, 2013).

Fifth District Court of Appeal

Sasseen v. Sasseen, __So. 3d__, 2013 WL 3480095 (Fla. 5th DCA 2013). **TRIAL COURT ERRED IN FAILING TO AWARD ARREARAGES DUE TO SPOUSE.** Former wife appealed a final judgment of dissolution of marriage; the appellate court concluded that the trial court erred in failing to award her arrearages due from former husband under a temporary support order. The stipulated temporary order of support obligated former husband to pay the mortgage and related expenses, pay former wife's car and insurance payments, pay private school tuition, and pay support. It was established that former husband had not met his obligations despite demands from former wife. The appellate court noted that the record reflected the trial court had been under the "misapprehension" that former wife had been reimbursed. Because she had not, it remanded for the trial court to require former husband to pay the arrearages.

<http://www.5dca.org/Opinions/Opin2013/070813/5D12-1449.op.pdf> (July 12, 2013).

Ingram v. Ingram, __ So.3d __, 2013 WL 3238460, (Fla.5th DCA 2013).

ATTORNEY'S FEE AWARD MUST BE SUPPORTED BY EVIDENCE AND FINDINGS.

Former husband appealed a post-judgment order holding him in contempt for failing to produce financial records regarding a 401(k) account, and awarding attorney's fees to former wife.

Appellate court affirmed in part and reversed in part. Pursuant to the final judgment of dissolution, a portion of former husband's 401(k) was given to former wife. The judgment required that former wife prepare the Qualified Domestic Relations Order (QDRO) and required former husband to provide the necessary documentation to enable preparation of the QDRO. After three years, when former husband failed to provide any records so that she could complete the QDRO, former wife moved for contempt. Appellate court found "no issue" with the trial court having ordered former husband to provide documentation, but did take issue with the fee award. No affidavit was offered at the hearing in support of the attorney's fee and the only testimony came from former wife's counsel in response to the question of how much he wanted.

<http://www.5dca.org/Opinions/Opin2013/062413/5D12-1501.op.pdf> (June 28, 2013).

Clore v. Clore, __ So.3d __, 2013 WL 3237794, (Fla.5th DCA 2013).

A TRIAL COURT ABUSES ITS DISCRETION WHEN IT ENTERS A TEMPORARY SUPPORT AWARD THAT EXCEEDS OR NEARLY EXHAUSTS A SPOUSE'S INCOME.

Former husband appealed a nonfinal temporary relief order in a dissolution case, arguing that the order required that he pay in excess of 100% of his available net income for temporary support. Concluding that the record did not enable it to determine whether there was error in the amount of temporary support ordered by the trial court, but stating that the amount appeared to "exhaust Husband's income," appellate court vacated the order and remanded for former husband to disclose his current income and expenses. It reiterated that a trial court abuses its discretion if it enters a temporary financial award that either "exceeds or nearly exhausts a party's income". <http://www.5dca.org/Opinions/Opin2013/062413/5D12-3926.op.pdf> (June 28, 2013).

Domestic Violence Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

Waybright v. Johnson-Smith, __ So.3d __, 2013 WL 3155856 (Fla. 1st DCA 2013) **CUSTODY ORDER REVERSED.** The father appealed a visitation order that resulted from a pro se hearing on child custody. During the hearing, the father offered police reports that detailed acts of domestic violence, however, the trial court excluded the evidence. The appellate court reversed, stating that the trial court erred in categorically excluding the reports. The court also noted that domestic violence and other violent behavior are probative matters in a child

custody case. <http://opinions.1dca.org/written/opinions2013/06-24-2013/12-3376.pdf> (June 24, 2013).

Second District Court of Appeal

Brilhart v. Brillhart ex rel. S.L.B., ___ So. 3d ____, 2013 WL 3335023 (Fla. 2d DCA 2013). [ORDER OF INJUNCTION FOR DOMESTIC VIOLENCE REVERSED](#). The mother appealed a final judgment of injunction for protection against domestic violence, which was issued to prevent contact between her and her daughter. The parents had been divorced for several years and the injunction was brought by the child's father. The mother argued that there was not competent, substantial evidence to support the trial court's decision to issue the injunction. The fourteen year old daughter sent a letter to her father saying that her mother was abusing her; the father filed the petition for an injunction on the daughter's behalf. The child did not testify at the hearing, and the only evidence offered to support the petition was the father's vague testimony based upon the letter and a doctor's statements that, based upon his meeting with the child, he had concerns for the child's safety. The court accepted the doctor's testimony even though the mother was never provided with an opportunity to properly explore the basis of the doctor's alleged expertise. The mother denied the abuse, and the letter was not admitted into evidence. The appellate court reversed the order for the injunction and stated that the father's testimony, which was based upon the father's hearsay and unsubstantiated fear, and the doctor's testimony, did not amount to competent, substantial evidence supporting the issuance of the injunction. The court also noted that there was no evidence in the record that showed that the doctor was an expert in domestic violence.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2013/July/July%2003,%202013/2D12-3339.pdf (July 3, 2013).

Third District Court of Appeal

No new opinions for this reporting period.

Fourth District Court of Appeal

Tobin v. Tobin, ___ So. 3d ____, 2013 WL 3811640 (Fla. 4th DCA 2013). [EVIDENTIARY HEARING REQUIRED IN DISSOLUTION CASE](#). A wife refused to make pretrial disclosures regarding her address and related information and attend a video deposition in a dissolution action due to her fear of domestic violence from her husband. She had obtained an injunction for protection against domestic violence. The trial court struck her pleadings as a sanction for the discovery violations, and the appellate court reversed. The appellate court ruled that an evidentiary hearing was necessary to give the wife an opportunity to show the extreme fear she cited as the reason for refusing comply with the discovery requests. The court also noted that striking a party's pleadings is the most severe of penalties and should only be exercised under "extreme circumstances."

<http://www.4dca.org/opinions/July%202013/07-24-13/4D12-2613.op.pdf> (July 24, 2013).

Fifth District Court of Appeal

Disston v. Hanson, ___ So.3d ___, 2013 WL 3237454 (Fla. 5th DCA 2013) **INJUNCTION AFFIRMED**. The respondent appealed a domestic violence injunction against him in favor of his former live-in girlfriend. Because there was competent substantial evidence presented to support the injunction, the appellate court affirmed the lower court's decision. The appellate court also noted that even though the evidence was in sharp contrast, the credibility of the witnesses was within the trial court's exclusive purview and they could not reweigh the evidence. June 28, 2013. <http://www.5dca.org/Opinions/Opin2013/062413/5D12-4026.op.pdf> (June 28, 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.