

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

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Delinquency Case Law

Florida Supreme Court

IN RE: AMENDMENTS TO FLORIDA RULES OF JUVENILE PROCEDURE – RULE 8.003, __ So. 3d __, 2010 WL 2518375 (Fla. 2010). [THE FLORIDA SUPREME COURT ADOPTED FLORIDA RULE OF JUVENILE PROCEDURE 8.003 WHICH REQUIRES THE PARTY OPENING OR REOPENING A CASE UNDER THE JUVENILE RULES TO FILE A FLORIDA FAMILY LAW RULES OF PROCEDURE FORM 12.928 \(COVERSHEET FOR FAMILY COURT CASES\)](#). The following new rule was adopted:

RULE 8.003. FAMILY LAW COVER SHEET

The party opening or reopening a case under Part I, II, III, or IV of these rules shall file with the clerk of the circuit court Florida Family Law Rules of Procedure Form 12.928, Cover Sheet for Family Law Cases.

The Court expressly stated that its intent is to ensure that Form 12.928 is filed in all cases under the Florida Family Law Rules of Procedure or the Florida Rules of Juvenile Procedure. The amendment became effective immediately upon release of the opinion on June 24, 2010.

<http://www.floridasupremecourt.org/decisions/2010/sc09-2195.pdf> (June 24, 2010).

First District Court of Appeal

P.W. v. State, __ So. 3d __, 2010 WL 2472259 (Fla. 1st DCA 2010). [THE DENIAL OF A MOTION TO WITHDRAW A PLEA WAS AFFIRMED WHERE THE FLORIDA RULES OF JUVENILE PROCEDURE DO NOT AUTHORIZE WITHDRAWAL AFTER DISPOSITION AND THE JUVENILE FAILED TO ESTABLISH ANY MANIFEST INJUSTICE](#). The juvenile appealed the denial of his motion to withdraw his plea which was filed almost a month after adjudication and disposition. The First District Court of Appeal found that the Florida Rules of Juvenile Procedure do not authorize the withdrawal of a plea after disposition. The juvenile suggested that the “manifest injustice” standard which applies after sentencing in criminal cases should be applied to his case. The First District found that even if that standard was applied in the instant case, the juvenile failed to establish any manifest injustice. Accordingly, the First District held that the denial of the motion was a proper exercise of the juvenile court's discretion and affirmed.

<http://opinions.1dca.org/written/opinions2010/06-21-2010/10-0485.pdf> (June 21, 2010).

Second District Court of Appeal

Z.C.B. v. State, __ So. 3d __, 2010 WL 2540438 (Fla. 2d DCA 2010). [ADJUDICATION AFFIRMED WHERE JEOPARDY HAD NOT ATTACHED AND NOTHING IN THE RULES OF JUVENILE PROCEDURE PRECLUDED A TRIAL COURT FROM SETTING ASIDE A DISMISSAL WITH PREJUDICE](#). The juvenile argued that the trial court erred by adjudicating him delinquent for possession of cannabis after having dismissed the petition with prejudice, denying his motion to suppress, and imposing \$115 court costs. The Second District Court of Appeal affirmed the adjudication of delinquency and the denial of the motion to suppress, and reversed the imposition of the \$115 court costs.

The juvenile appeared before the trial court on three separate juvenile delinquency petitions. The juvenile's three cases and the cases of several other juveniles were on the docket for trial. The juvenile's cases were called and the State indicated that a police officer, witness for the possession of the cannabis case, was not yet present and that a victim in one of the other cases was not yet present. The state indicated it was ready to proceed in the other case involving an affray charge. The juvenile's counsel moved to dismiss for lack of prosecution the case involving the victim witness. Apparently, there was a motion outstanding to suppress evidence in the cannabis case. The court delayed ruling on the motion to dismiss the case for lack of prosecution and all three cases were passed until later. The cases were later called for the second time with the same reply by the State. This time the juvenile's counsel moved to dismiss with prejudice both of the cases where the witnesses were not present. The trial court granted the motion "with prejudice" and the remaining case was set for trial later in the day. When the parties later returned for the remaining trial, the State advised the court that the police witness for the possession of cannabis case had actually been present the entire time. The trial judge struck the earlier motion to dismiss the possession of cannabis case. The juvenile's counsel then renewed an earlier motion to suppress. The court denied the motion to suppress. The juvenile then entered a no contest plea reserving his right to appeal the denial of his dispositive motion. There was never a hearing held in which evidence as to the juvenile's guilt or innocence was received. The juvenile was placed on probation and ordered to pay \$115 dollars in court costs. The Second District Court of Appeal affirmed the adjudication. The Second District found that jeopardy does not attach in a non-jury trial until the court begins to hear evidence upon which it can determine guilt or innocence of the charged offense. In the instant case, jeopardy never attached because the juvenile's suppression hearing for the possession of cannabis case was not an adjudicatory hearing. The Second District held that jeopardy had not attached when the trial court called on the State to begin that hearing. The Second District also affirmed, without comment, the trial court's denial of the motion to suppress. However, the Second District held that it was an error for the trial court to impose \$115 in court costs. While, s.775.083(2), F.S. (2008) allows for such an amount to be imposed in conjunction with a felony charge, the juvenile was only adjudicated delinquent for a misdemeanor offense. Thus, the imposition of the \$115 in court costs was reversed and remanded for the trial court to impose a correct amount.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2010/June/June%2025,%202010/2D08-3604.pdf (June 25, 2010).

T.D.S. v. State, __ So. 3d __, 2010 WL 2178578 (Fla. 2d DCA 2010). **ANY ERROR IN FAILING TO CITE A STATUTORY BASIS FOR IMPOSING \$50 IN COURT COSTS WAS HARMLESS.** The juvenile appealed an amended order that withheld adjudication and imposed a \$50 court cost. The order failed to cite a statutory authority for the court cost. The Second District Court of Appeal affirmed the withholding of adjudication without discussion. With regard to the court cost, the Second District 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. The disposition in this case was entered on a form that tracks the language of the standard Florida Rule of Juvenile Procedure form 8.947 (2008) for the imposition of costs in a delinquency proceeding. Unfortunately, this form contains no space or other provision for

the trial court to state the statutory basis for the cost. In criminal cases, accounting for costs is virtually impossible unless the State's agents know the statutory basis for the costs. The situation is simpler in juvenile cases. Only a few cost statutes apply to these cases. There still may be instances in which it is essential to disclose the statutory basis for a cost in a juvenile case, but the very common \$50 cost imposed in juvenile cases is based on the mandatory cost for the Crimes Compensation Trust Fund under s. 938.03, F.S. (2009), which the trial court cannot waive and must impose even when adjudication is withheld. Given that this situation was brought on by a standard form that has been used for years, the Second District declined to create a rule requiring hundreds of reversals of cost assessments merely because the form, which has not caused any harmful error, could have been better written. http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2010/June/June%2002,%202010/2D08-6047.pdf (June 2, 2010).

Third District Court of Appeal

D.W. v. State, __ So. 3d __, 2010 WL 2506713 (Fla. 3d DCA 2010). **THE REOPENING AND THE ADMISSION OF ADDITIONAL EVIDENCE IN THIS CASE (IN THE FORM OF JUDICIAL NOTICE) WAS PROPER.** The juvenile appealed the denial of his motion for judgment of dismissal. The juvenile was charged with resisting an officer without violence. The police had attempted to arrest the juvenile after an officer with knowledge of a pickup order spotted the juvenile at a football game. At trial, the State presented the testimony of two of the police officers, and then rested its case. The juvenile moved for a judgment of dismissal, arguing that the State had failed to prove the lawful execution of a legal duty because the State failed to introduce the pickup order into evidence. The trial judge initially opined that the State would have to introduce the pickup order into evidence or ask for judicial notice that it was in the court file. The judge looked through the court file and told the parties that there was no pickup order contained therein. The State argued that a pickup order conferred sufficient authority on a police officer to arrest the individual that was the subject of the order. The State contended that the proof was legally sufficient because the officer testified that he knew a pickup order existed and took the juvenile into custody on that basis. The trial court agreed and denied the motion for judgment of dismissal. While the juvenile was testifying, the trial judge informed the parties that he needed to correct his earlier statement that there was no pickup order in the file. The judge had located the pickup order in the court file of another of the juvenile's pending juvenile cases. The judge stated that the pickup order indicated it was in effect at the time the resisting incident took place. The State asked the court to reopen its case and to take judicial notice of the pickup order. The juvenile objected that the request came too late. The court overruled the objection and took judicial notice of the pickup order. On appeal, the juvenile acknowledged that the reopening of a case for additional evidence is a matter for the trial court's discretion. The Third District Court of Appeal found that a case is not technically closed until counsel has begun closing arguments or the case has been submitted to the jury. Further, where a case is not technically closed and the ends of justice are best served by the introduction of evidence, it would be an abuse of discretion to deny such an introduction. The Third District held that the additional evidence in this case (in the form of judicial notice) was properly admitted. Therefore, the denial of the juvenile's motion for judgment of dismissal was affirmed.

<http://www.3dca.flcourts.org/Opinions/3D09-1270.pdf> (June 23, 2010).

J.P. v. State, __ So. 3d __, 2010 WL 2178834 (Fla. 3d DCA 2010). **FINDING OF GRAND THEFT OF PROPERTY VALUED AT \$300 OR MORE WAS AFFIRMED WHERE THE PRINCIPAL'S TESTIMONY ESTABLISHED THE FAIR MARKET VALUE OF THE PROPERTY AT THE TIME OF THE THEFT.** The juvenile appealed a finding that he committed grand theft of property valued at \$300 or more. A high school principal, while taking inventory, discovered that a number of projectors were missing. The juvenile was charged with grand theft after admitting to stealing at least two of the missing projectors. At the adjudicatory hearing, the principal testified that each projector had a value of approximately \$800. At the conclusion of the State's case, the defense moved for a judgment of dismissal, arguing that the State had failed to establish the fair market and value of the projectors at the time of the offense. The motion was denied, and the juvenile was found to have committed grand theft of property valued at \$1600. The only issue on appeal was whether the principal's testimony sufficiently established that the value of the two projectors at the time of the theft was \$300 or more (\$150 or more per projector). The Third District Court of Appeal held that the testimony was sufficient. Having ordered the projectors, and also being responsible for the purchasing and maintaining of all of the school's equipment and materials, the principal was competent to testify as to the projectors' value. Her testimony revealed that each projector's purchase price was approximately \$800, that the projectors were brand new when installed, that the crime occurred only two months later, and that it would cost another \$800 to replace each stolen projector. Based on the principal's testimony, The Third District found that the State established the fair market value of the property to be \$300 or more at the time of the theft. The trial court's finding was affirmed.

<http://www.3dca.flcourts.org/Opinions/3D09-1619.pdf> (June 2, 2010).

Fourth District Court of Appeal

S.S. v. State, __ So. 3d __, 2010 WL 2382598 (Fla. 4th DCA 2010). **PETITION FOR WRIT OF CERTIORARI, REQUESTING A REVIEW OF TRIAL COURT'S GRANTING OF A MOTION TO VACATE AND SET ASIDE JUDGMENT FOUR YEARS AFTER NO CONTEST PLEA, WAS DENIED.** The State appealed the trial court's order granting the juvenile's motion to vacate her plea and set aside the judgment and sentence. The Fourth District Court of Appeal found that s. 985.534(1)(b), F.S. (2009), provided no authority for the State to appeal an order vacating a plea and setting aside judgment and sentence. However, the court could construe the appeal as a petition for writ of certiorari pursuant to Florida Rule of Appellate Procedure 9.030(b)(2). The juvenile had entered a no contest plea. Adjudication was withheld and the juvenile was placed on probation. Supervision was subsequently terminated. Approximately four years later, the juvenile learned that she had a criminal record that could not be sealed or expunged when she applied for a clinical position for a nursing program. The juvenile filed a Motion to Vacate and Set Aside Judgment and Sentence. The juvenile alleged: (1) the plea had not been entered knowingly; and (2) counsel affirmatively misadvised her and her family about whether she would have a criminal record and whether the record was eligible for expunction. The State responded that the petition was time-barred, legally insufficient, and the juvenile had failed to establish prejudice. The Fourth District found that Florida Rule of Juvenile Procedure 8.140 allows a

juvenile to move for relief from an order, judgment or proceeding where the order or judgment is void. A challenge to a void judgment must be made within a reasonable time. The Fourth District found that in this case, the plea suffered from multiple infirmities. The trial court did not place the child under oath or question her about her understanding of the plea, the possible dispositions, consequences, and whether she understood the rights she was waiving. In fact, the colloquy was so brief, it was almost nonexistent. Because the juvenile established that she would not have entered the plea had she been properly advised, the requisite prejudice existed to render the judgment void. Additionally, the trial court specifically found the juvenile's motion was timely, and made within the one year of discovering that her record was ineligible for expunction. Therefore, the trial court adhered to the essential requirements of the law and the petition for writ of certiorari was properly denied. Judge Taylor concurred in part and dissented in part with the opinion. <http://www.4dca.org/opinions/June%202010/06-16-10/4D08-4965.op.&Conc.Diss..pdf> (June 16, 2010).

T.M. v. State, __ So. 3d __, 2010 WL 2292215 (Fla. 4th DCA 2010). **DENIAL OF MOTION TO SUPPRESS EVIDENCE REVERSED WHERE NO FACTS OR CIRCUMSTANCES WARRANTED A PAT-DOWN SEARCH OF THE JUVENILE FOR OFFICER SAFETY.** The juvenile was adjudicated delinquent for possession of cannabis found pursuant to a pat-down search. The juvenile filed a motion to suppress, alleging that the pat-down was without his consent and illegal. The motion was denied. "Officer safety" was the basis upon which the trial court found the pat-down to be justified. The Fourth District Court of Appeal found that following an investigatory stop, police officers are authorized to execute a pat-down for weapons only where they have a reasonable suspicion to believe that a suspect is armed with a dangerous weapon. This means that a weapons pat-down would be justified when a reasonably prudent officer, under the circumstances which exist at the time of the stop, would be warranted in the belief that his safety, or the safety of others, was in danger. In this case, the trial court erred by not suppressing the evidence. The officer stopped the juvenile because he suspected that the juvenile had just participated or was about to participate in a burglary or drug sale. That suspicion, however, was dispelled upon questioning the juvenile, which took place before the pat-down. Thus, at the time of the pat-down, the deputy believed only that the juvenile was impermissibly missing school. Under these circumstances, the deputy did not have the requisite suspicion needed to justify a pat-down. Before patting down the juvenile, the deputy did not observe any bulges resembling a weapon near the juvenile's waistline area. The juvenile also did not attempt to grab anything from his pockets, and the deputy had no knowledge linking the juvenile to criminal activity involving a weapon. The Fourth District held that the pat-down was unwarranted and illegal, as there were no facts or circumstances warranting the pat-down for officer safety. Accordingly, the denial of the motion to suppress was reversed and the trial court was directed to vacate the adjudication of delinquency. <http://www.4dca.org/opinions/June%202010/06-09-10/4D09-1629.op.pdf> (June 9, 2010).

Fifth District Court of Appeal

A.L.M. v. State, __ So. 3d __, 2010 WL 2218569 (Fla. 5th DCA 2009). **PUBLIC DEFENDER'S FEE WAS IMPROPER BECAUSE THE JUVENILE WAS NOT GIVEN NOTICE OF HIS RIGHT TO CONTEST**

THE AMOUNT OF THE FEE. The juvenile was committed to a Level 8 program until his 19th birthday, and was further assessed certain court costs and a \$300 public defender's fee. On appeal, the juvenile argued that the imposition of the public defender's fee was improper because he was not given notice of his right to contest the amount of the fee. The Fifth District Court of Appeal agreed, and reversed and remanded. The Fifth District noted that on remand, the fee obligation may be re-imposed, provided the trial court complies with the provisions of Florida Rule of Criminal Procedure 3.720(d). The Fifth District found that the juvenile's additional argument that a public defender's lien may not be imposed against a juvenile offender's indigent parent was without merit.
<http://www.5dca.org/Opinions/Opin2010/053110/5D09-1516.op.pdf> (May 31, 2010).

Dependency Case Law

Florida Supreme Court

In Re:Amendments to Rules of Juvenile Procedure, ___ So. 3d ____, 2010 WL 2518375, 35 Fla.L.Weekly S370 (Fla. 2010). **NEW RULE REQUIRES THE FILING OF THE FAMILY LAW COVER SHEET IN JUVENILE CASES.**

The Supreme Court adopted Rule 8.003 which requires that the party opening or reopening a case under Part I, II, III, or IV of the Rules of Juvenile Procedure file with the clerk of the circuit court Family Law Form 12.928, Cover Sheet for Family Law Cases.

<http://www.floridasupremecourt.org/decisions/2010/sc09-2195.pdf> (June 24, 2010).

First District Court of Appeal

No new opinions for this reporting period.

Second District Court of Appeal

R.K. v. Department of Children and Family Services and Guardian ad Litem Program, ___ So. 3d ____, 2010 WL 2508845 (Fla. 2nd DCA 2010). **DEPENDENCY ADJUDICATION REVERSED.**

The Second District Court of Appeal reversed a supplemental order adjudicating children to be dependent. The father argued on appeal that the trial court erroneously considered hearsay evidence and that the admissible evidence was legally insufficient to adjudicate the children dependent. The Department conceded that admission of hearing testimony was in error. The Guardian ad Litem Program argued that the order should be affirmed.

The Department alleged in its dependency petition that both the father and the mother abused, neglected, and abandoned their three children. The mother consented to adjudication but the father did not. The factual basis of the dependency adjudication arose out of the mother's report of an argument between herself and the father which became physical and in which they had pushed furniture around the family home. The father locked the windows, blocked the exits, tried to disable the televisions, and snatched a cable wire from the children's television. The cable wire hit one of the children, R.K., who began crying. The child had a welt

on her arm. The mother took the children to the police and reported the incident. The Department's investigator indicated that the mother reported that the father intentionally hit R.K. with the cable wire, but the mother said that she did not see the incident. The investigator also reported that two of the children said the father punished R.K. more harshly than the younger siblings. During the course of the investigation, R.K. threatened to commit suicide "because of all the stress in the house" and was hospitalized. Although the father admitted treating R.K. differently than the younger children, he denied causing the welt on her arm. The trial court also found that the father neglected the children based on incidents of domestic violence and a mental health disorder. However, the findings in the order were limited as to the mental health disorder and included a suicide threat by the father, who was sent to a crisis center. The father denied being bipolar but said he had Antisocial Personality Disorder.

On appeal, the court reversed because nearly all of the evidence relied upon by the trial court was inadmissible. The mother did not testify at the hearing and the father's counsel repeatedly objected to the admission of multiple hearsay statements by the mother and R.K. Although the mother's statements to the investigator and Officer Wilma Tindell would have been admissible at a joint dependency hearing against both parents, the mother had already consented and her issues were not before the court. The mother's hearsay statements were neither made by the father, nor did he adopt them, believe in them, or authorize the mother to make them on his behalf. R.K. testified at trial but recanted her prior statements that her father struck her intentionally. R.K.'s prior inconsistent statements weren't sworn nor did they conform to section 90.801(2)(a), Florida Statutes. The requirements for the child hearsay exception were not met either. Thus, R.K.'s statements were only admissible for impeachment and not as substantive evidence. The only admissible substantive evidence came from R.K. and the father. The father testified, *inter alia*, that he thought R.K.'s welt was self-inflicted.

The Guardian ad Litem Program argued that father either waived any argument or invited error as to the sufficiency of the evidence because, at the close of the Department's case at trial, the father's counsel conceded that the Department had put on a prima facie case and declined to move for a directed verdict. However, the Second District disagreed that the father's acknowledgement served to waive his prior objections to admissibility of hearsay or invited error. The court reversed the father's order of adjudication and remanded the case for further proceedings.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2010/June/June%2023,%202010/2D09-5522.pdf (June 23, 2010).

Department of Children and Family Services and Guardian ad Litem Program, v. M.M. and A.H., ___ So. 3d ___, 2010 WL 2218597, 35 Fla.L.Weekly D1258 (Fla. 2nd DCA 2010).

DENIAL OF TERMINATION OF PARENTAL RIGHTS REVERSED.

The Second District Court of Appeal reversed the trial court's denial of termination of a father's parental rights to one of his children. The petition sought termination of both the mother's and father's parental rights as to each of two children. The trial court denied the petition as to the mother; on appeal, this was affirmed without comment. However the lower court granted the petition only with regard to the father's rights to his older child. The trial court declined to

terminate the father's rights to his younger child. On appeal, the court reversed this denial of the petition.

On the second day of the hearing before the trial court, the father indicated that he wanted to enter a consent to the petition. After the father was questioned under oath and informed that his parental rights could be terminated even if the mother's were not, the court determined that the father was freely and voluntarily consenting to termination. Although the lower court terminated the father's rights to the older child based on the father's egregious conduct against that child, it did not terminate his rights to his younger child because the Department did not show that termination was the least restrictive means of protecting the child from harm. However, the caselaw relied upon by the trial court for this ruling was distinguished on appeal. The Second District also noted that by acknowledging through his consent that a case plan would be futile, the father implicitly agreed that termination is the least restrictive means. Additionally, the father did not contest the issues of least restrictive means before the trial court. The court reversed with instructions for the trial court to enter a final judgment granting the petition against the father as to both of his children.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2010/June/June%2004,%202010/2D09-1970.pdf (June 4, 2010).

Third District Court of Appeal

M.V. v. Department of Children and Family Services and Guardian ad Litem Program, ___ So. 3d ___, 2010 WL 2509175 (Fla. 3d DCA 2010). CITATION OPINION

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

<http://www.3dca.flcourts.org/Opinions/3D09-3013.pdf> (June 23, 2010).

A.B. v. Department of Children and Family Services and Guardian ad Litem Program, ___ So. 3d ___, 2010 WL 2505456, 35 Fla.L.Weekly D ___ (Fla. 3d DCA 2010). WRIT OF PROHIBITION GRANTED.

The father sought a writ of prohibition to prevent the trial judge from presiding over his daughter's dependency case. Because the factual basis for the dependency action included conduct by the father that was witnessed by the trial judge in open court, the court granted the petition for the writ. <http://www.3dca.flcourts.org/Opinions/3D10-1607.pdf> (June 22, 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

In re Amendments to Florida Supreme Court Approved Family Law Forms—Forms 12.982(a), 12.982(c), and 12.982(f). Case SC10-828, issued June 24, 2010. The instructions to the revised name change forms adopted in this case clarify that these forms are not to be used in connection with dissolution of marriage proceedings; changes of name should be part of the dissolution proceedings themselves.

First District Court of Appeal

Biskie v. Biskie, __ So. 3^d __, 2010 WL 2472277, (Fla. 1st DCA 2010).

DISPARATE EARNINGS OF SPOUSES IS A KEY FACTOR IN CONSIDERATION OF ALIMONY WHERE MARRIAGE IS IN A GRAY AREA; TRIAL COURT SHOULD AWARD A NOMINAL SUM OF ALIMONY TO RETAIN JURISDICTION.

Former wife argued that the trial court had erred in denying her request for permanent, periodic alimony; the appellate court agreed. Trial court's denial was based on its conclusion that former husband did not have the ability to pay permanent, periodic alimony; instead, it ordered him to make a one-time lump sum bridge-the-gap payment. Appellate court held that the parties' 15-year/month/day/hour? marriage fell within the "gray area" in which there was no presumption either in favor of or against alimony, thereby making the disparate earning capabilities of the former spouses a significant factor for consideration of alimony. Appellate court concluded that former wife had a need for permanent alimony and that not only did former husband have the present ability to pay some alimony, that he had also testified that he expected his earnings to rebound in the future. Appellate court held that the trial court had abused its discretion in finding that former wife was not entitled to permanent alimony. In addition, it reiterated that when one spouse is entitled to alimony but the other lacks the present ability to pay, the trial court should retain jurisdiction by awarding a nominal sum in the event the parties' financial circumstances change in the future.

<http://opinions.1dca.org/written/opinions2010/06-21-2010/09-4961.pdf> (June 21, 2010).

Causey v. Causey, __ So. 3^d __, 2010 WL 2219732, (Fla. 1st DCA 2010).

TRIAL COURT ERRED IN GRANTING RELIEF NOT REQUESTED BY EITHER PARTY IN THE PLEADINGS.

Short opinion in which the appellate court reversed a portion of the trial court's order on modification of child support, which had changed the schedule of reimbursing non-covered health and child care costs and had provided for entry of a bond to cover anticipated health and child care costs, because that relief had not been requested by either party in their pleadings.

<http://opinions.1dca.org/written/opinions2010/06-04-2010/08-3738.pdf> (June 4, 2010).

Second District Court of Appeal

Lin v. Lin, __ So. 3^d __, 2010 WL 2330249, (Fla. 2d DCA 2010).

TRIAL COURT ERRED IN DOUBLE-COUNTING EXPENSES LEADING TO ALIMONY AWARD EXCEEDING NEED.

Former husband appealed final judgment of dissolution of marriage on several grounds; appellate court reversed due to the trial court double-counting the child's expenses, which resulted in an alimony award to former wife which exceeded her need. Appellate court held that in doing so, the trial court had abused its discretion. Appellate court reiterated that a trial court's determination of a spouse's income must be supported by competent, substantial evidence and concluded that in this case, it was. The case was remanded to the trial court for recalculation of alimony and child support.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2010/June/June%2011,%202010/2D08-1808.pdf (June 11, 2010).

Martinez v. Abinader, ___ So. 3d ___, 2010 WL 2330252, (Fla. 2d DCA 2010).

TRIAL COURT ERRED IN: 1) FAILING TO CONSIDER SPOUSE AS PRIMARY RESIDENTIAL PARENT BECAUSE SHE COULD NOT AFFORD TO RETAIN THE MARITAL HOME; 2) FAILING TO CONSIDER ALL SOURCES OF INCOME AVAILABLE TO SPOUSE IN DETERMINING OBLIGATIONS AND FEES; 3) AWARDED "TRANSITIONAL ALIMONY" TO SPOUSE; TRIAL COURT ABUSES ITS DISCRETION IN FAILING TO AWARD CHILD SUPPORT RETROACTIVE TO FILING DATE WHERE THERE WAS A NEED FOR SUPPORT AND AN ABILITY TO PAY.

Former wife appealed a final judgment of dissolution of marriage on several grounds; appellate court reversed. Concluding that the trial court had applied an incorrect standard when it equated the teenage child's "environment" referred to within Section 61.13(3)(d), Florida Statutes (2009), with the physical structure where the child resided, the appellate court held that the trial court erred in eliminating former wife from consideration as the primary residential parent because she could not afford to retain the marital home. Appellate court held that a trial court abuses its discretion if it fails to award child support retroactive to the filing date of the petition where there is a need for such support and an ability to pay.

Appellate court instructed the trial court that in awarding alimony, it must consider all sources of income available to obligor spouse, including voluntary contributions made to investment property and retirement accounts. Appellate court also found error in trial court's award of "transitional alimony". Here, both spouses had equally shared mortgage payments during lengthy dissolution proceedings and were each awarded one-half of the equity in the home; however, the trial court's treatment of former husband's payments as "transitional alimony" had the effect of former wife having a greater role in reducing the mortgage debt without getting credit. Appellate court also found that the trial court erred by failing to take into consideration all of former husband's income and assets when determining whether former wife should be awarded fees.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2010/June/June%2011,%202010/2D08-2744.pdf (June 11, 2010).

Third District Court of Appeal

No new opinions for this reporting period.

Fourth District Court of Appeal

Herbst v. Herbst, __ So. 3d __, 2010 WL _____, (WL cite not available) (Fla. 4th DCA 2010).

WHERE SPOUSES HAD SIMILAR INCOME, RECORD DID NOT SUPPORT REIMBURSEMENT BY ONE SPOUSE TO THE OTHER OF 75% OF ATTORNEY'S FEES.

Question on appeal was whether Section 61.16, Florida Statutes (2009), requires one spouse to reimburse the other for a large portion of attorney's fees where the receiving spouse has not demonstrated need. Appellate court held that, because the record reflected that the spouses had similar disposable income, while the record might support an award for a slight percentage in favor of one spouse, it could not support an award for 75%.

<http://www.4dca.org/opinions/June%202010/06-30-10/4D09-1383.op.pdf> (June 30, 2010).

Cohen v. Cohen, __ So. 3d __, 2010 WL 2509130, (Fla. 4th DCA 2010).

ABSENT ABUSE OF DISCRETION, TRIAL COURT'S DECISION WHETHER TO ALLOW AMENDMENT OF PLEADINGS SHOULD STAND; DETERMINATION THAT NONMARITAL ASSETS HAD NOT BECOME MARITAL WAS BASED ON COMPETENT, SUBSTANTIAL EVIDENCE.

Former wife appealed final judgment of dissolution of marriage on numerous grounds; appellate court affirmed. Former husband had previously appealed a temporary relief order; that order was also affirmed. (Cohen v. Cohen, 955 So. 2d 70, (Fla. 4th DCA 2007)). Appellate court reiterated that, absent abuse of discretion, a trial court's decision whether to allow pleadings to be amended should not be disturbed on appeal. It concluded that here, the trial court had not abused its discretion. Appellate court held that the trial court's conclusion that the nonmarital assets had not become marital was based on competent, substantial evidence. It also found that the trial court had correctly analyzed the law with regard to whether former wife should receive alimony and did not abuse its discretion in denying alimony to her.

<http://www.4dca.org/opinions/June%202010/06-23-10/4D08-1057.op.pdf> (June 23, 2010).

Posner v. Posner, __ So. 3d __, 2010 WL 2509134, (Fla. 4th DCA 2010).

TRIAL COURT DID NOT ABUSE DISCRETION IN IMPUTING INCOME TO SPOUSE LIVING IN PARENTS' HOME RENT FREE, BUT DID ABUSE DISCRETION IN ALLOWING ONE SPOUSE 71 YEARS TO REPAY OTHER; AN ISSUE UNRESOLVED AFTER REMAND WAS AGAIN REVERSED AND REMANDED.

Former husband appealed the trial court's refashioning of the awards on remand from Posner v. Posner, 988 So. 2d 128 (Fla. 4th DCA 2008). In that appeal, the appellate court found that the trial court's awards left former husband "in a hole" and constituted abuse of discretion, and also reversed the trial court application of former wife's nonmarital credit card debt as a marital liability. Former husband's appeal this time was to: 1) imputation of income; 2) requirement to pay former wife's credit card liability; and 3) requirement to allow former wife 71 years to pay the equalizing payment on equal distribution of marital assets. First, appellate court held that the law of the case doctrine did not preclude the trial court from imputing income to former husband, because that issue had not been specifically decided in the earlier appeal. Appellate court concluded that the trial court did not abuse its discretion in imputing, for purposes of child support, the rental value of the house in which former husband's parents allowed him to live rent free. Second, the appellate court held that the trial court had not

correctly resolved the issue of former wife's credit card debt and reversed again. Third, the appellate court concluded that the trial court had abused its discretion in allowing former wife over 70 years to pay former husband the equalizing payment. The appellate court reversed and required that the trial court refashion the repayment to allow former husband to receive a more expedited one. Appellate court noted that, while the trial court could not retain jurisdiction to change the amount of the original equalization payment, it should retain jurisdiction over future repayment provisions "to account for changed circumstances."

<http://www.4dca.org/opinions/June%202010/06-23-10/4D08-4755.op.pdf> (June 23, 2010).

Weiner v. Weiner, __ So. 3d __, 2010 WL 2523940, (Fla. 4th DCA 2010).

SPOUSE WAS ENTITLED TO RENTAL CREDIT OF MARITAL HOME ONCE OTHER SPOUSE'S RIGHT TO EXCLUSIVE POSSESSION TERMINATED.

A provision within a final judgment of dissolution which granted former wife exclusive use and possession of the marital home during the minority of minor child did not preclude former husband from being entitled to rental credit once former wife's right to exclusive possession terminated. Appellate court found that trial court had erred in accepting the magistrate's legal conclusion that former husband was not legally entitled to a reasonable rental value after the minor child reached majority.

<http://www.4dca.org/opinions/June%202010/06-23-10/4D09-582.op.doc.pdf> (June 23, 2010).

Marshall v. Marshall, __ So. 3d __, 2010 WL 2292177, (Fla. 4th DCA 2010).

TRIAL COURT HAD JURISDICTION TO ORDER RESTITUTION FOR FORMER HUSBAND AFTER REMAND.

The question was whether the trial court had jurisdiction to order restitution for former husband on remand after a finding that the trial court lacked personal jurisdiction over him for the purposes of resolving equitable distribution and support issues. (Previous case was Marshall v. Marshall, 988 So. 2d 644 (Fla. 4th DCA 2008)). On this go-round, the appellate court found trial court to have jurisdiction and reversed its order denying former husband's request for restitution as being outside the mandate of the earlier opinion. Appellate court held that the decision to grant restitution of alimony, costs, and fees to former husband fell within trial court's discretion. In reaching its conclusion, appellate court explained the two approaches taken by the court in Atkins v. Atkins, 388 So. 2d 34 (Fla. 4th DCA 2004) and Wright v. Lewis, 870 So. 2d 179 (Fla. 4th DCA 2004).

<http://www.4dca.org/opinions/June%202010/06-09-10/4D09-668.op.pdf> (June 9, 2010).

Brown v. Cannady-Brown, __ So. 3d __, 2010 WL 2178755, (Fla. 4th DCA 2010).

ONLY CLERICAL ERRORS MAY BE CORRECTED PURSUANT TO RULE 1.540(a); ERRORS AFFECTING SUBSTANCE OF JUDGMENT MUST BE CORRECTED WITHIN 10 DAYS PURSUANT TO RULE 1.530(g) OR BY APPEAL.

Former husband appealed the trial court's denial of his motion for relief from judgment pursuant to Florida Rule of Civil Procedure 1.540(a); appellate court affirmed. Appellate court reiterated that although a trial court may correct clerical errors pursuant to that rule, judicial errors must be corrected within ten days pursuant to Florida Rule of Civil Procedure 1.530(g) or through appellate review. With regard to family law cases, appellate court held that the length

of time to pay an obligation is not a clerical error, but rather one which affects the substance of the judgment. In this case, former husband neither timely filed a motion pursuant to rule 1.530(g) nor timely filed an appeal.

<http://www.4dca.org/opinions/June%202010/06-02-10/4D09-458.op.pdf> (June 2, 2010).

Fifth District Court of Appeal

Saunders v. Saunders, ___ So. 3d ___, 2010 WL 2539427, (Fla. 5th DCA 2010).

STIPULATION INCORPORATED IN FINAL JUDGMENT MUST EITHER BE AGREED TO BY PARTIES OR TRANSCRIBED.

Former wife appealed final judgment of dissolution; appellate court concluded the final judgment was not based on facts contained in the record and accordingly reversed. Although the final judgment referred to a joint stipulation being incorporated by reference, there was neither a stipulation signed by the parties nor any transcript of one.

<http://www.5dca.org/Opinions/Opin2010/062110/5D08-2398.op.pdf> (June 25, 2010).

Domestic Violence Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

No new opinions for this reporting period.

Second District Court of Appeal

Canavan v. State, --- So. 3d ----, 2010 WL 2594661 (Fla. 2d DCA 2010) **STALKING -REPLACES PRIOR OPINION.**

Canavan appealed his conviction for aggravated stalking, and the court reversed and remanded the case. In 2006, Canavan's former wife obtained a temporary injunction because he was following her, she was afraid of him, and she was afraid that he would try to take their son. A permanent injunction was entered a year later at a hearing that Canavan did not attend, and the permanent injunction was not served on Canavan until he was arrested for the stalking charge at issue in this case. The court noted that if the defendant had been served with the permanent injunction, proof of service would have been sufficient to prove that he had knowledge of the injunction, a required element of the aggravated stalking charge. However, the State failed to provide any evidence that Canavan knew of the entry of the permanent injunction. Therefore, the court remanded the case for entry of a judgment of conviction for simple stalking. To prove simple stalking, the State must demonstrate that the defendant willfully, maliciously, and repeatedly followed, harassed, or cyberstalked the victim. By finding Canavan guilty of aggravated stalking, the jury also made the necessary finding on the elements constituting the lesser-included offense of simple stalking. The jury was given both of these instructions. The court reversed Canavan's aggravated stalking conviction because the State did

not, as a matter of law, establish the third element of aggravated stalking--that factually Canavan knew the final injunction had been entered against him. However, the court did not take issue with the remaining elements of the offense.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2010/June/June%2030,%202010/2D08-5182rh.pdf (June 30, 2010).

Third District Court of Appeal

No new opinions for this reporting period.

Fourth District Court of Appeal

No new opinions for this reporting period.

Fifth District Court of Appeal

No new opinions for this reporting period.