

**OSCA/OCI'S FAMILY COURT CASE LAW UPDATE**  
**June - July 2008**

**Table of Contents**

<b>Delinquency Case Law</b> .....	2
Florida Supreme Court.....	2
First District Courts of Appeal.....	2
Second District Courts of Appeal .....	3
Third District Courts of Appeal .....	7
Fourth District Courts of Appeal .....	7
Fifth District Courts of Appeal .....	9
<b>Dependency Case Law</b> .....	11
Florida Supreme Court.....	11
First District Courts of Appeal.....	11
Second District Courts of Appeal .....	12
Third District Courts of Appeal .....	13
Fourth District Courts of Appeal .....	14
Fifth District Courts of Appeal .....	14
<b>Dissolution of Marriage Case Law</b> .....	15
Florida Supreme Court.....	15
First District Courts of Appeal.....	15
Second District Courts of Appeal .....	15
Third District Courts of Appeal .....	18
Fourth District Courts of Appeal .....	18
Fifth District Courts of Appeal .....	20
<b>Domestic Violence Case Law</b> .....	20
Florida Supreme Court.....	20
First District Courts of Appeal.....	20
Second District Courts of Appeal .....	20
Third District Courts of Appeal .....	20
Fourth District Courts of Appeal .....	21
Fifth District Courts of Appeal .....	21

## Delinquency Case Law

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

In Re: Amendments to Florida Rule of Juvenile Procedure 8.100, \_\_ So.2d \_\_, 2008 WL 2520890 (Fla. 2008). The Florida Supreme Court amended Rule 8.100(e) to allow a party or a party's attorney to obtain a transcript of court proceedings without a court order. Previously a court order was required. According to the Juvenile Court Rules Committee, this requirement hindered a timely challenge to a child's detention through a writ of habeas corpus. Often a transcript could not be obtained quickly enough to be included as an appendix as required by Florida Rules of Appellate Procedure 9.200(a). The Florida Supreme Court found that while it did not appear that a transcript was absolutely required in all cases under the appellate rules, certainly a transcript would be desirable and appropriate in the circumstances described by the Committee. Further, the need for a timely transcription under these circumstances is apparent. Accordingly, the Florida Rule of Juvenile Procedure 8.100(e) was amended to allow a party or a party's attorney to obtain a transcript of court proceedings without a court order effective immediately. <http://www.floridasupremecourt.org/decisions/opinions.shtml> (June 26, 2008).

### ***First District Courts of Appeal***

M.D. v. State, \_\_ So.2d \_\_, 2008 WL 2403723 (Fla. 1DCA 2008). The juvenile's counsel filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967). The First District Court of Appeal found that there was no good faith argument for the reversal of the juvenile's delinquency adjudication and affirmed the trial court's decision without discussion. However, on the State's cross- appeal, the First District held that the trial court erred in denying the State's motion for human immunodeficiency virus (HIV) testing pursuant to s. 960.003, F.S. (2007). The juvenile pled no contest to lewd or lascivious battery on a person less than 16 years of age pursuant to s. 800.04(4) (a), F.S. (2007). Section 960.003, F.S. (2007) provided for court ordered HIV testing where the charge was an offense enumerated in s. 775.0877(1)(a)-(n), F.S. (2007). The First District found that s. 775.0877(1)(d), F.S. (2007) included lewd and lascivious crimes as set forth in s. 800.04(1)-(3), F.S.<sup>1</sup> The trial court denied the State's motion for HIV testing because appellant's delinquency adjudication for lewd or lascivious battery under s. 800.04(4)(a), F.S. (2007) was not a sexual offense enumerated under s. 775.0877(1)(d), F.S. (2007). Effective October 1, 1999, s. 800.04, F.S. was substantially rewritten so that subsections (1) through (3) no longer referred to actual offenses which had been transferred to subsections (4) through (6). See Ch. 99-201, ss. 6, 17, at 1187-88, 1211, Laws of Fla. The First District held that the trial court should have construed s. 775.0877(1) (d), F.S. (2007) as referring to the amended version of s. 800.04, F.S. The First District found that the legislature's failure to amend s. 775.0877(1)(d), F.S. (2007) to reflect the 1999 amendments to s. 800.04, F.S. was a clerical oversight because a literal interpretation of s. 775.0877(1)(d), F.S. (2007) based on the outdated reference to s. 800.04, F.S. would render s. 775.0877(1)(d), F.S. (2007) meaningless because no one charged with committing a sexual offense under s. 800.04, F.S. after the 1999 amendments would be subject to HIV testing. The First District found that such a result would be absurd and contrary

---

<sup>1</sup> Although the court repeatedly refers to s. 775.0877(1)(d), F.S.(2007) in its opinion, it appears that s. 775.0877(1)(d), F.S.(2007) is the subsection that refers to ss. 800.04(1), (2) and (3).

to the legislatures' clear intent. Accordingly, the trial court's denial of the State's motion for HIV testing was reversed and remanded with directions that the trial court grant the motion. <http://opinions.1dca.org/written/opinions2008/06-16-08/08-0259.pdf> (June 16, 2008).

### ***Second District Courts of Appeal***

K.W. v. State, \_\_ So.2d \_\_, 2008 WL 2312506 (Fla. 2DCA 2008). The juvenile appealed his adjudication for first-degree petit theft of a cell phone. The juvenile argued that the trial court erred in denying his motion for judgment of dismissal because the State did not prove that the value of the stolen cell phone was \$100 or more. The Second District Court of Appeal found that in order to prove first-degree petit theft, the state must prove that the stolen property was "valued" at \$100 or more but less than \$300. See s. 812.014(2) (e), F.S. (2006). Section 812.012(10) (a) (1), F.S. (2006) defined value as the "market value of the property at the time and place of the offense or, if such cannot be satisfactorily ascertained, the cost of replacement of the property within a reasonable time after the offense." The Second District found that the Florida Supreme Court has held that when direct testimony of fair market value of the stolen item is not available, the trier of fact can consider the following in ascertaining market value: (1) original market cost; (2) manner in which the item was used; (3) the general condition and quality of the item; and (4) the percentage of depreciation. Further, the fair market value takes into consideration not only the purchase price, but the manner in which the item was used, its condition and depreciation. At the juvenile's adjudicatory hearing, the victim testified that the juvenile stole the cell phone in July 2006. The victim's mother testified that she paid \$450 for the phone in May 2006. She testified that when the phone was stolen, it was only three months old and was in "brand new" condition. The Second District held that the State's evidence established more than just the purchase price and that the phone was in working order. The State presented testimony that the cell phone in this case was purchased for \$450 only three months before the theft and that at the time of the theft, it was in "brand new," working condition. In viewing this evidence in a light most favorable to the State, a rational trier of fact could find beyond a reasonable doubt that the value of the cell phone at the time of the theft was \$100 or more. In light of the evidence, the Second District found that reasonable persons could not doubt that the value of the phone was at least \$100. Accordingly, the adjudication of delinquency was affirmed.

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2008/June/June%2006,%202008/2D07-2889.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2008/June/June%2006,%202008/2D07-2889.pdf) (June 6, 2008).

M.D.S. v. State, \_\_ So.2d \_\_, 2008 WL 2356691 (Fla. 2DCA 2008). The juvenile appealed his adjudication for grand theft of a motor vehicle pursuant to s. 812.014(2)(c)(6), F.S. (2004). Based on that adjudication, the trial court also revoked the juvenile's probation in several other cases. The juvenile argued that the evidence was insufficient to prove the theft crime and that his adjudication and probation revocations must be reversed. The Second District Court of Appeal agreed and reversed the adjudication and revocations of probation. At the adjudication hearing a deputy testified that she was on patrol in the mid-morning hours of June 17, 2006, when she noticed the juvenile in the parking lot of an apartment complex. He was wiping the passenger door handle of a parked Acura automobile with a cloth. The deputy testified that she stopped and asked the juvenile what he was doing. The deputy testified that the juvenile said

he was waiting for his father, the owner of the Acura. When the deputy checked the car's license tag, the deputy discovered that it had been reported stolen. At that point the deputy searched the juvenile and found the keys to the Acura in his pocket. The deputy noted that the hood of the car was hot, as if it had been driven and just parked. The owners of the Acura testified that they were in California on June 17, 2006. When they returned to Florida on June 27, 2006, they found their house had been ransacked, a lock box that contained the car's keys had been pried open, and both the Acura and its keys were gone. The victims did not say when they left for California, when they learned that their home had been burgled and that the Acura was missing, or when they reported the stolen car to the Sheriff. The State presented no evidence that even suggested the juvenile was present at the victims' house when the burglary and theft took place. At the close of the State's case, the juvenile moved for a judgment of dismissal, arguing that there was no direct evidence linking him to the theft of the car and that the circumstantial evidence did not exclude every reasonable hypothesis of innocence. The trial court denied his motion. The juvenile then testified and disputed parts of the deputy's account of their meeting in the apartment complex parking lot. The juvenile denied wiping the handle of the Acura and telling the deputy the car belonged to his father. The juvenile stated that he had been playing basketball the morning of his arrest and had been walking through the parking lot to buy a soda from a vending machine when he noticed car keys on the ground. The juvenile claimed he picked up the keys with the intention of taking them to the apartment complex management, but the deputy arrived and began asking him questions. After the defense rested, the juvenile renewed his motion for judgment of dismissal, which the trial court again denied. The Second District found that in order to establish the crime of theft, the state must prove that the accused "knowingly" obtained or used the property of another with the intent to deprive that person of the use of the property or to appropriate the property. See s. 812.014(1), F.S. Further, the phrase "obtains or uses" encompasses more than just a taking. It can also mean "exercising control" over the property or making an "unauthorized use" of it. Thus, if a defendant possesses property that he knows is stolen, he can be convicted of theft. When the state relies on circumstantial evidence to prove a crime, it must present sufficient evidence on each element of the crime and the evidence must exclude a defendant's reasonable hypothesis of innocence beyond a reasonable doubt. The Second District found the State provided no evidence that tied the juvenile to the taking of the Acura from the owners' residence. The State's evidence on the "exercising control" or "possession" element established three facts: that the keys to the Acura were in the juvenile's pocket, that he was wiping the door handle with a cloth, and that the hood of the car was hot. The fact that the juvenile was in possession of the keys could imply possession of the car itself. However, the juvenile testified that he found the keys on the ground. Nothing in the State's presentation disputed the juvenile's hypothesis of innocence on this point. The juvenile was not discovered inside the car or seen using the keys to enter the car. While possession of the keys was certainly suspicious, suspicion alone was not sufficient to meet the State's burden of proof. The other two facts that the State established were insufficient to prove that the juvenile possessed the Acura. Mere proximity to stolen property does not prove the crime of theft. The State failed to present sufficient evidence on the required element that the juvenile "knowingly" obtained or used the Acura—that he knew the car was stolen. While the deputy testified that the juvenile claimed the car belonged to his father, he denied making the statement. But even examining the evidence in a

light favorable to the State, the juvenile's false statement raises only a suspicion of guilty knowledge. That suspicion does not rise to the level of proof. In determining that the knowledge element of theft had been proven, the trial court relied on s. 814.022(2), F.S., which states that "proof of possession of property recently stolen, unless satisfactorily explained, gives rise to an inference that the person in possession of the property knew or should have known that the property had been stolen." The State's evidentiary burden to establish this inference was twofold. The State had to show both that the property was "recently stolen" and that the accused had possession of the property. The State failed to present sufficient evidence to prove that the juvenile possessed the Acura. Moreover, it presented no evidence that established when the car was taken. Accordingly, the State also failed to prove the Acura was "recently stolen." The Second District held that the inference in s. 812.022(2), F.S. did not apply under the circumstances and the evidence was insufficient to prove the crime. The adjudication for grand theft and the revocations of probation were reversed.  
[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2008/June/June%2011,%202008/2D06-3973.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2008/June/June%2011,%202008/2D06-3973.pdf) (June 11, 2008).

C.S. v. State, \_\_ So.2d \_\_, 2008 WL 2697249 (Fla. 2DCA 2008). The juvenile appealed his adjudication for aggravated assault with a deadly weapon and the imposition of \$ 165 of costs and surcharges. After trial, the trial court imposed several costs without providing statutory authority for those costs. The juvenile filed a motion to correct disposition errors pursuant to Florida Rule of Juvenile Procedure 8.135. At the hearing on the motion, the trial judge re-imposed the \$165 of costs and surcharges which consisted of a \$ 3 surcharge imposed pursuant to s. 938.01, F.S.; a \$50 surcharge pursuant to s. 938.03, F.S.; and \$112 for costs imposed pursuant to s. 938.05, F.S. The juvenile argued that the trial court erred in imposing costs pursuant to ss. 938.01 and 938.05, F.S. (2005). The Second District Court of Appeal found that the State had correctly conceded error on the cost imposed pursuant to s. 938.05, F.S. See V.K.E. v. State, 934 So.2d 1276, 1282 (Fla.2006) (holding that s. 938.05, F.S. does not apply in juvenile delinquency proceedings). Further, the Second District held that s. 938.01, F.S. was also an adult sanction that did not apply to juvenile delinquency proceedings. Therefore, the trial court erred in re-imposing the \$3 surcharge pursuant to s. 938.01, F.S. and the \$112 of costs pursuant to s. 938.05, F.S. The juvenile also argued that the trial judge originally imposed the \$50 surcharge pursuant to s. 938.03, F.S. as a term of his probation; therefore, it was error for the judge to re-impose the costs at the hearing on the motion when the juvenile had already completed his probationary term. The Second District found that s. 938.03(2), F.S. made the \$50 cost mandatory for any adjudication of delinquency. Nothing in the record demonstrated that the court imposed this cost as a term of probation. Accordingly, the Second District affirmed the adjudication of delinquency and the \$50 cost imposed pursuant to s. 938.03, F.S. The Second District reversed and remanded with instructions to strike the costs imposed pursuant to ss. 938.01 and 938.05, F.S. The Second District noted that the juvenile is entitled to a refund of any amount he may have already paid towards these costs.  
[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2008/July/July%2011,%202008/2D06-2631.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2008/July/July%2011,%202008/2D06-2631.pdf) (July 11, 2008).

C.H.C. v. State, \_\_ So.2d \_\_, 2008 WL 2744439 (Fla. 2DCA 2008). The juvenile challenged his adjudication for obstructing or opposing an officer without violence. The Second District Court of Appeal held that the State's evidence failed to establish that the deputy was engaged in the lawful execution of any legal duty when he attempted to detain the juvenile. The deputy was the only witness to testify at the adjudicatory hearing. The deputy testified that while on patrol he heard a call go out for a disturbance in the area. The deputy was not dispatched, but after a few minutes, one of the deputies at the scene requested backup. The deputy responded. When he arrived at the scene, he saw his corporal walking down a flight of stairs, surrounded by a large group of people. The corporal directed the deputy to detain the juvenile. The deputy observed the juvenile walking in a circle clinching his fists and yelling profanities. The deputy did not know exactly what the juvenile was saying. The deputy described the juvenile as screaming and yelling at the deputies on the scene. The deputy approached the juvenile, made eye contact, and said, "Come over here." The juvenile ran from the area. The deputy yelled, "Police, stop," but the juvenile continued to run. The deputy chased the juvenile, but lost visual contact. The deputy placed a radio alert and other deputies then found the juvenile and detained him. The Second District found that the crime of obstructing or opposing an officer without violence requires a showing that the officer was engaged in the lawful execution of a legal duty. In cases involving an investigatory detention, it is necessary for the State to prove that the officer had a reasonable suspicion of criminal activity that would support the detention. Thus, the State was required to establish that the deputy would have been justified in detaining the juvenile based on a founded suspicion that the juvenile was engaged in criminal activity. The Second District held that the State failed to show that the deputy had the necessary reasonable suspicion of criminal activity. First, the conduct attributed to the juvenile before he fled did not constitute "disorderly conduct" because the deputy did not indicate that the juvenile was inciting an immediate breach of the peace. Further, the State cannot rely on the "fellow officer rule" as justification for the detention because there is no record evidence that another officer on the scene had the reasonable suspicion necessary to justify the detention. The juvenile's flight from the scene cannot alone support the charge of obstructing or opposing an officer without violence because the State failed to show that the deputy was engaged in the lawful execution of a legal duty when he ordered the juvenile to stop. Accordingly, the Second District reversed and remanded for entry of an order granting the juvenile's motion for judgment of dismissal.

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2008/July/July%2016,%202008/2D07-3426.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2008/July/July%2016,%202008/2D07-3426.pdf) (July 16, 2008).

### ***Third District Courts of Appeal***

B.S. v. State, \_\_ So.2d \_\_, 2008 WL 2744310 (Fla. 3DCA 2008). The Third District Court of Appeal found the determination of delinquency correct on its merits citing Melton v. State, 546 So.2d 444 (Fla. 1st DCA 1989); and State v. Woods, 624 So.2d 739 (Fla. 5th DCA 1993), review denied, 634 So.2d 629 (Fla.1994). These cases held that the arresting officer's knowledge of prior trespass warnings gave the arresting officer substantial reason to believe an offense of trespass was being committed in their presence at time of arrest. Therefore, the resulting detention was legal and any evidence seized was not subject to suppression. However, the Third District found that the trial court erroneously denied the juvenile opening and concluding final arguments as required by Florida Rule of Juvenile Procedure 8.110(d). As a result, the cause was remanded for further proceedings consistent with D.B. v. State, 979 So.2d 1119 (Fla. 3d DCA 2008). <http://www.3dca.flcourts.org/Opinions/3D07-2088.pdf> (July 16, 2008).

D.E.M. v. State, \_\_ So.2d \_\_, 2008 WL 2744207 (Fla. 3DCA 2008). This case was on remand from the Florida Supreme Court for reconsideration in light of Hilton v. State, 961 So.2d 284 (Fla. 2007). Hilton held that a stop for a cracked windshield is permissible only where the officer reasonably believes that the crack renders the vehicle in such an unsafe condition as to endanger any person or vehicle. The Third District Court of Appeal remanded the case to the trial court for further consideration consistent with Hilton. <http://www.3dca.flcourts.org/Opinions/3D05-1208.rem.pdf> (July 16, 2008).

### ***Fourth District Courts of Appeal***

A.T. v. State, \_\_ So.2d \_\_, 2008 WL 2261548 (Fla. 4DCA 2008). The Fourth District Court of Appeal granted appellant's motion for clarification and substituted this opinion to correct scrivener's errors in the Fourth District's opinion issued April 23, 2008 and summarized in the April-May 2008 juvenile delinquency case law update. The juvenile had appealed her commitment to a level eight high risk residential program. The juvenile argued that the "characteristics vis-à-vis the needs" test is the most workable test for trial courts to use in deciding whether to depart from the DJJ's Predisposition Report recommendation. The Fourth District noted that in E.A.R. v. State, 975 So.2d 610 (Fla. 4DCA 2008), review granted in E.A.R. v. State, 2008 WL 1931352 (Fla. 2008), it had already rejected this same argument and certified conflict with M.S. v. State, 927 So.2d 1044, 1046 (Fla. 2d DCA 2006). As a result, the Fourth District denied the juvenile's appeal and noted conflict with M.S. The juvenile also argued that the upward departure after a juvenile disposition had already been imposed violated double jeopardy. The Fourth District held there was no double jeopardy violation because the departure only increased the restrictiveness level and was not a resentencing. <http://www.4dca.org/opinions/June%202008/6-4-08/4D07-2129.moC060308.pdf> (June 4, 2008).

C.Y. v. State, \_\_ So.2d \_\_, 2008 WL 2663750 (Fla. 4DCA 2008). The juvenile appealed a restitution order. The Fourth District Court of Appeal found that a juvenile has a constitutional right to be present at hearings to determine the imposition and amount of restitution absent a voluntary and intelligent waiver of that right. The record reflected that the juvenile did not receive notice of the restitution hearing. There was no basis in the record to conclude that the juvenile's absence from the restitution hearing constituted a waiver of his right to be present. In order for a defendant to voluntarily absent himself from a hearing, a defendant must have had notice of the hearing. The Fourth District also noted the absence of findings concerning the juvenile's ability to earn and to pay restitution. Section 985.437(2), F.S. provides that the amount of restitution in a juvenile case "may not exceed an amount the child and the parent or guardian could reasonably be expected to pay or make. The Fourth District Court of Appeal reversed and remanded for a new restitution hearing.

<http://www.4dca.org/opinions/July2008/07-09-08/4D07-3608.op.pdf> (July 9, 2008).

S.W. v. State, Department of Juvenile Justice, The Palm Beach County State Attorney, et al., \_\_ So.2d \_\_, 2008 WL 2755678 (Fla. 4DCA 2008). The juvenile petitioned for a writ of habeas corpus seeking immediate release from secure detention, while awaiting placement in a high-risk residential program. The petition was granted. The juvenile was on secure home detention after she was found guilty of petty theft and admitted violating her probation in two other cases. Following a disposition hearing, the trial court committed her to a high-risk program and ordered that she be held in secure detention pending her placement. The juvenile's risk assessment instrument reflected zero points. Twelve or more points are required for secure detention. No written reasons were given by the trial court for ordering the more restrictive placement. Generally, decisions regarding whether to place a child in detention care must be based on a risk assessment of the child. A court may order a more restrictive placement, but if it does, "the court shall state, in writing, clear and convincing reasons for such placement." See s. 985.255(3)(b), F.S. Children who are awaiting placement in a commitment program are required to be placed in some kind of detention care. See s. 985.27(1), F.S. If the child is committed to a high-risk residential program, the child must be held in detention care until the placement or commitment is accomplished. See s. 985.27(1)(c), F.S. Detention care does not necessarily mean "secure" detention. Children who have been adjudicated and are awaiting placement cannot be held in secure detention without a showing that the child meets the detention criteria. The State agreed that the juvenile did not meet the criteria for secure detention on her risk assessment instrument, and that the trial court did not provide written reasons for a more restrictive placement. The State asked the court to remand for the trial court to render a written order in accordance with s. 985.255, F.S. The Fourth District declined to remand for such purpose, but instead granted the petition and ordered that the juvenile be released immediately from secure detention and returned to nonsecure home detention. The Fourth District found that the trial court may revisit the issue and enter written findings supporting continued secure detention if it finds there is a basis to do so. Petition granted.

<http://www.4dca.org/opinions/July2008/07-16-08/4D08-2729.op.pdf> (July 16, 2008).

### ***Fifth District Courts of Appeal***

C.M.M. v. State, \_\_ So.2d \_\_, 2008 WL 2309010 (Fla. 5DCA 2008). The juvenile appealed her convictions for battery on a law enforcement officer and resisting arrest with violence. The sole issue on appeal was whether the law enforcement officer, who was working as a school resource officer, was executing a legal duty at the time he encountered and detained the juvenile on school grounds. The administrative dean, at juvenile's high school, noticed the juvenile running across the courtyard on her way to class. The dean realized that the juvenile would be tardy and directed her to come to him so that he could issue her a late pass. After three such requests, the juvenile displayed her middle finger and entered the school building. The dean radioed to the school resource officer, and asked him to stop the juvenile and send her back to him. The resource officer, who was a deputy, encountered the juvenile and directed her to stop, using both verbal and nonverbal commands. The juvenile kept walking towards him. When the juvenile attempted to walk around the resource officer, he grabbed her around the waist, at which time the juvenile began to fight. During the altercation, the juvenile hit the resource officer with her fists and kicked him in the chest, stomach and neck. The juvenile argued that the resource officer was not engaged in the lawful execution of his duties at the time that he detained her. The Fifth District held that the deputy was assigned as a school resource officer and was engaged in the execution of his duties as such at the time of the incident. School resource officers perform a unique mission. They are certified law enforcement officers who are assigned to work at schools under cooperative agreements between their law enforcement agencies and school boards. See ss. 1006.12(1)(a), (b), F.S. (2007). The Fifth District held that at the time the deputy encountered the juvenile, he was acting at the direction of a school administrator in enforcing school rules and clearly engaged in the lawful execution of his legal duty as a school resource officer. Accordingly, the juvenile's convictions were affirmed. <http://www.5dca.org/Opinions/Opin2008/060208/5D07-2431.op.pdf> (June 2, 2008).

D.R. v. State, \_\_ So.2d \_\_, 2008 WL 2388027 (Fla. 5DCA 2008). The juvenile appealed his separate convictions on two counts of lewd and lascivious molestation based upon double jeopardy grounds. The Fifth District Court of Appeal held that the acts that gave rise to the separate charges arose from a single criminal episode. The case was remanded with instructions for the trial judge to strike juvenile's conviction as to one of the counts and resentence the juvenile accordingly. <http://www.5dca.org/Opinions/Opin2008/060908/5D07-3129.op.pdf> (June 9, 2008).

S.P. v. State, \_\_ So.2d \_\_, 2008 WL 2544234 (Fla. 5DCA 2008). The juvenile filed a petition for writ of habeas corpus asserting entitlement to immediate release from secure detention. The juvenile challenged the trial court's finding of five instances of criminal contempt and imposing a total sentence of forty-five days. The juvenile asserted that the trial court was prohibited from imposing consecutive periods of detention for the separate findings of contempt pursuant to s. 985.037, F.S. (2007), and J.D. v. State, 954 So.2d 93 (Fla. 5th DCA 2007). The Fifth District Court of Appeal disagreed and denied the petition. On April 15, 2008, five different show cause orders were issued against the juvenile in three separate cases arising out of multiple failures to appear. A contempt hearing was held six days later on all of the five orders. After determining

the petitioner was in direct contempt for five separate violations of court orders, the trial court sentenced the juvenile to five days of secure detention to run consecutively on three of the orders because they were deemed the “first offense” for each respective case. The court then sentenced her to two consecutive fifteen-day sentences for the two subsequent contempts which were determined to be “second offenses.” The juvenile claimed she was entitled to immediate release due to impermissible stacking of the sentences based upon J.D. v. State which held that consecutive fifteen-day sentences for five separate violations of a “behavior order” violated the statutory limitations on juvenile sentences. See s. 985.216, F.S. (2007). The Fifth District held that J.D. did not apply. J.D. involved multiple violations of a single “behavior order.” In the instant case, the juvenile was held in direct contempt of court, based on five different show cause orders arising from multiple failures to appear in three different cases. The Fifth District found that although s. 985.037, F.S. limited a sentence for a second or subsequent offense to fifteen days, nothing in the statute states that multiple instances of direct contempt cannot be separately punished with consecutive sentences of fifteen days confinement for each offense. In fact, the statute specifically states that a sentence of fifteen days may be imposed for a ‘second or subsequent’ offense. Accordingly, the juvenile was not entitled to immediate release and the petition was denied.

<http://www.5dca.org/Opinions/Opin2008/062308/5D08-1547.op.pdf> (June 23, 2008).

X.H v. State, \_\_ So.2d \_\_, 2008 WL 2605126 (Fla. 5DCA 2008). The juvenile appealed his placement into a moderate-risk residential program. The juvenile was adjudicated delinquent after being found guilty of robbery by snatching. At the time of the disposition hearing, the juvenile was on probation for possession of counterfeit drugs and resisting arrest without violence. The juvenile also had pending charges for retail theft, resisting arrest without violence, resisting recovery of merchandise, and violation of probation. The Department of Juvenile Justice (“DJJ”) recommended low-risk residential placement. After a lengthy disposition hearing in which the primary points of discussion were the child's needs and the risk the child posed to public safety, the trial court declined to follow DJJ's recommendation and instead ordered placement into a moderate-risk residential program. The juvenile argued that the trial court erred because it failed to make reference to the characteristics of the restrictiveness level. The Fifth District Court of Appeal found that a trial court may disregard the DJJ's recommendation if the court states the reasons for doing so and makes reference to the characteristics of the restrictiveness level and the needs of the child. Further, the trial court's reasons must also be supported by a preponderance of evidence. In the instant case, the trial court was advised that most placements in low-risk residential programs result from first and second degree misdemeanors to third degree felonies. Offenses are infrequent and nonviolent, and are oriented toward property crimes rather than against people. The trial court was advised that the majority of youths in moderate-risk placements had committed serious property offenses and were typically repeat violators. The juvenile's psychological evaluation reflected a diagnosis of severe Conduct Disorder and a recommendation for placement in a program designed to develop, *inter alia*, anger management and impulse control skills. The psychological evaluation also indicated that without treatment, the juvenile had a high potential to engage in risky behavior. The juvenile did not challenge the trial court's finding that the juvenile's needs would best be met by a moderate-risk placement. The juvenile's only

challenge was to the trial court's alleged failure to adequately reference the characteristics of the restrictiveness levels for low-risk and moderate-risk placements. The Fifth District held that the trial court adequately referenced the characteristics of the restrictiveness level when it made findings as to the severity of the offense, the juvenile's failure to recognize the seriousness of his criminal conduct, and the juvenile's need for the development of anger management and impulse control skills. The record indicated that the trial judge believed that the juvenile posed more than a "low-risk" to the public. The trial court found that the juvenile had committed a violent crime and that his willingness to use force while "face-to-face" with a theft victim was of significant concern. The trial judge addressed the juvenile as to the severity of the offense. The trial judge engaged in a dialogue with the juvenile and the juvenile's mother regarding the juvenile's anger issues. Throughout the disposition hearing, the trial judge emphasized the need for the juvenile to receive treatment to develop anger management and impulse control skills. The trial court's concern regarding the juvenile's lack of anger management and impulse control skills was clearly related not only to the child's needs but also to the level of his risk to the public. The record reflected that the trial judge conducted an extensive hearing in an attempt to ascertain the needs of the child and the risk the child posed to the public. The trial court was advised, without objection, of the characteristics of the restrictiveness levels for low-risk and moderate-risk level placements. The trial judge was aware of the juvenile's record and his pending charges. The trial court also appeared to give great weight to the findings and recommendations set forth in the juvenile's psychological evaluation. As a result, the Fifth District affirmed the trial court's decision.  
<http://www.5dca.org/Opinions/Opin2008/063008/5D07-3732.op.pdf> (June 30, 2008).

## Dependency Case Law

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

Department of Children and Families v. H.D., \_\_\_ So. 2d \_\_\_\_, 2008 WL 2520970, 33 Fla.L.Weekly S425 (Fla. 2008). The Supreme Court dismissed its review of H.D. v. Department of Children and Families, 964 So. 2d 818 (Fla. 4th DCA 2007). The court determined that jurisdiction was improvidently granted.  
<http://www.floridasupremecourt.org/decisions/2008/sc07-2127.pdf> (June 26, 2008).

### ***First District Courts of Appeal***

B.K. v. Department of Children and Families, 2008 WL 2403731, 33 Fla.L.Weekly D1574 (Fla. 1st DCA 2008). The court denied a petition for belated appeal. In so doing, the court cited cases to the effect that the proper procedure for seeking belated appeal was to file a petition for a writ habeas corpus in the trial court.  
<http://opinions.1dca.org/written/opinions2008/06-16-08/08-1915.pdf> (June 16, 2008).

H.D. v. Department of Children and Families, 2008 WL 2491661, 33 Fla.L.Weekly D1638 (Fla. 1st DCA 2008). An order terminating the mother's parental rights under section 39.806(1)(e)1 was reversed because the Department did not competent substantial evidence that it took meaningful steps to assist the mother in completing the tasks set out in her case plan. The

record demonstrated that the Department's efforts to reunify the children with the mother by assisting her in her case plan tasks were initially half-hearted at best and later nearly non-existent. Even without the Department's help, the mother was able to accomplish a number of her tasks. Because the Department did not present competent substantial evidence that it had offered any meaningful assistance to help the mother accomplish the tasks in her case plan, the court reversed the order terminating parental rights. The court remanded the case for the mother to be offered a reasonable time within which to complete the tasks in her case plan with meaningful assistance from the Department.

<http://opinions.1dca.org/written/opinions2008/06-24-08/07-5343.pdf> (June 24, 2008).

### ***Second District Courts of Appeal***

B.A. v. Department of Children and Family Services, 2008 WL 2388898, 33 Fla.L.Weekly D1566 (Fla. 2nd DCA 2008). The father appealed an order that adjudicated his child dependent and ordered that he only have supervised visitation. The father argued a lack of competent, substantial evidence that abuse against an older half-sister placed the current child at substantial risk of imminent abuse, neglect, or abandonment. The Department and Guardian ad Litem Program conceded the lack of competent substantial evidence. The court ordered dismissal of the dependency petition as it related to that child and ordered expedited disposition of the case because the child was sheltered.

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2008/June/June%2013,%202008/2D07-4672.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2008/June/June%2013,%202008/2D07-4672.pdf) (June 13, 2008).

R.G. v. Department of Children and Family Services, 2008 WL 2437048, 33 Fla.L.Weekly D1582 (Fla. 2nd DCA 2008). The mother appealed an order changing her child's permanency goal from reunification to another planned permanent living arrangement (APPLA) pursuant to section 39.6241, Florida Statutes. Although the mother argued that the trial court failed to comply with the requirements of the statute, after reviewing transcripts of the judicial review hearings the Second District Court of Appeal concluded that the trial court complied with the statute.

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2008/June/June%2018,%202008/2D07-3207.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2008/June/June%2018,%202008/2D07-3207.pdf) (June 18, 2008).

M.H. v. Department of Children and Family Services, \_\_ So.2d, \_\_ 2008 WL 2697201 (Fla. 2d DCA 2008) A mother appealing her termination of parental rights was represented by the Office of Regional Counsel (ORC). The ORC did not provide a transcript for the appellate review and maintained that the Twelfth Circuit Digital Court Recording Office was required to provide the transcript. The ORC was willing to reimburse the Digital Recording Office for the cost of this transcript, but claimed that it was ethically inappropriate for it to retain the court reporter to create the transcript. The court held that the ORC can retain the services of an independent court reporter who can provide the transcript, and had to do so in this case to expedite the appellate process.

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2008/July/July%2011,%202008/2D08-346or.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2008/July/July%2011,%202008/2D08-346or.pdf) (July 11, 2008).

Justice Administrative Commission v. Peterson, \_\_\_ So.2d \_\_\_, 2008 WL 2811999 (Fla.App. 2 Dist.) The Justice Administrative Commission (JAC) petitioned for a common law writ of certiorari to quash the circuit court's order that it pay attorney's fees and costs to the court-appointed counsel for an indigent, nonparent legal custodian in a juvenile dependency proceeding. The trial court had appointed an attorney for the grandfather and legal custodian in the case. Because the plain language of the statute, §29.007(2), Florida Statutes, authorizing the JAC to pay attorney's fees and costs does not include nonparents in these circumstances, the court granted the petition and quashed the circuit court's order to pay the attorney's fees. [http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2008/July/July%2023,%202008/2D07-6075.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2008/July/July%2023,%202008/2D07-6075.pdf) (July 23, 2008).

### ***Third District Courts of Appeal***

Department of Children and Family Services v. M.L., 2008 WL 2357067, 33 Fla.L.Weekly D1526 (Fla. 3rd DCA 2008). The Third District Court of Appeal denied the petition for certiorari filed by the Department seeking review of an order reinstating supervision. The Department had sheltered a child that was the subject, three years before, of an order terminating supervision but retaining jurisdiction on an unrelated incident of child neglect. The Department had argued that the retention of jurisdiction meant that it could proceed as to the child based on an amended case plan. The Third District Court of Appeal disagreed, noting that section 39.6013, Florida Statutes contemplated amendments to a case plan still in effect. The court held that the Department's proposed process would have denied due process to both the parent and the child. The trial court properly ordered the Department to initiate a new dependency proceeding. <http://www.3dca.flcourts.org/Opinions/3D08-1187.pdf> (June 11, 2008).

M.B. v. Department of Children and Families, \_\_\_ So.2d \_\_\_, 2008 WL 2596323 (Fla. 3d DCA 2008) The mother filed a petition for a writ of certiorari to review an order that sheltered her child. The appellate court held that the order departed from the essential requirements of law because: (1) the only grounds for it was that M.B. was homeless; (2) the evidence showed that M.B.'s homelessness was for only one night, that M.B. had tried to find shelter for that night, and that her inability to do so was due only to her financial situation; and (3) no evidence showed that the Department (or anyone else) offered any services to M.B., in an effort to eliminate the need for the removal and placement in a shelter of M.B.'s minor son. The order was therefore quashed and the child returned to the mother. <http://www.3dca.flcourts.org/Opinions/3D08-1364.pdf> (July 2, 2008).

R.H. and B.H. v. Department of Children and Families, \_\_\_ So.2d \_\_\_, 2008 WL 2811785 (Fla. 3<sup>d</sup> DCA 2008) The grandparents challenged a court order modifying their granddaughter's placement pursuant to §39.812, Florida Statutes (2007), and Florida Rule of Juvenile Procedure 8.345(a). The child had lived with the grandparents for three years, but was moved so that the child could be raised in the same home as her siblings. The parental rights of both parents had been terminated. The court held that since the grandparents were participants rather than parties, they lacked standing to pursue an appeal and the appeal was dismissed. <http://www.3dca.flcourts.org/Opinions/3D08-0623.pdf> (July 23, 2008).

### ***Fourth District Courts of Appeal***

G. V. v. Department of Children and Families, \_\_\_ So.2d \_\_\_, 2008 WL 2815537 (Fla. 4<sup>th</sup> DCA 2008) The mother appealed an order denying her motion for reunification with her children and an order terminating the department's protective supervision that permanently placed her children with their custodians. The trial court found that although the mother complied with the case plan, "there is continued concern for the physical and mental safety of the child." The department's only witnesses, however, did not base their opinions opposing reunification on the statutory ground of endangerment to the children's "safety, well-being, and physical, mental, and emotional health" as required in §39.522(2), Florida Statutes. Rather, their views were based on their experience in working with the children, or on speculation based on older evaluations prepared prior to the mother's subsequent therapy sessions and compliance with the case plan. The appellate court reversed the trial court's order because the record reflected that the mother substantially complied with her case plan and because the trial court's finding that reunification posed a danger to the children was not supported by competent substantial evidence. <http://www.4dca.org/opinions/July2008/07-23-08/Cleaned4D07-4988.op.pdf> (July 23, 2008).

R.H. and K.H. v. Department of Children and Families, \_\_\_ So.2d \_\_\_, 2008 WL 2815538 (Fla. 4<sup>th</sup> DCA 2008) The appellants, biological relatives and former custodians of the child, appealed a final order finding that DCF's selection of Mr. and Mrs. X as an adoptive placement for the child was an appropriate placement. The appellants contended that the court erred in limiting its review to the appropriateness of DCF's selection of the X's as adoptive parents instead of determining which of the two competing petitions for adoption was in the best interests of the child. The appellate court held that the trial court did not err in determining that DCF's selection of the X's as the adoptive placement was appropriate. The court stated that when DCF consents to an adoption petition submitted in a termination of parental rights proceeding, the trial court lacks authority to determine whether another adoptive placement is more appropriate. <http://www.4dca.org/opinions/July2008/07-23-08/Cleaned4D08-286.op.pdf> (July 23, 2008).

### ***Fifth District Courts of Appeal***

T.B. v. Department of Children and Families, \_\_\_ So.2d \_\_\_, 2008 WL 2695916 (Fla. 5<sup>th</sup> DCA 2008) The father appealed his child's adjudication of dependency, claiming that there was insufficient evidence to support the trial court's findings that: (1) T.B. had abandoned the child, and (2) the child was at imminent risk of neglect if placed in his custody. Despite a court order for DCF to expedite paternity testing, DCF delayed the testing, and the child was adjudicated dependent less than a month after paternity was actually established and prior to the date the first child support payment was due. Therefore, under the facts in this case, there was insufficient evidence to establish that the father had abandoned the child. There was also insufficient evidence to show that the child was at imminent risk of neglect if placed in the custody of the father. Although the father had no driver's license, had been convicted of a felony, had no job, and lived with his mother and aunt, DCF failed to present sufficient evidence

to support a finding that the child could not be adequately provided for in the father's household. <http://www.5dca.org/Opinions/Opin2008/070708/5D08-960.op.pdf> (July 10, 2008).

## **Dissolution of Marriage Case Law**

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

No new opinions for this reporting period.

### ***First District Courts of Appeal***

Marrs v. Marrs, \_\_ So. 2d \_\_, 2008 WL 2901572 (Fla. App. 1 Dist., July 30, 2008)

(NO. 1D07-3758) Former husband appealed post-dissolution order as to alimony and equitable distribution. The appellate court reversed due to what it termed the “unreasonable delay in rendering the order” along with the trial court’s failure to: 1) factor into its plan for equitable distribution specific accounts and investments and 2) to determine the cut-off date for classifying assets and liabilities as either marital or non-marital in accordance with section 61.075(6), F.S. The appellate court held that the delay in issuing of the order coupled with the lack of specificity in the order warranted a new trial.

<http://opinions.1dca.org/written/opinions2008/07-30-08/07-3758.pdf> (July 30, 2008).

### ***Second District Courts of Appeal***

McCants v. McCants, 984 So. 2d 678 On its own motion, the appellate court withdrew its opinion issued June 11, 2008, and substituted this one which reworded the first sentence in the first full paragraph on page two to read: “The parties were married for six years but had also lived together for the previous twelve years.” Footnote one on page eight of the opinion was reworded to read: “The Husband did not file a cross-appeal or appear in this appeal. No one has challenged the determination that the marriage qualified as a long-term marriage and that permanent alimony is appropriate.” Former wife had appealed a final judgment of dissolution of marriage and challenged the trial court’s rulings regarding equitable distribution, imputation of income, alimony, emancipation of the parties’ older child, and attorney’s fees. The appellate court affirmed the dissolution, the determination of emancipation, and grant of shared parental responsibility of the remaining minor child, and reversed and remanded on the issues of determination of income, alimony, child support, equitable distribution, and attorney’s fees. (See June 2008 caselaw update).

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2008/July/July%2009,%202008/2D07-473%20co.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2008/July/July%2009,%202008/2D07-473%20co.pdf) (July 09, 2008).

Nucci v. Nucci, \_\_ So. 2d \_\_, 2008 WL 2697161 (Fla. App. 2 Dist., July 11, 2008)

(NO. 2D07-3717) Former husband petitioned for a writ of certiorari in response to the trial court’s denial of what the appellate court termed, “the lion’s share” of his motion to conditionally seal financial documents in a pending dissolution proceeding. The appellate court granted his petition and quashed the order. Former husband’s petition arose from questions put to him regarding his finances by a defense attorney deposing him in a personal injury case; the financial information had been obtained from the case file in the dissolution proceeding.

(The appellate court characterized former husband as a “successful surgeon with a lucrative practice limited to patients involved in personal injury litigation.”) Following the deposition, former husband sought to conditionally seal the financial records. Although former wife did not oppose the motion, the trial court, after two hearings, agreed only to redact the social security numbers from the filed documents and denied the remainder of the motion, concluding it was without authority to do more. The appellate court, citing Fla. Fam. L.R.P. 12.400(c) and Florida Rule of Judicial Administration 2.420 (formerly 2.051), held that the trial court had been mistaken in its reasoning that the rule of judicial administration, not the family rule, was controlling. The appellate court found that rule 12.400(c) governed former husband’s motion. Noting that recent supreme court decisions have recognized the potential for abuse when financial information is gleaned from a family law case file and used by third parties, the appellate court found that a writ of certiorari is warranted where departure from the essential requirements of law has resulted in material harm that cannot be remedied on appeal. In this case the trial court’s failure to apply the correct law constituted such a departure; because former husband had established both material injury and irreparable harm, he was entitled to relief.

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2008/July/July%2011,%202008/2D07-3717.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2008/July/July%2011,%202008/2D07-3717.pdf) (July 11, 2008).

Waliagha v. Kaiser, \_\_So. 2d \_\_, 2008 WL 2744492 (Fla. App. 2 Dist., July 16, 2008)

(NO. 2D06-5374) Former husband appealed a post-dissolution order denying his motion for relief from an *ex parte* order that prohibited his travelling outside the United States with his minor children and denying his motion to enforce terms of the marital settlement agreement; appellate court reversed. Former wife had refused to consent to former husband’s plans to travel with their children to Syria and Italy, fearing that because he and their children had dual citizenship with the US and Syria, that he would not return the children to this country. (The marital settlement agreement contained a provision allowing either parent to leave this country for scheduled custodial periods.) Based on information supplied by former wife, the trial court entered an *ex parte* order preventing former husband from taking the children outside the 12<sup>th</sup> Circuit. Upon former husband moving to set aside the order, an evidentiary hearing was held after which the trial court modified its earlier order to restrict his travels with the children to within the US; however, the documents the trial court relied on in rendering its order were never introduced into evidence during the hearing. The appellate court held that documents attached as exhibits to a motion are not evidence; also, former husband had been denied due process as to the documents.

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2008/July/July%2016,%202008/2D06-5374.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2008/July/July%2016,%202008/2D06-5374.pdf) (July 16, 2008).

Arthur v. Arthur, \_\_So. 2d \_\_, 2008 WL 2852873 (Fla. App. 2 Dist., July 25, 2008)

(NO. 2D07-1455) Former husband moved for rehearing on an opinion issued April 25, 2008; appellate court withdrew that opinion and substituted the following. Former husband had appealed a final judgment of dissolution on several grounds; the appellate court found reversible error only in the provision requiring him to maintain life insurance to secure his child support obligation. Although the appellate court held that the trial court did not exceed its

authority in granting former wife's relocation request upon the former couple's minor child reaching three years of age, (the child was 16 months old at the time of trial), it held that a requirement by a trial court that a party maintain life insurance to secure a child support obligation must be based on evidence in the record regarding the payor's insurability, the cost of the proposed insurance, and the payor's ability to afford the insurance. (See April 2008 caselaw update).

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2008/July/July%2025,%202008/2D07-1455rh.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2008/July/July%2025,%202008/2D07-1455rh.pdf) (July 25, 2008).

Franklin v. Franklin, \_\_ So. 2d \_\_, 2008WL 2901859 (Fla. App. 2 Dist., July 30, 2008) (NO. 2D07-2637) Former husband appealed final judgment of dissolution, claiming unequal distribution in favor on former wife and challenging denial of his request for attorney's fees and costs; appellate court reversed and remanded for the trial court to make an equitable distribution of marital assets. Former wife's request for an unequal distribution of assets with her petition for dissolution was based on her "extraordinary financial contributions to the marriage." The record reflected that the two substantial assets, the marital home and a lot in Tennessee, were debt free, and that over the course of their 37 year marriage, former wife's parents gave the couple substantial gifts of cash which assisted with their living expenses and enabled them to purchase the real property. Former wife's parents also gave the couple gifts such as cars. Finding that essentially all of the wealth accumulated during the marriage could be traced to the contributions from former wife's parents, the trial court relied on section 61.075(1)(g), F.S. to support an unequal distribution and awarded 70% of the assets to former wife, with the remaining 30% awarded to former husband. Based on its review of the evidence presented; however, the appellate court concluded that section 61.075(1)(g) did not support an unequal distribution. The appellate court pointed out that the gifts were made to both former husband and wife. The record did not establish that the gifts could properly be considered as former wife's contributions to the marriage under section, not did it establish that an unequal distribution was necessary to do equity and justice between the parties. Finding that the record did not support the trial court's 70/30 award, the appellate court reversed and remanded with instructions that the trial court equally distribute the assets.

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2008/July/July%2030,%202008/2D07-2637.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2008/July/July%2030,%202008/2D07-2637.pdf) (July 30, 2008).

### ***Third District Courts of Appeal***

Carbaugh v. Carbaugh, \_\_ So. 2d \_\_, 2008 WL 2901961 (Fla. App. 3 Dist., July 30, 2008) (NO. 3D07-632, 3D06-2261) Former husband appealed final judgment of dissolution on several grounds; appellate court focused on the issue of the amount of permanent alimony award. Although the appellate court found that the parties' marriage of over 20 years was long-term and that former wife had demonstrated both her need and former husband's ability to pay permanent periodic alimony, it also realized an error in the calculation of the award arising from former wife having based her living estimates on Key West's cost of living even though she had relocated to Montgomery, Alabama. The appellate court commented that not only did the record reflect that the cost of living was significantly lower in Montgomery, but that it was judicially aware of what it termed, "the extremely expensive housing market in Key West." The appellate court found the effect to be that former wife had overstated the amount she needed for housing and that for that reason, the record did not support the amount awarded. Accordingly, the appellate court remanded for a new hearing on the amount of alimony and allowed former wife the opportunity to request fees due to the possibility of a downward adjustment of alimony. <http://www.3dca.flcourts.org/Opinions/3D07-0632.pdf> (July 30, 2008).

### ***Fourth District Courts of Appeal***

Martland v Arabia, \_\_ So. 2d \_\_, 2008 WL 2596449 (Fla. App. 4 Dist., July 02, 2008) (NO. 4D07-4175) Former wife appealed a modification order setting her child support award well below the statutory guidelines; appellate court reversed for entry of an order meeting the guidelines and for reconsideration of the trial court's denial of retroactive support. Noting that the starting point for determining child support is set forth in the guidelines, the appellate court pointed out that, pursuant to section 61.30(1)(a), F.S., the trial court may vary more than 5% from the guideline amount only upon "a written finding explaining why ordering payment of such guideline amount would be unjust or inappropriate." The appellate court reasoned that had the trial court in this case taken the overall economic situation of both parties into consideration, it would not have deviated from the guidelines. <http://www.4dca.org/opinions/July2008/07-02-08/4D07-4175.opC070108.pdf> (July 02, 2008).

Aquirre v. Aquirre, \_\_ So. 2d \_\_, 2008 WL 2663688 (Fla. App. 4 Dist., July 09, 2008) (NO. 4D07-1273) Former husband appealed final judgment of dissolution contending, in absence of a transcript, that significant errors appeared on the face of the judgment. Appellate court found the judgment to be facially deficient as to child support and the equitable distribution of some assets and also found the judgment unclear on the issue of shared parental responsibility. Both parties had sought primary residential custody, sole parental responsibility, child support, alimony, equitable distribution of assets and liabilities, and fees and costs; former wife had also sought exclusive use and possession of the marital home. Although the judgment stated it was in the best interest of the children for former wife to have primary residential custody, it was deficient in that it did not specifically address the issue of sole or shared parental responsibility; thus, the appellate court remanded for the trial court to clarify its intent with regard to that issue. The appellate court also found the judgment to be deficient in that it failed to enumerate the factors on which it relied in making its determination that having former wife be the primary residential parent was in the children's best interest. As to child

support, the appellate court held that a final judgment is facially erroneous if it omits findings regarding each party's net income as a starting point for calculating child support and explains how the support was calculated.

<http://www.4dca.org/opinions/July2008/07-09-08/4D07-1273.op.pdf> (July 09, 2008).

Vitakis v. Valchine, \_\_ So. 2d \_\_, 2008 WL 2744396 (Fla. App. 4 Dist., July 16, 2008)

(NO. 4D07-3941) Initially, former wife appealed final judgment of dissolution, which had incorporated a marital settlement agreement, arguing that there had been mediator misconduct and that she had been coerced into entering into the agreement; the appellate court then remanded to the trial court so that it could make factual findings on the issue of alleged misconduct. (Vitakis v. Valchine, 793 So. 2d 1094, (Fla. 4<sup>th</sup> DCA 2001). On remand, the trial court found no misconduct and upheld the agreement; the appellate court affirmed. (Vitakis v. Valchine, 923 So. 2d 511, (Fla. 4<sup>th</sup> DCA 2006). The marital settlement agreement contained a provision requiring former wife to relinquish the couple's frozen embryos to former husband for disposal. When former husband sought to enforce this provision, former wife argued that former husband had had a "change of heart" regarding the embryos; however, that feeling was never reduced to writing. Finding the marital settlement agreement to be controlling, the trial court granted former husband's motion to enforce; appellate court, finding no error on the part of the trial court, affirmed.

<http://www.4dca.org/opinions/July2008/07-16-08/4D07-3941.opC071608.pdf> (July 16, 2008).

Posner v. Posner, \_\_ So. 2d \_\_, 2008 WL 2906658 (Fla. App. 4 Dist., July 30, 2008)

(NO. 4D06-4909) Both former husband and wife appealed their final judgment of dissolution on numerous grounds; appellate court found some error on the part of the trial court. The final judgment awarded former wife bridge-the-gap alimony, lump sum alimony, and child support; it also ordered former husband to pay other child related expenses, leading former husband to argue that the net effect of all the monetary awards exceeded his financial abilities and was not supported by the record. The appellate court found that the effect of the awards and expenses required of former husband would "leave him in a hole" and that the trial court had abused its discretion. <http://www.4dca.org/opinions/July2008/07-30-08/4D06-4909.op.pdf> (July 30, 2008).

Sass v. Sass, \_\_ So 2d \_\_, 2008 WL 2907108 (Fla. App. 4 Dist., July 30, 2008)

(NO. 4D07-1743, 4D07-1911) Former wife challenged final judgment of dissolution and final adjudication of an attorney's charging lien. On the day of their marriage, former husband and wife entered into a prenuptial agreement which provided for the protection of "separate property" each party had at the time of signing. Pursuant to the agreement, the manner in which property acquired during the marriage was titled would control its distribution in the event of dissolution and any appreciation in value relating to any separate property would also be separate. The agreement also provided that any funds deposited into either former husband's or wives separate bank account would be separate. Appellate court held that a loan made by former husband to his brother-in-law with funds from the sale of the marital home in Maryland, with that home having been titled in his name and purchased in part with funds from the sale of a pre-marital home in Ohio, was not a marital asset where the funds had been kept

solely in his account. The appellate court pointed out that at first blush under Florida law, a loan made with use of funds from sale of a marital home might appear to be a marital asset, but in this case, the agreement governed. The appellate court did agree with former wife; however, that the trial court had erred in allowing her former attorney's charging lien to be executed against her homestead property. The appellate court noted that the supreme court reiterated the importance of the homestead exemption in Chames v. DeMayo, 972 So. 2d 850, (Fla. 2007). <http://www.4dca.org/opinions/July2008/07-30-08/4D07-1743.op.pdf> (July 30, 2008).

Pineiro v. Pineiro, \_\_\_ So. 2d \_\_\_, 2008 WL 2908832 (Fla. App. 4 Dist., July 30, 2008) (NO. 4D07-4994) Former wife appealed a contempt order issued for selling a marital asset, after a final judgment of dissolution, in violation of earlier orders freezing the asset and granting an attorney's charging lien against her marital assets. Appellate court reversed, holding that the trial court was without authority to freeze former wife's assets in order to pay her own attorneys and that enforcement through contempt of debts not involving support violates the constitutional prohibition of imprisonment for debt. <http://www.4dca.org/opinions/July2008/07-30-08/4D07-4994.op.pdf> (July 30, 2008).

### ***Fifth District Courts of Appeal***

No new opinions for this reporting period.

## **Domestic Violence Case Law**

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

No new opinions for this reporting period.

### ***First District Courts of Appeal***

Acevedo v. Williams, --- So.2d ----, 2008 WL 2566201(Fla. 1st DCA 2008). The mother of a 17 year old girl petitioned the court for an injunction against dating violence against the girl's 18 year old boyfriend. The court granted the injunction, however, the appellate court held that the trial court erred in entering the injunction. The 17 year old consented to the relationship, their sexual relationship did not constitute sexual battery pursuant to statute, and the record contained no evidence upon which the trial court could have concluded that the girl was a victim of any sort of dating violence as defined in section 784.046, Florida Statutes (2007). <http://opinions.1dca.org/written/opinions2008/06-30-08/08-0370.pdf> (June 30, 2008).

### ***Second District Courts of Appeal***

No new opinions for this reporting period.

### ***Third District Courts of Appeal***

No new opinions for this reporting period.

***Fourth District Courts of Appeal***

No new opinions for this reporting period.

***Fifth District Courts of Appeal***

No new opinions for this reporting period.