

OSCA/OCI'S FAMILY COURT CASE LAW UPDATE
March 2009

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Delinquency Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

M.K. v. State, __ So.2d __, 2009 WL 779997 (Fla. 1st DCA 2009). **DISPOSITION ORDER REVERSED AND REMANDED FOR FAILURE TO COMPLY WITH THE NEW STANDARDS SET FORTH IN E.A.R. V. STATE, __ SO.2D __, 2009 WL 217979 (FLA. 2009), WHEN THE TRIAL COURT DEPARTED FROM THE DEPARTMENT OF JUVENILE JUSTICE'S DISPOSITION RECOMMENDATION.** The juvenile appealed the trial court's disposition order which departed from the recommendation of the Department of Juvenile Justice (DJJ). The trial court ordered a medium-risk commitment. DJJ had recommended probation. The First District Court of Appeal found that subsequent to the entry of the trial court's order, the Florida Supreme Court decided E.A.R. v. State, __ So.2d __, 2009 WL 217979 (Fla. 2009), which announced a new, more rigorous analysis in which a trial court must engage before departing from DJJ's recommendation. The First District held that the order on appeal failed to comply with these new standards. Accordingly, the order was reversed and remanded to provide the trial court an opportunity to enter an order in compliance with E.A.R., or impose probation as recommended by the DJJ.
<http://opinions.1dca.org/written/opinions2009/03-26-2009/08-4998.pdf> (March 26, 2009).

Second District Court of Appeal

E.D.P. v. State, __ So.2d __, 2009 WL 564398 (Fla. 2d DCA 2009). **RESTITUTION ORDER REVERSED AND REMANDED.** The Second District Court of Appeal reversed an order of restitution for items taken during a burglary: a knife, a firearm, a bicycle, and a laptop computer. At the restitution hearing, the victim testified that a valuable knife was taken, however, the theft of the knife was not identified in the charging document or as part of the factual basis for the plea. The first time the defendant was aware that the victim was seeking restitution for the knife was at the restitution hearing. The Second District found that this violated the principles set forth in its recent decision in Malarkey v. State, 975 So.2d 538 (Fla. 2d DCA 2008). However, the error was not properly preserved for appeal. The Second District concluded that the error was a fundamental error, thereby allowing them to address the issue, despite not being properly preserved. Thus, the Second District held that the inclusion of the value of the knife in the restitution order was in error and reversed. The Second District reversed the remainder of the restitution order as to the firearm, bicycle and computer because the State failed to present evidence necessary to establish fair market value. The Second District found that the State did present some evidence on some of the elements for some of the items, but insufficiently to establish the fair market value of these items. As to the juvenile's claim that the trial court imposed the restitution without a finding of his ability to pay, the Second District noted that the trial court on remand, should also take evidence and make findings to facilitate review in accord with its decision in J.A.B. v. State, 993 So.2d 1150

(Fla. 2d DCA 2008).

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/March/march%2006,%2009/2D07-1730.pdf (March 6, 2009).

Third District Court of Appeal

J.B. v. State, __ So.2d __, 2009 WL 606711 (Fla. 3d DCA 2009). **EVIDENCE WAS INSUFFICIENT TO SUPPORT CHARGE OF PETIT THEFT OF HANDCUFFS TAKEN INCIDENTAL TO FLIGHT FROM AN OFFICER'S UNLAWFUL ARREST.** The juvenile appealed his adjudication of delinquency for petit theft. The juvenile was at a public library doing homework. An off-duty police officer, working library security, recognized the juvenile because she had previously issued him a trespass warning. The officer arrested the juvenile and proceeded to place handcuffs on the juvenile's left wrist. The juvenile ran away. The police later found the juvenile, still with the handcuffs on, and arrested him. After a hearing, the trial court found the juvenile not guilty of the reduced charge of misdemeanor battery but guilty on petit theft of the handcuffs. The Third District Court of Appeal found that a person commits theft if he or she knowingly obtains or uses another person's property with the intent to temporarily or permanently deprive the other person of the right to use the property or benefit from the property or appropriate the property for his or her own use. Further, because petit theft is a specific intent crime, the State is required to prove that the juvenile intended to deprive the officer of her right to use the handcuffs or benefit from them, or that he intended to appropriate the handcuffs for his own use. The Third District held that the State failed to present any evidence that the juvenile intended to steal the handcuffs or deprive the police officer of her property. Instead, the juvenile's act of taking the handcuffs was incidental to his flight from an officer's unlawful arrest. Because the evidence was not sufficient to support the adjudication, the Third District reversed with instructions to dismiss the petit theft charge.

<http://www.3dca.flcourts.org/Opinions/3D08-1259.pdf> (March 11, 2009).

Fourth District Court of Appeal

A.A.V. v. State, __ So.2d __, 2009 WL 763536 (Fla. 4th DCA 2009). **DISPOSITION ORDER REVERSED AND REMANDED FOR FAILURE TO COMPLY WITH THE NEW STANDARDS SET FORTH IN E.A.R. V. STATE, __ SO.2D __, 2009 WL 217979 (FLA. 2009), WHEN THE TRIAL COURT DEPARTED FROM THE DEPARTMENT OF JUVENILE JUSTICE'S DISPOSITION RECOMMENDATION.** The juvenile challenged the trial court's disposition order placing him in a high-risk facility which departed from the moderate-risk facility recommendation of the Department of Juvenile Justice (DJJ). The Fourth District Court of Appeal found that the issue was controlled by the Florida Supreme Court's recent decision in E.A.R. v. State, __ So.2d __, 2009 WL 217979 (Fla. 2009) which set forth the requirements for pronouncing a disposition different than recommended by the DJJ. The Fourth District held that the reasons offered in support of the trial court's disposition fell short of the newly-articulated standard. Therefore, the disposition order was reversed and remanded for a new disposition hearing.

<http://www.4dca.org/opinions/Mar2009/03-25-09/4D08-841.op.pdf> (March 25, 2009).

C.H. v. State, __ So.2d __, 2009 WL 763541 (Fla. 4th DCA 2009). **DISPOSITION ORDER REVERSED AND REMANDED FOR FAILURE TO COMPLY WITH THE NEW STANDARDS SET FORTH IN E.A.R. V. STATE, __ SO.2D __, 2009 WL 217979 (FLA. 2009), WHEN THE TRIAL COURT DEPARTED FROM THE DEPARTMENT OF JUVENILE JUSTICE’S DISPOSITION RECOMMENDATION.** The Fourth District Court of Appeal found that the legal issue was the same as in E.E. v. State, __ So.2d __, 2009 WL 605399 (Fla. 4th DCA 2009)(See above). As in E.E., the Fourth District reversed the disposition imposed by the trial court under the authority of E.A.R. v. State, __ So.2d __, 2009 WL 217979 (Fla. 2009) (which set forth the requirements for pronouncing a disposition different than recommended by the DJJ) and remanded with instructions to hold a new disposition hearing complying with E.A.R.
<http://www.4dca.org/opinions/Mar2009/03-25-09/4D08-908.op.pdf> (March 25, 2009).

E.E. v. State, __ So.2d __, 2009 WL 605399 (Fla. 4th DCA 2009). **DISPOSITION ORDER REVERSED AND REMANDED FOR FAILURE TO COMPLY WITH THE NEW STANDARDS SET FORTH IN E.A.R. V. STATE, __ SO.2D __, 2009 WL 217979 (FLA. 4TH DCA 2009), WHEN THE TRIAL COURT DEPARTED FROM THE DEPARTMENT OF JUVENILE JUSTICE’S DISPOSITION RECOMMENDATION.** The juvenile challenged the trial court’s disposition order which departed from the recommendation of the Department of Juvenile Justice (DJJ). The trial court imposed a medium-risk commitment. The DJJ recommended probation. The trial judge explained why he disregarded the DJJ assessment and recommendation. The juvenile argued it was an abuse of discretion to disregard the recommendation of DJJ. First, the trial court's pronouncement failed to “articulate the characteristics [of the restrictiveness level imposed] vis-à-vis the needs of the child.” Second, the State failed to produce any evidence at the disposition hearing as a basis for disregarding the DJJ recommendation. Third, the Court's disposition reflected mere disagreement with the DJJ recommendation and is thereby improper. Finally, the juvenile maintained that the juvenile’s actual history involved only a minor misdemeanor offense of possession of marijuana, indicative of substance abuse and not criminal behavior. The Fourth District Court of Appeal found that the issue was controlled by the Florida Supreme Court’s recent decision in E.A.R. v. State, __ So.2d __, 2009 WL 217979 (Fla. 2009) which set forth the requirements for pronouncing a disposition different than recommended by the DJJ. The Fourth District held that while the trial court's pronouncement expressed cogent reasons for imposing more severe punishment, it did not comply with the requirements recently set forth in E.A.R. Thus, the disposition order was reversed and remanded for a new disposition hearing.
<http://www.4dca.org/opinions/Mar2009/03-11-09/4D08-2040.op.pdf> (March 11, 2009).

Fifth District Court of Appeal

E.D.B. v. State, __ So.2d __, 2009 WL 790131 (Fla. 5th DCA 2009). **TRIAL COURT CANNOT RETAIN JURISDICTION OVER A JUVENILE BEYOND HIS NINETEENTH BIRTHDAY TO COMPEL THE PAYMENT OF ASSESSED COSTS.** The juvenile appealed the trial court's entry of two orders for two separate juvenile cases that required the juvenile in each case to pay \$30 per month toward the costs previously assessed in each case. Both orders extended the trial court's jurisdiction over the juvenile until the assessed costs were paid in full. The juvenile argued that the trial court lacked the authority to retain jurisdiction over him past his nineteenth birthday.

The Fifth District Court of Appeal found that s. 985.0301(5)(i), F.S. unambiguously provides that a court may retain jurisdiction over a child and the child's parent or legal guardian whom the court has ordered to pay restitution until the restitution order is satisfied by entering a restitution order, which is separate from any disposition or order of commitment, on or prior to the date that the court's jurisdiction would cease under s. 985.0301, F.S. Further, the terms of the restitution order are subject to s. 775.089(5), F.S. An order of restitution may be enforced by the state, or by a victim named in the order to receive the restitution, in the same manner as a judgment in a civil action. If civil enforcement is necessary, the defendant shall be liable for costs and attorney's fees incurred by the victim in enforcing the order. Section 985.0301(5)(i), F.S. states what must be included in a restitution order. This includes a notation that costs, interest, penalties, and attorney's fees may also be due and owing. Reading ss. 985.0301(5)(i) and 775.089(5), F.S. together, the Fifth District concluded that costs, interests, penalties, and attorney's fees under s. 985.0301(5)(i), F.S. refers to the interest, costs and attorney's fees associated with the enforcement of a restitution order under s. 775.089(5), F.S. The Fifth District held that because s. 985.0301(5)(i), F.S. only allows jurisdiction to be retained to enforce orders of restitution and does not address the issue of retaining jurisdiction to enforce an order of assessed costs, it necessarily excludes it from its purview. *Expressio unius est exclusio alterius* is a canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative. Black's Law Dictionary 602 (7th ed.1999). Further, the Fifth District found no alternative authority for a trial court to retain jurisdiction to enforce orders of assessed costs. Therefore, the trial court erred by retaining jurisdiction over the juvenile, past his nineteenth birthday, in order to enforce the assessed costs provisions in its orders. <http://www.5dca.org/Opinions/Opin2009/032309/5D08-737.op..pdf> (March 27, 2009).

M.B. v. State, __ So.2d __, 2009 WL 559868 (Fla. 5th DCA 2009). **SECTIONS 985.433(7)(A) AND (B) ARE NOT UNCONSTITUTIONAL BASED ON THE SEPARATION OF POWERS DOCTRINE.** The juvenile appealed his commitment to a Level 6 residential program despite the Department of Juvenile Justice's recommendation that he be placed on probation. The State cross-appeals the trial court's order declaring ss. 985.433(7)(a) and (b), F.S., unconstitutional. The Fifth District Court of Appeal found that they were unable to address the first issue because the juvenile failed to preserve the issue in accordance with the Florida Rule of Juvenile Procedure 8.135. As for the cross-appeal, the trial court held ss. 985.433(7)(a) and (b) unconstitutional based on the separation of powers doctrine. The trial court reached this conclusion based on the premise that the statutes placed sentencing discretion solely within the province of the Department of Juvenile Justice. The Fifth District disagreed and reversed the trial court's finding. Section 985.433(7)(b), F.S. provides that the trial court may order placement at different restrictiveness level than recommended by department where it provides reasons supported by preponderance of evidence. Accordingly, the case was affirmed in part; and reversed in part. <http://www.5dca.org/Opinions/Opin2009/030209/5D08-598.op.pdf> (March 2, 2009).

F.T. v. State, __ So.2d __, 2009 WL 559938 (Fla. 5th DCA 2009). **DISPOSITION ORDER REVERSED AND REMANDED FOR FAILURE TO COMPLY WITH THE NEW STANDARDS SET FORTH IN E.A.R. V. STATE, __ SO.2D __, 2009 WL 217979 (FLA. 2009), WHEN THE TRIAL COURT DEPARTED FROM**

THE DEPARTMENT OF JUVENILE JUSTICE'S DISPOSITION RECOMMENDATION. The juvenile appealed the trial court's disposition order which departed from the recommendation of the Department of Juvenile Justice (DJJ). The trial court ordered a level 6 commitment for one-year after the juvenile was found guilty of possession of less than 20 grams of cannabis. DJJ had recommended probation. The Fifth District Court of Appeal found that a trial court may depart from the DJJ's recommendation only if the trial court complies with the standards set forth by the Florida Supreme Court in its recent decision in E.A.R. v. State, 2009 WL 217979 (Fla. 2009). A trial judge may not deviate from DJJ's recommendation simply because the judge disagrees with the recommendation. The Fifth District found that the reason articulated by the trial court in this case was insufficient to support the departure from the DJJ's recommendation. The trial court's decision seemed primarily calculated to punish the child for refusing to submit to a voluntary drug test and was not based on the needs of the child. The disposition order was reversed and remanded for entry of a disposition order consistent with the DJJ's recommendation. <http://www.5dca.org/Opinions/Opin2009/030209/5D08-3215.op.pdf> (March 2, 2009).

Dependency Case Law

Florida Supreme Court

In Re: Amendments to the Florida Supreme Court Approved Family Law Forms, --- So.3d ----, (Fla. 2009). **FORMS CHANGES** Several forms were amended to conform to the statutory changes that were made regarding child custody and parenting plans found in chapter 61, including the Uniform Child Custody Jurisdiction and Enforcement Act affidavit, Motion for Appointment of a Guardian ad Litem, and Order to Pick-up Minor Children. Many domestic violence and dissolution of marriage forms were also amended. <http://www.floridasupremecourt.org/decisions/2009/sc08-2058.pdf> (March 26th, 2009).

In Re: Amendments to the Florida Rules of Juvenile Procedure, --- So.2d ----, 2009 WL 702866 (Fla. 2009) **NOTICE TO CAREGIVERS** In September 2008, the Court adopted an amendment to Florida Rule of Juvenile Procedure 8.225 which required that notice of proceedings or hearings in dependency cases be given to pre-adoptive parents, foster parents, and relative caregivers, and specifically, that seventy-two hours notice be given to foster or pre-adoptive parents. After receiving comments from both the Department of Children and Families and the Juvenile Rules Committee, the Court further amended Florida Rule of Juvenile Procedure 8.225(c)(3) to clarify that notice does not confer party status on the caregivers, and that notice in emergency situations must occur in a way that is most likely to achieve actual service. <http://www.floridasupremecourt.org/decisions/2009/sc08-1612.pdf> (March 19, 2009).

First District Court of Appeal

C.W. v. Department of Children and Families, --- So.3d ----, 2009 WL 762173 (Fla. 1st DCA 2009). **DOMESTIC VIOLENCE NOT SUFFICIENT FOR ADJUDICATION** The mother appealed the trial court's order adjudicating the child dependent. The appellate court reversed because the trial court's findings, even if supported by competent, substantial evidence, did not meet the requirements to support an adjudication of dependency. In ruling the three-month-old child dependent, the trial court relied in large part on an expert's testimony that a child can be harmed by witnessing domestic violence. The court then concluded that general factors concerning the effect of domestic violence upon children constituted evidence that this child was harmed. The appellate court, however, noted that the trial court made no findings that the three-month-old child was aware of the incident or was physically or mentally harmed, and the record contained no evidence that the child comprehended the incident, sustained any physical or mental injury, or was cognizant in any way of the parents' poor behavior toward one another. Although the trial court found the parents showed wanton disregard for the child's presence during the incident, it did not find that this could reasonably have resulted in injury to the child. Nor did the trial court explain how the parents' "minimization" of the incident, the mother's past history of being subjected to domestic violence, or the parents' conflicting statements about what occurred during the incident "created an atmosphere for the child that has harmful consequences to the child," sufficient to support a dependency finding. <http://opinions.1dca.org/written/opinions2009/03-25-2009/08-1866.pdf> (March 25, 2009).

Second District Court of Appeal

A.W.P. v. Department of Children and Family Services, --- So.2d ----, 2009 WL 724040 (Fla. 2^d DCA 2009). **VIOLATION OF DUE PROCESS** The father requested review of a non-final Order Approving Educational Plans entered in a dependency case that prohibited him from having any visitation with his teenage son while his son is attending a military academy in Indiana. DCF conceded that the father's right to due process was violated because he was not noticed, did not have time to prepare, and the issue of counsel was not properly addressed. The court treated the appeal as a certiorari review of a non-final order, which is limited to errors that constitute a departure from the essential requirements of law, causing irreparable injury, for which there is no adequate remedy on direct appeal. Because the father was denied due process, the court granted certiorari relief and quashed the Order Approving Educational Plans. http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/March/march%2020,%2009/2D08-4165.pdf (March 20, 2009).

Third District Court of Appeal

K.G. v. Department of Children And Families, --- So.3d ----, 2009 WL 763609 (Fla. 3^d DCA 2009). **TERMINATION OF PARENTAL RIGHTS AFFIRMED** The mother appealed her termination of parental rights due to failing to comply with her case plan under section 39.806(1)(e)(1), Florida Statutes (2008). The mother was given three 6-month case plans for a total of eighteen months to comply. During the January 2008 case plan, the 2nd case plan for Reunification, the Mother

went into non-compliance and stopped participating in services. During the June 2008 case plan, the 3rd case plan for Reunification, the Mother still had not attained substantial compliance. The appellate court held that the mother had ample opportunity to complete her case plan and affirmed the termination of her parental rights. Judge Cope concurred, however, he stated that he was skeptical that the record adequately supported the material breach of the case plan ground, but felt that termination was still appropriate due to abandonment found in section 39.806(1)(b), Fla. Stat. (2007). <http://www.3dca.flcourts.org/Opinions/3D08-2795.pdf> (March 25, 2009).

Fourth District Court of Appeal

R.M. and E.H., v. Department Of Children & Families, --- So.3d ----, 2009 WL 763569 (Fla. 4th DCA 2009). **TERMINATION OF PARENTAL RIGHTS APPEALS** The parents appealed the termination of their parental rights, claiming that section 27.5304(6)(b)1.b, Florida Statutes (2007), is unconstitutional because under this statute, a court-appointed attorney who cannot find his client after a final order is entered cannot file a notice of appeal which is not signed by the client. The appellate court clarified that Section 27.5304(6)(b)1.b only requires that in order for counsel to receive payment for his trial level representation, he must certify that (1) he has discussed grounds for appeal with the parent or he has tried to contact the parent and was unable to; and (2) an appeal has not been filed or an appeal has been filed as well as a motion for appointment of appellate counsel signed by the parent. The statute does not require that the notice of appeal be signed by the parent, only the motion for appointment of counsel. The court further stated that Section 27.5304(6)(b)1.b does not modify the procedural rules which govern who is required to sign a notice of appeal. A parent is not required to sign the notice of appeal in his/her termination of parental rights case in order for the notice to be sufficient to obtain appellate jurisdiction of his/her case. <http://www.4dca.org/opinions/Mar2009/03-25-09/4D08-4502.op.pdf> (March 25, 2009).

T.G. v. Department of Children and Families, --- So.2d ----, 2009 WL 690998 (Fla. 4th DCA 2009). **SURRENDER OF PARENTAL RIGHTS** The mother appealed the order denying her motion to withdraw her surrender and consent to the termination of her parental rights alleging that her consent was the product of fraud and duress. The appellate court affirmed the lower court's ruling because the mother could not prove by clear and convincing evidence that her surrender was the result of fraud or duress. Before accepting the surrender, the court engaged in a thorough colloquy with the mother. The mother confirmed that she understood that the surrender was permanent and that her parental rights to the child would be terminated forever. When asked if anyone promised her anything or threatened her to get her to surrender her rights, she responded, "No, I was willing." She believed that the surrender was in the child's best interests. The court made clear there were no guarantees that anyone would allow her to have contact with the child and further that the court could not make that promise or make it a condition of the mother's surrender. <http://www.4dca.org/opinions/Mar2009/03-18-09/4D08-4928.op.pdf> (March 18, 2009).

J.M. v. Department of Children and Families, --- So.2d ----, 2009 WL 529558 (Fla. 4th DCA 2009).
TERMINATION OF PARENTAL RIGHTS A mother appealed a final judgment terminating her parental rights to her child. She raised two issues, first claiming that the court erred in entering a consent to termination after she failed to appear at one hearing; and second that the Department of Children and Families failed to present clear and convincing evidence of the statutory grounds for termination and also failed to prove that termination was in the manifest best interests of the child. Although the court should not have entered a consent because the court failed to order her to personally appear on the date of the adjudicatory hearing, the court permitted the mother to participate in the entire proceeding and specifically explained in its final judgment that it did not rely on the consent in making its determinations. Because there was competent substantial evidence to support the court's findings, the appellate court affirmed the termination. <http://www.4dca.org/opinions/Mar2009/03-04-09/4D08-3313.op.pdf> (March 4, 2009).

Fifth District Court of Appeal

No new opinions for this reporting period.

Dissolution Case Law

Florida Supreme Court

In Re: Amendments to the Florida Supreme Court Approved Family Law Forms, ___ So. 2d ___, 2009 WL 775400, (Supreme Court, March 26, 2009)(NO. SC08-2058). **SUPREME COURT APPROVED FAMILY LAW FORMS REVISED PER 2008 AMENDMENTS TO CHAPTER 61**

Adoption of revisions to existing Supreme Court Approved Family Law Forms and adoption of three new forms in accordance with statutory amendments contained in Chapter 2008-61, Laws of Florida, effective October 1, 2008. The purpose of the revisions was to remove references to the concepts of "custody," "primary or secondary residential parent," and "visitation" from the forms and to introduce and incorporate the concepts of "time-sharing" and "parenting plans" into the forms.

<http://www.floridasupremecourt.org/decisions/2009/sc08-2058.pdf> (March 26, 2009).

First District Court of Appeal

Rabbath v. Farid, ___ So. 2d ___, 2009 WL 127862, (Fla. 1st DCA, March 17, 2009)(NO. 1D07-6583). **MARITAL MISCONDUCT MAY BE FACTORED INTO SCHEME FOR EQUITABLE DISPOSITION; IMPUTATION OF INCOME MUST BE SUPPORTED BY RECORD; LONG-TERM MARRIAGE RAISES REBUTTABLE PRESUMPTION OF ALIMONY**

Appellate court substituted "this slightly revised opinion" for prior one issued January 21, 2009 (see 34 Fla. Law Weekly D201). Former husband appealed several findings of fact and conclusions of law in final judgment of dissolution of marriage, arguing that the trial court had

abused its discretion: in finding that he had concealed income and assets and dissipated assets; in the amount of income it had imputed to him; and in the awards of alimony and attorney's fees. With regard to the first issue, the appellate court defined dissipation as use of marital funds by one spouse for his or her own purpose, unrelated to the marriage, while the marriage is suffering an irretrievable breakdown. The appellate court reiterated that both adultery and dissipation may be taken into account by the trial court in fashioning its scheme of equitable distribution to the extent that the marital misconduct has depleted marital resources. Although no abuse of discretion was found in either the trial court's findings regarding dissipation or its having factored former husband's marital misconduct into the equitable distribution scheme, the appellate court found that the trial court had abused its discretion by imputing to former husband income in an amount unsupported by the record. The appellate court recognized that a 22 year marriage is considered long-term; in this case, that afforded to former wife a rebuttable presumption that she be entitled to alimony. It also pointed out that section 61.08(2)(g), Florida Statutes, enumerates the relevant economic factors that the trial court must consider when ordering alimony.

<http://opinions.1dca.org/written/opinions2009/03-17-2009/07-6583.pdf> (March 17, 2009).

Dejarnatt v. Dejarnatt, __ So. 2d __, 2009 WL 633185, (Fla. 1st DCA, March 13, 2009)(NO. 1D08-1839).

ABUSE OF DISCRETION IN AWARDING STATUTORY INTEREST ON EQUITABLE DISTRIBUTION AWARD

Former husband appealed an amended order granting former wife's motion to enforce the consent final judgment of dissolution of marriage. Appellate court agreed with former husband that the trial court had abused its discretion in awarding statutory interest on the equitable distribution award; accordingly, the appellate court reversed that portion of the order and affirmed the remainder.

<http://opinions.1dca.org/written/opinions2009/03-13-2009/08-1839.pdf> (March 13, 2009).

Morgan v. Morgan, __ So. 2d __, 2009 WL 559884, (Fla. 1st DCA, March 6, 2009)(NO. 1D08-2696).

TWO- PART SUBSTANTIAL CHANGE TEST APPLIES TO ALL CUSTODY AGREEMENTS

In an appeal by former husband to a trial court order which adopted the magistrate's factual findings and recommendations in denying former husband's request for modification, the appellate court cited Wade v. Hirschman, 903 So. 2d 928, 932 (Fla. 2005), for its conclusion that, "unless otherwise provided in the final judgment, the two-part substantial change test used in [Cooper v. Gress, 854 So. 2d 262, (Fla. 1st DCA 2003)], applies to modification of all custody agreements."

<http://opinions.1dca.org/written/opinions2009/03-06-2009/08-2696.pdf> (March 6, 2009).

Shaw v. Nelson, __ So. 2d __, 2009 WL 528795, (Fla. 1st DCA, March 4, 2009)(NO. 1D08-1677).

MODIFICATION OF SUPPORT AND CUSTODY REQUIRE SUBSTANTIAL CHANGE IN CIRCUMSTANCES; CHANGE IN CUSTODY ALSO REQUIRES CHANGE IN PARENTAL STATUS IN CHILD'S BEST INTERESTS

In an appeal to trial court's order, which granted former wife's supplemental verified petition for modification of child support and custody, the appellate court reiterated that with regard to modification of child support, the burden is on petitioner to show a substantial change in circumstances which necessitates increased support; with regard to modification of custody, petitioner "bears an extraordinary burden to show both a substantial, material and unanticipated change in circumstances has occurred since the final judgment of dissolution of marriage and that the change in primary residential parent status will be in the children's best interests." The trial court's order was affirmed.

<http://opinions.1dca.org/written/opinions2009/03-04-2009/08-1677.pdf> (March 4, 2009).

Second District Court of Appeal

Dukes v. Dukes, __ So. 2d __, 2009 WL 763597, (Fla. 2nd DCA, March 25, 2009)(NO. 2D07-4284).

PORTIONS OF ORDER INCONSISTENT WITH JUDGE'S ORAL RULINGS SUBJECT TO BEING STRUCK; ORDER MUST REFLECT COURT'S OWN DECISION-MAKING

Former husband appealed order awarding former wife temporary alimony and child support; appellate court struck portions of the order which were either inconsistent with the trial judge's oral findings or contained findings not made by the judge at the hearing. Problems arose when former wife's attorney submitted a proposed order to the judge without first providing it to former husband's attorney for his review following the hearing. Former husband's attorney found discrepancies within that order and prepared his own; however, before he was able to submit his proposed order to the judge, the judge adopted, verbatim, the one submitted by former wife's attorney. Appellate court held that the fact that an order is adopted from a proposal submitted by a party, standing alone, does not require reversal, but that when a trial court adopts a proposed order verbatim, reversal is required when the findings within the order are either inconsistent with the judge's earlier pronouncements or when the record establishes that the order does not reflect the court's own decision-making. In this case, the appellate court stopped short of reversing the order in its entirety because the judge made findings of fact and conclusions of law that provided a basis for much of the order.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/March/march%2025,%202009/2D07-4284.pdf (March 25, 2009).

Gibbons v. Gibbons, __ So. 2d __, 2009 WL 691179, (Fla. 2nd DCA, March 18, 2009)(NO. 2D07-5480).

DISABILITY BENEFITS GENERALLY ARE NONMARITAL; RETIREMENT BENEFITS GENERALLY ARE MARITAL; DATE OF FILING OF DOM PETITION IS CUT-OFF DATE FOR CLASSIFYING ASSETS AND LIABILITIES

Appellate court focused on two issues in appeal by former husband and cross-appeal by former wife to final judgment of dissolution: 1) the trial court's award to former wife of one-half of disability benefits accruing to former husband after his attaining the age of 65 from three separate disability insurance policies he purchased; and 2) the trial court having classified as nonmarital former wife's indebtedness on shareholder loans made to her by the former couple's closely held corporation prior to the filing of the petition for dissolution of marriage. As to the first issue, the appellate court noted that, generally, neither employer-sponsored disability pensions nor benefits from private disability policies are considered marital assets

subject to equitable disposition; however, retirement benefits are. Thus, reaching a correct assessment requires that the trial court look beyond how the benefit is labeled to its purpose. The appellate court concluded that the trial court erred when it reasoned that former husband's right to receive disability benefits beyond age 65 converted those benefits into a retirement plan, and in absence of any evidence that the post-65 disability benefits contained a retirement component, that they were former husband's separate property and not subject to equitable disposition. As to the second issue, the appellate court found that the trial court erred in classifying loans made prior to the filing of the petition for dissolution as nonmarital debt where the funds were used by former wife for living expenses for herself and the children after the couple's separation. The appellate court held that in absence of a separation agreement, the date of filing of the petition for dissolution is the cut-off date for determining classification of marital assets and liabilities.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/March/march%2018,%202009/2D07-5480.pdf (March 18, 2009).

Romerhaus v. Romerhaus, __ So. 2d __, 2009 WL 633200, (Fla. 2nd DCA, March 13, 2009)(NO. 2D08-1075). **DOUBLY CHARGING PAYING SPOUSE IS ERROR**

Trial court committed error when it doubly assessed former husband by including health insurance costs in former husband's child support calculations and then ordering him to pay one-half the premium as additional child support.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/March/march%2013,%202009/2D08-1075.pdf (March 13, 2009).

Eisemann v. Eisemann, __ So. 2d __, 2009 WL 564237, (Fla. 2nd DCA, March 6, 2009) (NO. 2D08-192; 2D08-1308). **INCREASE IN FINANCIAL ABILITY OF PAYING SPOUSE ALONE DOES NOT REQUIRE INCREASE IN ALIMONY**

Former husband appealed an increase in alimony payments ordered in postdissolution modification proceedings. In reversing, the appellate court reiterated that in order to justify modification of alimony, petitioner must establish a substantial change in circumstances, not contemplated at the time of the final judgment of dissolution, that is material, permanent, and involuntary. (Antepenکو v. Antepenکو, 824 So. 2d 214, (Fla. 2nd DCA 2002); Rahn v. Rahn, 768 So. 2d 1102, Fla. 2nd DCA 2000). Although it found that the trial court did not err in factoring in the increased financial need former wife experienced owing to significant and unexpected living and medical expenses, the appellate court disagreed with the trial court's rationale regarding former wife's standard of living and her unmet financial needs at the time of dissolution. Citing Bedell v. Bedell, 583 So. 2d 1005, (Fla. 1991), the appellate court noted that while proof of a substantial change in one spouse's ability to pay may justify an upward modification of alimony, that a substantial increase in the financial ability of the paying spouse, standing alone, does not require an order of increased alimony.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/March/march%2006,%202009/2D08-192.pdf (March 6, 2009).

Third District Court of Appeal

Martinez v. Kurt, __ So. 2d __, 2009 WL 763599, (Fla. 3rd DCA, March 25, 2009)(NO. 3D08-2712).

IMPROPER MODIFICATION OF MARITAL SETTLEMENT AGREEMENT BY COURT LEADS TO REVERSAL

Former husband appealed an order modifying the education and visitation provisions of a marital settlement agreement (MSA). Concluding that the trial court's order had improperly modified the MSA, the appellate court reversed. Pursuant to the MSA, former wife, a citizen of Turkey, would be allowed to relocate there with the children; however, the school they attended must be a "full-time English speaking" one agreed to by both parents. Upon former wife's relocation to Turkey, she provided former husband with the names of two schools, neither of which was full-time English speaking; he, in turn, provided her with the names of three schools that were. As no agreement regarding schools was reached, former wife moved for modification. Her motion was granted upon the trial court's finding that a full-time English speaking school as contemplated by the MSA did not exist and that allowing the children to attend a Turkish-speaking one with 10 hours of week of English was, "a fair compromise." The appellate court agreed with former husband that by allowing the children to attend a Turkish school, absent a finding, supported by competent, substantial evidence, that a substantial material change re circumstances had occurred, that the trial court had improperly modified the final judgment. Accordingly, the appellate court reversed and remanded with instructions for the trial court to reinstate the final judgment.

<http://www.3dca.flcourts.org/Opinions/3D08-2712.pdf> (March 25, 2009).

Karam v. Karam, __ So. 2d __, 2009 WL 605401, (Fla. 3rd DCA, March 11, 2009)(NO. 3D08-2134).

CERTIORARI REQUIRES DEPARTURE FROM ESSENTIAL REQUIREMENTS OF LAW WHICH CANNOT BE REMEDIED ON APPEAL; HOME STATE IS WHERE CHILDREN ARE LIVING 6 MONTHS PRIOR TO DOM

Former wife petitioned for and was granted a writ of certiorari, which quashed the trial court's order granting former husband's verified motion to dismiss the custody portion of former wife's petition for dissolution of marriage. In August 2007, former husband, a French national, filed a petition for dissolution of marriage in Guadeloupe; the following month, former wife, also a French national, not having been served with that petition and unaware of its existence, filed a petition for dissolution in Miami, where the former couple and their children had resided since 2005 (although they summered abroad and maintained a residence, businesses, and bank accounts in Guadeloupe). Both petitions raised issues relating to custody of the three children who lived with former wife and attended Dade County schools. Former husband challenged the Florida trial court's jurisdiction, arguing that the children's primary residence was in Guadeloupe; before that motion could be heard, the French court held a temporary relief hearing, ordering that the children be returned to Guadeloupe as the petition was filed in the French court before the "American" one. The appellate court stated that in order for it to grant former wife's petition for certiorari, that the order under review must be a departure from essential requirements of law resulting in material injury which could not be remedied on appeal; an order dismissing the custody portion of former wife's petition satisfied that

standard. With regard to the UCCJEA issues, the appellate court found that the Florida trial court's finding that the French trial court exercised its jurisdiction in substantial conformity with the UCCJEA was in error; the UCCJEA defines home state as where children were living six months prior to the filing of a petition for dissolution, which in this case was Florida, not Guadeloupe.

<http://www.3dca.flcourts.org/Opinions/3D08-2134.pdf> (March 11, 2009).

Fourth District Court of Appeal

No new opinions for this reporting period.

Fifth District Court of Appeal

No new opinions for this reporting period.

Domestic Violence Case Law

Florida Supreme Court

In Re: Amendments to the Florida Supreme Court Approved Family Law Forms, --- So.3d ----, (Fla. 2009). **FORMS CHANGES** Several forms were amended to conform to the statutory changes that were made regarding child custody and parenting plans found in chapter 61, including form 12.980(a) Petition for Injunction for Protection Against Domestic Violence. <http://www.floridasupremecourt.org/decisions/2009/sc08-2058.pdf> (March 26th, 2009).

First District Court of Appeal

C.W. v. Department of Children and Families, --- So.3d ----, 2009 WL 762173 (Fla. 1st DCA 2009). **DOMESTIC VIOLENCE NOT SUFFICIENT FOR ADJUDICATION** The mother appealed the trial court's order adjudicating the child dependent. The appellate court reversed because the trial court's findings, even if supported by competent, substantial evidence, did not meet the requirements to support an adjudication of dependency. In ruling the three-month-old child dependent, the trial court relied in large part on an expert's testimony that a child can be harmed by witnessing domestic violence. The court then concluded that general factors concerning the effect of domestic violence upon children constituted evidence that this child was harmed. The appellate court, however, noted that the trial court made no findings that the three-month-old child was aware of the incident or was physically or mentally harmed, and the record contained no evidence that the child comprehended the incident, sustained any physical or mental injury, or was cognizant in any way of the parents' poor behavior toward one another. Although the trial court found the parents showed wanton disregard for the child's presence during the incident, it did not find that this could reasonably have resulted in injury to the child. Nor did the trial court explain how the parents' "minimization" of the incident, the mother's past history of being subjected to domestic violence, or the parents' conflicting

statements about what occurred during the incident "created an atmosphere for the child that has harmful consequences to the child," sufficient to support a dependency finding.

<http://opinions.1dca.org/written/opinions2009/03-25-2009/08-1866.pdf> (March 25, 2009).

Second District Court of Appeal

No new opinions for this reporting period.

Third District Court of Appeal

No new opinions for this reporting period.

Fourth District Court of Appeal

Nicholson v. State, --- So.3d ----, 2009 WL 763429 (Fla. 4th DCA 2009). **PRIOR BAD ACT ADMITTED INTO EVIDENCE** Kevin Nicholson appealed his conviction and sentence for first-degree murder claiming that the trial court erred by denying his motion for judgment of acquittal because the state's case consisted of circumstantial evidence of an uncharged collateral crime which was insufficient to support the conviction. The defendant also argued that the trial court erred in admitting collateral evidence that he stalked, threatened, and assaulted the victim. The court noted that the standard of review for admission of evidence is abuse of discretion; but that discretion is limited by the rules of evidence. The appellate court concluded that the previous assault and stalking, although consisting of prior bad acts, were admissible as relevant to prove motive and intent under the Williams rule, which is codified in section 90.404(2)(a), Florida Statutes. The court also noted that the prior bad acts were not made a feature of the trial and affirmed the conviction.

<http://www.4dca.org/opinions/Mar2009/03-25-09/4D06-3389.op.pdf> (March 25, 2009).

Fifth District Court of Appeal

No new opinions for this reporting period.