

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

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Delinquency Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

No new opinions for this reporting period.

Second District Court of Appeal

State v. K.S., __ So.3d __, 2010 WL 743967 (Fla. 2d DCA 2010). [THE WARRANTLESS SEARCH OF THE JUVENILE'S AUTOMOBILE WAS NOT JUSTIFIED UNDER THE SEARCH INCIDENT TO ARREST EXCEPTION.](#) The State appealed from an order granting the juvenile's motion to suppress a firearm seized during a search of his vehicle and statements made relating to his ownership or use of the firearm. Following a fleeing and eluding incident, the officer pulled up behind the juvenile's car, directed his spotlight through the car's back window, and exited his vehicle. While approaching the juvenile's vehicle, the officer observed the juvenile reaching towards the dashboard on the passenger side and ordered the juvenile to show his hands and step out of the car. The juvenile exited the car, and backup officers arrived. The officer handcuffed the juvenile, arrested him for fleeing and eluding, and found no weapons on him. The officer then took the juvenile's car keys and used the keys to unlock and open the glove box inside the juvenile's car, where he found a semiautomatic firearm. The juvenile testified that he did not agree or consent to a search of the car. The Second District Court of Appeal found that warrantless searches are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions. Among the exceptions to the warrant requirement is a search incident to a lawful arrest. Police may search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search or when it is reasonable to believe evidence relevant to the crime underlying the arrest might be found in the vehicle. This exception is justified by interests in officer safety and evidence preservation. The Second District held that the warrantless search of the juvenile's automobile was not justified under the search incident to arrest exception. Nothing justified the search based on officer safety concerns. At the time of the search, the juvenile was separated from his automobile, placed in handcuffs, and under the supervision of backup officers. Further, the officer could not reasonably have believed he would find evidence of juvenile's crime of fleeing and eluding. Accordingly, the trial court's order granting the juvenile's motion to suppress was affirmed. http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2010/March/March%205,%202010/2D09-2790.pdf (March 5, 2010).

Third District Court of Appeal

J.J. v. State, __ So.3d __, 2010 WL 1222667 (Fla. 3d DCA 2010). [SECURE DETENTION FOR THE PURPOSE OF PERMITTING ADMINISTRATIVE ACCESS TO A CHILD IS NOT AUTHORIZED](#). The juvenile filed a petition for writ of habeas corpus seeking her immediate release from secure detention. Subsequently, the trial court ordered her release and the petition became moot. As a result, the Third District Court of Appeal dismissed the petition. However, because the parties contended that the situation had arisen before and may reoccur; the Third District explained why the detention was improper. Section 985.24(2)(b), F.S. (2009), prohibits detaining a child to permit administrative access to the child. Here, at a juvenile status conference, the trial court was informed that the juvenile was a 12-year-old dependent child, who continually ran away from her foster homes and school. The juvenile needed medical and dental examinations, psycho-educational testing to determine appropriate school placement, and a psychiatric evaluation. However, the juvenile's conduct made undergoing these examinations a problem. With the best of intentions, the trial court ordered her into secure detention. However, a child's secure detention must follow strict statutory criteria. Although the Third District sympathized with the trial court's motive, i.e. getting the juvenile to stay in one place long enough to get the help that she needed, detention was not authorized under these circumstances.
<http://www.3dca.flcourts.org/Opinions/3D10-0226.pdf> (March 31, 2010).

J.O. v. State, __ So.3d __, 2010 WL 1049976 (Fla. 3d DCA 2010). [ADJUDICATION FOR GRAND THEFT WAS REVERSED WHERE THE PETITION FAILED TO SET FORTH THE ELEMENTS SUBSTANTIATING A LESSER CHARGE OF GRAND THEFT](#). The juvenile appealed his adjudication for grand theft. A police officer saw a youth driving a stolen scooter. The youth told the officer that he had borrowed the scooter from the juvenile. When questioned by the officer, the juvenile confirmed he lent the scooter to the youth and explained he had purchased it from an individual named "Danny" for \$1200. The juvenile was charged with trafficking in, or endeavoring to traffic in, a scooter which the juvenile knew or should have known was stolen, per s. 812.019(1), F.S. The victim testified that after the scooter was returned, the juvenile went to his house and told him that his brother had stolen the scooter. The juvenile then asked permission to retrieve his baseball cap and computer discs left inside the scooter seat. The officer admitted there was no evidence suggesting the juvenile ever intended to sell the scooter, or that the juvenile did anything with the scooter other than possess it and loan it to the youth. The trial court found the evidence was insufficient to establish trafficking in stolen property. However, the trial court found the juvenile guilty of grand theft, a category two lesser-included offense of trafficking, which was not charged in the petition. The Third District Court of Appeal found that a conviction based upon a category two lesser-included offense is sustainable over a proper objection only if: (1) the charging document includes all of the elements of the lesser; and (2) the evidence admitted would support a conviction of the lesser. The Third District held that the charging petition only generally alleged a violation of the trafficking statute, without specifically setting forth any of the elements of the offense. Thus, the petition failed to set forth the elements substantiating a lesser charge of grand theft. Accordingly, the adjudication for grand theft was reversed.
<http://www.3dca.flcourts.org/Opinions/3D08-3119.pdf> (March 24, 2010).

A.D. v. State, __ So.3d __, 2010 WL 1050005 (Fla. 3d DCA 2010). **THE STATE FAILED TO ESTABLISH THE NECESSARY MARKET VALUE OF THE ITEMS STOLEN TO SUPPORT A THIRD-DEGREE GRAND THEFT.** The juvenile appealed the denial of his motion for judgment of acquittal for third degree grand theft. The juvenile argued that the State failed to establish that the market value of the items stolen was more than \$300. The Third District Court of Appeal found, that in order to establish third-degree grand theft, the State must prove that the property stolen was valued at \$300 or more, as defined by s. 812.012(10)(a)1., F.S. (2008). Section 812.012(10)(a)11 defines 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 State may present direct testimony as to the fair market value, testimony establishing cost minus depreciation, or testimony as to replacement cost if market value cannot be satisfactorily ascertained. Because the value of the stolen items is an essential element of the offense, the value must be established beyond a reasonable doubt. The State conceded that the evidence was insufficient as to the value of the cell phone, fishing rods, and iPod. Therefore, the Third District only addressed the evidence presented as to the truck radio and the boat battery charger. The Third District concluded that the record did not contain sufficient evidence establishing the value of the radio and boat battery charger. The State failed to present any evidence of the value of the truck radio or the boat charger at the time and place of the offense. Instead, the victim testified solely as to the replacement cost of these items. Replacement cost, however, is not appropriate unless the State first presents evidence that the market value could not be satisfactorily ascertained. In the instant case, the State failed to present any evidence that it could not “satisfactorily ascertain” the market value. The State argued that the finding of guilt may stand based on a finding that the minimum value of the items is self-evident. The Third District declined to find that the minimum value of the items was self-evident given the paucity of information on the record regarding the conditions of the items at issue. As such, the State failed to prove that the property stolen was valued at \$300 or more as defined by s. 812.012(10)(a)1. Accordingly, the disposition order was reversed and remanded with directions to reduce the finding of guilt to petit theft.

<http://www.3dca.flcourts.org/Opinions/3D09-0804.pdf> (March 24, 2010).

M.B. v. State, __ So.3d __, 2010 WL 934097 (Fla. 3d DCA 2010). **RESTITUTION ORDER WAS REDUCED WHERE BROKEN LOCK WAS NOT CAUSALLY CONNECTED TO THE JUVENILE’S OFFENSE AND THERE WAS NO EVIDENCE THAT THE JUVENILE STOLE THE MISSING REAL ESTATE SIGN.** The juvenile appealed an order imposing restitution. The Third District Court of Appeal reversed the restitution order and remanded for the trial court to deduct the \$50.00 for the lock repair and the \$148.16 for the missing real estate sign. The broken lock was not causally connected or significantly related to the defendant's offense. The victim had testified that the lock on the house was broken and that she had already bought a repair kit when the crime was committed. Further, there was no evidence that the juvenile stole the missing real estate sign. The juvenile was apprehended inside the house and the sign was not mentioned on the arrest form, or the petition for delinquency.

<http://www.3dca.flcourts.org/Opinions/3D09-1483.pdf> (March 17, 2010).

C.D. v. State, __ So.3d __, 2010 WL 934105 (Fla. 3d DCA 2010). **PROBATION ORDER WAS REMANDED FOR FAILURE TO SPECIFY THE TIME PERIOD DURING WHICH THE JUVENILE WOULD BE ON PROBATION.** This was an Anders v. California, 386 U.S. 738 (1967) appeal of an adjudication of delinquency. The juvenile's counsel pointed out that the probation order failed to specify the time period during which the juvenile would be on probation. The Third District Court of Appeal agreed and remanded for entry of the probation period on the probation order. The adjudication and probation order was affirmed in all other respects. <http://www.3dca.flcourts.org/Opinions/3D09-1638.pdf> (March 17, 2010).

Fourth District Court of Appeal

M.D. v. State, __ So.3d __, 2010 WL 934111 (Fla. 4th DCA 2010). **MOTION FOR JUDGMENT OF DISMISSAL ON POSSESSION OF MARIJUANA CHARGE SHOULD HAVE BEEN GRANTED BECAUSE THE STATE'S CIRCUMSTANTIAL EVIDENCE WAS NOT INCONSISTENT WITH THE JUVENILE'S REASONABLE HYPOTHESIS OF INNOCENCE.** The juvenile appealed his adjudication of delinquency and sentence for possession of marijuana (less than twenty grams), arguing that the State did not produce sufficient evidence that he had dominion and control over the marijuana found in proximity to him at the time of his arrest. The police responded to a report of possible loitering at a vacant residence. Upon arriving at the scene, one of the officers observed that the door to a small utility room at the back of the residence was open. About two or three feet from the door, the officer smelled marijuana. The officer looked inside and observed four individuals, including the juvenile. None of the individuals were observed smoking marijuana. However, the room, as well as the juvenile, smelled like marijuana. Bags of marijuana were recovered from the room and from the other three individuals. No marijuana was found in the juvenile's actual possession. The officer also found loose tobacco in the corner of the utility room. The officer testified that, from his experience, he believed that the tobacco had been removed from a cigar so that the tobacco leaves could be used to wrap marijuana. No cigarettes or packages of loose tobacco were found in the room. All of the individuals had lighters. The juvenile told one of the officers that he was "there to smoke." The officer testified that "smoking" was a street term for smoking marijuana. The other officer asked the juvenile if he had broken into the house, to which he replied, "we just used the shed to smoke." The juvenile argued that the State's case was entirely circumstantial and that its evidence did not rebut his theory that he was smoking tobacco, not marijuana. He pointed out that one of the officers found loose tobacco on the ground, and that his statement that he "was there to smoke" did not necessarily indicate that he was there to smoke marijuana. The Fourth District Court of Appeal found that since the juvenile was not in actual possession of any of the marijuana, the State needed to prove that he had constructive possession. When the premises on which the drugs are found are not in the defendant's exclusive possession, the defendant's mere proximity to the drugs is not enough to prove that he constructively possessed them. The State must present independent proof of the defendant's knowledge and ability to control the drugs. This proof may consist of actual knowledge, evidence of incriminating statements or actions, or other circumstances from which a jury might lawfully infer actual knowledge. The State's case depended on the juvenile's statement that he was "there to smoke." The Fourth District held that the juvenile's statements, in combination with the other evidence in the case,

did not conclusively refute his theory that he was smoking tobacco, not marijuana. The juvenile was unclear about what he had smoked in the utility room, he never made any statement about marijuana, and one of the officers found tobacco in the room. The fact that tobacco cigarettes were not found did not carry much significance. Moreover, the smell of marijuana did not foreclose the possibility that the juvenile was smoking tobacco while the other individuals were smoking marijuana, and that the smell of the marijuana masked the tobacco odor. Finally, the officer's theory that a tobacco cigarette was hollowed out to make room for marijuana was not inconsistent with the juvenile's theory that he was only smoking tobacco. Since the State's circumstantial evidence was not inconsistent with the juvenile's reasonable hypothesis of innocence, the trial court erred in denying the motion for judgment of dismissal on the charge of possession of marijuana. Accordingly, the case was reversed and remanded. <http://www.4dca.org/opinions/Mar%202010/03-17-10/4D09-806.op.pdf> (March 17, 2010).

State v. D.C., __ So.3d __, 2010 WL 718136 (Fla. 4th DCA 2010). **HELD THAT CARRYING A CONCEALED FIREARM WAS NOT A LESSER-INCLUDED OFFENSE OF POSSESSION OF A FIREARM ON SCHOOL PROPERTY.** The State appealed the juvenile's delinquency adjudication for carrying a concealed firearm as a lesser-included offense of possession of a firearm on school property. The juvenile was charged by petition for delinquency with possession of a firearm on school property pursuant to s. 790.115(2), F.S. (2007). During the adjudicatory hearing, the trial judge found the proof insufficient to support that charge but found it sufficient to support a finding of guilty for the uncharged crime of carrying a concealed firearm pursuant to s. 790.01(2). The Fourth District Court of Appeal held that carrying a concealed firearm was not a lesser-included offense of possession of a firearm on school property. Therefore, the trial court could not adjudicate the juvenile delinquent for the uncharged offense of carrying a concealed firearm. The adjudication was reversed and remanded for further proceedings consistent with the opinion. <http://www.4dca.org/opinions/Mar%202010/03-03-10/4D08-3877.op.pdf> (March 3, 2010).

G.G.J. v. State, __ So.3d __, 2010 WL 711768 (Fla. 4th DCA 2010). **THE CIRCUIT COURT ABUSED ITS DISCRETION IN HOLDING THE JUVENILE IN DIRECT CRIMINAL CONTEMPT WHERE THE STATE PRESENTED NO EVIDENCE THAT THE JUVENILE WILLFULLY FAILED TO APPEAR.** The juvenile appealed his adjudication for direct criminal contempt of court for failure to appear at a docket call. The Fourth District Court of Appeal found that an order of direct criminal contempt for failure to appear requires a showing that the failure to appear was willful. The State presented no evidence that the juvenile willfully failed to appear. Therefore, the circuit court abused its discretion in holding the juvenile in direct criminal contempt. Case reversed and remanded. <http://www.4dca.org/opinions/Mar%202010/03-03-10/4D09-1334.op.pdf> (March 3, 2010).

Fifth District Court of Appeal

D.B.P. v. State, __ So.3d __, 2010 WL 979481 (Fla. 5th DCA 2009). **OFFICER DID NOT HAVE REASONABLE SUSPICION FOR A WEAPONS PAT DOWN WHERE THE JUVENILE APPEARED NERVOUS AND KEPT HIS HANDS IN OR NEAR HIS POCKETS FOLLOWING A NON-CRIMINAL STOP FOR FAILURE TO USE A PEDESTRIAN CROSSWALK.** The arresting deputy was advised by other

officers that the juvenile had failed to use a pedestrian crosswalk (jaywalking). As a result, the deputy sought to make a “consensual encounter” with the juvenile at about mid-day near a bus stop in a “high crime” area. According to the deputy, when he approached the juvenile, the minor put both hands in his pockets and looked nervous. The deputy asked the juvenile to take his hands out of his pockets and the juvenile refused. At that point, the deputy physically assisted the juvenile in removing his hands from his pockets. The juvenile was then told to place his hands above his head. The deputy noted that the juvenile was wearing baggy pants, so the deputy could not visually see what was in them. He then patted the juvenile down and felt the handle of a handgun. The deputy took the juvenile into custody. The juvenile filed a motion to suppress. The trial court held that the actions of the deputy were reasonable. The Fifth District Court of Appeal held that the search was not reasonable, and that the motion to suppress should have been granted. One of the recognized circumstances justifying a weapons pat down is a combination of the defendant's nervousness and the officer's observation of a bulge in the defendant's clothing. However, an officer does not have reasonable suspicion that a defendant is armed merely because, following a non-criminal traffic stop, the defendant appears nervous and keeps his hands in or near his pockets. The mere thrusting of one's hand into one's pocket in front of a police officer does not constitute conduct which supports a founded suspicion that an individual is armed and dangerous. Although the refusal by a person to remove his or her hands from pockets might well constitute part of the basis authorizing a pat down for weapons in some circumstances, under the well-established case law of this state, the facts presented here did not amount to the reasonable suspicion necessary to justify the search. Accordingly, the denial of the motion was reversed and remanded for further proceedings.

<http://www.5dca.org/Opinions/Opin2010/031510/5D09-2877.op.pdf> (March 19, 2010).

K.H. v. State, ___ So.3d ___, 2010 WL 742587 (Fla. 5th DCA 2009). **WITHHOLDING OF ADJUDICATION OF DELINQUENCY FOR FURNISHING A WEAPON TO A MINOR WAS AFFIRMED BECAUSE THE KNIFE WAS NOT AN “ORDINARY POCKETKNIFE,” WITHIN THE MEANING OF THE EXCEPTION TO THE CRIMINAL STATUTE.** The juvenile appealed his disposition order withholding adjudication of delinquency and imposing six months of probation after finding the juvenile guilty of furnishing a weapon to a minor. The Fifth District Court of Appeal held that a switchblade knife was not an “ordinary pocketknife” within the meaning of the exception to the criminal statute making it illegal to furnish a weapon “other than an ordinary pocketknife” to a minor without the permission of the minor's parents. The trial testimony indicated that the knife at issue was a folding-type switchblade with a double-edged blade approximately three inches in length. The switchblade had distinctive features not usual for a common pocketknife but more characteristic of a knife designed to be a weapon, including a push-button that released to swing the blade into an open or extended position. Therefore, the denial of the juvenile's motion for judgment of dismissal was affirmed.

<http://www.5dca.org/Opinions/Opin2010/030110/5D09-2097.op.pdf> (March 5, 2010).

F.W. v. State, ___ So.3d ___, 2010 WL 742591 (Fla. 5th DCA 2009). **SECTION 938.27(1), F.S. DOES NOT AUTHORIZE COURTS TO IMPOSE COSTS OF PROSECUTION ON JUVENILES ADJUDICATED DELINQUENT.** The juvenile appealed from his disposition order imposing costs of prosecution. The State conceded the trial court erred in assessing costs of prosecution. The Fifth District

found that s. 938.27(1), F.S., does not authorize courts to impose costs of prosecution on juveniles adjudicated delinquent. Accordingly, the disposition order was remanded with directions that these costs be stricken. In all other respects, the adjudication of delinquency and disposition were affirmed.

<http://www.5dca.org/Opinions/Opin2010/030110/5D09-2138.op.pdf> (March 5, 2010).

Dependency Case Law

Florida Supreme Court

In Re: Amendments To Florida Rule Of Judicial Administration 2.420 and The Florida Rules Of Appellate Procedure, --- So.3d ----, 2010 WL 958075 (Fla. 2010) **RULES AMENDED REGARDING CONFIDENTIALITY OF COURT RECORDS**. The court amended Rule of Judicial Administration 2.420 and the Rules of Appellate Procedure to provide comprehensive procedures for identifying and segregating confidential information in court records, for sealing and unsealing court records, and for reviewing orders issued under the rule. The revisions clarified that those records defined in the rules are confidential and may not be released except as provided, including Chapter 39 records relating to dependency matters, termination of parental rights, guardians ad litem, child abuse, neglect, and abandonment.

<http://www.floridasupremecourt.org/decisions/2010/sc07-2050.pdf> (March 18, 2010).

First District Court of Appeal

R.T. v. Florida Department Of Children And Families, --- So.3d ----, 2010 WL 779994 (Fla. 1st DCA 2010) **CONSENT TO DEPENDENCY REVERSED**. The trial court adjudicated a child dependent based on a mediated settlement agreement without first determining whether the mother's consent was knowing and voluntary, and the mother appealed. The Department of Children and Family Services correctly conceded error. Florida Rule of Juvenile Procedure 8.325(c) requires that, before accepting a consent to a finding of dependency, the trial court must determine that the consent "is made voluntarily and with a full understanding of the nature of the allegations and the possible consequences of the consent," and that findings to that effect must be incorporated into the order, even when there has been a mediated settlement agreement. The appellate court reversed. <http://opinions.1dca.org/written/opinions2010/03-09-2010/08-5605.pdf> (March 9, 2010).

Second District Court of Appeal

R.C. v. Department of Children and Family Services and Guardian Ad Litem Program, --- So.3d ----, 2010 WL 1049937 (Fla. 2d DCA 2010) **TERMINATION OF PARENTAL RIGHTS AFFIRMED**. The parents appealed an order terminating their parental rights to their youngest child, asserting that it was fundamental error for the trial court to terminate their parental rights under section 39.806(1)(e)(1), Florida Statutes, when the case plan that was approved by the court and relied upon by the parties throughout the proceedings was not filed in the court file. The appellate court held that the error was not fundamental based on the specific facts of

this case, and therefore affirmed.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2010/March/March%2024,%202010/2D08-3544.pdf (March 24, 2010).

Third District Court of Appeal

No new opinions for this reporting period.

Fourth District Court of Appeal

No new opinions for this reporting period.

Fifth District Court of Appeal

M.M. v. Department of Children and Families, ___ So.3d ___, 2010 WL 979589 (Fla. 5th DCA 2010) [CUSTODY ORDER TO NON-OFFENDING PARENT REVERSED](#). The mother appealed a final order awarding permanent custody of her two middle children to their non-offending father under section 39.521(3), Florida Statutes, and terminating jurisdiction over her dependency case. The final order was entered at a hearing on the mother's motion for reunification with her children, which alleged that she had substantially complied with her case plan. The Department of Children and Families had also reported the mother's substantial compliance with the case plan. The trial court, however, never determined whether the mother had substantially complied with her case plan or whether reunification would be detrimental to the children, as required by section 39.522(2), Florida Statutes. The appellate court noted that it has repeatedly held that it is reversible error to permanently award custody to a non-offending parent when the offending parent has a case plan goal of reunification and has either substantially complied with the plan, or where the time for compliance has not yet expired--at least without a finding that reunification would be detrimental to the children. The court reversed and stated that on remand the trial court must first determine whether the mother has substantially complied with her case plan before proceeding further.

<http://www.5dca.org/Opinions/Opin2010/031510/5D09-3669.op.pdf> (March 16, 2010).

Dissolution Case Law

Florida Supreme Court

On March 4, 2010, the Court issued its opinion in SC08-2358 adopting three new family law forms: an Income Deduction Order; a Notice to Payor; and a Notice of Filing Return Receipt. The new forms are numbered 12.996(a), (b), and (c), respectively, and became effective upon the issuance of the opinion.

First District Court of Appeal

Puskar v. Puskar, ___ So.3d ___, 2010 WL 935466 (Fla. 1st DCA 2010).

REVIEW OF CLASSIFICATION OF ASSET IS DE NOVO; AN ASSET MAY REMAIN NONMARITAL EVEN WHEN INCOME FROM IT IS USED TO MAINTAIN OR RAISE MARITAL STANDARD OF LIVING; USE OF MARITAL FUNDS ON NONMARITAL ASSET DOES NOT TRANSFORM IT INTO A MARITAL ASSET; TRIAL COURT MUST DETERMINE PORTION OF ENHANCEMENT AND APPRECIATION IS DUE TO MARITAL FUNDS AND LABOR.

Former wife appealed final judgment of dissolution of marriage, arguing that the trial court erred in failing to designate any portion of the former couple's property in Orange Park as nonmarital, and in fashioning its scheme for equitable distribution. Appellate court affirmed the latter finding, but reversed the trial court's characterization regarding the real property. The property was owned jointly by former wife and her father prior to her marriage; former husband claimed a special equity in it. Former wife testified that former husband had built an addition to the residence prior to their marriage and that she had paid him for the construction labor. The residence was rented out during the marriage; former husband claimed that marital funds were used to cover debt, repairs, taxes, and maintenance of the home. Former wife sold the residence after the petition for dissolution was filed. Finding that former husband had made "numerous repairs" to the residence over the years and that the proceeds from the sale were commingled with marital funds, the trial court credited the proceeds of the sale to former wife's side of the ledger instead of classifying them as nonmarital. Reiterating that its review of classification of an asset as marital or nonmarital is de novo, the appellate court held that the trial court's conclusion that the sale proceeds had been commingled was not based on competent, substantial evidence. The appellate court also noted that an asset may remain nonmarital even when income derived from it may be used to maintain or raise the marital standard of living and that using marital funds on a nonmarital asset does not transform it into a marital one; what becomes marital is the enhancement. The appellate court emphasized that the trial court must make clear findings as to the value of enhancement and appreciation during the marriage, including which portion is attributable to marital funds and labor, in order to make an award for enhancement and appreciation. The appellate court instructed the trial court on remand to determine what portion of the property, if any, could be characterized as marital.

<http://opinions.1dca.org/written/opinions2010/03-17-2010/09-2045.pdf> (March 17, 2010).

Pombrio v. Pombrio, __So.3d __, 2010 WL 935575 (Fla. 1st DCA 2010).

TRIAL COURT ABUSED ITS DISCRETION IN DETERMINING THAT FORMER WIFE'S ALIMONY WOULD CEASE ONCE SHE BEGAN RECEIVING SHARE OF FORMER HUSBAND'S RETIREMENT BENEFITS WHERE THE RETIREMENT BENEFITS WERE AWARDED TO HER AS PART OF THE EQUITABLE DISTRIBUTION SCHEME.

Former wife appealed final judgment of dissolution of marriage on multiple grounds; appellate court held that the trial court's prospective determination that former wife's alimony would cease once she began receiving her share of former husband's retirement benefits was an abuse of discretion because the retirement benefit was awarded to her as part of the equitable distribution scheme. Accordingly, the appellate court reversed; the case was also remanded to the trial court for correction of insufficient factual findings within the final judgment.

<http://opinions.1dca.org/written/opinions2010/03-17-2010/09-3480.pdf> (March 17, 2010).

Castleberry v. Castleberry, __So.3d __, 2010 WL 935566 (Fla. 1st DCA 2010).

TRIAL COURT ERRED IN AWARDING MORE THAN A NOMINAL AMOUNT OF ALIMONY TO FORMER WIFE SINCE IT WAS UNDISPUTED THAT SHE EARNED MORE THAN FORMER HUSBAND.

Trial court reduced, but did not terminate, former husband's alimony obligation. Appellate court agreed with former husband that the trial court had abused its discretion in awarding more than a nominal amount of alimony since it was undisputed that former wife earned more than former husband.

<http://opinions.1dca.org/written/opinions2010/03-17-2010/09-3650.pdf> (March 17, 2010).

Annas v. Annas, __So.3d __, 2010 WL 935578 (Fla. 1st DCA 2010).

TRIAL COURT ERRED IN ASSIGNING TO FORMER WIFE AS PART OF THE EQUITABLE DISTRIBUTION SCHEME MONEY FROM THE COUPLE'S BANK ACCOUNT WHERE NOTHING INDICATED SHE HAD USED THE MONEY FOR ANYTHING OTHER THAN REASONABLE LIVING EXPENSES PENDING RESOLUTION.

Former wife appealed various financial provisions within final judgment of dissolution of marriage. Appellate court held that because nothing in the judgment indicated former wife used the money she withdrew from the couple's bank account for anything other than reasonable living expenses pending resolution of the petition for dissolution, the trial court erred in assigning that money to her as part of the equitable distribution scheme.

<http://opinions.1dca.org/written/opinions2010/03-17-2010/09-3768.pdf> (March 17, 2010).

Collier v. Collier, __So.3d __, 2010 WL 938662 (Fla. 1st DCA 2010).

BECAUSE CHILD HAD LIVED WITH BOTH PARENTS IN NORTH CAROLINA AND WITH HER MOTHER IN WISCONSIN PRIOR TO THE PETITION FOR DISSOLUTION OF MARRIAGE (DOM), FLORIDA WAS NOT HER HOME STATE UNDER UCCJEA.

Former wife appealed portion of the final judgment of dissolution of marriage allowing the couple's minor child to spend the majority of her time with former husband in North Carolina; appellate court reversed. Appellate court held that, because the child had lived with both parents in North Carolina and then in Wisconsin with former wife during the six months before former husband filed his petition for dissolution in Duval County (where he legally resided), Florida was not her home state under the UCCJEA; therefore, the circuit court did not have jurisdiction to make an initial child custody determination.

<http://opinions.1dca.org/written/opinions2010/03-10-2010/09-4639.pdf> (March 10, 2010).

Second District Court of Appeal

Zepeda v. Zepeda, __So.3d __, 2010 WL 1135898 (Fla. 2d DCA 2010).

TRIAL COURT ERRED IN TREATING A TIME-SHARING SCHEDULE PROPOSED BY ONE SPOUSE AS AN AGREEMENT UNDER 61.13001(2), F.S., AND IN BYPASSING CHILD SUPPORT GUIDELINES.

Appellate court reversed a nonfinal order allowing former wife to relocate during dissolution proceedings. Pursuant to section 61.13001(6)(b)(2), Florida Statutes (2008), a trial court may permit temporary relocation if it finds from the evidence a likelihood that relocation would be approved at the final hearing; pursuant to section 61.13001(2), a trial court may ratify a signed,

written agreement between the parties regarding relocation. Appellate court found former wife's proposed time-sharing agreement did not qualify as a written agreement; thus, the trial court's reliance on what it termed "the kitchen table agreement" was misplaced. It was not improper for the trial court to have allowed her to introduce her proposal, but it was improper for the court to have used it for the basis of its relocation decision. Appellate court held that the trial court erred when it did not establish a time-sharing schedule and when it bypassed the child support guidelines in awarding temporary child support; appellate court concluded that for the trial court's order that former wife should receive child support in the amount of the monthly stipend that the child (a member of the Seminole Indian tribe) had received in the past, without taking into account either the parents' incomes or the amount of time the child would spend with her father, was error. Accordingly, the appellate court reversed and remanded. (NOTE: The relocation statute, Section 61.13001, Florida Statutes, was substantially amended in 2009; however, section 61.13001(2) still provides for relocation by agreement.) http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2010/March/March%2026,%202010/2D09-4303.pdf (March 26, 2010).

Zuberer v. Zuberer, __ So.3d __, 2010 WL 844589 (Fla. 2d DCA 2010).

ISSUE OF FEES AND COSTS NOT RIPE FOR APPEAL UNTIL TRIAL COURT DETERMINES AMOUNT.

Appellate court held that former wife's appeal of the trial court's ruling that she was entitled to contribution to her fees and costs was premature; the issue would not be ripe for appeal until the trial court determined the amount.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2010/March/March%2012,%202010/2D09-691rh.pdf (March 12, 2010).

Macarty v. Macarty, __ So.3d __, 2010 WL 785799 (Fla. 2d DCA 2010).

DCA CERTIFIED QUESTION OF WHETHER AN ORDER AWARDING FEES AND LACKING REQUISITE FACTUAL FINDINGS CAN BE ERRONEOUS ON ITS FACE IF NEITHER A TRANSCRIPT NOR A STATEMENT OF THE PROCEEDINGS IS PROVIDED.

In an appeal by former husband of the trial court's order awarding temporary support and attorney's fees to former wife, appellate court affirmed the temporary support because the absence of a transcript prevented former husband from being able to demonstrate reversible error; however, it reversed the award of attorney's fees because that portion of the order was erroneous on its face. Reiterating that an award of attorney's fees without adequate findings justifying the amount is reversible even when appellant provides an inadequate record of the proceedings, the appellate court remanded for the trial court to make the requisite findings of fact. The appellate court then certified the question as to whether an order which awards fees under Fla. Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985), and which lacks the required findings regarding the number of hours expended and the reasonableness of the hourly rate, is erroneous on its face even when neither a transcript nor a statement of the proceedings below is provided.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2010/March/March%2010,%202010/2D09-2918.pdf (March 10, 2010).

Vollmer v. Vollmer, __So.3d __, 2010 WL 743934 (Fla. 2d DCA 2010).

SECTION 61.08, F.S., REQUIRES CONSIDERATION OF ALL AVAILABLE SOURCES OF INCOME.

Appellate court reversed trial court's determination of former wife's income because it was not based on competent, substantial evidence, and instructed the trial court on remand to consider "all sources of income available to either party," pursuant to Section 61.08(2)(g), Florida Statutes. The appellate court cited case law indicating that reconsideration of the parties' income would have a bearing on each party's ability to pay attorney's fees.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2010/March/March%205,%202010/2D08-6319.pdf (March 5, 2010).

Third District Court of Appeal

Campbell v. Campbell, __So.3d __, 2010 WL 1050009 (Fla. 3d DCA 2010).

EQUITABLE DISTRIBUTION OF ASSETS AND LIABILITIES WITHIN BROAD DISCRETION OF TRIAL COURT.

Former wife appealed final judgment of dissolution of marriage, specifically as to the issue of the former couple's line of credit with their bank. Appellate court affirmed for two reasons: one, the absence of either a transcript or record of testimony precluded it from resolving any factual issues below; and two, that the trial court was correct to apportion to former husband over \$100,000 he wrongfully withdrew from the line of credit and then dissipated, instead of to the bank as former wife had argued. The appellate court reiterated that a trial court has broad powers of discretion in fashioning its equitable scheme of distribution.

<http://www.3dca.flcourts.org/Opinions/3D09-0813.pdf> (March 24, 2010).

Greenwald v. Rivkind-Greenwald, __So.3d __, 2010 WL 1049959 (Fla. 3d DCA 2010).

TRIAL COURT ERRED IN AWARDING ATTORNEY'S FEES IN 14-MONTH MARRIAGE.

Appellate court agreed with former husband that attorney's fees assessed against him after a marriage that lasted 14 months could not stand. It held that under Rosen v. Rosen, 696 So.2d 697 (Fla. 1997), the trial court should have denied fees to former wife. Concluding that it "was unable to say" that the trial court had abused its discretion with regard to denial of former husband's request for fees, the appellate court affirmed denial of former husband's motion for fees.

<http://www.3dca.flcourts.org/Opinions/3D08-2999.pdf> (March 24, 2010).

Cordell v. Cordell, __So.3d __, 2010 WL 935789 (Fla. 3d DCA 2010).

GENERAL RULE IS THAT MODIFICATION OF CHILD SUPPORT IS RETROACTIVE TO DATE OF FILING OF THE PETITION TO MODIFY.

Former husband appealed an order denying his exceptions to the general magistrate's report, which the trial court affirmed, regarding retroactive modification of child support. The appellate court noted that generally modification of child support is retroactive only to the date of filing of the petition to modify; it held that date should have been relied on in this case as well, especially since former wife waited over eleven years from entry of the final judgment to request modification.

<http://www.3dca.flcourts.org/Opinions/3D09-1646.pdf> (March 17, 2010).

Fourth District Court of Appeal

McKenna v. McKenna, __So.3d __, 2010 WL (Fla. 4th DCA 2010).

TRIAL COURT ABUSED ITS DISCRETION BY NOT AWARDING CHILD SUPPORT TO BOTH PARENTS WHERE CUSTODY OF THE THREE CHILDREN WAS SPLIT BETWEEN THE TWO PARENTS.

Former husband appealed trial court's calculation of child support, including retroactive child support, where custody of the three minor children was split between the two parents. The trial court awarded child support to former wife for the two younger children who lived with her in Florida, but did not award former husband child support for the oldest child who lived with him in Ohio. Appellate court found trial court had abused its discretion by not awarding child support to both parents.

<http://www.4dca.org/opinions/Mar%202010/03-24-10/4D09-4535.op.pdf> (March 24, 2010).

Levine v. Levine, __So.3d __, 2010 WL 934067 (Fla. 4th DCA 2010).

IF MARITAL HOME BECAME INCOME PRODUCING, SPOUSE COULD REQUEST ALIMONY MODIFICATION.

Brief opinion in which the appellate court found that the trial court had correctly determined that because former wife was living in the marital home with the children, no income could be imputed; however, the appellate court pointed out that, should the home become income-producing in the future, former husband would not be precluded from seeking modification of his alimony obligation.

<http://www.4dca.org/opinions/Mar%202010/03-17-10/4D08-3363.op.pdf> (March 17, 2010).

Cummings v. Cummings, __So.3d __, 2010 WL 937254 (Fla. 4th DCA 2010).

PAYMENTS INTENDED TO BE FOR SUPPORT ARE ENFORCEABLE BY CIVIL CONTEMPT.

Issue was whether remedy of contempt was properly denied on basis that payments required by final judgment were not in the nature of support. According to the trial judge who signed the final judgment, two of the three payments referred to as equitable distribution were intended to be for support; however, the successor judge determined that the payments were not alimony. Appellate court reversed the holding that the payments were not in the nature of support and the denial of the use of contempt as a remedy. Appellate court held that if the "substance of a provision requiring payment is found to be in the nature of support," civil contempt may be used to enforce failure to pay; payments not qualifying as alimony may still be in the nature of support. The appellate court also held that the successor judge's reconsideration of the first determination and his holding that the payments did not constitute support were contrary to the law of the case doctrine. As the appellate court put it: "The issue is settled. The first two payments are support. He has failed to make these payments. Contempt is available to enforce compliance."

<http://www.4dca.org/opinions/Mar%202010/03-10-10/4D08-3250.op.pdf> (March 10, 2010).

Schneider v. Schneider, __ So.3d __, 2010 WL 785814 (Fla. 4th DCA 2010).

ASSESSING FEES PART OF TRIAL COURT'S DUTY TO DIVIDE ASSETS AND LIABILITIES; TRIAL COURT MUST MAKE FINDINGS TO SUBSTANTIATE A FEE AWARD; ABSENCE OF FINDINGS RESULTS IN REVERSAL.

Appellate court held that as a matter of law, awarding fees for fee litigation in a dissolution proceeding falls squarely within the discretion of the trial court; assessing fees is part of the trial court's duty to equitably divide the parties' assets and liabilities. The appellate court reiterated that a trial court must make findings to substantiate a fee award and allow for meaningful review; where such findings are absent, reversal is required, even when the evidence is within the record.

<http://www.4dca.org/opinions/Mar%202010/03-10-10/4D07-2796.op.pdf> (March 10, 2010).

Ginnell v. Pacetti, __ So.3d __ WL 711785 (Fla. 4th 2010).

TRIAL COURT DID NOT ABUSE ITS DISCRETION BUT CONSIDERED CHILD'S BEST INTERESTS.

Former wife appealed an order from the trial court holding her in contempt and modifying a time-sharing schedule, arguing that the trial court had abused its discretion in revising the visitation schedule. In affirming the trial court, the appellate court held that the trial judge's statements and language of the order indicated that he had considered the child's best interests; his conclusion that unsupervised visitation was warranted was not an abuse of discretion.

<http://www.4dca.org/opinions/Mar%202010/03-03-10/4D09-1942.op.pdf> (March 3, 2010).

Fifth District Court of Appeal

Boyle v. Boyle, __ So.3rd __, 2010 WL 979438, (Fla. 5th DCA 2010).

REMANDED TO TRIAL COURT FOR RECONSIDERATION OF EQUITABLE DISTRIBUTION DUE TO SIGNIFICANT DISPARITY; TRIAL COURT ERRED BY NOT CONSIDERING ASSETS AWARDED TO SPOUSE AS POTENTIAL SOURCES OF INCOME FOR ALIMONY FOR OTHER SPOUSE.

Former wife appealed a final judgment dissolving a 25-year marriage, arguing that the trial court had erred in valuing the marital assets and in fashioning its equitable distribution scheme. Although the couple had separated six years prior to the filing of the petition for dissolution of marriage, there was no formal separation agreement. In the absence of any such agreement, the trial court designated the marital assets using the filing date; however, it concluded that the parties had "truly separated" some six years before and adjusted the equitable distribution accordingly. The appellate court held that this was not an abuse of discretion, but noted that, since most of the assets to be distributed were amassed by former husband after the separation, this resulted in a significant disparity. The appellate court held that the trial court had correctly determined that former wife was in need of permanent alimony; however, the appellate court concluded that the trial court had erred in failing to consider the assets it awarded to former husband as potential sources of income. Accordingly, it remanded to the trial court for reconsideration of the scheme for equitable distribution.

<http://www.5dca.org/Opinions/Opin2010/031510/5D09-429.op.pdf> (March 19, 2010).

Nunez v. Nunez, ___ So.3d ___, 2010 WL 838066 (Fla. 5th DCA 2010).

[VALUATION OF BUSINESS INTEREST MUST BE BASED ON COMPETENT, SUBSTANTIAL EVIDENCE.](#)

Former husband appealed final judgment of dissolution of marriage, arguing that the trial court erred in determining the value of his interest in a closely held corporation and in awarding permanent alimony to former wife along with fees. Appellate court agreed, holding that the valuation of former husband's interest was not supported by competent, substantial evidence; accordingly, it remanded for the trial court to reconsider the equitable distribution.

<http://www.5dca.org/Opinions/Opin2010/030810/5D09-939.op.pdf> (March 12, 2010).

Domestic Violence Case Law

Florida Supreme Court

In Re: Amendments To Florida Rule Of Judicial Administration 2.420 and The Florida Rules Of Appellate Procedure, --- So.3d ----, 2010 WL 958075 (Fla. 2010) [RULES AMENDED REGARDING CONFIDENTIALITY OF COURT RECORDS](#). The court amended Rule of Judicial Administration 2.420 and the Rules of Appellate Procedure to provide comprehensive procedures for identifying and segregating confidential information in court records, for sealing and unsealing court records, and for reviewing orders issued under the rule. The revisions clarified that those records defined in the rules are confidential and may not be released except as provided, including the provision that keeps the petitioner's address confidential in domestic violence cases. <http://www.floridasupremecourt.org/decisions/2010/sc07-2050.pdf> (March 18, 2010).

First District Court of Appeal

No new opinions for this reporting period.

Second District Court of Appeal

No new opinions for this reporting period.

Third District Court of Appeal

No new opinions for this reporting period.

Fourth District Court of Appeal

Malchan v. Howard, --- So.3d ----, 2010 WL 787800 (Fla. 4th DCA 2010) [INJUNCTION MUST BE VACATED](#). The respondent appealed an injunction entered against him for protection against domestic violence because the injunction was based on a disputed event that occurred three years prior. The petitioner alleged that in 2005, the respondent punched a wall in their home, pushed the petitioner into a wall, tried to choke her, and told her that he was going to kill her. There were no allegations of recent violence or threats of violence. The trial court granted the injunction and ordered the respondent to attend a thirteen-week anger management program. The appellate court noted that an order imposing a permanent injunction will be affirmed absent a showing of abuse of discretion; however, the court reversed the trial court because

the petitioner failed to present sufficient evidence that she had a reasonable fear of imminent danger of domestic violence. Her only basis for requesting the injunction was a disputed incident that occurred three years before and a subjective fear that her anticipated request for child support might cause the respondent to become angry. The petitioner never alleged any recent violence or threats of violence. The appellate court also recognized that the respondent's current behavior consisted of civility between the parties in determining visitation and child support issues. Therefore, the facts did not support an objective reasonable fear of imminent violence. The appellate court reversed and remanded the case to the trial court to vacate the injunction. <http://www.4dca.org/opinions/Mar%202010/03-10-10/4D08-3584.op.pdf> (March 10, 2010).

Colarusso v. Lupetin, --- So.3d ----, 2010 WL 711745 (Fla. 4th DCA 2010) [MOTION TO DISSOLVE A DOMESTIC VIOLENCE INJUNCTION REQUIRED A HEARING.](#)

The trial court denied appellant's motion to dissolve a permanent injunction for domestic violence entered in January 2005 in favor of his then girlfriend. The appellate court reversed because the summary denial of a motion to vacate a protective injunction violated due process requirements. The court also noted that case law has not clearly set forth the applicable legal standard for determining whether a domestic violence injunction should be vacated or modified. Some cases seem to require the movant to allege and prove a change in circumstances. However, other cases have focused on the "at any time" language in the statutory text, finding that the trial court should have held an evidentiary hearing to allow the movant to present evidence regarding the initial procurement of the injunction. In this particular case, the trial court gave no reasons for its summary denial. Even assuming that appellant was required to allege a change in circumstances in order to state a legally sufficient motion, appellant alleged in his motion that there was a change in circumstances because the injunction has served its purpose; he had not attempted to contact his ex-girlfriend for years; he was incarcerated on unrelated charges; and the injunction was impacting his ability to participate in certain prison work programs. Because appellant's motion was legally sufficient, the trial court should have afforded appellant a meaningful opportunity to be heard rather than summarily denying his motion. <http://www.4dca.org/opinions/Mar%202010/03-10-10/4D08-4152.op.pdf> (March 3, 2010).

Fifth District Court of Appeal

No new opinions for this reporting period.