

OSCA/OCI'S FAMILY COURT CASE LAW UPDATE
March 2011

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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

No new opinions for this reporting period.

Third District Court of Appeal

T.J. v. State, __ So. 3d __, 2011 WL 1135549 (Fla. 3d DCA 2011). [THE TRIAL COURT'S FAILURE TO MAKE AN ADEQUATE INQUIRY FOR A DISCOVERY VIOLATION WAS NOT HARMLESS ERROR](#). The juvenile was charged with burglary of an unoccupied dwelling, third degree grand theft, and criminal mischief. On the morning of the adjudicatory hearing, the State listed two new witnesses: the crime scene investigator, and the latent fingerprint analyst and expert witness. The defense objected to their classification as "B" witnesses and to the late submission of them as witnesses. The trial court agreed with the State's classification of them as "B" witnesses and allowed them to testify. The juvenile was adjudicated delinquent. The State admitted that the late submission of the two testifying witnesses was error but argued that the error was harmless because the defense had the names of both witnesses in a supplemental discovery report. The Third District Court of Appeal found that the State's failure to strictly comply with Florida Rule of Juvenile Procedure 8.060(a)(2) was not harmless, as these witnesses were key State witnesses with direct and relevant knowledge of the investigation. Furthermore, the appellate court found that both of the witnesses should have been classified as "A" witnesses. The rule's strict requirement of listing the names of "A" witnesses is not satisfied by having the names included in reports, as was argued by the State. As "A" witnesses, the defense was entitled to take their depositions. When a discovery violation occurs, the trial court is required to hold a Richardson v. State, 246 So. 2d at 771 (Fla. 1971), inquiry. In this case, the trial court failed to hold an adequate Richardson inquiry upon the State's admittedly late disclosure of the two witnesses on the day of the adjudicatory hearing. The court failed to inquire whether the discovery violation was willful or inadvertent, whether it was substantial or trivial, and whether the violation had a prejudicial effect on the defense's trial preparation. As a result, the appellate court could not say that, beyond a reasonable doubt, no prejudice to the defense resulted from this discovery violation. Therefore, the trial court's failure to make an adequate inquiry for a discovery violation was not harmless error. The adjudication was reversed and remanded for further proceedings consistent with this opinion.

<http://www.3dca.flcourts.org/Opinions/3D10-0461.pdf> (March 30, 2011).

D.O. v. State, __ So. 3d __, 2011 WL 799741 (Fla. 3d DCA 2011). **THE TRIAL COURT PREMATURELY DISMISSED THE DELINQUENCY PETITION ON SPEEDY TRIAL GROUNDS.** The State appealed from an order dismissing its delinquency petition on speedy trial grounds. The juvenile was arrested on August 3, 2009, and charged with possession of marijuana with intent to sell. On November 3, 2009, the juvenile moved to discharge the petition, arguing that the State had allowed the ninety-day speedy trial period to expire. On November 6, the trial court held a hearing on the motion and set an adjudicatory hearing date for November 18, 2009. On November 18, 2009, the trial court was presented with two motions: (1) the State moved to extend the speedy trial period because the lead detective was injured and not available; and (2) the juvenile moved to dismiss the petition for delinquency. The juvenile argued that under Florida Rule of Juvenile Procedure 8.090(m)(3), because no hearing was held within ten days of the hearing on the motion for discharge, the State's motion was untimely, requiring a discharge of the petition. Without ruling on the State's motion to extend, the trial court granted the juvenile's motion and dismissed the petition. On appeal, the juvenile conceded that a violation of the five-day and ten-day periods provided in rule 8.090(m)(3) is harmless if a respondent is brought to an adjudicatory hearing within fifteen days of the filing of his motion for discharge. Further, the juvenile conceded that the trial court's dismissal of the State's petition was premature where the trial court had not yet ruled on the State's motion to extend the speedy trial period, and the fifteen-day window had not yet elapsed. Despite the confession of error, the juvenile argued that the dismissal should be affirmed because the State could not demonstrate exceptional circumstances for the extension of the speedy trial period under rule 8.090(f)(2). The Third District Court of Appeal held that a ruling on a motion to extend the speedy trial period involved a factual determination to be resolved by the trial court and not the Third District. Therefore, the trial court prematurely dismissed the State's petition. The order of dismissal was reversed and remanded. On remand, the State had ninety days from the date of the issuance of the mandate to bring the juvenile to an adjudicatory hearing per Florida Rule of Juvenile Procedure 8.090(j).

<http://www.3dca.flcourts.org/Opinions/3D09-3206.pdf> (March 9, 2011).

S.F. v. State, __ So. 3d __, 2011 WL 799745 (Fla. 3d DCA 2011). **COURT COSTS WERE REVERSED WHERE THEY DID NOT APPLY TO JUVENILE WITHHOLDS OF ADJUDICATION.** The juvenile was found to have committed a simple battery but the adjudication was withheld. The delinquency finding was upheld. However, the Third District Court of Appeal held that several of the court costs should be stricken. The \$20 crimes prevention program cost pursuant to s. 775.083(2), F.S. (2009), does not apply to juvenile withholds of adjudication. On the same ground, neither the \$65 additional court cost nor the \$85 temporary criminal surcharge authorized by s. 939.185(1)(a)-(b), F.S. (2009), may be assessed. The \$3 teen court fee imposed pursuant to s. 938.19, F.S. (2009), also failed because Miami-Dade County had not, as section 938.19 required, specifically elected to apply the cost to delinquencies.

<http://www.3dca.flcourts.org/Opinions/3D09-3463.pdf> (March 9, 2011).

K.S.H. v. State, __ So. 3d __, 2011 WL 804031 (Fla. 3d DCA 2011). **DENIAL OF JUDGMENT FOR DISMISSAL WAS AFFIRMED WHERE COMPETENT, SUBSTANTIAL EVIDENCE WAS PRESENTED TO REBUT THE CLAIM OF DEFENSE OF OTHERS, AND PROVED BEYOND A REASONABLE DOUBT THAT THE JUVENILE HAD COMMITTED MISDEMEANOR BATTERY.** The juvenile was found to have committed a misdemeanor battery. It was undisputed that the juvenile struck the victim. However, the juvenile asserted he was justified in using force in the defense of his sister. The juvenile argued that the trial court erred in denying his motion for dismissal because the State failed to adequately rebut the evidence of his defense of others defense. The Third District Court of Appeal found that once the defense produces evidence supporting a claim of defense of others, the State was required to rebut this defense by proving beyond a reasonable doubt that the actions were not taken in justifiable defense of another. If the State fails to produce legally sufficient evidence to rebut the prima facie evidence of defense of others, the court must grant a motion for judgment of dismissal. For the defense of others defense, the fact finder must determine whether the use of any force was justified under the circumstances, and, if so, whether the amount of force used was justified under the circumstances. In the instant case, a police officer testified that when the juvenile was questioned about his swollen hand, the juvenile acknowledged that he hit the victim. A teacher, who witnessed the incident, testified that the juvenile threw a “running punch,” striking the victim in the eye. The teacher also testified that before the juvenile began running at the victim, she had already put her arms down, was not shouting, and was not moving. Further, the victim and the juvenile’s sister were more than thirty feet apart when the victim was punched. The Third District held that this evidence, if believed, certainly would support a finding that, under the circumstances, the juvenile used excessive force in defense of his sister. Further, the trial court could reasonably have concluded that the State established beyond a reasonable doubt that, under the circumstances, the juvenile was not justified in the use of any force. Thus, the State presented competent, substantial evidence to rebut the claim of defense of others, and proved beyond a reasonable doubt that the juvenile had committed misdemeanor battery. Accordingly, the denial of the motion for judgment of dismissal was affirmed.
<http://www.3dca.flcourts.org/Opinions/3D10-1409.pdf> (March 9, 2011).

Fourth District Court of Appeal

R.H. v. State, __ So. 3d __, 2011 WL 1004582 (Fla. 4th DCA 2011). **ADJUDICATION REVERSED BECAUSE THE STATUTE EXEMPTS THE POSSESSION OF A “COMMON POCKETKNIFE” FROM THE DEFINITION OF A WEAPON THAT MAY NOT BE POSSESSED ON SCHOOL PROPERTY.** The juvenile was charged with violating s. 790.115(2), F.S. (2009), by possessing a common pocketknife on school property. The juvenile moved for a judgment of dismissal under Florida Rule of Juvenile Procedure 8.110(k). The trial court denied the motion. The juvenile was adjudicated delinquent and this appeal followed. The Fourth District Court of Appeal found that the juvenile could not be adjudicated delinquent for this crime, since s. 790.001(13), F.S. (2009), exempted possession of a “common pocketknife” from the definition of a weapon that may not be possessed on school property. Section 790.115(2), F.S. (2009), specifically prohibits *inter alia* the possession of a weapon as defined by section 790.001(13), F.S. (2009), on school premises. Section 790.001(13), F.S. (2009), specifically excludes “a common pocketknife” as a weapon. In the

instant case, the trial court correctly found that the knife with a three-and-a-quarter inch blade was a “common pocketknife.” Therefore, the juvenile’s possession of the pocketknife did not violate the statute in question. Accordingly, the adjudication was reversed and remanded for entry of a judgment of dismissal. <http://www.4dca.org/opinions/Mar%202011/03-23-11/4D10-3503.op.pdf> (March 23, 2011).

R.D.H. v. State, __ So. 3d __, 2011 WL 890951 (Fla. 4th DCA 2011). **ADJUDICATION AFFIRMED BECAUSE ANY SEQUESTRATION OF JUVENILE’S MOTHER WAS FOUND TO BE HARMLESS ERROR.** The juvenile was charged with resisting or obstructing two officers without violence. Before trial, over defense counsel's objection, the trial court granted the State's request to sequester appellant's mother (a state witness) with the other witnesses, prior to her testimony. The juvenile argued on appeal that the trial court abused its discretion in sequestering his mother. The Third District Court of Appeal found that the mother was not excluded from the courtroom during any portion of the prosecution's case, and was absent only during counsels' brief argument on a pretrial motion. Any error was harmless. The State called the mother for the sole purpose of establishing jurisdiction based on the juvenile’s age. She was called as the State's first witness, and was expressly told by the trial court that she could stay in the courtroom after her testimony. She was absent only during counsels' brief argument on a motion to discharge based on the running of the speedy trial period. The remaining claims on appeal were found to be without merit and affirmed without comment. <http://www.4dca.org/opinions/Mar%202011/03-16-11/4D10-241.op.pdf> (March 16, 2011).

Fifth District Court of Appeal

J.L. v. State, __ So. 3d __, 2011 WL 1079074 (Fla. 5th DCA 2011). **PROPERTY LEANING AGAINST THE SIDE OF THE VICTIM'S HOUSE WERE NOT IN THE “CURTILAGE” OF THE HOUSE WITHIN MEANING OF BURGLARY STATUTE.** The juvenile was found guilty of burglary of a dwelling and petit theft. The juvenile appealed the trial court's denial of his motion for judgment of dismissal as to the burglary count. The juvenile argued that the State failed to prove that the yard from which the property was taken was sufficiently enclosed so as to constitute a curtilage of the victim's house. The juvenile stole a go-cart, a four-wheeler, and a skateboard from the victim's yard. There was no contention or evidence that the juvenile entered the house in which the victim resided. The items were leaning against the side of the victim's residence. The Fifth District Court of Appeal found that the Florida statutes do not provide a definition for the word “curtilage.” However, in State v. Hamilton, 660 So. 2d 1038 (Fla. 1995), the Florida Supreme Court determined that there must be “some form of an enclosure” in order for the area surrounding a residence to be considered part of the curtilage as referenced in the burglary statute. The entire extent of the testimony regarding the “enclosure” of the victim's yard came from the victim's mother. She testified that there was a fence “in the back” and a fence “between ... my house and my neighbor's house.” There was no testimony as to the distance of these fences from the house, whether the two fences connected to each other, or even whether there was a fence on the side of the house from which the victim's personal property was taken. The State suggested that curtilage necessarily includes an item that touches (but is not attached to) the house. The Fifth District held that items leaning against the side of the

victim's house were not in the “curtilage” within the meaning of burglary statute. The Fifth District further held that while the State's evidence was insufficient to prove a burglary, it was sufficient to prove the lesser included offense of trespass. Accordingly, the Fifth District reversed the judgment for burglary of a dwelling and remanded with instructions to enter judgment on the offense of trespass. <http://www.5dca.org/Opinions/Opin2011/032111/5D10-1907.op.pdf> (March 25, 2011).

Dependency Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

No new opinions for this reporting period.

Second District Court of Appeal

Statewide Guardian Ad Litem Office v. Office Of The State Attorney Twentieth Judicial Circuit, -- So. 3d ----, 2011 WL 923945 (Fla. 2d DCA 2011). **COURT CANNOT COMPEL THE GUARDIAN AD LITEM TO SERVE.** The Statewide Guardian ad Litem Office (Statewide GAL) sought certiorari review of numerous orders denying motions to discharge the Guardian ad Litem Program from serving as guardians ad litem in certain criminal proceedings. Reluctantly, the appellate court ruled that the circuit court has no authority to compel the relatively new Statewide GAL, which is not a program of the judicial branch but rather of the executive branch, to provide guardians in those cases. The circuit court has authority to appoint guardians ad litem or other advocates for children in these cases, but it cannot compel the Statewide GAL to serve in that capacity. Because the circuit court departed from the essential requirements of the law in a manner that could not be remedied on direct appeal, the appellate court granted the petition for writ of certiorari and quashed the orders appointing the Statewide GAL as guardians ad litem in those cases.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/March/March%2018,%202011/2D10-3642.pdf (March 18, 2011).

Third District Court of Appeal

No new opinions for this reporting period.

Fourth District Court of Appeal

E.B. v. Department Of Children & Families, --- So. 3d ----, 2011 WL 798657 (Fla. 4th DCA 2011). **RULE VIOLATION.** A father appealed a supplemental order entered after the child was adjudicated dependent, and argued that the trial court's order failed to comply with Florida Rule of Juvenile Procedure 8.332 because it did not state with specificity the facts upon which the finding of dependency was based nor the requisite legal conclusions. The Department of Children and Families confessed error and the appellate court reversed since the order did not

comply with the rule. <http://www.4dca.org/opinions/Mar%202011/03-09-11/4D10-2721.op.pdf> (March 9, 2011).

Fifth District Court of Appeal

No new opinions for this reporting period.

Dissolution Case Law

Florida Supreme Court

Kaaa v. Kaaa, __ So. 3d __, 2011 WL 3782031 (Fla. 2011).

WHEN MARITAL FUNDS ARE USED TO PAY THE MORTGAGE ON A MARITAL HOME THAT IS NONMARITAL REAL PROPERTY, THE VALUE OF THE PASSIVE APPRECIATION OF THE PROPERTY DURING THE MARRIAGE IS A MARITAL ASSET.

The Second DCA certified that its decision in Kaaa v. Kaaa, 9 So. 3d 756 (Fla. 2d DCA 2009), was in direct conflict with the First DCA's decision in Stevens v. Stevens, 651 So. 2d 1306 (Fla. 1st DCA 1995). The question before the Court was whether and under what circumstances the passive appreciation of a marital home that is deemed nonmarital real property is subject to equitable distribution under Section 61.075(5)(a)(2), Florida Statutes. The Supreme Court concluded that, "contingent upon certain findings of fact by the trial court, passive appreciation of the marital home that accrues during the marriage is subject to equitable distribution even though the home itself is a nonmarital asset." Accordingly, the Court quashed the Second DCA's decision in Kaaa, approved the First DCA's decision in Stevens to the extent that the decision was consistent with its opinion. The marital home in question was purchased by former husband six months before a 27-year marriage to former wife. Although it was refinanced on a number of occasions, no interest in the home was conveyed to former wife. The trial court ruled that she was only entitled to equitable distribution of the enhancement value of the home; on appeal she argued that she was entitled to the value of passive appreciation of the home accruing during the marriage. The Court held that when marital funds are used to pay the mortgage on a marital home which is nonmarital real property, the value of the passive market-driven appreciation of the property accruing during the marriage is a marital asset subject to equitable distribution.

<http://www.floridasupremecourt.org/decisions/2011/sc09-967.pdf> (March 31, 2011).

First District Court of Appeal

Wagner v. Wagner, __ So. 3d __, 2011 WL 1167209 (Fla. 1st DCA 2011).

UNEQUAL DISTRIBUTION OF ASSETS BY TRIAL COURT REQUIRES EXPLANATION.

Former husband appealed the final judgment of dissolution of marriage, arguing trial court error on several grounds. With the exception of one issue, which was reversed and remanded, and a second which was remanded, the appellate court affirmed the trial court's judgment. The appellate court found that the trial court had erred in failing to identify and include a valuation of the marital home furnishings; therefore, this issue was reversed and remanded for the trial court to make the requisite findings. Noting that the trial court unequally distributed the non-partnership assets in favor of former wife without explanation, the appellate court

remanded this issue for the trial court to clarify whether it intended to provide an unequal distribution in former wife's favor. The appellate court instructed that if this unequal distribution was not intended, then the trial court should clarify that it was distributing the assets equally; however, if unequal distribution was intended, then the trial court should make the requisite findings to support that distribution.

<http://opinions.1dca.org/written/opinions2011/03-31-2011/10-4378.pdf> (March 31, 2011).

Doran v. Doran, __ So. 3d __, 2011 WL 1108800 (Fla. 1st DCA 2011).

FINAL JUDGMENT NOT ACTUALLY FINAL IF COURT RESERVES JURISDICTION.

Concluding that the amended final judgment of dissolution of marriage was not actually a final order due to the trial court having reserved jurisdiction over the issue of child support, the appellate court dismissed the appeal as premature.

<http://opinions.1dca.org/written/opinions2011/03-28-2011/10-6841.pdf> (March 28, 2011).

Furr v. Furr, __ So. 3d __, 2011 WL 9855279 (Fla. 1st DCA 2011).

FAILURE TO SEEK REHEARING MAY RESULT IN FAILURE TO PRESERVE ISSUE.

This was a short opinion in which the appellate court held that former husband had: 1) failed to preserve issues pertaining to a final judgment of dissolution of marriage for appellate review through either a motion for rehearing or other post-judgment filing; and 2) failed to demonstrate reversible error by the trial court. Accordingly, the appellate court affirmed.

<http://opinions.1dca.org/written/opinions2011/03-22-2011/10-4610.pdf> (March 22, 2011).

Second District Court of Appeal

Orloff v. Orloff, __ So. 3d __, 2011 WL 1136434 (Fla. 2d DCA 2011).

BUSINESS FOUNDED BY SPOUSE PRIOR TO MARRIAGE IS NONMARITAL; CONVEYANCE OF STOCK FROM THAT BUSINESS INTO A GRAT ALSO NONMARITAL; ENHANCEMENT OF THE VALUE OF THE BUSINESS DUE TO MARITAL FUNDS OR LABOR IS MARITAL; SHARES IN LIMITED FAMILY PARTNERSHIP ACQUIRED PRIOR TO MARRIAGE ARE NONMARITAL.

In this appeal by former husband to the final judgment of dissolution of marriage, the bone of contention between the parties was former husband's mail order business, which he had founded prior to the marriage. At the time of their marriage former husband was the sole stockholder of the business; former wife became employed by the business. The trial court had found that the business was the significant marital asset; however, appellate court concluded that this finding was erroneous because the business was nonmarital. The appellate court found that the trial court had also erred in classifying as marital 60% share of the stock of the mail order business which had been conveyed into a Grantor Retained Annuity Trust (GRAT). The appellate court reasoned that, because the mail order business was nonmarital, the percentage of it conveyed to the GRAT was nonmarital as well; former wife would receive the 20% share of stock in the mail order business conveyed to her by former husband during the marriage. The appellate court concluded that the trial court had also erred by classifying former husband's share in a limited family partnership, created with assets of former husband's family and controlled by his father, as a marital asset because former husband had acquired it prior to the marriage. The appellate court stated that any enhancement in value of the mail

order business since the date of the marriage due to contribution of marital funds or labor by either former husband or former wife should be considered a marital asset. The appellate court reversed and remanded, instructing the trial court to recalculate the scheme of equitable distribution and reconsider alimony in light of that recalculation.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/March/March%2030,%202011/2D09-3059.pdf (March 30, 2011).

Moree v. Moree, __ So. 3d __, 2011 WL 904577 (Fla. 2d DCA 2011).

MARITAL AGREEMENT MAY BE SET ASIDE IF IT IS ENTERED INTO AS A RESULT OF MUTUAL MISTAKE, COERCION, OR DURESS; ISSUE OF MUTUAL MISTAKE IS A FACTUAL ONE WITH BURDEN OF PROOF ON PARTY SEEKING TO SET MSA ASIDE.

Former husband appealed the final judgment in the dissolution of a 32-year marriage, into which a marital settlement agreement (MSA) had been incorporated. The appellate court affirmed the dissolution but reversed the trial court's ruling denying former husband's motion to either set aside or reform the MSA due to errors within it which adversely affected him financially. Concluding that former husband's motion had adequately alleged a claim for relief based on mutual mistake, appellate court held that the trial court had erred in denying his motion as facially insufficient. The appellate court reiterated that an MSA may be set aside when it is entered into as a result of mutual mistake, coercion, or duress; the issue of mutual mistake is a factual one to be resolved based on the evidence, with the burden of proof on the party seeking to set it aside on that basis.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/March/March%2016,%202011/2D09-5018.pdf (March 16, 2011).

Third District Court of Appeal

Castillo v. Castillo, __ So. 3d __, 2011 WL 1007377 (Fla. 3d DCA 2011).

TRIAL COURT HAS BROAD DISCRETION ON CERTAIN ISSUES IN DISSOLUTION PROCEEDINGS; RULINGS OF TRIAL JUDGE SHOULD ONLY BE DISTURBED ON APPEAL IF THEY FAIL TO SATISFY THE REASONABLENESS TEST.

Former husband appealed the final judgment of dissolution of marriage, arguing trial court error on numerous grounds. Recognizing the broad discretion of a trial court in dissolution proceedings on issues such as alimony and child support, valuation of assets, and equitable distribution, the appellate court stated that it could reverse on appeal only if no reasonable judge could have reached the same decision. The appellate court held that the discretionary ruling of the trial judge should be disturbed only when his or her decision fails to satisfy this test of reasonableness. Concluding that there was support in the record for each of the trial court's decisions and no abuse of discretion was demonstrated, the appellate court affirmed the judgment.

<http://www.3dca.org/Opinions/3D09-2741.pdf> (March 23, 2011).

Hill v. Hill, __ So. 3d __, 2011 WL 710169 (Fla. 3d DCA 2011).

TRIAL COURT CANNOT RESERVE JURISDICTION FOR FUTURE DETERMINATION OF NEED AND ENTITLEMENT TO ALIMONY WITHOUT MAKING STATUTORILY REQUIRED FINDINGS AND AWARDING AT LEAST NOMINAL ALIMONY.

Trial court entered a final judgment of dissolution of marriage in 1990, reserving ruling on the issue of alimony until the issue could be reassessed upon former husband's retirement. In 2008, the trial court entered its initial alimony award which former husband appealed. The appellate court held that the reservation of jurisdiction in 1990 contravened Section 61.08(1), Florida Statutes, and accordingly, reversed the 2008 determination of alimony. Stating that the plain language of that section authorizes a trial court to award alimony after considering all relevant economic factors, the appellate court found that the 1990 trial court failed in that duty and was without authority to reserve jurisdiction. The appellate court held that a trial court cannot reserve jurisdiction for a future determination of need and entitlement to alimony without making the statutorily required findings and awarding at least a nominal amount of alimony. The appellate court concluded that because the 1990 trial court had failed to make the required findings and failed to preserve jurisdiction, the 2008 trial court could not assume jurisdiction. Reversed and remanded.

<http://www.3dca.flcourts.org/Opinions/3D09-0590.pdf> (March 2, 2011).

Valdes v. Valdes, __ So. 3d __, 2011 WL 710171 (Fla. 3d DCA 2011).

APPEAL FROM ORDERS ENTERED ON REMAND FOR DETERMINATION AND DISTRIBUTION OF ENHANCEMENT OF NONMARITAL ASSETS; TRIAL COURT ERRED IN ADMITTING INACCURATE AND IMPROPER SUMMARY OF ASSETS.

On appeal for consideration of orders entered on remand for purposes of determining and distributing enhanced value of former husband's nonmarital property. In Valdes v. Valdes, 894 So. 2d 264 (Fla. 3d DCA 2005), the appellate court had agreed with the trial court that, although former wife had waived any interest in former husband's nonmarital property in the prenuptial agreement, she had not waived the enhancement; however, the appellate court had reversed the trial court's distribution because the enhanced value lacked evidentiary support. Although the trial court had ruled that only evidence considered at the 2001 dissolution final hearing would be considered in determining the enhanced value of former husband's nonmarital assets, it relied on a detailed summary, prepared by former husband's bookkeeper several years after the final hearing, to include assets omitted from documents considered during the final hearing. The appellate court held that this summary was improperly admitted and also inaccurate; accordingly, it remanded for the trial court to recalculate the enhanced value of the omitted assets and the assets previously valued on remand and to give its reasons for any unequal distribution of the enhancement.

<http://www.3dca.flcourts.org/Opinions/3D09-1291.pdf> (March 2, 2011).

Roth v. Cortina, __ So. 3d __, 2011 WL 710145 (Fla. 3d DCA 2011).

TRIAL COURT MUST EQUITABLY DISTRIBUTE ASSETS BEFORE DETERMINING WHETHER ALIMONY SHOULD BE AWARDED; IN ABSENCE OF SHOWING SPOUSE CANNOT REPRESENT HIMSELF, COUNSEL CAN WITHDRAW.

Appeals by both former spouses and former husband's attorney to three post-dissolution trial court orders; the appellate court reversed and remanded all three. Upon dissolving the marriage in 2007, the trial court retained jurisdiction over all issues of alimony and distribution of property. In 2009, the trial court awarded former husband permanent periodic alimony; three months later, in response to a motion for rehearing, it distributed the assets and modified the alimony award. The appellate court reversed the 2009 orders, holding that Section 61.075(9), Florida Statutes, requires a trial court to equitably distribute the assets before determining whether alimony should be awarded. The appellate court concluded that neither of the 2009 orders regarding alimony or distribution contained the required findings. Noting that the trial court had deferred consideration of the fee award until the economy improved, the appellate court reiterated that fee awards are best set at the time of the final judgment. The appellate court also reversed the trial court's denial of former husband's counsel's motion to withdraw, finding that there was no showing that former husband was not mentally competent or able to represent himself at any point during the proceedings.
<http://www.3dca.flcourts.org/Opinions/3D10-1983.pdf> (March 2, 2011).

Fourth District Court of Appeal

Lampert v. Lampert, __ So. 3d __, 2011 WL 1135547 (Fla. 4th DCA 2011).

GENERAL MAGISTRATE CORRECTLY CONCLUDED AGREEMENT BETWEEN SPOUSES WAS VALID AS TO DISTRIBUTION BUT VOID AS TO CHILD SUPPORT.

The former spouses entered into an agreement, following former husband's cessation in payment of child support and a promissory note, that former wife would accept a discounted balance on the note owed by former husband on distribution of their assets in exchange for cash and real estate. The general magistrate found the agreement was valid regarding the distribution issues but void as to the child support issues, and determined the amount of the child support arrearage. The appellate court held that the trial court properly ratified the general magistrate's conclusion that the contract entered into by the former spouses was void as to the child support provision; however, it reversed the portion of the order in which the trial court reached a different determination and remanded for ratification of the general magistrate's report.

<http://www.4dca.org/opinions/Mar%202011/03-30-11/4D10-2058.op.pdf> (March 30, 2011).

Laussermair v. Laussermair, __ So. 3d __, 2011 WL 710178 (Fla. 4th DCA 2011).

TRIAL COURT CANNOT GO BEYOND FOUR CORNERS OF PETITION.

The appellate court affirmed the trial court's ruling that a provision in a marital settlement agreement that was incorporated into the final judgment of dissolution and required former husband pay a specific amount into a college educational fund was not against public policy. Concluding that the trial court had gone beyond the four corners of the petition in considering former wife's claim that an increase in former husband's income since the final judgment had led to a substantial change in circumstances, the appellate court reversed the dismissal of her petition for modification. The trial court's dismissal was based in part upon representations by former husband's counsel that former husband was unemployed; the trial court had termed

former wife's allegations regarding former husband's changed earnings "speculative" in the wake of his counsel's representations that former husband was unemployed.

<http://www.4dca.org/opinions/Mar%202011/03-02-11/4D09-4823.op.pdf> (March 2, 2011).

Powell v. Powell, __So. 3d__, 2011 WL 710182 (Fla. 4th DCA 2011).

SPOUSE CANNOT BE HELD IN CONTEMPT FOR FAILURE TO PAY ATTORNEY'S FEES IF TRIAL COURT DOES NOT MAKE REQUIRED FINDINGS IN SETTING AWARD.

Former husband appealed the final judgment of dissolution of marriage, arguing that the trial court had abused its discretion by awarding former wife a portion of her attorney's fees and granting her motion for contempt without having made the required findings concerning reasonableness. The appellate court reiterated that a trial court must set forth specific findings concerning the hourly rate and number of hours reasonably expended; an award of attorney's fees without adequate findings justifying the amount of the award is reversible. The appellate court concluded that as the final judgment lacked the required findings, the fee award was improper; thus, former husband could not be held in contempt for failing to pay the award.

<http://www.4dca.org/opinions/Mar%202011/03-02-11/4D09-4888.op.pdf> (March 2, 2011).

Fifth District Court of Appeal

David v. David, __So. 3d__, 2011 WL 1078786 (Fla. 5th DCA 2011).

WRITTEN FINAL JUDGMENT NOT INCONSISTENT WITH TRIAL COURT'S ORAL RULINGS; TRIAL COURT ABUSED ITS DISCRETION IN UNEQUALLY DIVIDING MARITAL CREDIT CARD DEBT SOLELY ON BASIS OF PARTIES' RELATIVE INCOMES AND IN REQUIRING SPOUSE TO OBTAIN LIFE INSURANCE TO SECURE OBLIGATIONS IN ABSENCE OF SUPPORT FOR REQUIREMENT IN THE RECORD; TRIAL COURT ERRED IN AWARDING SPOUSE SPECIAL EQUITY IN MARITAL HOME.

Former husband appealed the final judgment of dissolution of marriage on numerous grounds. Finding the final judgment to be not inconsistent with the trial judge's oral rulings, the appellate court found no reversible error. With regard to former husband's argument that the trial court erred in failing to include sufficient findings of fact in the final judgment, the appellate court held that by failing to file a motion for rehearing, former husband failed to preserve this issue for appellate review. The appellate court agreed with former husband that the trial court abused its discretion in unequally dividing the marital credit card debt based solely on the parties' relative incomes. The appellate court also agreed that the trial court had erred in granting former wife a special equity interest in the marital home, since the home was jointly titled and thus presumed marital. The appellate court agreed with former husband that the trial court abused its discretion in requiring him to obtain life insurance to secure his alimony obligation, as nothing in the record supported this requirement. On remand, the trial court was instructed to reconsider the distribution of the credit card debt, to remove the special equity granted to former wife, and to remove the life insurance requirement.

<http://www.5dca.org/Opinions/Opin2011/032111/5D09-4126.op.pdf> (March 25, 2011).

Arcot v. Balaraman, __So. 3d__, 2011 WL 917526 (Fla. 5th DCA, March 18, 2011).

TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO ORDER ALTERNATE WEEKEND VISITATION AS PROVIDED IN THE FINAL JUDGMENT.

Former husband appealed an order denying his motion to clarify an amended final judgment of dissolution of marriage with regard to summer visitation with the couple's minor child. The appellate court concluded that the trial court abused its discretion by failing to order alternate weekend visitation during the summer months as provided in the amended final judgment; the appellate court disagreed with the trial court's narrow reading of an alternate provision within the judgment, that former husband would have the child two consecutive weeks during the summer, to mean that former husband would only have those two weeks. The appellate court noted that the amended final judgment was crafted to afford each parent frequent and continuing contact with the minor child in accordance with Section 61.13(2)(c)(1), Florida Statutes.

<http://www.5dca.org/Opinions/Opin2011/031411/5D10-988.op.pdf> (March 18, 2011).

Hernandez v. Hernandez, __ So. 3d __, 2011 WL 830550 (Fla. 5th DCA 2011).

TRIAL COURT FAILED TO MAKE REQUIRED FINDINGS.

Former husband appealed the final judgment of dissolution of marriage, arguing: the total amount of payments he was required to make exceeded his monthly net income; the trial court erred in awarding rehabilitative alimony to former wife; and the trial court had failed to award him any credit or setoffs for mortgage payments made prior to the sale of the marital home. Noting that former husband had agreed to pay child support and, in the absence of any findings regarding his monthly income, the appellate court affirmed on that issue; however, the appellate court reversed on the issues of rehabilitative alimony and credit for mortgage payments due to the trial court's failure to make the required findings. On remand, the trial court was instructed to determine the amount of former husband's net monthly income along with his ability to pay the mortgage and debt obligations, and to determine whether he was entitled to credits or setoffs for payments on the marital home in accordance with Section 61.077, Florida Statutes. <http://www.5dca.org/Opinions/Opin2011/030711/5D09-1632.op.pdf> (March 11, 2011).

Fischer v. Fischer, __ So. 3d __, 2011 WL 7433431 (Fla. 5th DCA 2011).

TRIAL COURT'S FINDINGS ON IMPUTATION OF INCOME FOR CALCULATION OF CHILD SUPPORT WERE SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE.

Former husband appealed the final judgment of dissolution of marriage with regard to the amount of income it imputed to him for purposes of calculating child support. Concluding that the trial court's findings were supported by competent, substantial evidence and that it had not erred in the imputation of income, the appellate court affirmed.

<http://www.5dca.org/Opinions/Opin2011/022811/5D09-1890.op.pdf> (March 4, 2011).

Domestic Violence Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

Graham v. Florida Parole Commission, --- So. 3d ----, 2011 WL 891916 (Fla. 1st DCA 2011). **REVOCATION OF PAROLE BASED ON HEARSAY ALONE REVERSED.** Graham was released to conditional release supervision until November 2013. In November 2008, Graham was arrested for domestic battery and aggravated assault, but the charges were later dropped. A violation of supervision warrant was issued, charging that Graham failed to obey all laws when he threatened and unlawfully touched the domestic violence victim. The alleged victim did not testify at the revocation hearing; however, an officer testified that, at the scene, the alleged victim stated that Graham punched her in the back of the head, causing her to hit her head on the bathroom wall, damaging the tile. Graham testified that he did not assault the alleged victim. The parole examiner found Graham guilty of the violations and, although the examiner recommended that Graham be restored to supervision, the Parole Commission revoked Graham's supervision. Graham appealed, arguing that there was insufficient evidence to demonstrate that he committed the offenses. There were no photographs or physical evidence. The circuit court denied the petition, concluding that the Parole Commission did not abuse its discretion when it revoked Graham's conditional release. However, the appellate court noted that revocation based solely on hearsay was improper, and stated that there must be some direct evidence in addition to the hearsay. The appellate court concluded that the circuit court's order constituted a departure from the essential requirements of law, quashed the circuit court's order, and remanded the case for further proceedings applying the correct law. <http://opinions.1dca.org/written/opinions2011/03-16-2011/10-4140.pdf> (March 16, 2011).

Murphy v. Reynolds, --- So. 3d ----, 2011 WL 722605 (Fla. 1st DCA 2011). **REPEAT VIOLENCE INJUNCTION DISSOLVED.** The respondent appealed a final injunction for protection against repeat violence that had already expired; however, the court held that the case was not moot because the collateral legal consequences flowing from the injunction outlast the injunction itself. The petitioner set out to prove cyberstalking as grounds for the injunction, alleging that the respondent sent her an offensive email, hacked into her email accounts, deleted all of her emails, and changed her email signature block to include disparaging remarks. The petitioner, however, did not introduce evidence that linked the respondent to the cyberstalking incidents. No competent substantial evidence identified the respondent as the perpetrator of these acts. Because the trial court's finding that the respondent committed repeat violence against the petitioner lacked competent, substantial evidence, the court reversed the trial court's decision. <http://opinions.1dca.org/written/opinions2011/03-03-2011/09-5867.pdf> (March 3, 2011)

Alkhoury v. Alkhoury, --- So. 3d ----, 2011 WL 714456 (Fla. 1st DCA 2011). **DISSOLUTION OF INJUNCTION REVERSED.** The trial court granted a motion filed by the former husband to dissolve a permanent injunction against domestic violence. The appellate court reversed, and noted that although § 741.30(10), Florida Statutes, provides that either party may move for modification or dissolution of a domestic violence injunction at any time, the statute does not directly speak to the burden of proof upon the movant. However, as a general rule, permanent injunctions, which remain indefinitely in effect, may be modified by a court of competent jurisdiction "whenever changed circumstances make it equitable to do so...." The requirement

to show changed circumstances applies equally to modification or dissolution of a protective injunction. Also, a party seeking an extension of a domestic violence injunction must present evidence from which a trial court can determine that a continuing fear exists and that such fear is reasonable, based on all of the circumstances. Because the circumstances that gave rise to the injunction had not changed, the court reversed the trial court's ruling.

<http://opinions.1dca.org/written/opinions2011/03-02-2011/10-5498.pdf> (March 2, 2011).

Second District Court of Appeal

No new opinions for this reporting period.

Third District Court of Appeal

Monteiro v. Monteiro, --- So. 3d ----, 2011 WL 711055 (Fla. 3d DCA 2011). **IN-CAMERA EXAMINATION OF CHILDREN IN DV INJUNCTION CASE ALLOWED.** The husband petitioned for a Writ of Certiorari in which he requested the trial court's order, which mandated the in-camera examination of the minor children of the marriage outside the presence of the parties and their counsel at a final domestic violence injunction hearing, be quashed. The original proceeding in the circuit court consisted of an action for dissolution of marriage; however, four domestic violence petition actions were consolidated with the dissolution of marriage case. The domestic violence actions involved one petition filed on behalf of the wife and three on behalf of each of the three minor children. The trial court's order in question stated that it would conduct an in-camera interview "of at least the two oldest Minor Children, privately and outside the presence of counsel and outside the presence of the parties, before the testimony of any and all other witnesses." The court further ordered that it reserved the right to determine whether an in-camera interview of the youngest child would be conducted, also privately and outside the presence of counsel and outside the presence of the parties.

The husband argued that the trial court's order violated his due process rights because an interview of the minor children without the presence of counsel or the parties deprived him of a meaningful opportunity to be heard. The appellate court disagreed and noted that the husband did not show how the trial court departed from the essential requirements of the law. The husband did not cite any authority which required the trial court to submit the minor children to cross-examination by the husband's counsel in the domestic violence action. Moreover, he cited no authority which required the trial court to have the husband or his counsel present during any in-camera examination of the children in a domestic violence case. Consequently, there could be no departure from the essential requirements of law because the trial court did not violate any established principles of law when it entered the order. The court also noted that Florida Family Law Rule of Procedure 12.407 and case law supported the trial court's decision. The children's interests are of the utmost importance in domestic and sexual violence cases. Also, pursuant to § 92.55, Florida Statutes, the trial court has discretion to determine how the best interests of the children are to be protected. The trial court thus acted well within its discretion and consistent with its obligation to act in the children's best interests. <http://www.3dca.flcourts.org/Opinions/3D10-1602.pdf> (March 2, 2011).

Fourth District Court of Appeal

No new opinions for this reporting period.

Fifth District Court of Appeal

No new opinions for this reporting period.