

OSCA/OCI'S FAMILY COURT CASE LAW UPDATE
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Delinquency Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

M.M. v. State, __ So. 3d __, 2010 WL 2015243 (Fla. 1st DCA 2010). **JUVENILE COULD NOT BE ADJUDICATED FOR GRAND THEFT OF A FIREARM AND DEALING IN STOLEN PROPERTY ARISING FROM THE SAME COURSE OF CONDUCT INVOLVING THE SAME ITEMS.** The juvenile appealed his adjudication for grand theft of a firearm and dealing in stolen property. The juvenile argued that the trial court erred in finding him delinquent for both grand theft and dealing in stolen property arising from the same course of conduct involving the same items (two firearms). The First District Court of Appeal found that s. 812.025, F.S. (2009), prohibited the trial court from finding the appellant delinquent for both grand theft and dealing in stolen property in the instant case. Accordingly, the adjudication for grand theft was reversed and remanded for further proceedings.

<http://opinions.1dca.org/written/opinions2010/05-21-2010/09-4544.pdf> (May 21, 2010).

Second District Court of Appeal

G.D. v. State, __ So. 3d __, 2010 WL 2134129 (Fla. 2d DCA 2010). **TRIAL COURT ERRED IN ASSESSING A PUBLIC DEFENDER FEE AGAINST THE JUVENILE WITHOUT NOTICE AND AN OPPORTUNITY TO OBJECT.** In an Anders v. California, 386 U.S. 738 (1967), brief, the appellate counsel raised the issue of the sufficiency of the evidence and raised that the trial court assessed a public defender fee without providing notice and an opportunity to object. The Second District Court of Appeal found no merit in the sufficiency of the evidence claim but found merit in the fee assessment claim. Section 938.29, F.S. (2008), authorized the assessment of a public defender fee and granted the state a lien to secure its payment. Section 938.29(5) specifically required the trial court to provide the defendant notice and an opportunity to object to the amount. Further, Florida Rule of Criminal Procedure 3.720(d)(1) provided that at sentencing, a defendant must be given notice of the right to a hearing to contest the amount of the lien. In the instant case, the trial court failed to provide notice and an opportunity to contest the public defender fee. Accordingly, the public defender fee was stricken and the juvenile given thirty days to file a written objection. If an objection is filed, the trial court must hold a hearing. If an objection is not timely filed, the court may reimpose the fee without a hearing.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2010/May/May%2028,%202010/2D08-2691.pdf (May 28, 2010).

M.F. v. State, __ So. 3d __, 2010 WL 2010799 (Fla. 2d DCA 2010). **GRAND THEFT OF A MOTOR VEHICLE FINDING WAS REVERSED AND REMANDED WHERE THE STATE'S EVIDENCE WAS LEGALLY INSUFFICIENT TO ESTABLISH A PRIMA FACIE CASE AND WAS NOT INCONSISTENT WITH ANY REASONABLE HYPOTHESIS OF INNOCENCE.** The juvenile argued that the trial court erred in

denying her motion for judgment of dismissal because the State failed to establish that she was involved with the theft of her mother's vehicle. The mother, the juvenile, and her boyfriend lived in a home with the juvenile's grandmother. The mother owned a car that she kept in the carport. The car had expired tags. The mother temporarily moved out of the house. Code enforcement told the grandmother that the car had to be removed because it did not have a valid tag. A few days later, the grandmother saw two unidentified men towing the car away. The grandmother saw the juvenile and her boyfriend getting into the next door neighbor's car in his driveway. The grandmother yelled but the juvenile ignored her. The neighbor drove his car in the same direction as the tow truck. When the juvenile came home later that night, she did not say anything about her mother's car. The only thing the juvenile ever said to the grandmother about the car was that it was none of the grandmother's business. The grandmother waited a couple of days and then called the mother. After she spoke to the mother, the grandmother called the police. The juvenile told the mother that the grandmother had the car towed away. The police placed a notice to "be on the look out" (BOLO) for the car. There was no police report from any towing company indicating that the car was towed. The car was never recovered. The Second District Court of Appeal found that in circumstantial evidence cases, the State must present evidence that is inconsistent with any reasonable hypothesis of innocence. The elements of grand theft of a motor vehicle are (1) knowingly obtaining or using or attempting to obtain or use the property of another with (2) the intent to deprive the victim of the right to or benefit from the property or to appropriate the property to one's own use or the use of another unauthorized person, when (3) the property is a motor vehicle. The Second District held that the evidence did not even establish that the mother's car was stolen as opposed to being towed away by code enforcement or that the juvenile was responsible for having the car towed away. There was no evidence suggesting that the juvenile planned to steal the car. There was no evidence connecting the juvenile to the two unidentified men who towed the car other than the fact that the juvenile got into a neighbor's car that headed the same direction as the tow truck for about one block. Finally, the car was never retrieved, so there was no physical evidence that the juvenile had used it or sold it to someone else. The evidence did not exclude the reasonable hypothesis of innocence that code enforcement had arranged for the car to be towed. Because the State's evidence was legally insufficient to establish a prima facie case of grand theft of a motor vehicle and was not inconsistent with any reasonable hypothesis of innocence, the order on appeal was reversed and remanded.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2010/May/May%2021,%202010/2D09-3053.pdf (May 21, 2010).

Third District Court of Appeal

E.A. v. State, __ So. 3d __, 2010 WL 2077160 (Fla. 3d DCA 2010). [MOTION TO SUPPRESS WAS REVERSED AND REMANDED FOR THE TRIAL JUDGE TO RESOLVE THE CONFLICT IN TESTIMONY RELATING TO WHETHER THERE WAS A SEIZURE UNDER THE FOURTH AMENDMENT AS IT RELATES TO PROBABLE CAUSE FOR THE ARREST OF THE JUVENILE](#). The State appealed an order granting the juvenile's motion to suppress. The Third District Court of Appeal reversed and remanded for the trial judge to enter adequate findings of fact determining the credibility of

testimony on the issue of whether or not a seizure within the Fourth Amendment had occurred to implicate a finding on probable cause. At the suppression hearing, a police officer testified that he approached the car in which the juvenile was a passenger because the vehicle was blocking the entrance to the driveway to a residence. The officer smelled burnt marijuana emanating from the car. The officer then shined his flashlight through the open window and saw the juvenile holding a bag of marijuana. The juvenile was placed under arrest. The juvenile testified that his car was parked next to an abandoned residence and that he was across the street from the car when he first saw the police officer. He crossed back to his car and, as he was getting into the car, the officer came out of the bushes with his gun drawn and ordered him out of the vehicle. The juvenile consented to a search of his person and claimed that the officer found nothing. The trial court granted the juvenile's motion to suppress based upon a finding that the juvenile did not commit a parking or law violation, and therefore, there was no reasonable suspicion for the stop. The State asserted error in the trial court's failure to include in its written order credibility findings resolving the conflict in testimony between the juvenile and the police officer. The Third District held that the factual resolution on credibility was necessary in order to determine whether or not there was a Fourth Amendment seizure before addressing probable cause for the seizure of the marijuana and ensuing arrest of the juvenile. The defense argued that the State failed to preserve the issue for appeal by failing to get a factual ruling from the trial court. The Third District rejected the defense's argument and found that because the trial judge first ruled, incorrectly, that there was no reasonable suspicion to uphold the stop, he granted the motion to suppress without ever addressing the issue of probable cause for the arrest. The State was left with no opportunity to object to the failure of the trial court to resolve the conflict in testimony on the issue of whether or not a Fourth Amendment seizure had occurred. Accordingly, the order granting the motion to suppress was reversed and remanded for the trial judge to resolve the conflict in testimony relating to whether there was a seizure under the Fourth Amendment as it relates to probable cause and for a written order containing the findings. <http://www.3dca.flcourts.org/Opinions/3D08-3109.pdf> (May 26, 2010).

O.B. v. State, __ So. 3d __, 2010 WL 1875621 (Fla. 3d DCA 2010). **THE TRIAL COURT'S FINDING OF RESISTING AN OFFICER WITHOUT VIOLENCE WAS REVERSED AND REMANDED WHERE THERE WERE NO FACTS OR CIRCUMSTANCES SUPPORTING A REASONABLE SUSPICION THAT THE JUVENILE HAD COMMITTED A CRIME.** The juvenile, his brother, and a friend sought shelter under a neighbor's carport when it began raining. Just as the rain was abating, a police car pulled up, and an officer, with his gun drawn, approached the youths. The police had been dispatched in response to a BOLO in connection with a burglary in the neighborhood. The youths ran away. The juvenile was apprehended and charged with resisting an officer without violence. The trial judge found that responding to a BOLO was tantamount to the lawful execution of a legal duty and issued the juvenile a judicial warning and withheld adjudication of delinquency. The juvenile appealed and argued that the State failed to establish either that the officers had the requisite reasonable suspicion to detain him or that he fled with knowledge that the officers intended to detain him. The Third District Court of Appeal, after a review of the case law, found that police officers seeking to detain an individual in response to a BOLO are not lawfully executing a legal duty unless they have the requisite reasonable suspicion. In this

case, there were no facts or circumstances supporting a reasonable suspicion that the juvenile had committed a crime. The trial court had deemed the contents of the BOLO inadmissible hearsay; therefore, it is unknown whether a description of the suspects was even given, much less whether the youths matched such a description. The State said merely that the officers “observed three African-American males in the backyard,” not that they observed them engaging in any criminal or suspicious conduct. As a general rule, flight alone is insufficient to form the basis of a resisting without violence charge. There was no testimony that the juvenile’s flight took place in a high-crime area, an element essential to create reasonable suspicion. There was no evidence that the juvenile heard any order to stop. The juvenile had testified that when he took off running, he did not hear the officers issue a command, and was unaware that an officer was after him in particular. Thus, the State failed to prove the juvenile knew of the officer's intent to detain him. Accordingly, the trial court’s finding of resisting an officer without violence was reversed and remanded.

<http://www.3dca.flcourts.org/Opinions/3D09-1726.pdf> (May 12, 2010).

J.M. v. State, __ So. 3d __, 2010 WL 1779890 (Fla. 3d DCA 2010). [MIRANDA RIGHTS DO NOT APPLY TO QUESTIONS DESIGNED TO OBTAIN BASIC BOOKING INFORMATION](#). The trial court found the juvenile guilty of possession of a firearm by a minor. While running away from a police officer, the juvenile was observed removing a gun from his waistband and throwing it underneath a parked car. The juvenile was taken into custody and the gun was recovered. At some point, the juvenile was asked his date of birth. The juvenile provided his date of birth which indicated that he was sixteen years of age. The sole issue raised by the juvenile was whether the trial court erred in admitting, over Defense’s objection, evidence as to the juvenile’s age. The juvenile argued that his statement regarding his age was an incriminating statement made prior to being advised of his Miranda v. Arizona, 384 U.S. 436 (1966), rights, and therefore, the statement should have been suppressed. The record was unclear as to whether the statement was made pre-or post-Miranda. The Third District Court of Appeal held that even if the statement was made pre-Miranda, it was properly admitted. The Florida Supreme Court and the District Courts of Appeal have routinely held that Miranda does not apply to questions designed to obtain basic booking information. The juvenile’s date of birth was basic biographical booking information, not requiring Miranda warnings. It was immaterial that the juvenile’s date of birth was obtained prior to the actual booking process. This information is required prior to the booking process because juveniles must be transported to the Department of Juvenile Justice and law enforcement officers are required to comply with additional requirements when dealing with juveniles. Even though the juvenile’s age later took on an added significance, this did not mean that the information obtained should have been suppressed because it was obtained prior to the juvenile being advised of his Miranda warnings. Accordingly, the trial court’s order was affirmed.

<http://www.3dca.flcourts.org/Opinions/3D09-1270.pdf> (May 5, 2010).

Fourth District Court of Appeal

D.B v. State, __ So. 3d __, 2010 WL 1881092 (Fla. 4th DCA 2010). [JUVENILE WAS IN CUSTODY FOR MIRANDA PURPOSES WHERE UNDER THE TOTALITY OF THE CIRCUMSTANCES, A](#)

REASONABLE ELEVEN-YEAR-OLD CHILD WOULD NOT BELIEVE HE WAS FREE TO LEAVE. The juvenile appealed the denial of his motion to suppress after entering a no contest plea to burglary of a dwelling, grand theft, and criminal mischief greater than \$1,000. The juvenile argued that the trial court erred in denying his motion to suppress because he was not given his Miranda v. Arizona, 384 U.S. 436 (1966), warnings. The juvenile was originally thought to be a witness to a burglary. The juvenile was interviewed by a detective at his home with his mother present. The juvenile provided the name and positive photo identification of a suspect. That suspect then inculcated the juvenile in the crimes. The juvenile was interviewed a second time at the district office. The detective brought the juvenile into the five foot by five foot investigation room where he remained alone, but under camera surveillance, while the detective spoke to his mother for sixteen minutes. The detective testified that he did not provide the juvenile with his Miranda rights at the beginning of the interview because the juvenile was listed as a witness and he just wanted to confirm or deny the allegations made by the co-defendant. The detective told the juvenile that he had obtained information not previously revealed by the juvenile in the first interview. The detective explained that he already knew what the juvenile did and that the juvenile needed to tell the truth. The juvenile, in response to statements made by the detective, made incriminating statements. The juvenile pled no contest to the charges, and reserved his right to appeal the ruling on the motion to suppress. On appeal, the juvenile argued that his incriminating statements were made prior to being given Miranda warnings. The Fourth District Court of Appeal found that Miranda warnings are required when an individual is interrogated while in custody. The question of whether a suspect is in custody is a mixed question of law and fact. Four factors guide the determination of whether a suspect is in custody: (1) the manner in which the police summon the suspect for questioning; (2) the purpose, place, and manner of the interrogation; (3) the extent to which the suspect is confronted with evidence of his or her guilt; (4) whether the suspect is informed that he or she is free to leave the place of questioning. Applying the four-part test, the Fourth District held that under the totality of the circumstances, a reasonable eleven-year-old child would not believe he was free to leave. Therefore, the juvenile was “in custody” for Miranda purposes. Therefore, the failure to provide the Miranda warnings required the suppression of the juvenile's statements. The order denying the motion to suppress was reversed and the case remanded to the trial court to vacate the disposition order and plea. <http://www.4dca.org/opinions/May%202010/05-12-10/4D08-3649.op.pdf> (May 12, 2010).

Fifth District Court of Appeal

S.C. v. State, __ So. 3d __, 2010 WL 1905037 (Fla. 5th DCA 2009). **TRIAL COURT’S BEHAVIORAL ORDER WAS QUASHED AND HABEAS PETITION GRANTED WHERE THE JUVENILE HAD SCORED ONE POINT ON HER DETENTION RISK ASSESSMENT INSTRUMENT AND WAS RELEASED AFTER ARREST.** The juvenile sought habeas corpus relief, requesting the appellate court to quash a behavioral order he argued was improper. The State agreed that the juvenile was not in any legal status from which the trial court could release the child or impose conditions of release. The juvenile had scored one point on her detention risk assessment instrument and was released earlier after arrest. See C.A.F. v. State, 976 So.2d 629 (Fla. 5th DCA 2008). The Fifth

District Court of Appeal quashed the behavioral order entered by the trial court and granted the habeas corpus petition. <http://www.5dca.org/Opinions/Opin2010/050310/5D10-1438.op.pdf> (May 7, 2010).

J.B. v. State, __ So. 3d __, 2010 WL 2008831 (Fla. 5th DCA 2009). **NO STATUTORY BASIS EXISTS TO ASSESS THE COSTS OF TWO MENTAL COMPETENCY EVALUATIONS, ORDERED BY THE TRIAL COURT, AGAINST THE JUVENILE OR HIS PARENTS.** The juvenile appealed the portion of the trial court's order concerning fines, costs and fees requiring him and his parents to pay the costs of two mental competency evaluations ordered by the trial court in his delinquency case. The Fifth District Court of Appeal recently held in *W.Z. v. State*, 35 Fla. L. Weekly D851 (Fla. 5th DCA Apr. 16, 2010), that no statutory basis exists to assess such costs against a juvenile or his or her parents. Accordingly, that portion of the trial court's order requiring the juvenile and his parents to pay the costs of the mental competency evaluations were stricken. <http://www.5dca.org/Opinions/Opin2010/051710/5D09-2555.op.pdf> (May 21, 2010).

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

No new opinions for this reporting period.

Third District Court of Appeal

N.S. and D.R. v. The Department of Children and Families and The Guardian Ad Litem Program, -- So. 3d ----, 2010 WL 1875624 (Fla. 3d DCA 2010) **TERMINATION OF PARENTAL RIGHTS AFFIRMED.** The father and mother of the minor children sought to reverse a final order terminating their parental rights. The children were adjudicated dependent because the mother, was mentally impaired and homeless, was unable to care for her children, and the father should have known that his child was homeless and should have assisted, but failed to support and care for his child. The court found that DCF made reasonable efforts to rehabilitate the father and reunite him with his children through a detailed case plan, and that the record contained clear and convincing evidence that the father failed to comply. The appellate court also affirmed the termination of the mother's parental rights, and agreed that there was compelling and substantial evidence that the mother was unable to safely parent the children. The court noted that the trial court correctly applied the least restrictive means test as to the mother and also agreed with the trial court's determination that TPR was in the manifest best interest of the children. A dissent by Judge Shepherd outlined that he felt that the mother's rights should not have been terminated because both DCF and the GAL program had not

correctly addressed the needs of the mentally impaired mother and therefore did not meet the least restrictive means test. <http://www.3dca.flcourts.org/Opinions/3D09-2019.pdf> (May 12, 2010).

Fourth District Court of Appeal

C.A. v. Department of Children and Families, --- So. 3d ----, 2010 WL 2076923 (4th DCA 2010) **TERMINATION OF PARENTAL RIGHTS AFFIRMED**. In a previous case, the father was killed in an automobile accident before his appeal of an order terminating his parental rights as to his daughter could be submitted to the appellate court for a final decision on the merits. In DCF's notice of his death, DCF advised that even if the final judgment of TPR was soundly based and affirmed, it might not be in the best interest of the child to do so due to the father's death. DCF pointed out that a TPR may have had adverse legal consequences for her in regard to any interest she might have had in a wrongful death action related to her father's death. The appellate court therefore abated the appeal in the manifest best interests of the child. The trial court then found that there was no viable wrongful death action possible under the circumstances of the death of the child's father, and that there was little likelihood of any recovery. Both sides accepted the trial court's decision as supported by the evidence, and accordingly the appellate court vacated the abatement of the appeal and proceeded to this final decision. The court concluded there was substantial competent evidence supporting the trial court's termination of the father's parental rights as to his daughter on multiple grounds. The record also demonstrated that it was in her best interest to terminate their relationship, so the termination of the father's rights was affirmed. <http://www.4dca.org/opinions/May%202010/05-26-10/4D08-3394.op.pdf> (May 26, 2010).

S.M. v. Department of Children and Families, --- So. 3d ----, 2010 WL 1881432 (Fla. 4th DCA 2010) **APPEAL DISMISSED**. The maternal grandmother was not a party, and thus, had no standing to bring the appeal. <http://www.4dca.org/opinions/May%202010/05-12-10/4D10-838.op.pdf> (May 12, 2010).

Fifth District Court of Appeal

No new opinions for this reporting period.

Dissolution Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

McQuaig v. McQuaig, __ So. 3rd __, 2010 WL 2077163,(Fla. 1st CA 2010). **SECTION 61.08, F.S., GOVERNS ALIMONY AWARDS; 61.30, GOVERNS CHILD SUPPORT**. Pursuant to a consent final judgment of dissolution of marriage which incorporated an agreement entered into by the parties, former wife was to receive both permanent alimony

and child support in agreed upon monthly amounts. Former husband petitioned for a downward modification of alimony two years following the dissolution due to a decrease in income in the wake of economic and industry downturns. Former husband appealed the trial court's order granting temporary reduction in alimony, arguing that the court had erred by: 1) setting an excessive alimony amount; 2) failing to deduct business expenses when computing his income; and 3) awarding partial attorney's fees to former wife. Appellate court found no abuse of discretion in either the modified alimony amount or the fee award; and, accordingly, affirmed. Focusing on former husband's income, the appellate court held that Section 61.08, Florida Statutes, governs alimony awards rather than Section 61.30, which pertains to child support. <http://opinions.1dca.org/written/opinions2010/05-26-2010/09-3551.pdf> (May 26, 2010).

Second District Court of Appeal

Buoniconti v. Buoniconti, __ So. 3rd __, 2010 WL 2133944, (Fla. 2d DCA 2010).

GENERALLY, PERIODIC PAYMENTS ARE PREFERRED OVER LUMP SUM IN PERMANENT ALIMONY; LUMP SUM REQUIRES SPECIAL CIRCUMSTANCES; QUESTION OF WHICH IS APPROPRIATE WITHIN DISCRETION OF TRIAL COURT; INTEREST INCOME SHOULD BE CONSIDERED WHEN LIQUID ASSETS ARE RECEIVED AS PART OF EQUITABLE DISTRIBUTION; REDUCTION TO PRESENT VALUE SHOULD ALSO BE CONSIDERED.

Former husband appealed final judgment of dissolution of marriage on several grounds. Appellate court affirmed award of permanent alimony payable as lump sum and decision to award retroactive alimony, but reversed the amounts as being unsupported by the record; it also reversed the equitable distribution due to the trial court's improper determination that former husband had dissipated marital assets. The appellate court cited Yandell v. Yandell, 39 So. 2d 554 (Fla. 1949), for its holding that periodic payments are preferred over gross with lump sum being made in instances where "special equities might require it or make it advisable." The appellate court noted that since Yandell, courts have generally held that lump sum is appropriate only when special circumstances between the parties make that advisable; however, the question of whether it is appropriate falls within the trial court's discretion. Absent a finding of unreasonableness, that discretion should not be disturbed on appeal. The appellate court concluded that the trial court had erred in determining the alimony amount by failing to consider the interest income from liquid assets former wife was receiving as part of the equitable distribution; it also stated that the amount should have been reduced to present value. Both the retroactive alimony and the equitable distribution were remanded for reconsideration.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2010/May/May%2028,%202010/2D09-1953.pdf (May 28, 2010).

Speed v. Ferris, __ So. 3rd __, 2010 WL 2134128, (Fla. 2d DCA 2010).

A TRIAL COURT'S RULINGS REGARDING FEES ARE NOT RIPE FOR APPEAL UNTIL AMOUNT HAS BEEN DETERMINED.

Short opinion in which the appellate court reiterated that a trial court's rulings on fees are not ripe for appeal until the amount is determined.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2010/May/May%2028,%202010/2D08-1222.pdf (May 28, 2010).

Hunter v. Hunter, __So. 3rd__, 2010 WL 2077158, (Fla. 2d DCA 2010).

EX PARTE RELIEF REQUIRES IMMEDIATE THREAT OF IRREPARABLE INJURY AND REASON NOTICE CANNOT BE GIVEN

Former husband appealed trial court's order granting former wife exclusive use and possession of marital home and requiring him to return multiple items of personal property to the home. Appellate court reversed because neither former wife's motion nor the trial court's order complied with Florida Rule of Civil Procedure 1.610 concerning injunctions. Reiterating that a trial court should only order relief in an ex parte proceeding where the "immediate threat of irreparable injury forecloses the opportunity to give reasonable notice," the appellate court held that in this case, former wife's motion failed to demonstrate either an immediate threat or a reason that notice could not be given.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2010/May/May%2026,%202010/2D09-4878.pdf (May 26, 2010).

Tullos v. Tullos, __So. 3rd__, 2010 WL 2010846, (Fla. 2d DCA 2010).

LODESTAR AMOUNT = NUMBER OF HOURS REASONABLY EXPENDED ON LITIGATION TIMES THE REASONABLE HOURLY RATE; ADJUSTMENTS TO LODESTAR MUST BE ACCOMPANIED BY JUSTIFICATION.

Former wife appealed trial court's order awarding her fees in an amount below that requested. Because the parties had stipulated that the amount of fees and costs was reasonable, the appellate court found that the trial court had erred in awarding a lesser amount without having made specific findings justifying the reduction and accordingly, reversed. The appellate court defined the "lodestar amount" as the result of multiplying the number of hours reasonably expended on the litigation by the reasonable hourly rate for this type of litigation. The appellate court held that adjustments by the trial court to the lodestar must be accompanied by justification for the enhancement or reduction.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2010/May/May%2021,%202010/2D08-3837.pdf (May 21, 2010).

Wilcox v. Munoz, __So. 3rd__, 2010 WL 2010841, (Fla. 2d DCA 2010).

IN ABSENCE OF A TRANSCRIPT, APPELLATE REVIEW LIMITED TO ERRORS ON FACE OF JUDGMENT.

Former husband appealed a trial court order granting his post-dissolution petition to modify his child support obligation. In the absence of a transcript, the appellate court's review was limited to errors on the face of the judgment. Appellate court found that the trial court had erred in not having made findings as to the parties' income and ability to pay and had instead simply ordered the parties to equally share child care expenses. Appellate court held that a trial court's failure to include findings regarding the parties' income for purposes of child support calculations rendered an order erroneous on its face; therefore, the absence of a transcript did not preclude appellate review. However, the appellate court held that the absence of a transcript did preclude it from concluding whether the trial court had abused its discretion by

failing to order the modification of child support retroactive to the date of filing, as former husband had not requested that the modification be retroactive in either his petition or his motion for rehearing. Reversed and remanded.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2010/May/May%2021,%202010/2D08-5743.pdf (May 21, 2010).

Armstrong v. Armstrong, __So. 3rd __, 2010 WL 2010826, (Fla. 2d DCA 2010).

FORMER WIFE # 1 NOT ALLOWED TO INTERVENE IN DISSOLUTION OF MARRIAGE (DOM) PROCEEDINGS BETWEEN FORMER HUSBAND AND FORMER WIFE # 2; ONCE LITIGATION HAS BEEN CONCLUDED, THIRD PARTY MAY NOT INTERVENE; FLORIDA COURT MUST HONOR VALID JUDGMENT FROM ANOTHER STATE.

Appellate court held that a motion to intervene in closed dissolution proceedings between former husband and former wife # 2 filed by former wife # 1 was not the correct way to resolve a dispute as to the retirement benefits. The trial court should have either dismissed or stricken the motion instead of treating it as a motion to modify child support; accordingly, the appellate court reversed and remanded for entry of an order dismissing without prejudice and allowing former wife # 1 to file appropriate pleadings to resolve the confusion. The confusion had resulted from a final judgment of dissolution of a marriage in Texas which had divided the marital estate—including former husband’s retirement plan—between former wife # 1 and former husband; this judgment apparently did not come to light in the dissolution proceedings between former husband and former wife # 2. The appellate court held that the trial court erred as a matter of law by treating the motion to intervene as a motion to modify child support; once litigation has been concluded, a third person cannot intervene as a party to the litigation. The appellate court reiterated that a Florida court must give full faith and credit to a valid Texas judgment; likewise, a Texas court must honor a Florida judgment. The appellate court reasoned that the two judgments in this case somehow needed to be reconciled.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2010/May/May%2021,%202010/2D09-2781.pdf (May 21, 2010).

Baker v. Baker, __So. 3rd __, 2010 WL 2039173, (Fla. 2d DCA 2010).

TRIAL COURT HAS BROAD DISCRETION WITH REGARD TO AWARDED TEMPORARY FEES, BUT AWARD MUST BE SUPPORTED BY FACTUAL FINDINGS REGARDING REASONABLENESS OF HOURLY RATE AND TIME EXPENDED.

Former husband appealed trial court order requiring him to contribute a stated amount to former wife’s attorney’s fees. Due to former wife’s failure to present competent, substantial evidence on the reasonableness of the fees, the appellate court reversed and remanded for the trial court to determine the fees, as neither former wife’s need for fees nor former husband’s ability to pay fees were in dispute. The appellate court held that, although a trial court has broad discretion in awarding temporary fees, the award must be supported by factual findings regarding the reasonableness of the hourly rates and the time expended.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2010/May/May%2012,%202010/2D09-3907.pdf (May 12, 2010).

Sharon v. Sharon, __So. 3rd __, 2010 WL 1816603, (Fla. 2d DCA 2010).

ON APPEAL FOLLOWING REMAND, APPELLATE COURT AGAIN REMANDED FOR TRIAL COURT'S CONCLUSIONS REGARDING TAX CONSEQUENCES OF ALIMONY AND TEMPORARY ATTORNEY'S FEES.

In what it termed “a disturbing example of dissolution litigation,” the appellate court reversed the trial court’s order which was issued on remand after Sharon v. Sharon, 862 So. 2d 789 (Fla. 2d DCA 2003). Although the appellate court had “attempted to pinpoint the problems in the final judgment so that the parties could readily resolve the issues on remand,” it took over four years for the parties to return to the trial court to resolve the issues. With regard to those issues, the appellate court affirmed the trial court’s determinations regarding rehabilitative alimony and permanent alimony; however, it reversed and remanded the trial court’s conclusions on the tax consequences of the alimony as well as the award of temporary attorney’s fees. The appellate court held that the trial court had not abused its discretion in declining to calculate interest on the various adjustments required by the remand. It also held that while the trial court’s award of temporary alimony was well-intended, it was not in accord with the case law.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2010/May/May%2007,%202010/2D08-3731.pdf (May 7, 2010).

Third District Court of Appeal

Rocha v. Mendoca, __ So. 3rd __, 2010 WL 1880388, (Fla. 3d DCA 2010).

EVEN IF TRIAL COURT IS MOTIVATED TO DO WHAT IT CONSIDERS FAIR AND EQUITABLE, IT MAY NOT REWRITE THE TERMS OF A SETTLEMENT AGREEMENT.

Former husband appealed trial court’s order granting former wife’s motions. Appellate court concluded trial court had rewritten the parties’ settlement agreement and impermissibly amended prior court orders and accordingly reversed. The final order stated that the trial judge’s ruling was contained in the transcript, prompting the appellate court to comment that it was “left to scour through the transcript to ascertain the court’s ruling.” Appellate court reasoned that former wife’s motions should have been denied, as there was nothing to enforce, and concluded that the trial court had given former wife relief not contemplated under the settlement agreement. Appellate court held that while a trial court may be motivated to do what it considers fair and equitable, it has no authority to rewrite the terms of a settlement agreement and that here, under the “guise of enforcing the agreement,” the trial court rewrote it. <http://www.3dca.flcourts.org/Opinions/3D09-0024.pdf> (May 12, 2010).

Purrinos v. Purrinos, __ So. 3rd __, 2010 WL 1875607, (Fla. 3d DCA 2010).

FORMER WIFE IN DISSOLUTION OF 16-YEAR MARRIAGE SHOULD BE AWARDED PERMANENT PERIODIC ALIMONY IN NOMINAL AMOUNT TO RESERVE JURISDICTION IN EVENT FORMER HUSBAND CAN PAY.

Former wife appealed final judgment of dissolution of 16-year marriage, arguing that trial court had erred in not having awarded her alimony in any form. Appellate court agreed, concluding that trial court had erred and abused its discretion. Accordingly, appellate court remanded and ordered the trial court to award former wife permanent periodic alimony in a nominal amount

to reserve jurisdiction in the event that former husband's current inability to pay alimony changed in the future.

<http://www.3dca.flcourts.org/Opinions/3D09-1085.pdf> (May 12, 2010).

Albert v. Albert, __So. 3rd__, 2010 WL 1875630, (Fla. 3d DCA 2010).

TRIAL COURT HAD JURISDICTION TO REINSTATE LAWSUIT AGAINST FORMER COUPLE BY FORMER HUSBAND'S FATHER WHEN FORMER WIFE'S ACTIONS DECLARED THE AGREEMENT NULL AND VOID; DIFFERENCE BETWEEN VOLUNTARY DISMISSAL AND ORDER OF DISMISSAL BASED ON SETTLEMENT.

Former wife appealed a nonfinal order granting her former father-in-law's motion to reinstate an action to recover money he had loaned the former couple for construction of a house. Pursuant to a settlement agreement entered into by the parties, former wife would receive a specified amount of cash after the dissolution from former husband and his father, she would quitclaim a condominium in Vail to her former father-in-law, and he, in turn, would dismiss all claims against the former couple. The agreement also provided that if the father had difficulty obtaining financing or failed to make timely payments, former wife could declare the agreement null and void which would have the effect of returning all parties to the position they were in prior to the agreement. The order adopting the agreement reserved jurisdiction to the trial court to either enforce the agreement or set it aside. Things did not go according to plan; when the father was unable to obtain financing and pay former wife, she sold the condo to a third party. The appellate court affirmed the trial court's ruling that former wife's actions were a declaration that the agreement was null and void, that her actions had the effect of returning the parties to the position they were in prior to the agreement, and that it had jurisdiction to reinstate the father's lawsuit. The appellate court held that there is a difference between a voluntary dismissal under Florida Rule of Civil Procedure 1.420(a) which divests a trial court of jurisdiction and entry of an order of dismissal based upon a settlement agreement among the parties in which the trial court retains jurisdiction to enforce the terms of the agreement. <http://www.3dca.flcourts.org/Opinions/3D09-2074.pdf> (May 12, 2010).

Child v. Child, __So. 3rd__, 2010 WL 1779931, (Fla. 3d DCA 2010).

REQUIRING OBLIGOR TO OBTAIN LIFE INSURANCE TO SECURE AWARD WITHIN DISCRETION OF TRIAL COURT; REQUIRES SPECIAL CIRCUMSTANCES AND MUST BE BASED ON COMPETENT, SUBSTANTIAL EVIDENCE; COST, AVAILABILITY, AND FINANCIAL IMPACT UPON OBLIGOR MUST BE CONSIDERED.

Former husband appealed final judgment of dissolution of marriage. Appellate court affirmed trial court's ruling that former husband's income was higher than he reported, but concluded that its ruling that he obtain term life insurance to secure the alimony award was not based on competent, substantial evidence. Appellate court also found that the trial court had incorrectly determined former husband's income and ordered that it recalculate the awards based on its reconsideration of the imputed income. Appellate court held that it is within the trial court's discretion to impute income in order to determine support, as the testimony, tax returns, and business records of a self-employed spouse may not reflect his or her true earnings, earning capability and net worth; however, it is incumbent on the trial court to explain how it arrived at the figure it relied on and to ensure that it was based on competent, substantial evidence.

Appellate court held that it is also within the trial court's authority to order life insurance to secure an award, but that the trial court must consider the need for insurance along with its costs and availability as well as the financial impact upon the obligor. Absent special circumstances, the requirement should not be imposed. Here, the appellate court concluded that those circumstances were clearly reflected in the record, but that evidence as to the cost, amount, or availability was not.

<http://www.3dca.flcourts.org/Opinions/3D08-3237.pdf> (May 5, 2010).

Fourth District Court of Appeal

No new opinions for this reporting period.

Fifth District Court of Appeal

Lilly v. Lilly, __ So. 3rd __, 2010 WL 2139423, (Fla. 5th CA 2010).

TRIAL COURT HAS DISCRETION TO PICK AN EQUITABLE DATE TO VALUE ASSETS; VALUE MUST BE SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE; HERE COURT ERRED IN CHANGING DATE.

Both parties appealed an amended final judgment of dissolution of marriage on numerous grounds; appellate court reversed as to the trial court's valuation of the parties' retirement accounts and affirmed on all other issues. Appellate court concluded that the trial court had erred by changing the valuation date and values of the accounts from the trial date (relied on in the final judgment) to the date of entry of the judgment (relied on in the amended final judgment) without any evidentiary basis. Pursuant to Section 61.075(3), Florida Statutes, the trial court has the discretion to pick an equitable date to value assets; however, Section 61.075(3), Florida Statutes, requires the trial court to establish a value based on competent, substantial evidence. Appellate court held that an assertion by a party that the value of the assets has dropped without any evidence to support such assertion is insufficient. Appellate court remanded for the trial court to either insert the values from the original final judgment or hold an evidentiary hearing before reconsidering the values.

<http://www.5dca.org/Opinions/Opin2010/052410/5D09-951.op.pdf> (May 28, 2010).

Silver v. Silver, __ So. 3rd __, 2010 WL 2131796, (Fla. 5th DCA 2010).

TRIAL COURT ORDERED TO HOLD HEARING ON TIMELY FILED EXCEPTIONS TO CONTEMPT ORDER.

Former husband appealed trial court's order on the magistrate's report and recommendation on former wife's motion for contempt claiming the court overlooked his timely filed exceptions. The order was entered without a hearing on the exceptions and without a transcript. Appellate court remanded for the trial court to hold a hearing on former husband's exceptions.

<http://www.5dca.org/Opinions/Opin2010/052410/5D09-1118.op.pdf> (May 28, 2010).

Rashid v. Rashid, __ So. 3rd __, 2010 WL 2008701, (Fla. 5th DCA 2010).

SHARED PARENTAL RESPONSIBILITY SHOULD BE GRANTED IN ABSENCE OF FINDING THAT IT WOULD BE DETRIMENTAL; REQUIREMENT TO OBTAIN INSURANCE TO SECURE AWARD

REQUIRES APPROPRIATE CIRCUMSTANCES AND FINDINGS; AWARD OF FEES TO ONE SPOUSE WHERE FINAL JUDGMENT LEAVES THEM IN EQUAL FINANCIAL POSITIONS IS ABUSE OF DISCRETION IN ABSENCE OF MISCONDUCT.

Former husband appealed final of dissolution of 22-year marriage, arguing that the trial court had erred: 1) in awarding former wife sole parental responsibility of their daughter; 2) by failing to make required findings to support ordering former husband to obtain insurance to secure the alimony and child support ; and 3) awarding attorney's fees to former wife. Appellate court held that shared parental responsibility is required by statute in absence of a specific finding that it would be detrimental to the child and, due to the trial court's failure to make the necessary findings, reversed on that issue. With regard to the second issue, appellate court held that trial courts are required by statute to order an obligor to obtain life insurance to secure alimony and child support awards where appropriate circumstances exist. When doing so, the trial court should consider the availability and cost of the insurance as well as its financial impact on the obligor. Due to the trial court's failure to make the requisite findings, the appellate court reversed. As to the third point, appellate court held that fees are governed by Section 61.16(1), Florida Statutes, whose purpose is to ensure that each party has the ability to obtain competent counsel; therefore, both need and ability must be determined by the trial court. A trial court abuses its discretion if the final judgment of dissolution leaves both parties in equal financial positions and the trial court awards fees to a party. Appellate court held here that former wife wound up in a superior position to former husband and, as there were no specific findings of misconduct on former husband's part to justify the award of fees on that basis, remanded on this issue as well. <http://www.5dca.org/Opinions/Opin2010/051710/5D08-2805.op.pdf> (May 21, 2010).

Clark v. Clark, __ So. 3rd __, 2010 WL 1923964, (Fla. 5th DCA 2010).

CHANGE IN CUSTODY REQUIRES SUBSTANTIAL CHANGE IN CIRCUMSTANCES NOT REASONABLY CONTEMPLATED IN PREVIOUS ORDER AND MUST BE IN CHILD'S BEST INTEREST.

Former wife was named primary residential parent for the couple's ten year old son pursuant to a marital settlement agreement which was incorporated in the final judgment of dissolution of marriage. She appealed the trial court's post-dissolution order which temporarily transferred primary residential custody to former husband on the grounds that he had neither plead nor proven a substantial change in circumstances sufficient to warrant a change in custody. Appellate court reiterated that a change in custody requires both a substantial change in circumstances which was not reasonably contemplated when the previous custody order was entered and that the change is in the child's best interest. In addition, appellate court held that while modifying custody is within the trial court's discretion, that discretion is more restricted when modifying previously entered custody orders. Appellate court concluded that former husband had neither plead nor proven a substantial change in circumstances, nor did the trial court make a finding of substantial change in circumstances; therefore, the trial court had abused its discretion and accordingly, reversed and remanded. <http://www.5dca.org/Opinions/Opin2010/051710/5D09-672.op.pdf> (May 21, 2010).

Neville v. Neville, __ So. 3rd __, 2010 WL 1923964, (Fla. 5th DCA 2010).

SECTION 743.07(2), F.S., NOT APPLICABLE WHERE PARTIES AGREED THAT FORMER HUSBAND WOULD PAY CHILD SUPPORT UNTIL GRADUATION FROM HIGH SCHOOL BUT NOT TO EXCEED 19 YEARS.

Former wife appealed an order terminating child support, arguing that the trial court had erred in adopting the hearing officer's recommendation. Appellate court reversed because the former couple's youngest child, although 18, had not yet graduated from high school and the order regarding child support was based on an agreement between the parties that child support would be continued for each child until he or she graduated from high school (not to exceed 19 years). At a hearing on former husband's supplemental petition for modification, the hearing officer terminated support for the couple's three children (two of whom were over 18 and had graduated from high school) even though the youngest was still in high school. Termination of child support for the youngest child was apparently based upon the fact that he would not graduate before age 19. Appellate court held that the hearing officer's determination "flew directly in the face of the agreement between the parties" and the order requiring child support. It also held that the trial court had erred in failing to order former husband to pay child support in accordance with the agreement. Appellate court noted that Section 743.07(2), Florida Statutes, should not have come into play due to the parties' agreement.

<http://www.5dca.org/Opinions/Opin2010/051010/5D09-1736.op.pdf> (May 14, 2010).

Jensen v. Jensen, __ So. 3rd __, 2010 WL 1905040, (Fla. 5th DCA 2010).

CONTEMPT ORDER LACKING FINDING THAT FORMER HUSBAND HAD ABILITY TO PAY PURGE VACATED.

Former husband petitioned for a writ of habeas corpus after being sentenced to 30 days for contempt for failure to pay court-ordered child support and fees and costs. Appellate court agreed with former husband that the order did not make any findings regarding his present ability to pay the purge and vacated the contempt order.

<http://www.5dca.org/Opinions/Opin2010/050310/5D10-1460.op.pdf>
(May 3, 2010).

Hickey v. Burlinson, __ So. 3rd __, 2010 WL 1726293, (Fla. 5th DCA 2010).

TRIAL COURT'S ORDER REGARDING VISITATION IS AN APPEALABLE NONFINAL ORDER.

IN a case involving former wife's petition for a writ of certiorari following denial of her motion to temporarily halt visitation between former husband and their children, the appellate court held that an order regarding visitation is an appealable nonfinal order. Appellate court also held that trial court had erred by not allowing the in camera testimony of the children to be recorded.

<http://www.5dca.org/Opinions/Opin2010/042610/5D09-4522.op.pdf> (April 30, 2010).

Domestic Violence Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

No new opinions for this reporting period.

Second District Court of Appeal

Weiss v. Weiss, --- So. 3d ----, 2010 WL 1929863 (Fla. 2d DCA 2010) **INJUNCTION VACATED**. The respondent appealed a final judgment of injunction for protection against domestic violence that his former wife obtained for their minor daughter. The order was entered on two unusual theories - that the respondent was using bad Yiddish words around a child who did not completely understand the words and that he was stalking his daughter during timesharing. While the petition was pending and shortly before the final hearing on the petition, the couple obtained a final judgment of dissolution based on a marital settlement agreement. The final judgment of injunction for protection against domestic violence contained provisions altering the visitation rights under the final judgment of dissolution. The petitioner conceded error and the court declined to address the merits of the issues on appeal and ordered the trial court to vacate the final judgment of injunction against domestic violence.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2010/May/May%2014,%202010/2D09-2094.pdf (May 14, 2010).

Canavan v. State, --- So. 3d ----, 2010 WL 1780014 (Fla. 2d DCA 2010) **STALKING CONVICTION OVERTURNED**. The defendant was charged with aggravated stalking in violation of §784.048(4), Florida Statutes, based on allegations that he harassed his former wife after entry of a final injunction against domestic violence. The defendant appealed his conviction, claiming that the court should have granted his motion for judgment of acquittal because the state failed to prove that he knew of the entry of the final injunction when he continued to harass the victim. To convict him of this offense, the state had to prove beyond a reasonable doubt that the defendant continued to harass the victim despite knowledge of the injunction upon which the charge was premised. However, after the permanent injunction was entered, at a hearing that the defendant did not attend, he was never served with the injunction until he was arrested for the stalking charge. Since the state failed to provide any evidence that the defendant knew of the entry of the permanent injunction, the appellate court reversed the conviction.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2010/May/May%2005,%202010/2D08-5182.pdf (May 5, 2010).

Third District Court of Appeal

No new opinions for this reporting period.

Fourth District Court of Appeal

No new opinions for this reporting period.

Fifth District Court of Appeal

No new opinions for this reporting period.