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

T.K.B. v. Durham, Superintendent of Duval Regional Juvenile Detention Center and the State of Florida, __ So. 3d __, 2011 WL 1879119 (Fla. 1st DCA 2011). HABEAS CORPUS PETITION GRANTED WHERE SECURE DETENTION WAS NOT AUTHORIZED BY STATUTE. The juvenile had entered a guilty plea to resisting an officer without violence, a misdemeanor. The juvenile was placed on home detention. She failed to appear for her adjudication hearing, and a custody order was issued. The Department of Juvenile Justice (DJJ) scored petitioner's Risk Assessment Instrument (RAI) at 22 points, including ten points for absconding, one point for the pending misdemeanor and three points for "aggravation." The juvenile was placed in secure detention to await the adjudication hearing. The pre-disposition report recommended probation. The State objected, contending that the juvenile was a high risk to reoffend because she had a history of running away from home. The circuit court continued the secure detention for almost a month while awaiting a new pre-disposition report. The juvenile's parents refused to pick her up from detention and the circuit court found that there were no other viable options for her placement. The First District Court of Appeal found that the power to place juveniles charged with a delinquent act in detention is entirely statutory in nature. In the instant case, the statutory criteria of s. 985.255, F.S., were not met. The circuit court is prohibited from ordering detention because of a lack of a better alternative; concern for the child's well-being; or where a parent expresses fear that the child might run away, take drugs or engage in sexual activity. Further, the juvenile's RAI was incorrectly scored and she did not qualify for detention. Running away is not included within the statutory definition of absconder. Therefore, it was improper to include ten points for absconding. The DJJ erroneously scored one point for the pending misdemeanor, which was not a separate offense, and the three points for "aggravation" were not supported by the record. Subtracting those fourteen points improperly included in the RAI, the juvenile correctly scored eight points, which did not qualify her for secure detention. Accordingly, the juvenile was ordered released and the petition was granted.
http://opinions.1dca.org/written/opinions2011/05-18-2011/11-1984.pdf (May 18, 2011).

J.L. v. State, __ So. 3d __, 2011 WL 1634235 (Fla. 1st DCA 2011). FINDING OF AGGRAVATED BATTERY WITH A DEADLY WEAPON WAS REVERSED WHERE PLASTIC FORK UNDER THE CIRCUMSTANCES WAS FOUND NOT TO CONSTITUTE A "DEADLY WEAPON". The juvenile stabbed the victim in the neck with a plastic fork, causing several scratches and an area of redness, but no bleeding. The victim did not require any medical treatment for his injuries, although the school nurse did put some ointment on his neck. After the State rested, and at the close of evidence, the juvenile conceded there was sufficient evidence that he committed a battery, but moved for a judgment of acquittal on the aggravated battery charge. The trial court denied both motions, and found the juvenile guilty of aggravated battery with a deadly

weapon. The First District Court of Appeal found that aggravated battery requires the use of a "deadly weapon." Whether a weapon is a deadly weapon, for purposes of aggravated battery, is a question of fact to be determined by the trier of fact based upon the circumstances. A key element is whether the weapon would likely cause "great bodily harm." The First District held that the evidence was insufficient to support a finding that the plastic fork as used by the juvenile was likely to cause great bodily harm. Thus, the plastic fork in this case did not constitute a deadly weapon as required for an aggravated battery. However, the evidence was sufficient to support the juvenile's concession that he committed a simple battery. Accordingly, the case was reversed and remanded with instructions to find the juvenile guilty of battery and to resentence him accordingly.
http://opinions.1dca.org/written/opinions2011/05-02-2011/10-6031.pdf (May 2, 2011).

Second District Court of Appeal

T.V.W. v. State, __ So. 3d __, 2011 WL 1938250 (Fla. 2d DCA 2011). TRIAL COURT ERRED IN FINDING THE JUVENILE GUILTY OF BATTERY AS A PERMISSIVE LESSER-INCLUDED OFFENSE TO THE CHARGE OF ATTEMPTED ROBBERY WHERE THE ELEMENTS OF THE CRIME OF BATTERY WERE NOT CHARGED IN THE PETITION FOR DELINQUENCY. The trial court withheld adjudication and placed the juvenile on probation for battery. The juvenile appealed. The Second District Court of Appeal found that the State correctly conceded that the trial court erred in finding the juvenile guilty of battery as a permissive lesser-included offense to the charge of attempted robbery where the elements of the crime of battery were not charged in the petition for delinquency. Accordingly, the order withholding adjudication that found the juvenile guilty of battery was reversed and remanded for further proceedings consistent with this opinion.
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/May/May%2020,%202011/2D09-3145.pdf (May 20, 2011).

D.J.P. v. State, __ So. 3d __, 2011 WL 1707239 (Fla. 2d DCA 2011). JUVENILE WHO PLED GUILTY CONTINGENT ON HIS RIGHT TO APPEAL THE DENIAL OF HIS MOTION TO SUPPRESS FAILED TO EXPRESSLY RESERVE A DISPOSITIVE ISSUE FOR REVIEW. Juvenile was adjudicated delinquent after he admitted committing burglary of an unoccupied dwelling and grand theft of a firearm. The juvenile pled guilty contingent on his right to appeal the denial of his motion to suppress his confession. The Second District Court of Appeal held that the juvenile failed to expressly reserve a dispositive issue for review. Although the juvenile attempted to reserve his right to appeal the denial of a motion to suppress, the motion was not dispositive. At the hearing on the motion to suppress, the trial court and the State noted that there was no stipulation that the motion was dispositive. The trial court stated, "In fact it was the State that refused to stipulate because they believe they could go forward even [if the motion had been granted]." Further, at the change of plea hearing, the State asserted that there were other witnesses who could identify the juvenile. Accordingly, the Second District affirmed the adjudication.
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/May/May%2006,%202011/2D10-2439.pdf (May 6, 2011).

Third District Court of Appeal

E.M. v. State, __ So. 3d __, 2011 WL 2031362 (Fla. 3d DCA 2011). ADJUDICATION WAS REVERSED WHERE STATEMENTS REGARDING THE NEIGHBORHOOD WHERE THE JUVENILE WAS ARRESTED WERE IMPROPERLY ADMITTED, AND THERE WAS NO STATEMENT ON THE RECORD BY THE TRIAL COURT THAT THIS TESTIMONY WAS NOT CONSIDERED BY THE COURT IN ADJUDICATING THE JUVENILE'S GUILT. While testifying, the police officer made several references to the area where the arrest was made as "a hot spot for narcotics" and "a location that we had checked the prior week for narcotics and guns, involving gang members." The trial judge overruled several objections made by the juvenile to the statements. The officer testified that he saw the juvenile standing next to a parked car and that he recognized the passenger as someone that he had dealt with recently. The officer stopped his car and went to talk to the passenger. As he walked in front of the car, he saw the juvenile's hand open, and a marijuana cigarette rolled down the windshield into a crevice below the windshield area. The juvenile was adjudicated delinquent for possession of marijuana and committed to the Department of Juvenile Justice. The juvenile argued that the trial court erred in overruling his objections to the officer's characterization of the area where he was arrested. The State conceded that the statements were improper, but that because a non-jury bench trial was involved, the appellate court may presume that the trial court disregarded the inadmissible evidence in making its determination. The Third District Court of Appeal found that when improper evidence is admitted over objection, the trial court must make an express statement on the record that the erroneously admitted evidence did not contribute to the final determination. Since the State admitted that the statements were improperly admitted, and because there was no statement on the record that this testimony was not considered by the court in adjudicating the juvenile's guilt, the Third District could not presume that these highly prejudicial and improper statements played no part in the trial court's guilt determination. Accordingly, the adjudication of guilt was reversed and remanded for a new trial before another judge.
http://www.3dca.flcourts.org/Opinions/3D10-0394.pdf (May 25, 2011).

K.N. v. State, __ So. 3d __, 2011 WL 2031432 (Fla. 3d DCA 2011). RESTITUTION FOR ITEMS RELATED TO ABANDONED THEFT CHARGE REVERSED WHERE THE STATE FAILED TO PROVE CAUSATION OR NEXUS BETWEEN THE TRESPASS AND THE THEFT LOSSES, AND THE JUVENILE DID NOT AGREE TO PAY RESTITUTION FOR LOSSES STEMMING FROM OFFENSES SHE DID NOT PLEA TO PURSUANT TO SECTION 775.089(1)(B)(2), F.S. The juvenile was charged with burglary of an unoccupied dwelling, criminal mischief, and grand theft. The delinquency petition alleged that the juvenile entered the unoccupied residence by breaking a sliding glass door (after damaging another door) and then stole cash and jewelry from the home. Pursuant to a plea agreement, the juvenile pled no contest to misdemeanor trespass and the State abandoned the grand theft and criminal mischief charges. There was no written plea agreement. At the plea hearing, the only reference to restitution was a statement by the prosecutor that they were reserving on restitution. At the restitution hearing, the juvenile agreed that she should pay for the damage to the doors, which she conceded was associated with the trespass charge, but disputed restitution for items related to the abandoned theft charge. Following an evidentiary hearing, the trial court ordered the juvenile to pay restitution for the damaged doors, the

jewelry and the cash. The Third District Court of Appeal found that, to order restitution under s. 775.089, F.S., the State must prove that the loss or damage for which the defendant is being ordered to pay is causally connected to the offense and bears a significant relationship to it. With regard to the doors to the home in question, there was no doubt that these criteria were met. However, the same could not be said as to the missing cash and jewelry. The State argued that restitution for the jewelry and cash was appropriate because such restitution was expressly part of the plea agreement. Section 775.089(1)(b)(2), F.S., provides that a plea agreement may contain provisions that order restitution relating to criminal offenses committed by the defendant to which the defendant did not specifically enter a plea. According to the State, it would not have agreed to reduce the burglary charge to trespass and to abandon the grand theft and criminal mischief charges without the juvenile's agreement to pay restitution for these losses; further, the State said this agreement was confirmed by the prosecutor's statement that "[w]e're reserving on restitution as well." The Third District held that neither the State's unilateral intention nor the prosecutor's statement evidenced any such agreement on the juvenile's part. In this case, the juvenile pled guilty to trespass and admitted only to entering or remaining in the home at issue without permission. She did not admit to criminal mischief or to theft, both of which were abandoned. To obtain restitution for the loss or theft of the missing cash and jewelry, the State had to prove causation or nexus between the trespass and the theft losses. Because it failed to do so, the portion of the restitution order requiring restitution for the loss of the stolen cash and jewelry was reversed; that portion of the order requiring restitution relating to damage to the doors of the home was affirmed. http://www.3dca.flcourts.org/Opinions/3D10-1285.pdf (May 25, 2011).

V.C. v. State, __ So. 3d __, 2011 WL 1878004 (Fla. 3d DCA 2011). LESSER INCLUDED OFFENSE OF FELONY BATTERY FINDING REVERSED WHERE THE CHARGING DOCUMENT FAILED TO ALLEGE THE REQUISITE ELEMENTS OF FELONY BATTERY. The juvenile cut the victim with a razor blade during a fight. The trial court held that the evidence was insufficient to find an aggravated battery, but did support felony battery under s. 784.041, F.S. The juvenile argued that the trial court erred in: 1.) restricting the testimony of her expert witness regarding the voluntariness of her pretrial statements; 2.) allowing the State to introduce her pretrial statements at the adjudicatory hearing; and 3.) finding her guilty of the uncharged crime of felony battery. The Third District Court of Appeal found that the trial court did not abuse its discretion in limiting the scope of the expert testimony. The record reflected that the expert was permitted to testify at length. The additional testimony she may have provided was not of such a nature as to require special knowledge or experience, especially where the issues were tried before the judge rather than a jury. As to the second issue, the Third District concluded that there was competent substantial evidence to support the trial court's finding that the juvenile knowingly, intelligently, and voluntarily waived her rights per Miranda v. Arizona, 384 U.S. 436 (1966), prior to agreeing to provide her oral and written statements to the police. However, the Third District reversed the felony battery finding. The Third District found that felony battery is a category two permissive lesser included offense of aggravated battery, and the charging document failed to allege the requisite elements of felony battery. Although instruction 8.4 of the Florida Standard Criminal Jury Instructions provides that felony battery is a category one lesser included offense of aggravated battery, the commentary that follows specifies that "the lesser

included offense of Felony Battery is only applicable if element 2a [permanent disability or permanent disfigurement] is charged and proved." In the instant case, permanent disability or permanent disfigurement was not charged in the charging document. Therefore, the juvenile could not be adjudicated delinquent as to the uncharged felony battery as a lesser included offense. Although the juvenile failed to object to the trial court's pronouncement and the error was not properly preserved for appellate review, the Third District held that under Ray v. State, 403 So. 2d 956, 960 (Fla. 1981), fundamental error occurred. Accordingly, the trial court was instructed to vacate the delinquency finding as to felony battery and to enter a withholding of adjudication as to the necessarily included lesser offense of simple battery. The Third District specifically recommended that the Criminal Jury Instruction Committee submit a modification to jury instruction 8.4 because the instruction, as written, is misleading. http://www.3dca.flcourts.org/Opinions/3D10-0350.pdf (May 18, 2011).

Fourth District Court of Appeal

D.F.J. v. State, __ So. 3d __, 2011 WL 2031341 (Fla. 4th DCA 2011). MOTION FOR JUDGMENT OF DISMISSAL SHOULD HAVE BEEN GRANTED WHERE THE STATE WAS UNABLE TO OVERCOME THE JUVENILE'S REASONABLE HYPOTHESIS OF INNOCENCE. The juvenile appealed his adjudication of delinquency for aggravated battery and robbery with a weapon. The victim was attacked from behind and suffered a stab wound to the head. The victim was robbed of a gold chain, cash, and a cellular telephone. The crime occurred in the backyard of the victim's home while he and the juvenile, along with the co-defendant and an unidentified male, drank beer. The victim did not see who had grabbed or struck him, and could not identify who perpetrated the crime. The juvenile and the co-defendant were witnessed jumping over a fence and the victim's wallet was found by the fence. The defense moved for judgment of dismissal. The defense argued that there was a reasonable hypothesis of innocence since there was no indication of who actually attacked and robbed the victim. Because the evidence failed to exclude a reasonable possibility that someone else could have committed the crime, the defense submitted that the court was required to grant the motion for judgment of dismissal. The Fourth District Court of Appeal found that a motion for judgment of dismissal should be granted in a circumstantial evidence case if the State fails to present evidence from which the judge can exclude every reasonable hypothesis except that of guilt, no matter how strongly the circumstantial evidence points toward guilt. The Fourth District held that because the only witness to the crime was the victim and he could not definitively state who attacked him, the State was unable to rebut the juvenile's reasonable hypothesis of innocence that he was present at the scene and was merely a witness to the crime. Accordingly, the juvenile's motion for judgment of dismissal in this circumstantial evidence case should have been granted. The case was reversed and remanded for dismissal of the charges against the juvenile. http://www.4dca.org/opinions/May%202011/05-25-11/4D10-1763.op.pdf (May 25, 2011).

Fifth District Court of Appeal

M.H.-R. v. State, __ So. 3d __, 2011 WL 1899536 (Fla. 5th DCA 2011). CASE REMANDED FOR A NEW DISPOSITION HEARING BECAUSE OF INCONSISTENCIES BETWEEN THE TRIAL COURT'S

ORAL PRONOUNCEMENT AND ITS WRITTEN ORDER. The Fifth District Court of Appeal affirmed the trial court's determination that the juvenile was guilty of resisting a law enforcement officer without violence. However, the case was remanded for a new disposition hearing because of the inconsistencies between the trial court's oral pronouncement and its written order regarding the length of the juvenile's curfew and probationary periods. Affirmed in part; reversed in part; and remanded. http://www.5dca.org/Opinions/Opin2011/051611/10-2108.op.pdf (May 20, 2011).

Dependency Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

A.T.N. v. Florida Department of Children and Family Services, --- So. 3d ----, 2011 WL 1879196 (Fla. 1st DCA 2011). ADJUDICATION OF DEPENDENCY REVERSED. The mother appealed an order that adopted a general magistrate's recommended order and adjudicated her child dependent. In violation of Florida Rule of Juvenile Procedure 8.257(h), the general magistrate, not the circuit judge, had presided over the adjudicatory hearing. The Department of Children and Family Services (DCFS) conceded error, moreover, in that the only evidence adduced at the hearing was hearsay. Accordingly, the appellate court reversed.
http://opinions.1dca.org/written/opinions2011/05-18-2011/11-0543.pdf (May 18, 2011).

Second District Court of Appeal

No new opinions for this reporting period.

Third District Court of Appeal

M.S. v. Department of Children and Families, --- So. 3d ----, 2011 WL 1773469 (Fla. 3d DCA 2011). ADJUDICATION OF DEPENDENCY REVERSED. The mother appealed an order adjudicating her child dependent after police officers found unsecured weapons and drug paraphernalia in a bedroom closet in connection with the arrest of the father. The trial court determined that DCF proved that both the father and the mother neglected the minor child by allowing the child to live in an environment that caused the child's physical, mental, or emotional health to be significantly impaired. The appellate court, however, reversed the lower court's ruling and found that the trial court erred in finding that the mother neglected the child, because the evidence did not prove that the mother allowed the child to live in an environment which caused the child harm. DCF presented no evidence showing that the child's physical, mental or emotional health was significantly impaired or was at risk of such impairment, and the evidence did not meet the statutory requirements for a dependency adjudication based on neglect.
http://www.3dca.flcourts.org/Opinions/3D10-3052.pdf (May 11, 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.

Dissolution 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

Stewmon v. Stewmon, __So. 3d__, 2011 WL 2-23416, (Fla. 2d DCA 2011).
TRIAL COURT MUST EXPLAIN RATIONALE AS TO VALUATION OF ASSETS AND LIABILITIES AND MUST DISTRIBUTE ALL; IT MUST ALSO EXPLAIN DISTRIBUTION OF DEPLETED ASSETS; TRIAL COURT CANNOT DECIDE FEDERAL BANKRUPTCY ISSUES IN DISSOLUTION OF MARRIAGE PROCEEDING WHERE BANKRUPTCY HAS NOT BEEN FILED.
Former husband argued trial court error in the equitable distribution of assets and liabilities. The appellate court held a trial court should explain its rationale with regard to valuation of assets and liabilities and must distribute them all. The trial court must also explain its distribution of any depleted assets. It is error for a trial court to rule that an equalizer payment is nondischargeable in bankruptcy; a state court cannot decide a federal bankruptcy issue in a dissolution case when no bankruptcy proceeding has been filed.
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/May/May%2025,%202011/2D09-1759.pdf (May 25, 2011).

Shelden v. Shelden, __So. 3d__, 2011 WL 1901955, (Fla. 2d DCA 2011).
TRIAL COURT'S ERRORS IN ADOPTING GENERAL MAGISTRATE'S FINDINGS OF FACT AFFECTED ITS DISCRETIONARY DECISION TO DENY MODIFICATION OF ALIMONY OBLIGATION.
Former husband appealed the denial of his request to modify his alimony obligation. His request was based on a substantial change in circumstances; he had lost his job in the economic downturn. He also claimed former wife was in a supportive relationship. The general magistrate concluded that although former husband had failed to prove that former wife's relationship warranted a modification of the alimony, there had been a substantial change in circumstances with regard to former husband's income; however, that reduction in income, in and of itself, was not a reason to reduce the alimony obligation. The trial court overruled former husband's exceptions to the general magistrate's report. The appellate court agreed that the record supported the general magistrate's findings regarding the absence of a supportive relationship and the change in the parties' incomes—a substantial reduction in former husband's and a

significant increase in former wife's; however, it concluded that the record did not support the finding that former wife's significant increase was anticipated when the parties agreed that she would receive rehabilitative alimony. The appellate court held that the trial court erred in accepting the findings of fact and that those errors affected its discretionary decision regarding modification. The trial court was instructed on remand to reconsider whether any substantial, permanent, unexpected changes in the parties' financial circumstances warranted a modification of the alimony obligation.
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/May/May%2020,%202011/2D10-832.pdf (May 20, 2011).

Mills v. Mills, __So. 3d__, 2011 WL 1707233, (Fla. 2d DCA 2011).
TRIAL COURT ERRED IN FAILING TO IDENTIFY AND INCLUDE ALL MARITAL ASSETS AND IN AWARDING FUNDS DEPLETED DURING DISSOLUTION OF MARRIAGE PROCEEDINGS ABSENT FINDING OF MISCONDUCT; DETERMINATION OF ALIMONY MUST INCLUDE ALL SOURCES OF INCOME; PARTIES' STANDARD OF LIVING PLUS NEED OF ONE SPOUSE AND ABILITY OF OTHER TO PAY SHOULD BE CONSIDERED.
Former wife appealed the final judgment of dissolution of marriage; the appellate court reversed. The appellate court found that the trial court erred in distributing only a portion of the proceeds from former husband's sale of his business and in awarding former wife funds that were depleted during the dissolution proceedings. It held that a distribution scheme which fails to identify and distribute all the marital assets is erroneous; likewise, a distribution scheme which includes marital assets used for living or litigation expenses absent a finding of misconduct is erroneous. The appellate court also found error in the determination of former husband's net monthly income; the trial court had failed to include either his business income or payments that reduced his living expenses. It held that a trial court should determine alimony in accordance with the parties' standard of living during the marriage and should include findings regarding need of one spouse for alimony and ability of the other spouse to pay. A trial court should also make findings as to the reasonableness of a spouse's fees and the parties' relative financial positions to pay those fees.
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/May/May%2006,%202011/2D09-4541.pdf (May 6, 2011).

Third District Court of Appeal

No new opinions for this reporting period.

Fourth District Court of Appeal

Ross v. Ross, __So. 3d__, 2100 WL 1877990, (Fla. 4th DCA 2011).
TRIAL COURT CANNOT ADOPT PARTY'S PROPOSED ORDER VERBATIM WITHOUT GIVING OTHER PARTY AN OPPORTUNITY TO REVIEW AND OBJECT TO IT.
Short opinion in which the appellate court agreed with former husband that the trial court entered former wife's proposed order verbatim without allowing him the opportunity to review it and make objections, thus failing to comply with Perlow v. Berg-Perlow, 875 So. 2d 383 (Fla.

2004). Former wife conceded that she submitted the proposed order to the trial court without providing former husband the opportunity to review it; the trial court immediately adopted it verbatim. The appellate court reversed and remanded with instructions to the trial court that it enter a new order. Former husband would be given the opportunity to either submit his own proposed order or object to former wife's proposed order; the trial court was "free to draft its own order as well."
http://www.4dca.org/opinions/May%202011/05-18-11/4D11-107.op.pdf (May 18, 2011).

Lule v. Lule, __So. 3d__, 2011 WL 1775814, (Fla. 4th DCA 2011).
FINAL JUDGMENT OF DISSOLUTION OF MARRIAGE MUST CONTAIN REQUIRED STATUTORY FINDINGS FOR EQUITABLE DISTRIBUTION SCHEME AND ALIMONY AWARD; TRIAL COURT MUST CONSIDER FACTORS IN SECTION 61.08(2), F.S.; AWARD OF MARITAL HOME TO SPOUSE AS LUMP SUM ALIMONY REVERSED; LUMP SUM ALIMONY REQUIRES FINDINGS BEYOND JUSTIFICATION FOR PERMANENT PERIODIC ALIMONY.
The appellate court reversed and remanded the final judgment of dissolution of marriage because it did not contain the required statutory findings for either the equitable distribution scheme or the alimony award. It held that the trial court's award of the marital home to former wife as lump sum alimony without any findings as to the value of the home or what interest either spouse had in it prior to dissolution rendered any meaningful review of the equitable distribution impossible. The appellate court noted that it had previously reversed an award of the marital home as lump sum alimony to a spouse based on the other spouse's adultery where the results were "grossly unequal." (Rosario v. Rosario, 945 So. 2d 629 (Fla. 4th DCA 2006)). It held that the nature and amount of an alimony award is within the discretion of the trial court, which must consider the factors in Section 61.08(2), Florida Statutes, and then make factual findings; alimony awards are reviewed for an abuse of discretion. Lump sum alimony requires findings that go beyond the justification for an award of permanent periodic alimony; it requires both a finding of special need for lump sum payment and the existence of unusual circumstances requiring a non-modifiable award of support. Here, the trial court failed to make a finding that former wife was in need of any type of alimony, rendering the final order reversible; former husband's argument that the award was unreasonable because her monthly income exceeded his was not addressed.
http://www.4dca.org/opinions/May%202011/05-11-11/4D10-817.op.pdf (May 11, 2011).

Denker v. Denker, __So. 3d__, 2011 WL 1661377, (Fla. 4th DCA 2011).
SPOUSE'S FAILURE TO APPEAR AT FINAL HEARING NOT A DEFAULT; ORDER NOT VOIDABLE WHERE SHE RECEIVED NOTICE AND HAD OPPORTUNITY TO APPEAR; CUSTODY MODIFICATION SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE.
Former wife appealed an order modifying custody after failing to appear at the final hearing. Former husband had alleged a substantial change in circumstances following former wife's relocation from Florida to California and that rotating custody was no longer in the children's best interests. Based on its findings concerning a substantial change in circumstances and the safety of the minor children, the trial court awarded sole custody to former husband. The appellate court held that, although custody determinations made in default are often reversed on appeal, this case was not decided upon a default but after a final hearing with witnesses and

evidence that former wife simply failed to attend. It held that her failure to appear should not result in the final judgment being voided on appeal as long as she received notice of the hearing and an opportunity to participate. The appellate court noted that former wife neither moved to vacate the proceedings nor offered any reason why she failed to attend after having received notice. Unless she sought to vacate the final judgment, it was not reversible. The appellate court held that the trial court's findings regarding modification were supported by competent, substantial evidence.
http://www.4dca.org/opinions/May%202011/05-04-11/4D09-3011.op.pdf (May 4, 2011).

Niederman v. Niederman, __So. 3d__, 2011 WL 1661073, (Fla. 4th DCA 2011).
INCOME FROM IRA ACCOUNT CAN BE IMPUTED TO SPOUSE FOR DETERMINING ALIMONY WHERE PRINCIPAL WILL NOT BE INVADED; TRIAL COURT SHOULD CONSIDER INVESTMENT INCOME; TRIAL COURT MUST RULE ON EVIDENCE PRESENTED; POST-DISSOLUTION OF MARRIAGE CHANGES MATTER FOR MODIFICATION PROCEEDINGS.
The appellate court held that the trial court had not abused its discretion in considering Individual Retirement Accounts (IRAs) to be available sources of income after the trial court had concluded the monies could be withdrawn without incurring a penalty. Had the trial court failed to include the income from the annuities and required former husband to pay additional alimony, former wife would have received an "impermissible savings" component in the alimony. The appellate court held that income from an IRA, via Regulation 72(t) of the Internal Revenue Code, can be imputed to a spouse for purposes of determining the alimony obligation in circumstances where the trial court can reasonably conclude that the IRA principal will not be invaded for support. The appellate court noted its decision could work both ways; a trial court can impute income to a paying spouse pursuant to a 72(t) plan if that spouse claims a reduction in earned income but has substantial IRA or other retirement plans. In response to former wife's contention that early withdrawal of payments from an IRA is contrary to public policy, the appellate court held that legislative policy regarding alimony is clear—a trial court should consider income available from investments of any assets held by a party. In response to her argument that the downturn in the economy rendered the trial court's imputation of her returns speculative, the appellate court held that a trial court must rule upon the evidence presented; post-dissolution changes in the parties' positions do not render a final judgment erroneous. Those changes are more properly addressed in modification proceedings.
http://www.4dca.org/opinions/May%202011/05-04-11/4D08-1731.op.pdf (May 4, 2011).

Fifth District Court of Appeal

Thomas v. Thomas, __So. 3d__, 2011 WL 2097691, (Fla. 5th DCA 2011).
ORDER ON FEES MUST INCLUDE FINDINGS AS TO REASONABLENESS OF HOURLY RATE AND HOURS EXPENDED; NO AUTHORITY FOR TRIAL COURT TO AWARD LOST WAGES TO ONE SPOUSE WHEN OTHER FAILS TO SHOW AT MEDIATION.
Former wife appealed a post-dissolution order adopting magistrate's findings and recommendations; the appellate court reversed on two minor issues. First, the order awarding fees did not include the requisite findings as to the reasonableness of the fees regarding the hourly rate and the hours expended. Second, requiring former wife to reimburse former husband for two days of lost wages as part of a sanction for her failure twice to appear at

mediation was improper. The appellate court held there is no authority for a lost wage award in this context.
http://www.5dca.org/Opinions/Opin2011/052311/5D10-259.op.pdf (May 27, 2011).

Poe v. Poe, __So. 3d__, 2011 WL 1899533, (Fla. 5th DCA 2011).
MODIFICATION OF CHILD SUPPORT REQUIRES SUBSTANTIAL CHANGE IN CIRCUMSTANCES, NOT CONTEMPLATED AT FINAL JUDGMENT, WHICH ARE MATERIAL, INVOLUNTARY AND PERMANENT; CREDIBILITY OF WITNESSES IS IN TRIAL COURT'S EXCLUSIVE PURVIEW; NO IMPUTATION OF INCOME WHERE LOANS TO SPOUSE ARE TEMPORARY OR TESTIMONY IS UNREFUTED BY TAX RETURNS.
Former wife appealed the modification of former husband's child support obligation, arguing that the trial court error in the finding of a substantial change in circumstances and imputation of income to her, but not former husband. The appellate court reiterated that modification of child support requires a substantial change in circumstances, not contemplated at the time of final judgment, which is sufficient, material, involuntary, and permanent. The trial court accepted former husband's testimony as to the date he was laid off from his job over that of the president of the company which had employed him. Holding that the credibility of witnesses is within the trial court's "exclusive purview", the appellate court found no abuse of discretion in the trial court's conclusion that former husband met his burden of showing a substantial change in circumstances. The trial court did not err in failing to impute income to former husband based on loans from his parents that were temporary in nature; however, it did err in imputing income to former wife where her testimony that her lower income was due to fewer hours as a substitute teacher was unrefuted.
http://www.5dca.org/Opinions/Opin2011/051611/10-1926.op.pdf (May 20, 2011).

Gordon v. Gordon, __So. 3d__, 2011 WL 1810598, (Fla. 5th DCA 2011).
TRIAL COURT ABUSED ITS DISCRETION REGARDING HEALTH AND LIFE INSURANCE; SECURITY OF AWARDS, WHEN APPROPRIATE, REQUIRES FINDINGS OF AVAILABILITY AND AFFORDABILITY; NO ABUSE OF DISCRETION IN REQUIRING SPOUSE TO CONTRIBUTE TO PRIVATE SCHOOL EXPENSES OR AGREED-UPON EXTRACURRICULAR ACTIVITIES DEPENDING ON PARTIES' STANDARD OF LIVING, ABILITY TO PAY AND BEST INTERESTS OF CHILDREN.
The trial court erred in determining former husband's support obligations in dissolution of the twenty-year marriage; it abused its discretion by requiring former husband to provide health insurance for former wife without setting any limitation on the amount. The appellate court noted that if, on remand, the trial court required him to contribute to her health insurance costs, that amount should be taken into consideration in determining the spouses' net incomes. Need for alimony and ability to pay must also be considered. The trial court erred in requiring former husband to maintain one million dollars in life insurance to secure his obligations because there was insufficient evidence to support a finding that insurance over the amount he currently maintained was either available or reasonably affordable. Security of awards, when appropriate, requires a finding that the obligor can obtain and afford the insurance. The allocation of insurance securing the alimony award in relation to that securing the child support award must be designated and the insurance securing the child support award should be designated as being on their behalf. There was no error in requiring former husband to

contribute to the expense of private school tuition; those expenses may be awarded as part of child support when parents have the ability to pay, they are in accordance with the family's standard of living, and are in the child's best interest. The trial court's findings on that issue were supported by competent, substantial evidence. In response to former husband's argument that the trial court abused its discretion in ordering him to contribute to the costs of the children's extracurricular activities in accordance with his pro rate share of the parties' total net income, the appellate court held that contribution applies only to activities agreed to by the parents pursuant to their shared parental responsibility.
http://www.5dca.org/Opinions/Opin2011/050911/5D09-3772.op.pdf (May 13, 2011).

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

Moriggia v. Moriggia, --- So. 3d ----, 2011 WL 2119559 (Fla. 2d DCA 2011) DOMESTIC VIOLENCE INJUNCTION REVERSED. The respondent challenged a final judgment of injunction for protection against domestic violence with minor children after notice. Because there was no evidence that the petitioner was either the victim of domestic violence or had reasonable cause to believe he was in imminent danger of becoming a victim of domestic violence, the appellate court reversed. There was no evidentiary support for the proposition that the respondent had been physically abusive toward the petitioner, and there was also nothing to support the conclusion that the petitioner had reasonable cause to believe that he would be the victim of domestic violence. In fact, the only testimony presented at the hearing about physical abuse between the two parties was that the petitioner abused the respondent --not the other way around.
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/May/May%2027,%202011/2D10-3594.pdf (May 27, 2011).

L.C. v. A.M.C., --- So. 3d ----, 2011 WL 1775891 (Fla. 2d DCA 2011) DOMESTIC VIOLENCE INJUNCTION REVERSED. The paternal grandfather appealed from the final judgment of injunction for protection against domestic violence which prohibited him from having any contact with his granddaughter. After reviewing the Mother's petition, the court found that the facts as stated in the petition, standing alone, did not justify the entry of a temporary injunction. The court had then set a hearing for April 15, 2010, at 11:00 a.m. The Grandfather was not served with notice of the hearing until April 14, 2010, at 9:45 a.m. The Grandfather attempted to obtain counsel, but was unable to do so in time for the hearing. The parties appeared as scheduled, but neither party was sworn as a witness. The Mother stated that she

sought an injunction because the school crossing guard and the child had told her that the Grandfather had been coming to the child's school to see the child without the Mother's knowledge. She expressed her fear that the Grandfather would kidnap the child because, approximately five years ago, the child's father had taken the child from a restaurant during visitation while the child's grandparents were present. In response, the Grandfather testified that he had attempted to see the child at her request. He also stated that the grandparents were never ordered by a court to stay away from their granddaughter. The Grandfather further argued that the trial court denied him his fundamental right to due process by not providing him a full evidentiary hearing. The appellate court agreed and reversed and remanded the case for a full evidentiary hearing. The appellate court also noted that in due process hearings the witnesses should be sworn, each party should be permitted to call witnesses with relevant information, and cross-examination should be permitted. The court similarly stated that the Grandfather was also denied due process by the service of notice only twenty-five hours before the hearing. Because of this, he was not provided sufficient notice to hire an attorney or to prepare a defense to the allegations in the petition.
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/May/May%2011,%202011/2D10-2669.pdf (May 11, 2011).

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.