

OSCA/OCI'S FAMILY COURT CASE LAW UPDATE
November 2008

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Delinquency Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

State v. D.A.G., ___ So.2d ___, 2008 WL 4899174 (Fla. 1st DCA 2008). **FAILURE TO MAKE REQUISITE INQUIRY PRIOR TO ACCEPTING JUVENILE'S PLEA DOES NOT RENDER THE JUDGMENT "VOID" FOR PURPOSES OF FLORIDA RULE OF JUVENILE PROCEDURE 8.140(b) TIME LIMITATIONS.** Juvenile filed a motion to vacate a disposition order pursuant to rule 8.140(a)(4). The disposition order was entered eight and a half years prior to the filing of the motion. The trial court held that the disposition order was void for failure to make the requisite inquiry prior to accepting the juvenile's plea. The First District Court of Appeal found that rule 8.140(b) requires that all rule 8.140 motions except those claiming that the order or judgment sought to be vacated is void be filed within one-year. The First District held that where a court is legally organized and has jurisdiction of the subject matter and the adverse parties are given an opportunity to be heard, then errors, irregularities or wrongdoing in proceedings, short of illegal deprivation of opportunity to be heard, will not render the judgment void. In the instant case, there was no suggestion that the court entering the order was not legally organized or lacked subject matter jurisdiction or that the juvenile was illegally deprived of an opportunity to be heard. Therefore, the disposition order was "voidable," rather than "void" and the motion had to be filed within the one-year time limit. Accordingly, the trial court's order granting the motion and vacating the disposition order was reversed.

<http://opinions.1dca.org/written/opinions2008/11-17-08/08-0538.pdf> (November 17, 2008).

J.W.J. v. State, ___ So.2d ___, 2008 WL 4899179 (Fla. 1st DCA 2008). **SPECIAL CONDITIONS OF PROBATION MUST BE ORALLY PRONOUNCED AT DISPOSITION OR STATUTORILY AUTHORIZED.** Juvenile appealed the denial of his motion for judgment of dismissal or acquittal and the imposition of certain special conditions of probation that were not orally pronounced at the disposition hearing. The juvenile was adjudicated delinquent of aggravated battery with a deadly weapon and shooting or throwing a deadly missile at an occupied vehicle. The First District Court of Appeal held that viewing the evidence in the light most favorable to the State, a reasonable trier of fact could infer from the juvenile's body language and gesturing that he had intentionally thrown and struck the victim in the head with a can of soda. Therefore, the trial court correctly denied the motion for judgment of dismissal or acquittal. The trial court had concluded that the special conditions of probation were statutorily authorized and did not need to be orally pronounced. The First District agreed that special conditions of probation that were statutorily authorized did not need to be orally pronounced. However, the First District found that some of the special conditions were not authorized by statute. The First District found that \$65.00 in costs imposed pursuant to s. 939.185(1)(a), F.S. (2007) did not apply to juveniles and had to be stricken. The special condition prohibiting the juvenile from associating "with any known delinquent peers" was not explicitly authorized by statute and had to be stricken.

Finally, the First District found that the special condition that the juvenile “shall not possess nor [sic] use any type of weapon” was authorized in part, by s. 790.23(1)(b), F.S. (2007). However, the First District, citing W.J. v. State, 688 So.2d 954, 957 (Fla. 4th DCA 1997), held that to the extent the special condition prohibited the possession of a non-electric, non-concealed weapon, it had to have been pronounced. The adjudication and disposition order was affirmed in all respects. The conditions of probation were affirmed except for those discussed above and found to be not specifically authorized by statute. The case was remanded with directions to strike the unauthorized special conditions and in the case of the “weapon” special condition, to amend it to accord with the statute and the holding of W.J.
<http://opinions.1dca.org/written/opinions2008/11-17-08/08-1013.pdf> (November 17, 2008).

Second District Court of Appeal

C.D. v. State, ___ So.2d ___, 2008 WL 4925033 (Fla. 2d DCA 2008). **CREATING CIRCUMSTANCES OR CONDITIONS THAT ALLOW ANOTHER TO COMMIT PETIT THEFT WAS NOT ENOUGH TO ESTABLISH ONE AS A PRINCIPAL TO THAT OFFENSE.** The juvenile appealed an order withholding adjudication for battery and petit theft. The Second District Court of Appeal affirmed the battery, but held that the State failed to prove petit theft. The juvenile had a disagreement with the teenage victim. While riding as the passenger in a friend's car, the juvenile saw the victim standing alone at a bus stop. Both the juvenile and her friend got out of the car and began to punch the victim. The victim knew that one of the attackers snatched her necklace and bracelet during this fight, but she did not know which one. Shortly after, the police located the juvenile on foot but she did not have the jewelry. Thereafter, the jewelry was returned by the mother of the other girl. The mother found the jewelry in the glove compartment of her car. The juvenile claimed that the other girl took the jewelry and that there had been no plan to rob the victim. The juvenile did not remember seeing the other girl place the jewelry in the glove compartment. The State argued that the juvenile's fighting gave the other girl the opportunity to steal the jewelry. The Second District held that merely creating circumstances or conditions that allow another to commit an independent offense is not enough to establish one as a principal to that offense. There was no evidence that the juvenile took the jewelry or planned or intended to take the jewelry or that she did any act or made any statement which was intended to “incite, cause, encourage, assist or advise” the other girl to commit the crime. The disposition order was affirmed as to battery and reversed as to petit theft and remanded.
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2008/November/November%2019,%202008/2D07-6033.pdf(November 19, 2008).

S.E.B. v. State, ___ So.2d ___, 2008 WL 4891029 (Fla. 2d DCA 2008). **STATE FAILED TO ESTABLISH CONSTRUCTIVE POSSESSION OF MARIJUANA AND PARAPHERNALIA.** The juvenile was found delinquent for possession of more than twenty grams of marijuana and drug paraphernalia. Juvenile argued that the state failed to establish constructive possession. Juvenile was a front-seat passenger in a car stopped for speeding. The trooper smelled an odor of both raw and burnt marijuana coming from the car when he approached the car on the passenger side. Two partially smoked marijuana cigarettes were in plain view in the cup holder of the center console. Thereafter, a K-9 alerted on the car's center console and a bag containing approximately ninety-nine grams of marijuana was found underneath the console. The car was

registered to a third individual who was not in the car. The juvenile testified that she got a ride and was not aware that there was marijuana in the car. The Second District found that the State had to prove the juvenile knew of the presence of the contraband and that she had the ability to exercise dominion and control over it to establish constructive possession. In the instant case, the State failed to establish constructive possession because there was no independent evidence of her knowledge of, or her ability to control, the items. Accordingly, the finding that the juvenile committed the offenses of possession of paraphernalia and possession of more than twenty grams of marijuana was reversed. However, there was sufficient, competent evidence to support a conviction for the necessarily lesser-included offense of misdemeanor possession of marijuana for two partially smoked marijuana cigarettes in plain view. Therefore, the Second District directed that her adjudication of delinquency be upheld on the basis of misdemeanor possession of marijuana. Case remanded with instructions that the trial court conduct a new disposition hearing.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2008/November/November%2014,%202008/2D07-5417.pdf(November 14, 2008).

T.A.R. v. State, __ So.2d __, 2008 WL 4891112 (Fla. 2d DCA 2008). **AN ISSUE IS NOT PROPERLY PRESERVED FOR REVIEW UNDER FLORIDA RULE OF CRIMINAL PROCEDURE 9.140(B)(2)(A)(I) UNLESS THERE IS AN EXPRESS RESERVATION OF THE RIGHT TO APPEAL A PARTICULAR POINT OF LAW AND A DETERMINATION BY THE TRIAL COURT THAT ITS PRIOR ORDER ON THAT POINT WAS DISPOSITIVE.** The juvenile was charged with burglary of a structure, criminal mischief, and petit theft. The juvenile filed a motion to suppress, raising several issues. After an evidentiary hearing, the trial court granted the motion in part and denied the motion in part. Later, the parties entered into a plea agreement for the entry of a guilty plea to the burglary and criminal mischief charges in exchange for a nolle prosequi of the petit theft charge. The juvenile's counsel indicated that the juvenile was entering the plea "with the right to reserve for an appeal." The plea form indicated that the juvenile was "reserving the right to appeal." The trial court accepted the plea and entered an order withholding adjudication and placing the juvenile on probation. On appeal, the juvenile argued that the trial court erred in partially denying his motion to suppress. After the parties submitted their briefs, the Second District Court of Appeal entered an order directing the parties to address whether the issue argued on appeal had been properly preserved for review under Florida Rule of Criminal Procedure 9.140(b)(2)(A)(i) which provides that a defendant may not appeal from a guilty or nolo contendere plea unless the defendant expressly reserves the right to appeal a dispositive order of the lower tribunal, identifying with particularity the point of law being reserved. In response, the juvenile acknowledged that his trial counsel did not identify a particular point of law to be appealed and that there was no finding or stipulation that the suppression issue was dispositive. As a result, the Second District found that no appealable issue was presented. The trial court's order was affirmed.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2008/November/November%2014,%202008/2D07-4681.pdf(November 14, 2008).

G.T.J. v. State, __ So.2d __, 2008 WL 4820763 (Fla. 2d DCA 2008). **THE STATE'S EVIDENCE WAS LEGALLY INSUFFICIENT AND FAILED TO REBUT THE JUVENILE'S PRIMA FACIE CASE OF SELF-**

DEFENSE. The juvenile appealed a juvenile probation order and order withholding adjudication of delinquency for assault and battery. While being chased by two men, the juvenile turned and struck one of the men in the face with a stick. The juvenile then swung his belt at the men, but missed. The juvenile testified that he hit the man with the stick in self-defense. The juvenile argued that the State failed to exclude the reasonable hypothesis of innocence that the juvenile was acting in self-defense. The Second District Court of Appeal found that when a defendant presents a prima facie case of self-defense, the State's burden includes proving beyond a reasonable doubt that the defendant did not act in self-defense. The State must overcome the defense by rebuttal or by inference in its case in chief. Ordinarily, the justifiable use of force is a question for the fact finder, but when the State's evidence is legally insufficient to rebut the defendant's testimony establishing the self-defense, the court must grant a motion for dismissal. Such motions must be granted because a finding that the evidence is legally insufficient is equivalent to a determination that the prosecution has failed to prove the defendant's guilt beyond a reasonable doubt. The juvenile presented a prima facie case of self-defense by providing unrebutted testimony that he swung the rod only after the two men began chasing him and that he swung his belt after one of the men began choking him. The State's evidence did not rebut the juvenile's testimony regarding the aggressive, violent conduct of the two men. Neither man denied that one of them had threatened the juvenile with a knife or that the juvenile had been choked. The Second District held that the State's evidence was legally insufficient and failed to rebut the juvenile's prima facie case of self-defense. Therefore, the trial court erred by denying the juvenile's motion for judgment of dismissal. Case was reversed and remanded with instructions to dismiss the State's petition for delinquency.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2008/November/November%2007,%202008/2D07-3386.pdf(November 7, 2008).

J.A.B. v. State, ___ So.2d ___, 2008 WL 4790946 (Fla. 2d DCA 2008). **TRIAL COURT MAY SET A COMMENCEMENT DATE FOR RESTITUTION PAYMENTS FOR AN UNEMPLOYED JUVENILE IF THE COURT ALLOWS A REASONABLE TIME TO OBTAIN EMPLOYMENT.** Unemployed, pregnant juvenile appealed a restitution order requiring her to pay restitution of \$1479.09 at the rate of \$50 per month, commencing approximately six weeks after the juvenile's due date for childbirth. The Second District Court of Appeal held that the trial court's order was not an abuse of discretion. The Second District concluded that a hard-and-fast rule prohibiting a judge from setting a commencement date for monthly payments of juvenile restitution and requiring that such payments can only be ordered contingent upon the juvenile actually obtaining employment was inappropriate. In the instant case, the trial court considered all the evidence and decided not to require the juvenile to immediately commence payment of the restitution amount, or to require a payment that would require full-time employment. Rather, the trial court deferred any payment until more than six weeks after the juvenile's anticipated due date and in an amount that could be easily paid with part-time work. Further, if the juvenile is thereafter unable to obtain appropriate employment or to otherwise afford the monthly payment despite reasonable efforts, the juvenile may present that evidence in his or her defense in any enforcement proceeding. The Second District receded from its decisions in R.S.M. v. State, 910 So.2d 361 (Fla. 2d DCA 2005); R.D.S. v. State, 844 So.2d 720 (Fla. 2d DCA

2003); and L.J.H. v. State, 627 So.2d 593 (Fla. 2d DCA 1993), to the extent that those cases suggested that a trial court issuing a restitution order with a monthly payment schedule against an unemployed juvenile cannot specify a commencement date for the payments but must make payment contingent upon the juvenile actually obtaining employment that would enable the juvenile to afford the payment. The Second District noted conflict with the First District's opinion in J.A.M. v. State, 601 So.2d 278 (Fla. 1st DCA 1992) and certified conflict. The trial court's order was affirmed and conflict certified.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2008/November/November%2005,%202008/2D07-1943.pdf(November 5, 2008).

M.E.R. v. State, ___ So.2d ___, 2008 WL 4790944 (Fla. 2d DCA 2008). **STATE FAILED TO REFUTE THE JUVENILE'S REASONABLE HYPOTHESIS OF INNOCENCE FOR GRAND THEFT CHARGE.** Juvenile appealed the order withholding adjudication and placing him on probation for burglary and grand theft. Juvenile argued that the State failed to rebut his reasonable hypothesis of innocence. At trial, a witness testified that she saw the juvenile hanging out with some friends in the breezeway of her apartment complex. The witness observed the juvenile enter the victim's apartment. The juvenile was wearing a blue shirt. When the juvenile emerged fifteen to twenty minutes later, the juvenile was no longer wearing the blue shirt but was carrying the shirt tucked underneath his arm. The witness could not tell whether the juvenile was concealing anything underneath the shirt. The victim testified that shoes, a Play Station, a cell phone, and some clothing had been stolen. The stolen items were never recovered and there was no evidence linking the juvenile to the stolen items. The Second District Court of Appeal found that where the evidence is entirely circumstantial, a conviction should not be upheld unless the evidence is inconsistent with any reasonable hypothesis of innocence. In this case, the State's evidence was sufficient to support the conviction for burglary. The evidence had established that the juvenile entered the victim's apartment without permission with the intent of committing a theft inside. However, the State's evidence was insufficient to establish the monetary thresholds for grand theft. The State charged the juvenile with the grand theft of shoes and electronic games valued between \$100 and \$300. For some reason, the information did not charge the juvenile with the theft of the cell phone or the clothing the victim reported as stolen. In order to find that the juvenile took items valued between \$100 and \$300, the fact finder would have to find that the juvenile carried some or all of these items under his shirt or in another trip from the victim's apartment. Because the juvenile was not seen carrying any specific items and the items were never recovered, there was no direct evidence connecting the juvenile with the theft of the shoes or the Play Station. Therefore, the State failed to refute the juvenile's reasonable hypothesis of innocence that someone else took the Play Station and shoes from the apartment as to the grand theft charge. Accordingly, the trial court's denial of the juvenile's motion for judgment of dismissal was affirmed in part; and reversed in part; and remanded.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2008/November/November%2005,%202008/2D07-5053.pdf(November 5, 2008).

Third District Court of Appeal

M.J. v. State, ___ So.2d ___, 2008 WL 4862548 (Fla. 3d DCA 2008). SECURITY CAMERA OBSERVATIONS RELAYED TO A POLICE OFFICER OVER WALKIE TALKIE WERE ADMISSIBLE UNDER THE SPONTANEOUS STATEMENT EXCEPTION TO THE HEARSAY RULE AND DID NOT VIOLATE THE CONFRONTATION CLAUSE. The juvenile appealed his adjudication for resisting an officer without violence. The juvenile argued that the State failed to establish that the officer was engaged in the lawful execution of a legal duty. Over defense objection, the officer testified that she received a radio dispatch from a Loss Prevention security officer advising her that the juvenile and another individual were seen on a security camera leaving a store without paying for merchandise. Moreover, the security officer gave the officer a description of the individuals, informed the officer that he continued to watch them over a security camera, and that the individuals were coming down an escalator. The officer attempted to make contact on the escalator, but the juvenile fled. The officer chased the juvenile identifying herself as a police officer and instructing him to stop. The juvenile eventually tripped and was apprehended. Since the case involved an investigatory detention, the State was required to prove that the officer had a reasonable suspicion that the juvenile was engaged in criminal activity. The State attempted to prove this element by the fellow officer rule, thereby imputing the security officer's observations of reasonable suspicion to the officer to justify the stop. The juvenile argued that the trial court impermissibly allowed the officer to testify as to the radio transmissions she received from the non-testifying security officer because this evidence was inadmissible hearsay and violated the Confrontation Clause. The juvenile argued that without this evidence, the State failed to establish that the officer was engaged in the lawful execution of a legal duty, as required by s. 843.02, F.S. (2007). The Third District Court of Appeal held that the non-testifying security officer's statements were properly admitted pursuant to the spontaneous statement exception to the hearsay rule, as the security officer was describing or explaining an event or condition while perceiving the event or condition, or immediately thereafter. See s. 90.803(1), F.S. (2007). In this case, the security officer relayed information to the police officer in an attempt to obtain assistance, and the statements were not in response to any police questioning. As such, the security officer's statements were nontestimonial in nature and did not violate the holding in Crawford v. WASHINGTON, 541 U.S. 36 (2004) or the Confrontation Clause. Accordingly, the Third District held that the trial court did not err in admitting this evidence and the State established that the officer was engaged in the lawful execution of a legal duty (the investigation of a criminal offense that the officer had a reasonable suspicion to believe the juvenile had committed). The adjudication of delinquency was affirmed. <http://www.3dca.flcourts.org/Opinions/3D08-0010.pdf> (November 12, 2008).

M.G. v. Vershawn Berry, Superintendent and State of Florida, ___ So.2d ___, 2008 WL 4823078 (Fla. 3d DCA 2008). IMPROPER FOR TRIAL COURT TO CONSIDER AN OUTSTANDING ADULT CRIMINAL CHARGE AS AN AGGRAVATING FACTOR, THEREBY ADDING THREE POINTS TO THE DETENTION RISK ASSESSMENT INSTRUMENT (DRAI), SINCE IT ALREADY WAS INCORPORATED INTO THE DRAI WITH TWO POINTS FOR OTHER CURRENT OFFENSES AND PENDING CHARGES. Juvenile filed a petition for a writ of habeas corpus for immediate release from secure

detention. Juvenile was arrested and being held for a grand theft auto charge committed while on custody release for an adult case for conspiracy to commit armed robbery. The juvenile argued that the pending grand theft auto charge should not have qualified as a detainable charge on the Detention Risk Assessment Instrument (DRAI). The juvenile contended that it was improper for trial court to consider an outstanding adult criminal charge as an aggravating factor thereby adding three points to the DRAI score since it already added two points for other current offenses and pending charges. The juvenile argued that the finding of aggravating circumstances amounted to double scoring. The State conceded and the Third District Court of Appeals agreed that it was improper to consider the outstanding adult charge as an aggravating factor, since it already was incorporated into the DRAI with two points for the other current offenses and pending charges. Therefore, the three points should not have been included in the DRAI score and there was no basis for ordering secure detention. However, the Third District found that the juvenile's arrest for grand theft auto qualified him for home detention under ss. 985.255(2)-(3), F.S. Accordingly, the Third District granted the petition and ordered that the juvenile be immediately released from secure detention and placed in the custody of his parent or guardian or, if they are unable to receive him, to a person authorized by the parent, and placed on home detention, as required by his DRAI score.

<http://www.3dca.flcourts.org/Opinions/3D08-2807.pdf> (November 7, 2008).

Fourth District Court of Appeal

W.W. v. State, ___ So.2d ___, 2008 WL 4862815 (Fla. 4th DCA 2008). **OFFICER WAS NOT ENGAGED IN THE EXECUTION OF A LAWFUL DUTY AT THE TIME HE QUESTIONED JUVENILE AND THE JUVENILE'S DENIAL OF A SUSPECT'S PRESENCE IN THE JUVENILE'S HOME DID NOT CONSTITUTE OBSTRUCTING OR RESISTING AN OFFICER WITHOUT VIOLENCE.** Two deputies went to the juvenile's residence looking for A.C., a juvenile shoplifting suspect. The juvenile told the deputies that A.C. was not there and allowed the deputies to come inside and look around. When the deputy and his partner entered the home, they noticed that the side exterior door was ajar. They went outside, and around the rear of the house. The partner told the deputy that he heard a door open and close. The juvenile then admitted that A.C. had been inside the house. A short time later another officer apprehended A.C. Based on the juvenile's false statement regarding A.C.'s whereabouts, the juvenile was found guilty of resisting or obstructing a law enforcement officer without violence. The trial court denied the juvenile's motions for a judgment of acquittal. The trial court held that the deputy was carrying out a legal duty by investigating a crime and that juvenile's conduct in lying to the police, which gave A.C. the opportunity to run out of the house, constituted obstruction. The Fourth District Court of Appeal found that if a police officer is not engaged in executing process on a person, is not legally detaining that person, or has not asked the person for assistance with an ongoing emergency that presents a serious threat of imminent harm to person or property, the person's words alone can rarely, if ever, rise to the level of an obstruction. The Fourth District held that the deputy's investigation, though performed during the course of his general duties, did not fall within the above category of legal duties. Although the deputy initially testified that his purpose in coming to juvenile's residence was to apprehend A.C., he later clarified that he was not there to arrest A.C. or to place him in custody, but merely to question him about the

shoplifting incident. The deputy was not attempting to detain or arrest a suspect but merely searching for a suspect for questioning. Therefore, the juvenile's verbal conduct could not be construed as unlawfully obstructing the officer in the performance of a legal duty. The Fourth District further held that even if the investigation qualified as the execution of a legal duty, the State failed to prove that appellant, by his words alone, committed an action that constituted obstruction or resistance of that lawful duty. With limited exceptions, physical conduct must accompany offensive words to support a conviction under s. 843.02, F.S. The deputy was not performing a legal duty when questioning the juvenile and the juvenile did not physically impede the deputy's investigation. Accordingly, the case was reversed and remanded to vacate the delinquency order and disposition.

<http://www.4dca.org/opinions/Nov%202008/11-12-08/4D08-514.op.pdf> (November 12, 2008).

Fifth District Court of Appeal

No new opinions for this reporting period.

Dependency Case Law

Florida Supreme Court

In Re: Amendments to Florida Family Law Rules, ___ So.2d ___, 2008 WL 4830932 (Fla. 2008).
FAMILY LAW RULES COMMITTEE REGULAR CYCLE AMENDMENTS Family Law Rule [12.040](#) was amended to require attorneys from the Department of Revenue to file a notice of limited appearance when the Department is involved in Title IV-D proceedings to determine paternity or establish, enforce, or modify an obligation of support or whenever the Department intervenes in a non-IV-D proceeding. The notice should clearly inform the recipient of Title IV-D services and other parties to the case that the IV-D attorney represents only the Title IV-D agency and not the recipient of IV-D services. (Rule 12.407 requires court approval before a child is deposed or is subpoenaed to appear at a hearing.) Subdivision (f) of rule 12.490, General Magistrates, was amended to clarify that exceptions to a general magistrate's report should be "filed" within 10 days of service of the report. Also, subdivision (g) of rule 12.492, Magistrates, is amended to clarify that exceptions to a special magistrate's report must be "filed" within ten days of service of the report, and that cross-exceptions be filed within five days of the "filing" of the exceptions. Two new forms were also adopted. Form 12.900(g) is a retainer agreement for unbundled legal services and is intended to be used as a "rider" or supplemental agreement, in addition to a standard attorney-client fee agreement. New form 12.900(h) is for use in complying with [Florida Rule of Judicial Administration 2.545\(d\)](#), which requires the petitioner in a family law case to file with the court a notice of related cases. Several existing forms were also amended, including forms regarding name changes for minor children and Standard Family Law Interrogatories for Modification Proceedings.
<http://www.floridasupremecourt.org/decisions/2008/sc08-92.pdf> (October 16, 2008).

First District Court of Appeal

No new opinions for this reporting period.

Second District Court of Appeal

D.R. v. Department of Children and Family Services, __ So.2d __, 2008 WL 4820814 (Fla. 2d DCA 2008). [ONE INCIDENT OF CORPORAL PUNISHMENT NOT ENOUGH](#) The Mother appealed a dependency adjudication in which the trial court found that the Mother's behavior created an environment which has resulted in harm to the children and which has the potential to seriously worsen. Both DCF and the GAL acknowledged that this finding was not supported by the evidence. The court also reiterated that one incident of corporal punishment that did not result in serious injury was not enough to support a finding of dependency. http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2008/November/November%2007,%202008/2D08-852.pdf (November 7, 2008).

Third District Court of Appeal

No new opinions for this reporting period.

Fourth District Court of Appeal

J.R. V. State Of Florida, Department Of Children And Families, __ So.2d __, 2008 WL 4922953, (Fla. 4th DCA 2008). [DEPENDENCY ADJUDICATION CAN'T BE BASED UPON HEARSAY](#) A mother appeals an order adjudicating her children dependent. She argued, and DCF agreed, that the evidence was insufficient to establish either neglect or abandonment of the children and the case was reversed. The DCF failed to present witnesses with firsthand knowledge of the allegations to support a finding of dependency based upon abandonment under [section 39.01\(1\), Florida Statutes](#), or neglect under [section 39.01\(43\), Florida Statutes](#). The only direct testimony came from the mother. The only substantive evidence presented by the DCF was uncorroborated hearsay evidence of an anonymous abuse report stating that the children had been abandoned at the great-grandmother's home. A finding of dependency based upon an uncorroborated report and hearsay evidence is insufficient to support an adjudication of dependency. Absent the hearsay testimony, there was no evidence of abandonment or neglect. <http://www.4dca.org/opinions/Nov%202008/11-19-08/4D08-1031.op.pdf> (November 19, 2008).

J.J. v. Department Of Children And Families, __ So.2d __, 2008 WL 4864203 (Fla. 4th DCA 2008). [TERMINATION OF PARENTAL RIGHTS REVERSED](#) The mother appealed the termination of her parental rights and claimed that DCF failed to prove by clear and convincing evidence that she posed a substantial risk of significant harm to her twin children and that termination of her parental rights was the least restrictive means of protecting them from harm. The appellate court agreed and reversed the termination. Although the mother's parental rights had previously been terminated for two of her children due to egregious conduct, the mother showed positive changes to her life and voluntarily took parenting classes and participated in

counseling. The court also noted that 5 years has passed since the first termination, and that the mother now had a job, a home, and a support system in place. The court ordered the children to remain dependent and DCF to give the mother a reunification case plan. <http://www.4dca.org/opinions/Nov%202008/11-12-08/4D08-1825.op.pdf> (November 12, 2008).

D.B. and K.B. v. Department of Children and Families, ___ So.2d ___, 2008 WL 4791024 (Fla. 4th DCA 2008). **TERMINATION OF PARENTAL RIGHTS AFFIRMED** The court received abundant evidence that both parents failed and refused to comply with their case plans, even though the Department of Children and Families made reasonable efforts to provide services to them, which they either affirmatively rejected or failed to attend. Although each parent testified to facts which would excuse compliance with their case plans, the trial court found that both parents were not credible. The evidence was sufficient to support the trial court's determination that both parents' rights should be terminated, that it was in the manifest best interests of the child to do so, and that termination was the least restrictive means of protecting the child. <http://www.4dca.org/opinions/Nov%202008/11-5-08/4D08-1702.op.pdf> (November 5, 2008).

Fifth District Court of Appeal

L.H.v. Department Of Children And Families, ___ So.2d ___, 2008 WL 4998963 (Fla. 5th DCA 2008). **INEFFECTIVE ASSISTANCE OF COUNSEL** Pursuant to [Florida Rule of Appellate Procedure 9.030\(a\)\(2\)\(B\)\(i\)](#), the court certified the following questions: 1. Does Florida recognize a claim of ineffective assistance of counsel arising from a lawyer's representation of a parent(S) in a proceeding for the termination of parental rights? 2. If so, what procedure must be followed to pursue a claim of ineffective assistance of counsel? <http://www.5dca.org/Opinions/Opin2008/112408/5D08-133.pdf> (November 25, 2008).

L.M. v. Department Of Children and Families, ___ So.2d ___, 2008 WL 4949131 (Fla. 5th DCA 2008). **APPOINTMENT OF APPELLATE COUNSEL** The mother appealed her motion to have the court retroactively appoint her appellate counsel. The court treated the appeal as a petition for certiorari and found that the trial court's denial of the motion constituted a departure from the essential requirements of law. The mother had been appointed appellate counsel for one appeal. When another issue arose, the same appellate attorney believed that he was also to represent the mother on the second issue. After completing the work, the JAC refused to pay the appellate attorney for the 2nd representation on the grounds that there was not order appointing him to represent the mother on the second issue. The appellate attorney requested that the court issue an order *nunc pro tunc* appointing him, and the court refused, stating that the trial counsel should have handled the appeal. The appellate court found that the trial court departed from the essential requirements of law in denying the appellate counsel's request to be appointed appellate counsel *nunc pro tunc*. It was not unreasonable for the appellate counsel to believe that he had been appointed to represent the mother on both appeals. The initial order appointing him as appellate counsel was vague and did not specifically limit his

appointment to an appeal regarding the first issue alone. No party objected to the appellate counsel's representation of the mother on her second appeal. The appellate counsel, not the trial counsel, performed all of the work on both appeals and the trial counsel did not seek compensation from the JAC on either appeal. Furthermore, there is no claim by the JAC that the appellate counsel was aware of the order appointing the trial counsel for the second appeal prior to the completion of that appeal.

<http://www.5dca.org/Opinions/Opin2008/111708/5D08-2321.op.pdf> (November 21, 2008).

A.W. v. Department Of Children And Families, __ So.2d __, 2008 WL 4889139 (Fla. 5th DCA 2008). **ADJUCIATION OF DEPENDENCY AFFIRMED** A father contested his daughter's adjudication of dependency. The appellate court affirmed the trial court's findings that the child was dependent as to Father based on several factors, including moral and ethical conflicts, his failure to have contact with the child, his failure to support the child and other factors that the trial court found evinced a lack of settled purpose to assume all parental responsibility for the child. <http://www.5dca.org/Opinions/Opin2008/111008/5D08-1238.op.pdf> (November 10, 2008).

Circuit Court Case of Interest

In The Matter Of The Adoption Of: John Doe and James Doe, 2008 WL 5006172 (Fla. Cir. Ct. 2008). **HOMOSEXUAL'S ADOPTION OF FOSTER CHILDREN** A foster parent filed a petition for adoption of two children that had been living with him and his partner as foster children since 2004. The Department of Children and Families moved to dismiss the petition based upon the foster parent's sexual orientation. The Petitioner claimed that §63.042(3), Florida Statutes (2008) which prohibits homosexuals from adopting is unconstitutional. The court agreed and found that the statute violated the Petitioner and the Children's equal protection rights guaranteed by [Article I, § 2 of the Florida Constitution](#) without satisfying a rational basis. The court also stated that the statutory exclusion defeats a child's right to permanency as provided by federal and state law pursuant to the Adoption and Safe Families Act of 1997, and granted the petition for adoption. (November 25, 2008).

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

Voronin v. Voronina, ___ So. 2d ___, 2008 WL 4891111, ___ Fla. L. Weekly D ___, (Fla. 2nd DCA 2008). **ABSENCE OF SPECIFIC FINDINGS RE ATTORNEY'S FEES RENDERS ORDER FUNDAMENTALLY ERRONEOUS**

Former husband appealed award of attorney's fees to former wife in dissolution proceedings; appellate court agreed that the trial court's order was flawed due to the absence of findings as to the basis for the amount of the fee award. Appellate court reiterated that when making an award of attorney's fees in a dissolution proceeding, the trial court must take into account the hourly rate; the number of hours reasonably expended, and then set forth specific findings. Noting that former husband did not preserve the issue for appeal by raising it below, the appellate court found the absence of the specific findings rendered the order fundamentally erroneous on its face.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2008/November/November%2014,%202008/2D07-3555.pdf (November 14, 2008).

Wilder v. Wilder, ___ So. 2d ___, 2008 WL 4837460, 46 Fla. L. Weekly D2615, (Fla. 2nd DCA 2008). **CERTIORARI; DISCOVERY; CONFLICT CERTIFIED WITH 5TH DCA**

Former wife sought certiorari relief from a non-final order granting former husband's motion to compel her to respond to an interrogatory requesting contact information on the health care professionals with whom she had consulted. Former wife had argued in her petition for dissolution that the prenuptial agreement she signed was invalid because it was obtained through coercion, duress, fraud, etc; she also contended that her assertion she was under emotional distress prior to signing the agreement did not make an issue of either her physical or mental health and that the consultations were privileged. Former husband responded that the privilege did not attach because he was not seeking the substance of any communication between former wife and her health care professional. Stating the rule that certiorari is appropriate when a discovery order departs from the essential requirements of law and causes injury to the petitioner without an adequate remedy on appeal, the appellate court held that former husband was not seeking information that was privileged because contact information does not fall within the scope of the psychotherapist-patient privilege in Chapter 90, Florida Statutes. Noting that a different conclusion had been reached in Weinstock v. Groth, 659 So. 2d 713 (Fla. 5th DCA 1995), the 2nd DCA certified conflict with the 5th DCA with regard to its holding that the psychotherapist-patient privilege automatically applies to protect the contact information of mental health professionals.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2008/November/November%2007,%202008/2D08-453.pdf (November 7, 2008).

Chhoury v. Chhoury, ___ So. 2d ___, 2008 WL 4790970, 46 Fla. L. Weekly D2590, (Fla. 2nd DCA 2008). **REQUIRED FINDINGS RE TEMPORARY ATTORNEY FEES**

Former husband sought review of temporary relief order granting former wife alimony, child support, temporary attorney's fees and costs. Noting that the party seeking fees must prove the reasonableness and necessity of the fees and reiterating that an award of temporary attorney's fees must be accompanied by factual findings regarding reasonableness, the appellate court reversed the award of fees for not having included the requisite findings and reversed the award of costs for not being supported by the evidence.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2008/November/November%2005,%20008/2D08-767.pdf (November 5, 2008).

Third District Court of Appeal

No new opinions for this reporting period.

Fourth District Court of Appeal

Vitale v. Vitale, __ So. 2d __, 2008 WL 4922727, __ Fla. L. Weekly D __, (Fla. 4th DCA 2008).

IMPROPER TRANSFER OF VENUE

Former wife appealed an order transferring venue in a modification of custody proceeding; appellate court reversed. The final judgment of dissolution had approved an agreement that former wife would be the primary residential parent for the two minor children in Broward County. She then relocated with the children to North Carolina; former husband relocated to Collier County. Although former husband initiated modification proceedings in Broward County, he moved to transfer to Collier County on grounds on *forum non conveniens*. The trial court granted former husband's motion after finding that neither party had lived in Broward County for several years. Pursuant to section 61.13(2)(c), Florida Statutes, venue lies where either parent resides with the child or where the final judgment was rendered. Section 47.122, Florida Statutes, authorizes a change of venue for *forum non conveniens* only to a court where the action might have been brought. The appellate court held that because the proceedings could only have been initiated in either North Carolina or Broward County, not Collier County, that the trial court committed error when it transferred venue to Collier County.

<http://www.4dca.org/opinions/Nov%202008/11-19-08/4D08-145.op.pdf> (November 19, 2008).

Fifth District Court of Appeal

Baker & Hostetler v. Swearingen, __ So. 2d __, 2008 WL 494118, __ Fla. L. Weekly D __, (Fla. 5th DCA 2008). **JURISDICTION OF TRIAL COURT RE ATTORNEY'S CHARGING LIEN IN DISSOLUTION OF MARRIAGE CASE**

Appeal by law firm which had represented former wife in dissolution of marriage proceeding and had then filed a motion to withdraw as counsel and a charging lien. Trial court had "reluctantly" found it was without jurisdiction to consider the matter. Appellate court concluded that because the trial court had specifically retained jurisdiction over the issue of fees, it had retained jurisdiction over the charging lien as well.

<http://www.5dca.org/Opinions/Opin2008/111708/5D08-1089.op.pdf> (November 21, 2008).

Herpich v. Herpich, __ So. 2d __, 2008 WL 4889135, __ Fla. L. Weekly D __, (Fla. 5th DCA 2008). **CONSTRUCTION OF LANGUAGE CONTAINED IN PRENUPTIAL AGREEMENTS**

Former spouses had remarried following their divorce and were married at the time of the husband's death. The trial court denied the wife's estate-related petitions based on its finding that the prenuptial agreement executed on the day of the couple's first marriage remained in

effect after the divorce and remarriage and that the terms, “separation and reconciliation” encompass the terms, “divorce and remarriage.” Appellate court agreed with the wife that the trial court erred in its ruling that the words, “separation and reconciliation” encompass “divorce and remarriage” and held that the rules of construction applicable to other contracts apply to the interpretation of a prenuptial agreement. If the language is clear and unambiguous, then the contract is the best guide to the intent of the parties; if however, the language is reasonably susceptible to more than one meaning, then the court may look to rules of construction and rely on evidence to interpret it. The appellate court also stated that generally speaking, a prenuptial agreement does not survive a divorce, but terminates upon divorce.

<http://www.5dca.org/Opinions/Opin2008/111008/5D07-3920.op.pdf> (November 14, 2008).

Beebe v. Roman, __ So. 2d __, 2008 WL 4820488, 46 Fla. L. Weekly D2608, (Fla. 5th DCA 2008).

EQUALIZATION OF INCOME NOT IMPROPER PER SE

Former husband argued that the trial court’s award of permanent periodic alimony to former wife was based on an improper intent to “automatically” equalize the parties’ net income. Appellate court disagreed and affirmed, holding that an award of alimony that results in equalization of income is not improper per se. Citing Canakaris v. Canakaris, 382 So. 2d 1197 (Fla. 1980), the appellate court reiterated that a trial court’s alimony award made after an appropriate consideration of all the factors set forth in section 61.08(2), Florida Statutes, will generally be upheld if the amount awarded is neither arbitrary, fanciful, nor unreasonable. The appellate court found no abuse of discretion in this case.

<http://www.5dca.org/Opinions/Opin2008/110308/5D08-441.op.pdf> (November 7, 2008).

Domestic Violence Case Law

Florida Supreme Court

In Re: Amendments To Florida Rules Of Juvenile Procedure, 992 So.2d 242, (Fla. 2008).

CHAPTER 39 INJUNCTION FORM AMENDED TO COMPLY WITH LEGISLATION Rule 8.225 is amended to require notice to foster or pre-adoptive parents of a proceeding or hearing in a chapter 39 *dependency case*. Forms 8.962 and 8.963 are amended to incorporate changes made to the injunction motion and order forms set forth in [§39.504, Florida Statutes](#), concerning injunctions entered to protect children from abuse and domestic violence. Changes to §39.503(6), Florida Statutes, required form 8.968 to be amended to state that when the Department of Children and Family Services made its diligent search to determine the residence of a parent or prospective parent, it conducted a thorough search of at least one electronic database specifically designed for location of persons. Form 8.977 is amended in response to newly created [§743.046, Florida Statutes](#), which removes the disability of nonage for certain minors to ensure they can secure utility services.

<http://www.floridasupremecourt.org/decisions/2008/sc08-1612.pdf> (September 25, 2008).

In Re: Amendments To Florida Family Law Rules., __ So.2d ____, 2008 WL 4830932 (Fla. 2008). [FAMILY LAW RULES COMMITTEE REGULAR CYCLE AMENDMENTS](#) Family Law Rule [12.040](#) was amended to require attorneys from the Department of Revenue to file a notice of limited appearance when the Department is involved in Title IV-D proceedings to determine paternity or establish, enforce, or modify an obligation of support or whenever the Department intervenes in a non-IV-D proceeding. The notice should clearly inform the recipient of Title IV-D services and other parties to the case that the IV-D attorney represents only the Title IV-D agency and not the recipient of IV-D services.

(Rule 12.407 requires court approval before a child is deposed or is subpoenaed to appear at a hearing.) Subdivision (f) of rule 12.490, General Magistrates, was amended to clarify that exceptions to a general magistrate's report should be "filed" within 10 days of service of the report. Also, subdivision (g) of rule 12.492, Special Magistrates, is amended to clarify that exceptions to a special magistrate's report must be "filed" within ten days of service of the report, and that cross-exceptions be filed within five days of the "filing" of the exceptions.

Two new forms were also adopted. Form 12.900(g) is a retainer agreement for unbundled legal services and is intended to be used as a "rider" or supplemental agreement, in addition to a standard attorney-client fee agreement. New form 12.900(h) is for use in complying with [Florida Rule of Judicial Administration 2.545\(d\)](#), which requires the petitioner in a family law case to file with the court a notice of related cases. Several existing forms were also amended, including forms regarding name changes for minor children and Standard Family Law Interrogatories for Modification Proceedings. <http://www.floridasupremecourt.org/decisions/2008/sc08-92.pdf> (October 16, 2008).

First District Court of Appeal

No new opinions for this reporting period.

Second District Court of Appeal

No new opinions for this reporting period.

Third District Court of Appeal

No new opinions for this reporting period.

Fourth District Court of Appeal

No new opinions for this reporting period.

Fifth District Court of Appeal

No new opinions for this reporting period.