

OSCA/OCI'S FAMILY COURT CASE LAW UPDATE
November 2009

Table of Contents

Delinquency Case Law	2
Florida Supreme Court.....	2
First District Court of Appeal	2
Second District Court of Appeal.....	3
Third District Court of Appeal.....	3
Fourth District Court of Appeal.....	3
Fifth District Court of Appeal.....	4
Dependency Case Law	5
Florida Supreme Court.....	5
First District Court of Appeal	6
Second District Court of Appeal.....	6
Third District Court of Appeal.....	6
Fourth District Court of Appeal.....	6
Fifth District Court of Appeal.....	8
Dissolution Case Law	8
Florida Supreme Court.....	8
First District Court of Appeal	8
Second District Court of Appeal.....	9
Third District Court of Appeal.....	10
Fourth District Court of Appeal.....	10
Fifth District Court of Appeal.....	12
Domestic Violence Case Law	12
Florida Supreme Court.....	12
First District Court of Appeal	13
Second District Court of Appeal.....	13
Third District Court of Appeal.....	13
Fourth District Court of Appeal.....	13
Fifth District Court of Appeal.....	14

Delinquency Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

R.A.V. v. State, ___ So.3d ___, 2009 WL 3817934 (Fla. 1st DCA 2009). **COSTS IMPOSED PURSUANT TO S.775.083 (2), F.S. (2008), CAN ONLY BE IMPOSED IF THERE IS AN ADJUDICATION.** The trial court withheld adjudication for simple battery and placed the juvenile on probation. The juvenile's counsel filed a brief pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). The First District Court of Appeal affirmed the disposition but remanded with instructions to strike costs in the amount of \$20.00 imposed pursuant to the Crime Prevention Fund and s.775.083(2), F.S. (2008). The First District found that such costs can only be imposed if there is an adjudication. Since adjudication was withheld, costs could not be imposed. See J.S. v. State, 19 So.3d 380 (Fla. 2d DCA 2009) and C.M.S. v. State, 997 So.2d 520 (Fla. 2d DCA 2008).

<http://opinions.1dca.org/written/opinions2009/11-17-2009/09-1694.pdf> (November 17, 2009).

A.L.B. v. State, ___ So.3d ___, 2009 WL 3645187 (Fla. 1st DCA 2009). **DISPOSITION THAT FAILED TO MEET THE REQUIREMENTS OF E.A.R. V. STATE, 4 SO.3D 614 (FLA.2009), WAS AFFIRMED WHERE JUVENILE FAILED TO OBJECT AT THE TIME OF SENTENCING AND FAILED TO FILE A FLORIDA RULE OF JUVENILE PROCEDURE 8.135(B)(2) MOTION TO CORRECT SENTENCING ERROR BEFORE HIS INITIAL BRIEF WAS FILED.** The First District Court of Appeal affirmed the juvenile's disposition even though their independent review of the record pursuant to Anders v. California, 386 U.S. 738 (1967), and State v. Causey, 503 So.2d 321 (Fla.1987), revealed the trial court failed to comply with the strict standards set forth in E.A.R. v. State, 4 So.3d 614 (Fla.2009). The juvenile failed to object at the time of sentencing and failed to file a Florida Rule of Juvenile Procedure 8.135(b) (2) motion to correct sentencing error before his initial brief was filed. See Maddox v. State, 760 So.2d 89, 102, 110 (Fla.2000), (holding "improper habitualization" to be fundamental error, although not susceptible to correction on direct appeal after the "window period [following] the enactment of the Criminal Appeal Reform Act" had closed). The First District affirmed the disposition without prejudice to the juvenile's right to seek relief collaterally and certified as a question of great public importance the following:

NOTWITHSTANDING MADDOX, SHOULD AN APPELLATE COURT CORRECT A SENTENCING ERROR IN AN ANDERS CASE WHICH WAS NOT PRESERVED PURSUANT TO THE APPLICABLE RULES OF PROCEDURE? IF NOT, WHAT STEPS SHOULD AN APPELLATE COURT FOLLOW TO CARRY OUT THE MANDATES OF ANDERS AND CAUSEY IN SUCH A CASE?

<http://opinions.1dca.org/written/opinions2009/11-05-2009/09-2036.pdf> (November 5, 2009).

Second District Court of Appeal

No new opinions for this reporting period.

Third District Court of Appeal

L.C. v. State, __ So.2d __, 2009 WL 3763278 (Fla. 3d DCA 2009). **DENIAL OF MOTION TO SUPPRESS MARIJUANA EVIDENCE WAS REVERSED.** The juvenile was truant. The police were going to transport the juvenile to school. Before placing her in the police car, one of the officers searched all of her pockets. Her rear pocket contained a small bag of marijuana. The officer testified that he did not see any bulges and that the police searched everyone that they put into their police car. The police officer testified that he searched her pockets without performing any pat down. The juvenile's motion to suppress the evidence was denied and the juvenile appealed. The Third District Court of Appeal held that the search incident to arrest exception did not apply and that the search of juvenile's pockets was unreasonable. Pursuant to s. 984.13(1) (b), F.S. (2007), an officer may take a child into custody for the purpose of delivering the child, without unreasonable delay to the appropriate school system site. Truancy is not a crime. Because the juvenile was not arrested in this case, the search incident to arrest exception to the warrant requirement cannot apply. Third District held that it was unreasonable for a police officer to perform a weapons search without having performed a pat-down on a fifteen-year-old truant before putting her in the back of his police car when the officer had no basis to suspect her of possessing any weapons. The Third District noted that case law consistently indicated that the officer must have a reasonable belief his safety is in danger and must first perform a pat-down. In the absence of a reasonable suspicion, the officer was not justified in proceeding to a direct search of the juvenile merely because he felt uneasy about his safety, nor could he do so based upon blanket department policy. At a minimum, the officer was required to perform a pat-down. Denial of motion to suppress was reversed and remanded.

<http://www.3dca.flcourts.org/Opinions/3D08-2826.pdf> (November 12, 2009).

Fourth District Court of Appeal

B.O. v. State, __ So.2d __, 2009 WL 4061010 (Fla. 4th DCA 2009). **SENTENCING ENHANCEMENT IMPOSED PURSUANT TO S.790.22 (9), F.S., WAS REVERSED BECAUSE OF THE ABSENCE OF NOTICE IN THE CHARGING DOCUMENT OF THE FACTS SUPPORTING THE ENHANCED PUNISHMENT.** The juvenile burglarized a home while unarmed. The juvenile stole, among other things, two hand guns. The charging document alleged only that he committed two counts of grand theft of a firearm. Neither count alleged that in stealing the firearms he possessed or used a firearm. The juvenile pled to the crimes as charged. On appeal, the juvenile challenged the disposition increasing the standard penalty to 15 days of secure detention pursuant to s.790.22(9), F.S., Section 790.22(9), F.S., provides that the trial court shall order, in addition to any other penalty imposed for a first offense where the juvenile is not committed to a residential commitment program, a minimum detention of 15 days in a secure detention facility for any juvenile who committed an offense that involved the use or possession of a firearm, or

an offense during the commission of which the minor possessed a firearm. The issue was whether the statute applies when the petition neither cited the statute nor alleged that, in committing the theft, the child used or possessed a firearm. The Fourth District Court of Appeal held that under State law the accused must be given notice in the charging document of any fact on which a sentencing enhancement will be based. The State failed to provide any statute that would dispense with the due process requirement of notice to support a sentencing enhancement in juvenile delinquency cases. Accordingly, the sentence was reversed and remanded. Judge Hazouri filed a dissenting opinion. <http://www.4dca.org/opinions/Nov%202009/11-25-09/4D08-3682.op.pdf> (November 25, 2009).

S.W. v. State, __ So.2d __, 2009 WL 3837036 (Fla. 4th DCA 2009). [THE TRIAL COURT'S DISPOSITION SATISFIED THE REQUIREMENTS OF E.A.R. V. STATE, 4 So.3d 614 \(FLA.2009\)](#). The Fourth District Court of Appeal affirmed the denial of the juvenile's motion for judgment of acquittal and the trial court's departure from the Department of Juvenile Justice's (DJJ) recommended disposition. At the time of the offense, the juvenile was seventeen years old. She was on juvenile probation for having committed misdemeanor battery and on adult probation for having committed criminal mischief. In the past, she also received pretrial diversion for burglary of a dwelling. Following the current theft adjudication, the trial court held a disposition hearing. The DJJ's pre-disposition report contained a comprehensive evaluation indicating that the juvenile had psychiatric issues, suicidal ideations, and an extensive substance abuse history. The comprehensive evaluation recommended that the trial court place the juvenile in a highly-structured residential facility capable of handling her substance abuse issues. Nevertheless, the DJJ found that the juvenile was a low risk for re-offending or flight, and recommended that the juvenile continue on probation, with the added special condition of residential drug treatment and aftercare. The trial court rejected the DJJ's recommendation and committed the juvenile to a high-risk residential program. The court explained its reasoning for the high-risk program in great detail. The main reason was the trial court's belief that the juvenile needed an intensive substance abuse treatment program. The Fourth District Court of Appeal held that the trial court employed the proper legal standard in providing its on-the-record departure reasons and satisfied the requirements of E.A.R. v. State, 4 So.3d 614 (Fla.2009). Further, the trial court's stated reasons were supported by a preponderance of the competent, substantial evidence contained within the record. Therefore, the trial court satisfied its duty to determine the most appropriate dispositional services in the least restrictive available setting. The trial court's disposition was affirmed. <http://www.4dca.org/opinions/Nov%202009/11-18-09/4D08-4040.op.pdf> (November 18, 2009).

Fifth District Court of Appeal

R.J.L. v. State, __ So.3d __, 2009 WL 3784600 (Fla. 5th DCA 2009). [JUVENILE ORDERED TO BE IMMEDIATELY RELEASED FROM SECURE DETENTION WHERE THE TRIAL COURT FAILED TO STATE, IN WRITING, CLEAR AND CONVINCING REASONS FOR THE MORE RESTRICTIVE PLACEMENT AS REQUIRED BY S.985.255\(3\)\(B\), F.S.](#) The juvenile petitioned for habeas corpus

relief. The juvenile was on home detention for two separate cases. While on home detention, the juvenile was charged with a new law violation and a detention hearing was held for all three cases. The juvenile scored “zero” on the detention risk assessment instrument (RAI) prepared by the Department of Juvenile Justice. Nevertheless, the trial court ordered secure detention without any explanation. The Fifth District Court of Appeal found that s.985.255(3)(b), F.S., requires that if the court orders a placement more restrictive than indicated by the RAI, the court shall state, in writing, clear and convincing reasons for such placement. In the instant case, no such findings were made. Accordingly, the writ of habeas corpus was granted, with the juvenile ordered to be immediately released from secure detention and returned to home detention. The trial court was permitted an opportunity to revisit the issue of detention if there is a basis for doing so. <http://www.5dca.org/Opinions/Opin2009/110909/5D09-3846.op.pdf> (November 13, 2009).

S.D.J. v. State, __ So.3d __, 2009 WL 3672074 (Fla. 5th DCA 2009) and S.D.J. v. State, __ So.3d __, 2009 WL 3672089 (Fla. 5th DCA 2009). **IMPOSITION OF COURT COSTS REVERSED AND REMANDED BECAUSE S. 938.27(1), F.S., DOES NOT AUTHORIZE COURTS TO IMPOSE COSTS OF PROSECUTION ON A JUVENILE ADJUDICATED DELINQUENT.** In these appeals, the State conceded error by the trial court in assessing costs of prosecution in case numbers 5D09-1285 and 5D09-1287. The Fifth District Court of Appeal held that s. 938.27(1), F.S., does not authorize courts to impose costs of prosecution on a juvenile adjudicated delinquent. In all other respects the adjudications of delinquency and dispositions were affirmed. Accordingly, the cases were remanded with directions that the costs be stricken. <http://www.5dca.org/Opinions/Opin2009/110209/5D09-1285.op.pdf> (November 6, 2009) and <http://www.5dca.org/Opinions/Opin2009/110209/5D09-1287.op.pdf> (November 6, 2009).

Dependency Case Law

Florida Supreme Court

In Re: Amendments To The Florida Rules Of Judicial Administration, The Florida Rules Of Juvenile Procedure, And The Florida Rules Of Appellate Procedure--Implementation Of The Commission On District Court Of Appeal Performance And Accountability Recommendations, --- So.3d ----, 2009 WL 3763128 (Fla. 2009). **RULES AMENDED.**

1. Rule of Judicial Administration 2.250(a) (2) was amended to state that a district court of appeal should render a decision in juvenile dependency and termination of parental rights cases within sixty, rather than the standard one hundred eighty, days of oral argument or submission of the case to the court panel for a decision without oral argument. The Court noted that "[p]roviding a limited time standard for preparation of a decision provides a policy statement that the expedition of these cases is important to the judiciary of the state."
2. Rule of Judicial Administration 2.535(i) was amended to require that transcription of hearings for appeals of dependency and termination of parental rights orders be given priority over transcription of other proceedings unless the court orders otherwise.

3. Rules of Juvenile Procedure change: An adjudication of dependency or a final judgment of termination of parental rights should set forth all of the specific days on which the hearing occurred. A sentence is added to subdivision 8.525(i) (1), Terminating Parental Rights, providing that the court must include the dates of the adjudicatory hearing in an order terminating parental rights. Similarly, forms 8.983 and 8.984 are amended to require that all dates of the adjudicatory hearing be provided in the order.
4. Florida Rule of Appellate Procedure 9.430, Proceedings by Indigents, was amended to add new subdivision (d), providing that an appellate court may, in its discretion, presume that a party in juvenile dependency and termination of parental rights cases who has been declared indigent in the lower court remains indigent for purposes of appeal. <http://www.floridasupremecourt.org/decisions/2009/sc08-1724.pdf> (November 12, 2009).

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

A.R. v. Department of Children and Family Services, --- So.3d ----, 2009 WL 3763154 (Fla. 3d DCA 2009) **DEPENDENCY REVERSED**. The Father appealed an Order of Adjudication and the Department conceded error noting that the evidence introduced at trial did not support the court's finding of dependency. The Father was found to be at "medium risk" based on an Adult-Adolescent Parenting Inventory Test, and the Department conceded that the test administered was invalid because the child in question was an infant. Moreover, the case manager's testimony regarding the Father's lack of parenting skills that was based on his ability to diaper the infant and correctly position the infant's head was also insufficient to support the trial court's finding of dependency. The court vacated the Order of Adjudication and remanded the case. <http://www.3dca.flcourts.org/Opinions/3D09-2264.pdf> (November 12, 2009).

Fourth District Court of Appeal

T.O. the Father and E.R. the Mother v. Department of Children and Families, --- So.3d ----, 2009 WL 3837159 (Fla. 4th DCA 2009). **TERMINATION OF PARENTAL RIGHTS AFFIRMED**. A mother and father appealed the termination of their parental rights. The family had a history of domestic violence, and both parents had criminal histories. DCF's concurrent case plan included, among other things, psychological evaluations, parent effectiveness training, substance abuse evaluations, random drug testing, and domestic violence counseling for the parents. It also included assessments, therapy and counseling for the children. During the course of the case plan, one of the children stated that her father sexually abused her, and began exhibiting sexual behavior. As a result, the trial court ordered that the parents and children submit to psychosexual evaluations. The parents were also required to attend psychosexual counseling and the father was ordered to take a lie detector examination for therapeutic purposes. The

parents completed most of their case plan tasks, the trial court found, by clear and convincing evidence, that any further services to the parents would be futile, that there was a high likelihood of harm by the parents if the children were returned to their care, and that there is a high likelihood that the parents' continuing involvement threatens the life, safety, or well-being of the children.

The parents contested the termination of their parental rights and argued that the trial court improperly admitted the child's hearsay evidence because the child did not testify at trial. In this case, the trial court conducted a hearsay hearing prior to trial, as required by the statute, and determined that the child's hearsay statements were reliable and from trustworthy sources. The parties expected the child to testify at trial to meet the second requirement of section 90.803(23). When she refused to testify about her parents, neither party objected or asked the court to find the child unavailable as a witness. The appellate court agreed that the testimony should not have been admitted but held that the error was not fundamental because there was sufficient corroborating evidence to support the admission of this evidence. Section 90.803(23), Florida Statutes (2008), allows for the admission of child victim hearsay statements where the statements describe an act of child abuse or neglect. Before these statements are admissible, the trial court must conduct a hearing and make a preliminary determination that they come from a trustworthy source and are reliable. §90.803(23), Fla. Stat. (2008). Then, the child must either testify at trial or be declared unavailable as a witness. If the child is unavailable, the hearsay statements are admissible only if the trial court determines that there is other corroborating evidence of the abuse or neglect. Also, because there was competent, substantial evidence to support termination of the parents' rights to all four children under section 39.806(1) (c) as ordered by the trial court, the court affirmed the termination as to both parents. <http://www.4dca.org/opinions/Nov%202009/11-18-09/4D09-686%20&%2009-687.op.pdf> (November 18, 2009).

J.G., the Father, and R.G., the Mother v. Department of Children and Families, --- So.3d ----, 2009 WL 3837143 (Fla.4th DCA 2009) **TERMINATION OF PARENTAL RIGHTS AFFIRMED**. A father and a mother appealed the trial court's final judgment terminating their parental rights. The appellate court affirmed, concluding that the termination of parental rights was supported by competent substantial evidence. In a well-reasoned order, the trial court found that the parents, who had been involved in the dependency system for six years while attempting to address their continuing pattern of substance abuse, domestic violence, and other criminal conduct: (1) failed to substantially comply with their case plans; (2) demonstrated a pattern of substance abuse, criminal activity, and inappropriate decisions pertaining to the child, which would continue irrespective of the provision of services; and (3) engaged in "episodic abandonment" in that the parents were given multiple opportunities to reunite with their child but had "botched" these events by committing crimes and being incarcerated, leaving the child to languish in the foster care system for years. The court found that termination of the parental rights was in the manifest best interest of the child, considering the factors set forth under section 39.810, and that termination was the least restrictive means of protecting the child. <http://www.4dca.org/opinions/Nov%202009/11-18-09/4D09-29.op.pdf> (November 18, 2009).

Fifth District Court of Appeal

A.H. v. Department of Children and Families, ___ So.3d ____, 2009 WL 4059232 (Fla. 5th DCA 2009). **TERMINATION OF PARENTAL RIGHTS REVERSED.** The father appealed his termination of parental rights which occurred after he failed to appear at a TPR adjudicatory hearing. The appellate court reversed and held that the trial court failed to comply with section §39.801(3) (d), Florida Statutes (2008). Although the court advised the father at the initial advisory hearing that his failure to appear for trial could result in termination of his rights, at the status hearing almost nine months later the court failed to give this instruction to the father even when the father informed the court that he would not be present. Indeed, the court intimated that Appellant's attorney could appear for him.
<http://www.5dca.org/Opinions/Opin2009/112309/5D09-611.op.pdf> (November 23, 2009).

Dissolution Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

Welch v. Welch, ___ So. 3rd ____, 2009 WL 4164075, (Fla. 1st DCA 2009). **FAILURE TO TIMELY MOVE FOR REHEARING MAY RESULT IN FAILURE TO PRESERVE ISSUE ON APPEAL; STATUTORY GROUNDS FOR ATTORNEY'S FEES MUST BE STATED IN MOTION** Appellate court withdrew its opinion in this case on July 24, 2009, (Welch v. Welch, 34 Fla. L. Weekly D1503, (Fla. 1st DCA, July 24, 2009)), and substituted this opinion. Former wife appealed particular findings of fact and conclusions of law made by the trial court in the dissolution of her long-term (23 years) marriage; specifically, former wife argued that no competent, substantial evidence in the record supported the trial court's determination of her income for purposes of awarding alimony and child support. The appellate court concluded that the trial court had not abused its discretion in its findings regarding the incomes of the former spouses. The appellate court also held that by failing to timely move for rehearing, former wife had failed to preserve the more specific issue that the trial court's findings should have been presented in more detail to explain its calculations of the former spouses' respective incomes. Reiterating that the statutory grounds for fees must be stated in the motion for fees; the appellate court held that failure to do so results in denial of the motion.
<http://opinions.1dca.org/written/opinions2009/11-30-2009/08-5670.pdf> (November 30, 2009).

Kotlarz v. Kotlarz, ___ So 3rd ____, 2009 WL 3681902, (Fla. 1st DCA 2009). **TRIAL COURT MUST MAKE SPECIFIC FINDINGS WHEN ORDERING SPOUSE TO MAINTAIN LIFE INSURANCE AS SECURITY FOR PAYMENT OF AN OBLIGATION.**

Appellate court affirmed all issues raised on appeal in this case except the requirement that former husband maintain a life insurance policy to secure his alimony and child support obligations. The appellate court held that in order to require a spouse to either purchase or

maintain a life insurance policy to secure the awards, the trial court must make specific evidentiary findings as to the cost and availability of the insurance, the obligor's ability to pay, and the special circumstances warranting the security. The appellate court enumerated those special circumstances and also noted that the amount of insurance must be related to the obligation being secured. Finding that the final judgment in this case failed to include the specific findings supporting the insurance requirement, the appellate court reversed and remanded. <http://opinions.1dca.org/written/opinions2009/11-05-2009/08-5698.pdf> (November 5, 2009).

Second District Court of Appeal

Murley v. Wiedamann, __ So. 3rd __, 2009 WL 3788059, (Fla. 2d DCA 2009).

TRIAL COURT SHOULD HAVE USED DATE OF SEPARATION, NOT FINAL HEARING, IN VALUING MARITAL ESTATE WHEN SPOUSES SEPARATED TWO YEARS BEFORE FINAL HEARING.

Former wife appealed final judgment of dissolution of marriage and the order requiring that she pay one-half of the expenses on a condo she co-owned with former husband beyond the date of the final judgment. The order also required that she pay interest on amounts owed to former husband. Appellate court held that it was error to require former wife to make these payments and also found that the trial court had abused its discretion in relying on the date of the final hearing as the date for valuation of the marital estate because the former spouses had separated two years before. The trial court was instructed on remand to use the date of separation. The appellate court also found that the trial court had misinterpreted the plain language within the prenuptial agreement in determining that former wife's stock and stock options were marital property.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/November/November%2013,%202009/2D08-2864.pdf (November 13, 2009).

Jacob v. Jacob, __ So.3rd __, 2009 WL 3789400, (Fla. 2d DCA 2009).

TRIAL COURT ABUSED ITS DISCRETION BY NOT TAKING INTO ACCOUNT FORMER HUSBAND'S PAYMENT OF MORTGAGE AND RELATED EXPENSES ON THE MARITAL HOME.

Former husband appealed a nonfinal order awarding temporary child support to former wife; appellate court affirmed in part, reversed in part, and remanded for further proceedings. Appellate court found that the trial court had not abused its discretion in its decision to award support to former wife prior to her full compliance with discovery; however, it held that the trial court had erred in its determination of the amount of temporary child support. The appellate court concluded that although the trial court had found that former husband was paying the mortgage, utilities, and upkeep on the marital home, its failure to take those payments into account in determining the awards was an abuse of discretion.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/November/November%2013,%202009/2D08-2977.pdf (November 13, 2009).

McCann v. Crumblish-McCann, __ So.3rd __, 2009 WL 3787791, (Fla. 2d DCA 2009).

TRIAL COURTS HAVE BROAD DISCRETION TO AWARD TEMPORARY ALIMONY WHEN EVIDENCE DEMONSTRATES NEED OF ONE SPOUSE AND ABILITY OF OTHER TO PAY; HOWEVER, THE AWARD MAY NOT EXCEED OBLIGOR'S ABILITY TO PAY.

Former husband appealed a nonfinal order awarding temporary alimony to former wife, arguing: 1) that the trial court had failed to make specific findings regarding former wife's need for alimony and his ability to pay; and 2) that the trial court incorrectly imputed income to him. Holding that trial courts have broad discretion to award temporary alimony where competent, substantial evidence demonstrates the need of one spouse and the ability of the other to pay, the appellate court concluded that the record in this case contained, in its words, "ample evidence," to support the imputation of income; but remanded to the trial court because the temporary award exceeded former husband's ability to pay.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/November/November%2013,%202009/2D08-6227.pdf (November 13, 2009).

Third District Court of Appeal

Plaza v. Plaza, __ So. 3rd __, 2009 WL 4061395, (Fla. 3d DCA 2009).

TRIAL JUDGE MAY REDUCE A PRIOR ORAL RULING TO WRITING SUBSEQUENT TO RECUSING HIMSELF; THIS EXCEPTION TO THE GENERAL RULE IS LIMITED TO PERFORMANCE OF MINISTERIAL ACTS.

Case in which the appellate court noted an exception to the general rule that a judge is prohibited from issuing further orders or participating in a case once an order disqualifying him has been entered. In this case, the judge had issued an order recusing himself before issuing his written order holding former husband in contempt. The appellate court noted that an exception to the rule exists when the trial judge orally announces his ruling on an issue, subsequently enters an order of recusal, and then performs what the appellate court termed, "the ministerial act" of entering an order of judgment which reduces his prior oral ruling to writing. The appellate court concluded that the exception did not apply in this case because the trial judge did not reduce his prior ruling to writing, but instead directed former wife's attorney to submit a proposed order. Reasoning that because the trial judge was required to exercise discretion in reviewing the proposed order and in this case made handwritten modifications to the proposed order, the appellate court held that the order issued after disqualification was more than a mere ministerial act; accordingly, it quashed that order.

<http://www.3dca.flcourts.org/Opinions/3D09-2453.rh.pdf> (November 25, 2009).

Fourth District Court of Appeal

Worrell v. Worrell, __ So. 3rd __, 2009 WL 4661266, (Fla. 4th DCA 2009).

CHILD SUPPORT HEARING OFFICERS MAY HEAR ALLEGATIONS OF FRAUD IN MODIFICATION REQUESTS.

Former husband appealed trial court's denial of his motion for relief from child support award; appellate court affirmed, briefly commenting on former husband's argument that a child support hearing officer is without authority to address issues of fraud. Appellate court held that child support hearing officers are empowered by Florida Family Law Rule of Procedure

12.491(b) to hear allegations of fraud in a request for modification of child support and noted that there was no case law to abrogate the jurisdiction plainly granted in the rule.
<http://www.4dca.org/opinions/Nov%202009/11-25-09/4D09-208.op.pdf> (November 25, 2009).

Roberts v. Roberts, __So. 3rd __, 2009 WL 3617983, (Fla. 4th DCA 2009).

ORDERS ON MODIFICATION OF ALIMONY AWARDS ARE REVIEWED FOR ABUSE OF DISCRETION.

Former wife appealed post-dissolution modification order reducing her permanent periodic alimony; former husband cross-appealed, arguing that the trial court had erred in calculating the retroactive portion of the modified alimony. Appellate court agreed that the trial court had made a mathematical error and accordingly, reversed. Appellate court reiterated that orders on modification of alimony awards are reviewed for abuse of discretion.

<http://www.4dca.org/opinions/Nov%202009/11-04-09/4D08-2178.op.pdf> (November 4, 2009).

Wofford v. Wofford, __So. 3rd __, 2009 WL 3617640, (Fla. 4th DCA 2009).

TRIAL COURT ERRED IN PERMITTING FORMER HUSBAND TO QUITCLAIM INTEREST IN MARITAL HOME TO FORMER WIFE WHEN HIS FAILURE TO PAY MORTGAGE AND RELATED EXPENSES LEFT THEM FACING FORECLOSURE; WHEN MARRIAGE IS IN GRAY AREA, DISPARATE EARNING POWER OF THE SPOUSES IS SIGNIFICANT FACTOR IN DETERMINING WHETHER SUPPORT IS APPROPRIATE.

Former wife appealed final judgment of dissolution of marriage in which the trial court awarded her bridge-the-gap alimony, but neither permanent nor rehabilitative, despite her lack of income and former husband's net monthly income in excess of \$9,000.00. She also appealed the trial court's having permitted former husband to avoid incarceration for contempt, stemming from his failure to pay their children's medical expenses as well as the mortgage and related expenses on the marital home, by quitclaiming his interest in the home to her—even though the home was facing foreclosure as a result of his failure to pay. Former wife also appealed the trial court's denial of attorney's fees. Although there was no transcript of the final hearing, the appellate court found that the trial court's errors were apparent on the face of the judgment and accordingly, reversed. The appellate court held that the trial court had abused its discretion in awarding bridge-the-gap alimony because its purpose is to assist a spouse, already capable of self-support, to transition from being married to being single; in this case, bridge-the-gap did not comport with the facts found by the trial court. The appellate court noted that when a marriage is in the "gray area" as here, that the disparate earning power of the spouses is a significant factor in determining whether temporary or permanent support is appropriate. The appellate court concluded that the trial court's findings demonstrated both former wife's need for permanent alimony and former husband's ability to pay. Finding it "somewhat inexplicable" that the trial court permitted former husband to quitclaim his interest in the marital home as it was facing foreclosure due to his failure to pay, the appellate court remanded for the trial court to determine the amount owing and enter a judgment.

<http://www.4dca.org/opinions/Nov%202009/11-04-09/4D08-3358.op.pdf> (November 4, 2009).

Fifth District Court of Appeal

Rotolante v. Rotolante, __So.3rd__, 2009 WL 3670354, (Fla. 5th DCA 2009).

TRIAL COURT MUST SPECIFY TYPE OF ALIMONY AWARDED; MUST ALSO INCLUDED INTEREST AND DIVIDEND INCOME OF SPOUSE AS INCOME FOR CHILD SUPPORT CALCULATIONS.

Former husband appealed the trial court's supplemental final judgment and contempt order; former wife cross-appealed. Appellate court affirmed in part and reversed in part. The arguments centered on the trial court's interpretation of two postnuptial agreements executed by the former spouses during the dissolution proceedings. The appellate court found no error in the trial court's decision to enforce the support provision within the agreements, to require former husband to pay arrearages, and to require former husband to reimburse former wife for the attorney's fees necessary for enforcement; however, the appellate court found that the trial court should have specified the type of alimony awarded and should have included former wife's interest and dividend income as income for the purposes of calculating the parties' child support obligations. Accordingly, the appellate court remanded to the trial court to recalculate as necessary.

<http://www.5dca.org/Opinions/Opin2009/110209/5D08-685.op.pdf> (November 2, 2009).

Domestic Violence Case Law

Florida Supreme Court

Inquiry Concerning a Judge, No. Re: Peter A. Bell, --- So.3d ----, 2009 WL 3644188 (Fla. 2009).

JUDGE PUBLICALLY REPRIMANDED. The Investigative Panel of the Judicial Qualifications Commission (JQC) charged County Judge Peter A. Bell with conduct alleged to violate Canons 1, 2A, 3B(1), and 3B(2) of the Code of Judicial Conduct. A former husband appeared before him as a defendant in a domestic violence battery case. After reading the probable cause affidavit, Judge Bell found that probable cause existed for the former husband's domestic battery charge. Moreover, Judge Bell found that the probable cause affidavit contained facts sufficient to establish probable cause that the former wife had also committed an act of domestic battery in attempting to force the former husband from her home. Despite the deputy's findings and law enforcement's determination to arrest only the former husband, and in the absence of a complaint from the former husband, the County Sheriff's Office, or the State Attorney's Office, Judge Bell ordered sua sponte for the former wife, who was present in court as a victim of domestic violence, to be taken into custody. In accord with Judge Bell's order, the former wife was arrested, incarcerated overnight, and ordered to appear the next day for first appearance. Judge Bell had a personal relationship with the former couple, and the former husband was an attorney who regularly appeared before Judge Bell. Judge Bell also stated that he believed he acted lawfully in his orders as to the former wife, yet he admitted that he would not have had the former wife arrested or taken any other action if she had not been in the courtroom for the hearing. Judge Bell also acknowledged that his actions had the potential appearance of impropriety, and that he violated Canons 1, 2A, 3B(1), and 3B(2) of the Code of Judicial Conduct. The Court approved the JQC's recommendation for sanctions.

<http://www.floridasupremecourt.org/decisions/2009/sc09-782.pdf> (November 5, 2009).

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

T.O. the Father and E.R. the Mother v. Department of Children and Families, --- So.3d ----, 2009 WL 3837159 (Fla. 4th DCA 2009). [TERMINATION OF PARENTAL RIGHTS AFFIRMED](#). A mother and father appealed the termination of their parental rights. The family had a history of domestic violence, and both parents had criminal histories. DCF's concurrent case plan included, among other things, psychological evaluations, parent effectiveness training, substance abuse evaluations, random drug testing, and domestic violence counseling for the parents. It also included assessments, therapy and counseling for the children. During the course of the case plan, one of the children stated that her father sexually abused her, and began exhibiting sexual behavior. As a result, the trial court ordered that the parents and children submit to psychosexual evaluations. The parents were also required to attend psychosexual counseling and the father was ordered to take a lie detector examination for therapeutic purposes. The parents completed most of their case plan tasks, the trial court found, by clear and convincing evidence, that any further services to the parents would be futile, that there was a high likelihood of harm by the parents if the children were returned to their care, and that there is a high likelihood that the parents' continuing involvement threatens the life, safety, or well-being of the children.

The parents contested the termination of their parental rights and argued that the trial court improperly admitted the child's hearsay evidence because the child did not testify at trial. In this case, the trial court conducted a hearsay hearing prior to trial, as required by the statute, and determined that the child's hearsay statements were reliable and from trustworthy sources. The parties expected the child to testify at trial to meet the second requirement of section 90.803(23), F.S. When she refused to testify about her parents, neither party objected or asked the court to find the child unavailable as a witness. The appellate court agreed that the testimony should not have been admitted, but held that the error was not fundamental because there was sufficient corroborating evidence to support the admission of this evidence. Section 90.803(23), Florida Statutes (2008), allows for the admission of child victim hearsay statements where the statements describe an act of child abuse or neglect. Before these statements are admissible, the trial court must conduct a hearing and make a preliminary determination that they come from a trustworthy source and are reliable. Section F.S. §90.803(23), Fla. Stat. (2008). Then, the child must either testify at trial or be declared unavailable as a witness. If the child is unavailable, the hearsay statements are admissible only if the trial court determines that there is other corroborating evidence of the abuse or neglect.

Also, because there was competent, substantial evidence to support termination of the parents' rights to all four children under section 39.806(1)(c) to support the trial court's order, the court affirmed the termination as to both parents.

<http://www.4dca.org/opinions/Nov%202009/11-18-09/4D09-686%20&%2009-687.op.pdf>

(November 18, 2009).

Fifth District Court of Appeal

No new opinions for this reporting period.