

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

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Delinquency Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

V.B. v. State, __ So. 3d __, 2011 WL 5843021 (Fla. 1st DCA 2011). **THE TRIAL COURT ERRED IN ORDERING RESTITUTION BASED UPON HEARSAY EVIDENCE THAT WAS IMPROPERLY ADMITTED OVER THE JUVENILE'S OBJECTION.** See Butler v. State, 970 So. 2d 919 (Fla. 1st DCA 2007); Forlano v. State, 964 So. 2d 246 (Fla. 1st DCA 2007); I.M. v. State, 958 So. 2d 1014 (Fla. 1st DCA 2007); and Herrington v. State, 823 So. 2d 286 (Fla. 1st DCA 2002). Accordingly, the trial court's restitution determination was reversed and remanded for a new restitution hearing. <http://opinions.1dca.org/written/opinions2011/11-22-2011/11-2621.pdf> (November 22, 2011).

B.L.R. v. State, __ So. 3d __, 2011 WL 5561291 (Fla. 1st DCA 2011). **DISPOSITION ORDER FAILED TO COMPLY WITH E.A.R. V. STATE, 4 SO. 3D 614 (FLA. 2009), IN DEVIATING FROM THE RECOMMENDATION OF THE DEPARTMENT OF JUVENILE JUSTICE.** The trial court ordered commitment to a maximum-risk facility, Although the Department of Juvenile Justice (DJJ) had recommended a high-risk facility. The juvenile argued that the trial court failed to comply with E.A.R. v. State, 4 So. 3d 614 (Fla. 2009), in deviating from the DJJ's recommendation. The First District Court of Appeal found that the trial court failed to articulate its understanding of the respective characteristics of the opposing restrictiveness levels and failed to explain why, based on these differing characteristics, a maximum-risk facility was better suited to the juvenile's rehabilitative needs and the safety of the public as required by E.A.R. Accordingly, the disposition order was reversed and remanded. The trial court was directed to either include findings as required by E.A.R. to support the maximum-risk commitment or enter a new order committing the juvenile to a high-risk facility as recommended by DJJ. <http://opinions.1dca.org/written/opinions2011/11-16-2011/10-6581.pdf> (November 16, 2011).

Second District Court of Appeal

D.A.D. v. State, __ So. 3d __, 2011 WL 5188987 (Fla. 2d DCA 2011). **THE TRIAL COURT'S ORAL PRONOUNCEMENT AT THE DISPOSITION HEARING TIMELY RESERVED JURISDICTION TO AWARD RESTITUTION BEYOND THE SIXTY-DAY PERIOD IN RULE 3.800(C).** The juvenile challenged his restitution order. At the disposition hearing, the trial court reserved jurisdiction to determine restitution. The juvenile subsequently filed a notice of appeal. While his appeal was pending, the trial court held a restitution hearing and entered a restitution order. Both parties agreed that the restitution order must be reversed because the trial court did not have jurisdiction to hold a restitution hearing or enter the restitution order after the notice of appeal was filed. However, the juvenile argued that, because the restitution order was not filed within sixty days of the disposition order as required by Florida Rule of Criminal Procedure 3.800(c), the trial court lacked jurisdiction to re-impose restitution on remand. The Second District Court of

Appeal found that if an order of restitution has been entered in a timely manner, a court can determine the amount of restitution beyond the sixty-day period. In the instant case, the trial court's oral pronouncement at the disposition hearing timely reserved jurisdiction to award restitution beyond the sixty-day period. See L.O. v. State, 718 So. 2d 155 (Fla. 1998) (noting that trial court's oral pronouncement reserving jurisdiction to award restitution is "sufficient to constitute an initial order of restitution"). Therefore, the restitution order was reversed and remanded to allow the trial court to conduct another hearing and impose restitution. http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/November/November%2002,%202011/2D10-3108.pdf (November 2, 2011).

Third District Court of Appeal

L.M. v. State, __ So. 3d __, 2011 WL 5554842 (Fla. 3d DCA 2011). **THE BB GUN POSSESSED BY THE JUVENILE WAS NOT A WEAPON.** The juvenile argued that he was improperly found guilty of carrying a concealed weapon. The Third District Court of Appeal followed its decision in E.S. v. State, 886 So. 2d 311 (Fla. 3d DCA 2004), and held that the trial court erred in finding the juvenile guilty of carrying a concealed weapon under s. 790.01(1), F.S. (2009). The Third District found that the evidence was insufficient as a matter of law to establish that the BB gun was indeed a "deadly weapon." The BB gun had no CO2 air cartridge and was not loaded with pellets. Although the BB gun was introduced in evidence, there was no testimony describing its operation or the nature and characteristics of the injuries, if any, it was capable of inflicting. Accordingly, the adjudication for carrying a concealed weapon was reversed. <http://www.3dca.flcourts.org/Opinions/3D10-1431.pdf> (November 16, 2011).

J.B. v. State, __ So. 3d __, 2011 WL 5169446 (Fla. 3d DCA 2011). **STATE PRESENTED SUFFICIENT EVIDENCE TO SHOW THAT THE VICTIM DID NOT CONSENT TO BATTERY.** The Third District Court of Appeal granted the juvenile's motion for rehearing, and substituted this opinion for their original opinion. The juvenile appealed her adjudication for battery, arguing that the state failed to prove the victim's lack of consent beyond a reasonable doubt. The Third District held that the state presented sufficient evidence, through testimony from the officer who observed the battery of the victim, to show the victim did not consent to the juvenile's battery. Accordingly, the adjudication was affirmed. <http://www.3dca.flcourts.org/Opinions/3D10-1413.reh.pdf> (November 2, 2011).

Fourth District Court of Appeal

M.S.O. v. State, __ So. 3d __, 2011 WL 5170285 (Fla. 4th DCA 2011). **VICTIM'S TESTIMONY WAS INSUFFICIENT TO ESTABLISH, BEYOND A REASONABLE DOUBT, A VALUE OF \$300 OR MORE AT THE TIME OF THE THEFT.** The juvenile appealed his adjudication for grand theft in the third degree. The Fourth District Court of Appeal found that, on a charge of grand theft of the third degree, the state is required to prove that the value of the stolen property at the time of the theft is \$300 or more. Value means the market value of the property at the time and place of the offense. In the absence of direct testimony as to market value, proof may be established through original market cost, manner in which the item had been used, its general condition

and quality, and the percentage of depreciation since its purchase or construction. In the instant case, the property owner testified that the laptop was purchased four years prior to the theft for \$1,000. Using the IRS standard deduction of 15 percent a year for depreciation, the property owner estimated that \$600 was an approximate "depreciated value" for the laptop at the time it was stolen. The Fourth District held that, given the nature of the property, this testimony was insufficient to establish beyond a reasonable doubt a value of \$300 or more at the time of the theft. Electrical goods like televisions, computers, and stereo systems are subject to accelerated obsolescence because manufacturers are constantly releasing new, improved technology at lower prices. Accordingly, the adjudication of delinquency for third degree grand theft was reversed and remanded with instructions for the trial court to enter judgment for the lesser included offense of petit theft. <http://www.4dca.org/opinions/Nov%202011/11-02-11/4D10-3398.op.pdf> (November 2, 2011).

Fifth District Court of Appeal

No new opinions for this reporting period.

Dependency Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

No new opinions for this reporting period.

Second District Court of Appeal

No new opinions for this reporting period.

Third District Court of Appeal

S. V.-R. v. Department of Children and Family Services, --- So. 3d ----, 2011 WL 5375047 (Fla. 3d DCA 2011). [REUNIFICATION AFTER SUBSTANTIAL COMPLIANCE WITH CASE PLAN](#). The mother appealed an order denying her motion for reunification with one of her children following her substantial compliance with the tasks in her case plan, and a second order that placed the child with the father, terminated supervision by the Department of Children and Families (DCF), and terminated the circuit court's jurisdiction. The children were initially removed for neglect. The approved DCF case plan specified that the primary goal was for the children to be reunited with their "parents," with a concurrent goal for one of the children of remaining with the father. The general master found, and the trial court approved, that the child's father was a non-offending parent with a "presumptive right to custody" pending any reunification under s. 39.521(3)(b)2, F.S. The trial court also stated that changing custody back to the mother as a permanency disposition should be based on the "best interest of the child" standard and the six factors

enumerated in section 39.621(10)(a) through (f), even though the mother had "in general" complied with the tasks in her case plan.

The appellate court reversed because it found that s. 39.522(2), F.S., was applicable, that neither DCF nor the Guardian ad Litem (GAL) proved endangerment of the "safety, well-being, and physical, mental, and emotional health of the child" pursuant to that provision, and that the permanency determination granting custody to the child's father incorrectly applied the "best interest" factors set forth in s. 39.621(10), F.S. It was undisputed that the mother had custody of the child before the dependency case began and that the mother substantially complied with the tasks in her case plan, in effect reasonably relying on the prospect that the child would be returned to her custody upon compliance. The appellate court held that, in cases where the issue before the court is whether a child should be reunited with a parent, the trial court shall determine whether the parent has substantially complied with the terms of the case plan to the extent that the safety, well-being, and physical, mental, and emotional health of the child is not endangered by the return of the child to the home. In the instant case, the court was not charged with selecting the "better" permanency option. Instead, having determined that the mother substantially complied with her case plan, the general magistrate was obligated to allow reunification with the mother unless that would "endanger" the child as described in s. 39.522(2), F.S. <http://www.3dca.flcourts.org/Opinions/3D11-1580.pdf> (November 9, 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

In Re: Amendments to the Florida Family Law Rules of Procedure, __ So. 3d __, 2011 WL 5219466 (Fla. 2011).

[REVISION AND ADOPTION OF FLORIDA SUPREME COURT APPROVED FAMILY LAW FORMS 12.913\(a\)\(1\) AND \(a\)\(2\), AND FLORIDA FAMILY LAW RULES OF PROCEDURES FORMS 12.913\(b\) AND \(c\), EFFECTIVE JANUARY 1, 2012.](#)

Revision of former Florida Supreme Court Approved Family Law Form 12.913(a), Notice of Action for Dissolution of Marriage, to 12.913(a)(1), Notice of Action for Dissolution of Marriage (No Child or Financial Support), and revision of Florida Family Law Rules of Procedure Forms 12.913(b), Affidavit of Diligent Search and Inquiry, and 12.913(c), Affidavit of Diligent Search. Adoption of Florida Supreme Court Approved Family Law Form 12.913(a)(2), Notice of Action for Family Cases with Minor Child(ren). The forms take effect January 1, 2012.

<http://www.floridasupremecourt.org/decisions/2011/sc11-40.pdf> (November 3, 2011).

First District Court of Appeal

McGrath v. Puckett, __ So. 3d __, 2011 WL 5843031 (Fla. 1st DCA 2011).

NONFINAL ORDER DENYING RELOCATION NOT APPEALABLE AS PARTIAL FJ.

Former wife appealed the denial of her petition for relocation, which was decided in a nonfinal dissolution of marriage. The appellate court held that because the order did not dispose of any issue which was separate and distinct from the dissolution action, it was not appealable as a partial final judgment.

<http://opinions.1dca.org/written/opinions2011/11-22-2011/11-5143.pdf> (November 22, 2011).

Wright v. Wright, __ So. 3d __, 2011 WL 5301614 (Fla. 1st DCA 2011).

FINAL JUDGMENT RESERVING JURISDICTION NOT A FINAL APPEALABLE ORDER.

A judgment of dissolution of marriage which reserves jurisdiction over “integrally related issues” is not a final appealable order even though it may be titled a final judgment.

<http://opinions.1dca.org/written/opinions2011/11-07-2011/11-4877.pdf> (November 7, 2011).

Cheek v. Hesik, __ So. 3d __, 2011 WL 5138617 (Fla. 1st DCA 2011).

THE MANNER IN WHICH MAKE-UP TIME-SHARING IS IMPOSED MUST BE IN A CHILD’S BEST INTEREST.

Former wife appealed: 1) a final order finding her in direct criminal contempt for lying under oath; 2) a nonfinal order awarding former husband make-up time-sharing; and 3) a related nonfinal order giving former husband immediate 100% physical custody of the child for 150 days for the make-up time-sharing. The last order required relocating an autistic child from Florida to Illinois in the middle of the school year. The appellate court affirmed the contempt order but reversed and remanded the two nonfinal orders. Noting that s. 61.13(4)(c), F.S., requires make-up time-sharing be awarded when one parent has been denied time-sharing by the other parent, the appellate court found no error in either the trial court’s finding that former wife had deprived former husband of time-sharing or that he was entitled to make-up time-sharing; however, it did find that the trial court had erred by not having found that the manner in which the make-up time-sharing was imposed was in the child’s best interest. The fact that imposing make-up time-sharing is in the best interest of a child is not enough under the statute; the manner in which the make-up time-sharing is imposed must be in the child’s best interest as well. Acknowledging the difficulty faced by the trial court in providing meaningful make-up time-sharing for an out-of-state father, the appellate court did not find the trial court’s actions “inherently unreasonable or inappropriate,” but did conclude that the trial court was required to consider the child’s best interest before ordering a temporary change of custody or any other type of make-up sharing.

<http://opinions.1dca.org/written/opinions2011/11-01-2011/11-2716.pdf> (November 1, 2011).

Second District Court of Appeal

Witt v. Witt, __ So. 3d __, 2011 WL 5600018 (Fla. 2d DCA 2011).

EQUITABLE DISTRIBUTION SCHEME MUST BE SUPPORTED BY SPECIFIC FACTUAL FINDINGS; CURRENT VERSION OF SECTION 61.08 SHOULD BE USED ON REMAND.

The appellate court reversed and remanded the equitable distribution scheme in a final judgment of dissolution of marriage for lack of clarity, and also instructed the trial court to make statutorily required findings regarding alimony on remand. Holding that a trial court has broad discretion in fashioning its equitable distribution scheme, which must be supported by specific factual findings, the appellate court concluded that the trial court's failure in this case to make specific findings on several issues resulted in a final judgment that failed to identify what property it found to be marital or nonmarital, or which party should receive each item. Accordingly, it remanded for the trial court to make specific findings to support its equitable distribution scheme and make the required findings regarding alimony, applying the current version of s. 61.08, F.S.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/November/November%2018,%202011/2D10-857.pdf (November 18, 2011).

Third District Court of Appeal

Kerzner v. Kerzner, __ So. 3d __, 2011 WL 5964493 (Fla. 3d DCA 2011).

FUNDS FROM VOLUNTARY SALE OF HOMESTEAD PROPERTY ARE PROTECTED IF NOT COMMINGLED AND ARE HELD FOR SOLE PURPOSE OF PURCHASE OF NEW HOME WITHIN REASONABLE PERIOD OF TIME; IN ABSENCE OF SPECIFIC LANGUAGE IN MARITAL SETTLEMENT AGREEMENT, PROCEEDS OF SALE ARE PROTECTED FROM OUTSTANDING JUDGMENTS.

The appellate court affirmed the trial court's determination that the proceeds from the sale of a marital home, pursuant to a marital settlement agreement (MSA), were subject to homestead protection. As the home was the parties' primary marital asset, they agreed to sell it and use the proceeds to settle their debts; however, they encountered difficulty when former husband's first wife intervened to make a claim against his share of the proceeds for unpaid child support. In order to complete the sale, former husband, former wife, and the first wife entered into an agreement releasing the marital home from outstanding judgments, allowing the judgments to attach instead to former husband's share of the proceeds and be held in escrow pending determination by the trial court on that issue. The trial court determined that the proceeds were protected from creditors by the homestead clause, that the terms of the MSA did not constitute a waiver of that protection, and that former husband intended to use his share to buy a new home; following that determination, it released the funds from escrow. Citing Florida case law that homestead property may be sold voluntarily and the funds protected so long as they are not commingled and are held for the sole purpose of acquiring another home within a reasonable period of time, and distinguishing this case from Myers v. Lehrer, 671 So. 2d 864 (Fla. 4th DCA 1996), the appellate court agreed with the trial court that under the terms of the MSA former husband was responsible for any "lien or encumbrance on the marital home not specifically listed," but not for all outstanding judgments against him. <http://www.3dca.flcourts.org/Opinions/3D10-3124.pdf> (November 30, 2011).

Mata v. Mata, __ So. 3d __, 2011 WL 5554808 (Fla. 3d DCA 2011).

TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN GRANTING EMERGENCY MOTION FOR TEMPORARY RELOCATION.

The appellate court reversed an order granting former wife's emergency motion to permit temporary relocation of the parties' minor child to North Carolina, due to the trial court's failure to comply with s. 61.13001(6)(b), F.S. Pursuant to a settlement agreement incorporated into the final judgment of dissolution of marriage, the parties agreed that it was in the child's best interest for the parents to live close together in Miami-Dade County, and also agreed to a time-sharing schedule. Former husband objected to former wife's petition to relocate to North Carolina with the minor child; former wife then filed an emergency motion for temporary relocation during the pendency of the relocation proceedings. Although it heard arguments from counsel, the trial court considered neither testimony nor evidence before granting former wife's emergency motion. The appellate court concluded that the trial court's decision to allow temporary relocation under the circumstances was unreasonable. It held that the trial court had abused its discretion in granting the emergency motion. Accordingly, the appellate court reversed and remanded for the trial court to hold an evidentiary hearing and determine the findings required by s. 61.13001, F.S.

<http://www.3dca.flcourts.org/Opinions/3D11-2297.pdf> (November 16, 2011).

Yu Wu v. Xiaoming Xing, __ So. 3d __, 2011 WL 5375036 (Fla. 3d DCA 2011).

TRIAL COURT'S AWARDS MUST BE SUPPORTED BY SPECIFIC FINDINGS OF FACT.

The appellate court found the final judgment of dissolution of marriage legally insufficient, specifically with regard to the award to one spouse of the parties' only significant asset, the marital home, and also with regard to the award of permanent periodic alimony. Neither award was supported by statutorily required findings of fact. The appellate court reversed and remanded for the trial court to amend its final judgment by articulating factual findings in support of its awards.

<http://www.3dca.flcourts.org/Opinions/3D11-1423.pdf> (November 9, 2011).

Fourth District Court of Appeal

Rushetsky v. Rusetsky, __ So. 3d __, 2011 WL 5864705 (Fla. 4th DCA 2011).

ERROR ON FACE OF JUDGMENT ALLOWS REVERSAL WITHOUT TRANSCRIPT.

Former husband appealed the final judgment of dissolution of marriage, arguing error in the calculation of child support. Reiterating that the absence of a transcript requires affirmance unless the error is clear on the face of the judgment, the appellate court reversed and remanded for recalculation of child support.

<http://www.4dca.org/opinions/Nov%202011/11-23-11/4D10-2167.op.pdf> (November 22, 2011).

Capo v. Capo, __ So. 3d __, 2011 WL 5554782 (Fla. 4th DCA 2011).

TRIAL COURT MUST DETERMINE NET INCOME AND EXPLAIN CHILD SUPPORT CALCULATIONS.

The appellate court agreed with former wife that the trial court's order modifying child support was facially erroneous because it was devoid of any findings as to the net income of each party and any explanation as to how the support was calculated. Accordingly, it remanded for the trial court to find the net income of each party and, based on those findings, to explain why the child support calculations should remain the same or be modified.

<http://www.4dca.org/opinions/Nov%202011/11-16-11/4D09-4608.op.pdf> (November 16, 2011).

Escobar v. Escobar, __ So. 3d __, 2011 WL 5554839 (Fla. 4th DCA 2011).

DOCTRINE OF RES JUDICATA BARRED TRIAL COURT FROM RESETTING PAYMENT TERMS; TRIAL COURT ALSO ERRED IN GRANTING RELIEF NOT REQUESTED.

Former husband petitioned for modification of child support, which had been set by a marital settlement agreement (MSA). Because one section of the MSA obligated him to pay \$600 every two weeks until the youngest child graduated from high school and the other section obligated him to pay \$1200 monthly, former husband had sought unsuccessfully to clarify the MSA and to reduce his obligation as each of the three children attained majority; however, he did not raise these issues in his petition for modification. Commenting that former husband could have a legal basis for a downward modification due to change of circumstances if that issue were pled, the trial court denied his petition for modification on the issue of two of the three children having attained majority; however, the trial court found that former husband should be charged for 24 installments of \$600 rather than 26, leaving him with a credit and prompting former wife to appeal. The appellate court agreed with former wife that the trial court erred when it revised the child support to semi-monthly instead of bi-weekly, because it had previously held that the MSA required bi-weekly payments. The appellate court held that the earlier order was res judicata with regard to the payment terms and that the trial court did not have the authority to amend those terms. Noting that former husband had not pled any ambiguity in the terms of the MSA in his petition for modification, the appellate court also held that the trial court erred in granting relief not requested.

<http://www.4dca.org/opinions/Nov%202011/11-16-11/4D10-4310.op.pdf> (November 16, 2011).

Hernandez v. Frontiero, __ So. 3d __, 2011 WL 5375071 (Fla. 4th DCA 2011).

A REPAYMENT SCHEDULE THAT POSTPONES SATISFACTION OF AN ARREARAGE UNTIL CHILD IS AN ADULT FLIES IN THE FACE OF WHY CHILD SUPPORT EXISTS.

The appellate court affirmed a trial court order finding former husband in contempt for failure to pay child support, but reversed the portion of that order allowing him to satisfy an arrearage of over \$18,000 by making a monthly payment of \$20. The appellate court held that the trial court erred in setting a repayment schedule which would not satisfy the arrearage until the minor child turned 29. Citing its reasoning in Lamar v. Lamar, 889 So. 2d 983 (Fla. 4th DCA 2004), the appellate court stated that a payment schedule which postpones satisfaction until the object of support reaches legal age or becomes self-supporting flies in the face of why child support exists.

<http://www.4dca.org/opinions/Nov%202011/11-09-11/4D10-4122.op.pdf> (November 9, 2011).

Fifth District Court of Appeal

Tuomey v. Tuomey, __ So. 3d __, 2011 WL 5598330 (Fla. 5th DCA 2011).

TRIAL COURT ERRED BY FAILING TO CREDIT SPOUSE'S PAYMENT OF EXPENSES ON MARITAL HOME AND FAILING TO MAKE FINDINGS ON FAIR RENTAL VALUE;

PARTIES' AGREEMENT AT TRIAL INADVERTENTLY OMITTED FROM JUDGMENT.

Former husband appealed the final judgment of dissolution of marriage on numerous grounds; the appellate court addressed three. First, the appellate court instructed the trial court to include the parties' agreement that former wife's brother would neither be left alone with nor drive their children; the final judgment had inadvertently omitted that agreement. Second, the appellate court found the trial court erred in failing to credit former husband for paying post-dissolution expenses on the marital home pending its sale; the trial court had found that the expenses were offset by the rental value, but failed to make any findings as to what the fair rental value was. The trial court was instructed on remand to make express findings regarding the reasonable rental value and credit former husband for any difference between the fair rental value and payments he made.

Finally, in response to former husband's argument that the trial court erred by arbitrarily valuing his unvested stock options, the appellate court reasoned that because the trial court only distributed former husband's vested stock options, there was no need to address the valuation argument.

<http://www.5dca.org/Opinions/Opin2011/111411/5D10-2334.op.pdf> (November 18, 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

No new opinions for this reporting period.

Third District Court of Appeal

No new opinions for this reporting period.

Fourth District Court of Appeal

Hasey v. Metzger, --- So. 3d ----, 2011 WL 5170175 (Fla. 4th DCA 2011). **COSTS**. Appellant timely appealed the summary denial of his motion for costs following appellee's voluntary dismissal of her petition for injunction against domestic violence. The appellate court reversed and remanded the case with instructions for the trial court to hold an evidentiary hearing on appellant's motion for costs. <http://www.4dca.org/opinions/Nov%202011/11-02-11/4D10-3356.op.pdf> (November 2, 2011).

Fifth District Court of Appeal

No new opinions for this reporting period.