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

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Delinquency Case Law

Florida Supreme Court

In re Amendments to the Florida Rules of Criminal Procedure, the Florida Rules of Juvenile Procedure, and the Florida Family Law Rules--Report of the Task Force on Treatment-Based Drug Courts, ___ So.2d ___, 2008 WL 4587121 (Fla. 2008). THE FLORIDA SUPREME COURT DECLINED TO ADOPT A RECOMMENDATION BY THE TASK FORCE ON TREATMENT-BASED DRUG COURTS TO AMEND FLORIDA RULE OF JUVENILE PROCEDURE 8.010 (DETENTION HEARING) The Task Force's recommendation was to amend rule 8.010 to add the following provision to the list of issues to be determined at a detention hearing: "The court shall consider the nature and circumstances of the offense charged, the child's need for substance abuse evaluation and/or treatment, and the child's mental condition." By previous opinion, the Florida Supreme Court adopted several rule amendments based on recommendations made by the Task Force. See In re: Amend. to Fla. Rules of Crim. Pro., Fla. Rules of Juv. Pro., & Fla. Fam. Law Rules-Report of Task Force on Treatment-Based Drug Courts, 959 So.2d 250, 251 (Fla.2007). However, some of the Task Force's recommendations were not adopted and were instead referred to various rules committees for consideration. One such recommendation was the Task Force's recommendation to amend rule 8.010. The Juvenile Court Rules Committee had opposed the amendment. As a result, the Florida Supreme Court declined to adopt the amendment and instead referred it back to the Task Force and the Committee for joint consideration. On October 8, 2007, the Committee reported that they had been unable to agree upon a revised version of the proposed amendment with the Task Force. The Committee reiterated its objections to the proposed amendment. The Committee's position was that the amendment was contrary to law because the criteria for determining probable cause to detain a child is circumscribed by s. 985.255, F.S., and that those criteria do not include a child's mental condition or need for substance abuse evaluation or treatment. Further, pursuant to s. 985.145, F.S., the court is limited to what it may consider before adjudication. On December 28, 2007, the Task Force responded by acknowledging the concerns of the Committee and requesting that the Court adopt its proposed amendment. Due to the objections of the Committee, the Florida Supreme Court declined to adopt the Task Force's recommendation to amend rule 8.010.
http://www.floridasupremecourt.org/decisions/2008/sc06-434.pdf (October 16, 2008).

First District Court of Appeal

R.A.P. v. Charles Parkins, Superintendent of the Alachua Regional Juvenile Detention Center and the State of Florida, __ So.2d __, 2008 WL 4643875 (Fla. 1st DCA 2008). SECURE DETENTION NOT AUTHORIZED FOR VIOLATION OF PROBATION NOT INVOLVING A NEW LAW OFFENSE
Juvenile was charged with violating his probation without committing a new law offense. The juvenile allegedly violated a curfew provision of his probation order. The juvenile was placed into secure detention pending a violation hearing. The risk assessment instrument (RAI) for the juvenile scored 9 points. Twelve points are required for secure detention. The circuit judge first

ordered secure detention as a punishment for violating probation and later aggravated the RAI an additional three points. The circuit judge rejected the juvenile's argument that secure detention was not authorized. The juvenile filed a petition for a writ of habeas corpus. The First District Court of Appeal found that secure detention can only be ordered when authorized by statute. Juvenile detention determinations involve a two-step process. If a juvenile meets the detention criteria under s. 985.255(1) (a)-(j), the RAI score must establish a need for detention. Section 985.255(1)(h) authorizes detention if a child is alleged to have violated the conditions of probation. However, this subsection limits the form of detention that may be imposed to a consequence unit, and if a consequence unit is not available, home detention with electronic monitoring. Although s. 985.255(3)(b), F.S., allows a placement more restrictive than that indicated by the RAI if supported by a written statement of clear and convincing reasons, this does not authorize the court to impose a form of detention more restrictive than the statutory maximum. Therefore, secure detention was not authorized. The First District noted that this holding was limited to situations where the alleged violation of probation does not constitute a new law offense. Where there is a new crime alleged as the violation of probation, proceedings are governed by s. 985.245(4), F.S., (RAI scored based upon underlying offense and the new offense). Further, the decision does not restrict the court's contempt power set forth in s. 985.037, F.S. Finally, the First District addressed the problem arising in this case where neither a consequence unit nor electronic monitoring for home detention is available within the trial court's geographic jurisdiction. The First District held that in such circumstance only a less restrictive form of detention, such as home detention, is permissible. The petition for habeas corpus was granted.
http://opinions.1dca.org/written/opinions2008/10-22-08/08-4513.pdf (October 22, 2008).

Second District Court of Appeal

S.G. v. State, __ So.2d __, 2008 WL 4682593 (Fla. 2d DCA 2008). MERITORIOUS ARGUMENT NOT ADDRESSED WITHOUT MOTION TO CORRELT A DISPOSTIONS ORDER The Second District Court of Appeal granted appellant's motion for rehearing and vacated its September 17, 2008 opinion. On rehearing, the Second District affirmed the trial court's order. The juvenile had appealed his adjudication and disposition order after violating concurrent terms of probation for possession of cannabis, possession of drug paraphernalia, and culpable negligence. His appellate counsel filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967), after which supplemental briefing was ordered to address several possible disposition errors. In its September 17, 2008 opinion, the Second District Court of Appeal found that the supplemental briefs presented a meritorious argument concerning these disposition errors but declined to discuss them because no motion to correct a disposition order was filed pursuant to Florida Rule of Juvenile Procedure 8.135. Because the disposition errors were not preserved for appellate review, the Second District affirmed the adjudication and disposition without prejudice to the juvenile's right to file a rule 8.135 motion.
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2008/October/October%2024,%202008/2D07-523%2007-618%20rh.pdf (October 24, 2008).

Third District Court of Appeal

J.N. v. State, __ So.2d __, 2008 WL 4643382 (Fla. 2d DCA 2008). TRIAL COURT WAS WITHOUT JURISDICTION TO ENTERTAIN THE VIOLATION OF PROBATION AFFIDAVIT WHERE JUVENILE HAD SUCCESSFULLY COMPLETED HIS PROBATIONARY TERM PRIOR TO THE FILING OF THE AFFIDAVIT
Juvenile appealed an order finding him in violation of his juvenile probation. The State's confession of error conceded the lower court was without jurisdiction to entertain the violation of probation affidavit because the juvenile had successfully completed his six-month probationary term prior to the filing of the affidavit. Therefore, the order finding the juvenile in violation of his probation was reversed and remanded with instructions to discharge the juvenile from the two cases for which he was on probation.
http://www.3dca.flcourts.org/Opinions/3D08-0730.pdf (October 22, 2008).

Fourth District Court of Appeal

S.L v. State, __ So.2d __, 2008 WL 4489253 (Fla. 4th DCA 2008). INCONSISTENT STATEMENTS MADE BY JUVENILE'S MOTHER TO DEPUTY WERE NOT ADMISSIBLE AS SUBSTANTIVE EVIDENCE
Juvenile appealed her adjudication for simple assault. The juvenile argued that the trial court erred by allowing the State to prove its case exclusively through the mother's prior inconsistent statements. Juvenile was charged with simple assault and criminal mischief. At trial, the juvenile's mother testified that she called the police after she discovered that the juvenile was gone and the coffee table was broken. Mother denied that the juvenile threatened her and she denied telling a deputy that the juvenile said, “You bitch, I'm going to kill you. I'm going to stab you.” The deputy then testified that the mother told him that she called the police after the juvenile became very aggressive and said, “Bitch, I'm going to kill you. I'm going to stab you.” At the conclusion of the State's evidence, the juvenile moved for a judgment of dismissal on both charges, arguing insufficient evidence and that the mother's prior inconsistent statements could not be used as substantive evidence. The trial court granted the motion as to the criminal mischief charge but denied the motion as to the simple assault charge. Following the court's ruling, the juvenile testified that she became involved in a heated argument with her mother regarding the purchase of the vehicle but that she never threatened her. The juvenile admitted that she hit a figurine on the coffee table, which caused the table to shatter. At the conclusion of the juvenile's testimony, the trial court found her guilty of simple assault based solely upon the deputy's testimony. The Fourth District Court of Appeal held that the trial court erred when it relied on the mother’s inconsistent statements as the sole evidence supporting its finding of guilt on the assault charge. The deputy's testimony as to the mother's statements cannot be used to support a finding of guilt because the mother's alleged inconsistent statements were inadmissible as substantive evidence because they were not given under oath at a trial, hearing, or other proceeding or in a deposition. Case was reversed.
http://www.4dca.org/opinions/Oct%202008/10-08-08/4D07-4868.op.pdf (October 8, 2008).

Fifth District Court of Appeal

N.C. v. State, __ So.2d __, 2008 WL 4600980 (Fla. 5th DCA 2008). DENIAL OF MOTION TO

WITHRAW PLEA REVERSED BECAUSE THE TRIAL JUDGE FAILED TO PERSONALLY ADDRESS THE IMPLICATIONS OF THE JIMMY-RYCE ACT The juvenile entered a nolo contendere plea to sexual battery. As part of the plea agreement, the juvenile signed a printed form containing notification of the possible future applicability of the Jimmy Ryce Act. The juvenile filed a motion to withdraw his plea which was denied by the trial court. The juvenile appealed the denial. The Fifth District Court of Appeal found that although the trial court received the printed form at the time the plea was entered, the trial judge failed to personally address this issue with the juvenile and determine whether he understood the potential consequence of the Act. As a result, the Fifth District reversed the lower court's order with directions that the juvenile be permitted to withdraw his plea and proceed to trial.
http://www.5dca.org/Opinions/Opin2008/101308/5D07-3622.op.pdf (October 17, 2008).

J.R. v. State, __ So.2d __, 2008 WL 4600982 (Fla. 5th DCA 2008). JUVENILE PERMITTED TO WITHDRAW UNCOUNSELED GUILTY PLEA Juvenile appealed the trial court's order adjudicating him guilty of criminal mischief and sentencing him to a term of 60 days in a high-risk facility. The order was rendered after the juvenile entered an uncounseled plea. The juvenile argued that he should be permitted to withdraw his plea because the trial court committed a fundamental error by failing to conduct an adequate inquiry regarding his waiver of counsel. The State conceded error and agreed that the case should be remanded so that the juvenile could withdraw his plea. As a result, the Fifth District Court of Appeal reversed and remanded the case.
http://www.5dca.org/Opinions/Opin2008/101308/5D07-4077.op.pdf (October 17, 2008).

J.L. v. State, __ So.2d __, 2008 WL 4600987 (Fla. 5th DCA 2008). CONCLUSIONARY WITNESS STATEMENT THAT A "BOMB THREAT" WAS MADE WAS INSUFFICIENT TO SUPPORT A FINDING OF GUILT OF MAKING A FALSE REPORT CONCERNING THE PLACEMENT OF A BOMB IN VIOLATION OF S. 790.163(1), F.S. (2007) Juvenile was adjudicated delinquent after being found guilty of making a false report concerning the placement of a bomb in violation of s. 790.163(1), F.S. (2007). The juvenile argued that the State's evidence was insufficient to support a finding of guilt. The arresting officer testified that she had been advised by dispatch of a "bomb threat". After conducting a search, the officer determined that there was no bomb placed at this location. The officer testified that the juvenile "did confess to making a bomb threat." Even after being given the opportunity to reopen its case, the state failed to present any evidence as to the words actually used in the "bomb threat." The Fifth District Court of Appeal found that absent some evidence of the words used by the juvenile, the state failed to meet its burden of proof. The Fifth District noted that this holding does not suggest that the state was required to establish the exact words used by the juvenile. Instead, the state must present more than a conclusionary statement that a "bomb threat" was made. In the instant case, it simply cannot be determined from the evidence whether the juvenile knowingly made a false report regarding the placement of a bomb. Case was reversed and remanded.
http://www.5dca.org/Opinions/Opin2008/101308/5D08-1060.op.pdf (October 17, 2008).

Dependency Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

M.D. v. Department of Children and Families, ___ So. 2d ____, 2008 WL 4643827, __ Fla.L.Weekly D____ (Fla. 1st DCA 2008). CONFESSION OF ERROR
Because the appellee conceded error and requested remand, the court reversed the final order and remanded the case for further proceedings.
http://opinions.1dca.org/written/opinions2008/10-22-08/08-0347.pdf (October 22, 2008).

M.F. v. Department of Children and Families, ___ So. 2d ____, 2008 WL 4566971, __ Fla.L.Weekly D____ (Fla. 1st DCA 2008). CONFESSION OF ERROR
Because the Department confessed error, the court reversed the order of termination of parental rights and remanded the case for further proceedings.
http://opinions.1dca.org/written/opinions2008/10-15-08/08-1475.pdf (October 15, 2008).

R.D. v. Department of Children and Families, ___ So. 2d ____, 2008 WL 4471471, 33 Fla.L.Weekly D2357 (Fla. 1st DCA 2008). CONFESSION OF ERROR
Because the Department confessed error, the court reversed the order of termination of parental rights and remanded the case for further proceedings.
http://opinions.1dca.org/written/opinions2008/10-07-08/08-1596.pdf (October 7, 2008).

Second District Court of Appeal

T.L. v. Department of Children and Family Services and Guardian ad Litem Program, ___ So. 2d ____, 2008 WL 4482579, 33 Fla.L.Weekly D2350 (Fla. 2d DCA 2008). NEXUS BETWEEN RISK OF HARM TO CHILD AND ABUSE OF SIBLING NOT PROVEN The court reversed an order terminating the father T.L.'s parental rights because: 1) the Department failed to prove a nexus between past abuse of the child's sibling and prospective of the child that the subject of the termination of parental rights petition; and 2) the Department failed to prove that termination of parental rights was the least restrictive means of protecting the child from harm. One of the child's siblings had been admitted to the hospital with multiple bruises, dehydration, and signs of sexual abuse. The child's injuries were so severe that they would have been noticed by a layperson and the child's condition was potentially fatal without prompt medical attention. The trial court was not able to determine whether the father or mother caused the injuries but did find that "[a]lthough it is possible that both persons inflicted the harm, the evidence more strongly suggest that one person was inflicting the harm while the other person, with knowledge that the child was being harmed, allowed it to continue by failing to remove the child from harm's way…" On appeal, the court agreed that the sibling suffered serious abuse and that the father was aware of the severity of the injuries and knowingly failed to take

appropriate steps to obtain necessary medical care for the child. However, the court agreed with the father that the Department failed to show the required nexus and that even the Department's own expert did not establish that the father lacked self-control, had a drug addiction, or a mental or emotional condition. The trial court incorrectly found a nexus between harm to the sibling and a threat of harm to the child. The court also agreed with the father that termination of his parental rights was not the least restrictive means of protecting the child. There was no psychological assessment of the father and no evidence that the father would not benefit from services. The court concluded by noting that although it shared the trial court's concern about the sibling's abuse and the father's role, the trial court allowed the desire to achieve permanency for the child to override the lack of proof of the requirements of a nexus and least restrictive means. The court reversed the judgment and remanded the case for further proceedings.
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2008/October/October%2003,%202008/2D07-715.pdf (October 3, 2008).

Third District Court of Appeal

A.T.W. v. Department of Children and Family Services, ___ So. 2d ____, 2008 WL 4643790, __ Fla.L.Weekly D____ (Fla. 3d DCA 2008). CONFESSION OF ERROR
The Department confessed error that the evidence did not support the trial court's finding that the father had abandoned the child. The adjudication of dependency was reversed and the case remanded for further proceedings. http://www.3dca.flcourts.org/Opinions/3D08-1553.mo.pdf (October 22, 2008).

I.J.-L. v. Department of Children and Family Services, ___ So. 2d ____, 2008 WL 4414294, 33 Fla.L.Weekly D2340 (Fla. 3d DCA 2008). REQUEST FOR RELINQUISHMENT OF JURISDICTION TREATED AS CONFESSION OF ERROR
After I.J.-L. appealed the entry of a "default consent," the Department moved for relinquishment of jurisdiction so that the case could proceed to an adjudicatory hearing. The court treated the motion for relinquishment as a confession of error. The court reversed and remanded the case for further proceedings. http://www.3dca.flcourts.org/Opinions/3D08-0930.mo.pdf (October 1, 2008).

M.H. v. Department of Children and Family Services, ___ So. 2d ____, 2008 WL 4414309, 33 Fla.L.Weekly D2340 (Fla. 3d DCA 2008). REQUEST FOR RELINQUISHMENT OF JURISDICTION TREATED AS CONFESSION OF ERROR
After M.H. appealed a judgment of dependency, the Department moved for relinquishment of jurisdiction for dismissal of the case. The court treated the motion for relinquishment as a confession of error. The court reversed the judgment and remanded the case for the court to vacate the order. http://www.3dca.flcourts.org/Opinions/3D08-1553.mo.pdf (October 1, 2008).

Fourth District Court of Appeal

No new opinions for this reporting period.

Fifth District Court of Appeal

R.J. v. Guardian ad Litem Program, ___ So. 2d ____, 2008 WL 4753731, __ Fla.L.Weekly D____ (Fla. 5th DCA 2008). NOTICE OF APPEAL TREATED AS CERTIORARI PROCEEDING

The father and the Department filed a notice of appeal to challenge a non-final order changing the placement of the father's son. Because there was no rule authorizing direct appeal of that type of non-final order in a termination of parental rights case, the appellate court treated the case as a certiorari proceeding. The court denied certiorari and noted that the evidence supported the trial court's findings that the placement was in the child's best interest.
http://www.5dca.org/Opinions/Opin2008/102708/5D07-3959.op.pdf (October 30, 2008).

M.C. v. Department of Children and Families, ___ So. 2d ____, 2008 WL 4753757, __ Fla.L.Weekly D____ (Fla. 5th DCA 2008). DEPARTMENT FAILED TO PROVE THAT MOTHER'S MENTAL HEALTH ISSUES PLACED CHILDREN AT RISK OF HARM

The mother appealed the adjudication of her children as dependent and the Fifth District Court of Appeals reversed because the Department did not present competent, substantial evidence of prospective neglect or abuse. The mother had taken her children to the Department to seek food and housing assistance and indicated, *inter alia*, that she heard voices "like a T.V. that won't shut off." The mother declined the investigator's suggestion of a psychiatric evaluation. Due to the mother's statements, previous Baker Act, and generally strange behavior, the Department sheltered the children and filed a petition for dependency. At the adjudicatory hearing, the Department presented testimony about the mother's visitation and offer of services and referrals for a psychological evaluation. The caseworker admitted that the mother did not appear to pose any threat of harm to the children. The Department also presented evidence of the mother's Baker Act a month before the events of the case wherein the Department investigated the mother for inadequate supervision. The mother's home was clean and the investigator found no issues that would negatively affect the children's health or safety. The trial court found that the mother had a mental illness which combined with the mother's strange behavior placed the children at risk of harm if released to the mother. On appeal, the court found that when the evidence was viewed in the light most favorable to the Department, it did not establish a nexus of harm between the mother's psychiatric disorder and the potential to impair the children's physical, mental, or emotional health. The Department had presented no expert witnesses about the nature or extent of the mother's mental illness or about the negative effects of the mother on the children's well-being. Rather than establish that the mother had a mental illness that would affect her ability to care for her children, the Department relied on speculation. The court acknowledged the trial judge's dilemma regarding the mother's mental health issues but concluded that the Department did not present sufficient evidence to sustain its burden.
http://www.5dca.org/Opinions/Opin2008/102708/5D08-696.op.pdf (October 28, 2008).

L.H. v. Department of Children and Families, ___ So. 2d ____, 2008 WL 4681174, __ Fla.L.Weekly D____ (Fla. 5th DCA 2008). INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM IN TERMINATION OF PARENTAL RIGHTS CASE

The mother appealed termination of her parental rights. The court affirmed as to the sufficiency of the evidence without discussion. The mother also argued that she received ineffective assistance of trial counsel but conceded that the ineffectiveness was not apparent in the record. The court affirmed the trial court's order due to the lack of a mechanism to review claims of ineffective assistance of counsel ("IAC"). The court discussed the Fourth District Court of Appeal's decision in E.T. v. DCF, 930 So. 2d 721 (Fla. 4th DCA 2006) and recognized the differences between IAC claims in termination of parental rights cases and in criminal cases. The court noted that the Fourth DCA concluded that neither the Legislature nor the judicial system had authorized a petition for habeas corpus for IAC in termination of parental rights cases and also had not created an alternative method for such claims. The Florida Supreme Court referred the issue to the Juvenile and Appellate Court Rules Committees but they have not submitted a rules proposal to the Supreme Court. The mother had raised her IAC claim for the first time on appeal but conceded that the record lacked sufficient information for the court to determine her claim's merits. The court therefore affirmed the trial court's order terminating parental rights. The court also noted that it assumed that the mother received constitutionally adequate counsel but did not decide that issue. The court cited the United States Supreme Court decision in Strickland v. Washington, 466 U.S. 668, 689 (1984) but noted that it wasn't clear whether Strickland actually had any application. The court concluded by urging the Florida Supreme Court and the rules committees to provide guidance on the issue. http://www.5dca.org/Opinions/Opin2008/102008/5D08-133.op.pdf (October 23, 2008).

Dissolution of Marriage Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

Finney v. Finney, __So. 2d __, 2008 WL 4601216 (Fla. 1st DCA 2008). DATE FOR DETERMINING MARITAL ASSETS

Both former spouses raised issues on appeal following a final judgment of dissolution; appellate court reversed and remanded in three of former husband's issues and affirmed the remaining issues. Noting that a trial court is required, pursuant to s. 61.075(5) (b) 1., Florida Statutes, to set apart for each spouse any nonmarital asset, the appellate court found that the trial court had erred in having classified an annuity of former husband's as a marital asset where the evidence was undisputed that the annuity was a nonmarital asset acquired by him prior to the marriage. The appellate court also pointed out that a trial court is not afforded the same discretion in determining marital assets as it is with valuing assets and held that the date for determining marital assets is either the earliest date the spouses entered into a valid separation agreement or the date the petition for dissolution was filed. Where there is no valid separation

agreement, the date for determining marital assets is the date the petition is filed; contributions made to a profit-sharing plan *after* the date a petition is filed are not marital assets subject to equitable distribution. With regard to child support, the trial court is required to determine each parent's gross and net monthly income before determining the parents' combined net monthly income; once that is determined; the trial court must determine the child support needed and then each parent's % share of that need before determining each parent's dollar share of the child support need.
http://opinions.1dca.org/written/opinions2008/10-17-08/07-1813.pdf (October 17, 2008).

Johnson v. Johnson, __So. 2d __, 2008 WL 4566893 (Fla. 1st DCA 2008). RIGHT OF PRISONER TO BE HEARD IN DOM PROCEEDINGS
Appeal from an inmate in the custody of the Mississippi Department of Corrections to the order dissolving his marriage. Appellate court found that the trial court had erred in conducting the final hearing without giving former husband an opportunity to be heard, at the very least via telephone, in light of his having apprised the trial court of his desire to attend and present evidence. Appellate court rejected former husband's argument that the trial court lacked personal jurisdiction over him and found that he had waived that issue when he failed to object on those grounds in responding to the petition for dissolution. Citing the concurring opinion in Rogers v. Rogers, So. 2d 687 (Fla. 4th DCA 2008), which recognized that it is not incumbent on the state to ensure a defendant's presence in civil proceedings as in criminal--that a prisoner must take the initiative to be preserve his right to be heard in a civil proceeding-- the appellate court held that where the right is preserved, the issue is clear as to defendant's participation.
http://opinions.1dca.org/written/opinions2008/10-15-08/07-5377.pdf (October 15, 2008).

Wilson v. Wilson, __So. 2d __, 2008 WL 4566892 (Fla. 1st DCA 2008). MARITAL LABOR DOES NOT TRANSFORM A MARITAL ASSET
Former wife and her grandmother appealed final judgment of dissolution of marriage, arguing that the trial court had abused its discretion in finding former wife's nonmarital interest in a motel became a marital asset when its value was enhanced as a result of former husband's marital labor. Appellate court agreed, finding that the trial court had abused its discretion in treating the entirety of former wife's interest in the motel as marital property. Citing Martin v. Martin, 923 So. 2d 1236 (Fla. 1st DCA 2006), the appellate court held that where the value of a nonmarital asset is enhanced and appreciates due to marital labor, that enhancement and appreciation becomes a marital asset; however, the enhancement and appreciation do not transform a nonmarital asset into a marital one. The trial court erred when it converted former wife's nonmarital asset to a marital one when marital labor enhanced is value.
http://opinions.1dca.org/written/opinions2008/10-15-08/07-5325.pdf (October 15, 2008).

Hall v. Hall, __So. 2d__, 2008 WL 4531802 (Fla. 1st DCA 2008). TRIAL COURT ERRED IN ITS DEVIATIONS FROM CHILD SUPPORT GUIDELINES
Issue was whether trial court had abused its discretion in ordering former wife to pay $20 per month for child support where there was no indication the trial court had considered the child support guidelines prior to making its award. Appellate court remanded for recalculation of child support. Pursuant to s. 61.30(1) (a), Florida Statutes, the trial court may order a child

support amount varying more than 5% from the guidelines only when accompanied by a written explanation as to why ordering payment of the guideline amount would be unjust or inappropriate. Although the trial court provided an explanation, the appellate court found that the amount of child support ordered resulted in a 94% deviation from the guidelines in absence of any indication that the trial court was either aware of or considered the amount of the deviation. Noting that the trial court had apparently reduced the child support amount in part based on former wife's disability, the appellate court pointed out that pursuant to s. 61.30(2) (a) 4., Florida Statutes, disability payments should be included as income for purposes of child support calculation and while a parent's lack of employment opportunities or increased financial needs resulting from a disability may be considered by the trial court, that to excuse a parent from a meaningful financial contribution based on his or her disability is not what the legislature intended.
http://opinions.1dca.org/written/opinions2008/10-10-08/07-4446.pdf (October 10, 2008).

Second District Court of Appeal

Berry v. Berry, __So. 2d __, 2008 WL 4682520, (Fla. 2d DCA 2008). PROPERTY DEEDED BACK DURING MARRIAGE NO LONGER MARITAL
Former husband and his father appealed final judgment of dissolution , arguing that the trial court: 1) erred in having found that the residence where former husband, former wife, and their children lived during their marriage was marital property; and 2) abused its discretion in having awarded permanent periodic alimony to former wife. Finding that the record below contained competent, substantial evidence to support the alimony award, the appellate court affirmed on that issue, but reversed on the issue of the marital home and remanded to the trial court for restructuring of the plan for equitable distribution. The house in which former husband and former wife had lived was deeded to former husband shortly after the wedding by former husband's father and was deeded back to the father the following day; however, the deed was not recorded until after former husband and former wife separated. The trial court found that the father had intended that former husband and former wife use the house as long as they were married. The appellate court held the trial court's conclusion that the house was marital property was incorrect. The appellate court found former wife to be bound by the deed which conveyed her interest to her father-in-law in absence of any testimony that she was either prevented from reading the deed or induced to sign it without reading. The appellate court also found that the failure of former husband's father to record the deed for eleven years did not extinguish his ownership of the property.
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2008/October/October%2024,%202008/2D07-825.pdf (October 24, 2008).

Silver v. Silver, __So. 2d __, 2008 WL 4682517 (Fla. 2d DCA 2008). SETTLEMENT AGREEMENT REACHED DURING MEDIATION IS BINDING
Former husband argued that trial court had erred when it included within the amended final judgment of dissolution an award to former wife based on claims she raised after she and he had entered into a binding mediation agreement. The appellate court held that a mediated settlement agreement is a contract and should be interpreted as such. Noting that the

mediation agreement contained the provision that it was a "full and complete settlement of the issues," the appellate court found the trial court's interpretation of that provision to be contrary to its plain meaning. Additionally, the appellate court pointed out that Florida Family Law Rule of Procedure 12.740, which governs mediation, requires the mediator to report any areas in which the parties cannot reach agreement. In this case, the mediator had reported "all issues" had been settled; therefore, the trial court had no basis to conclude that the parties' settlement was an incomplete resolution.
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2008/October/October%2024,%202008/2D07-3105.pdf (October 24, 2008).

Sweet v. Sweet, __So. 2d __, 2008 WL 4482581 (Fla. 2d DCA 2008). NO RENTAL VALUE FROM MARITAL HOME UNLESS SPECIFIED IN FJ
Appellate court held that a trial court should reduce a former husband's temporary child support obligation during a period of substantial shared parenting under a temporary schedule for rotating custody. With regard to a marital home, the appellate court cited the Supreme Court's holding in Kelly v. Kelly, 583 So. 2d 667 (Fla. 1991), that when a spouse is ousted from the marital home by court order following a dissolution and no reimbursement for rental value is provided in the final judgment, it is assumed that the trial court did not intend one. The appellate court also held that in cases where former wife was awarded exclusive occupancy until sale of the home, she is obligated to pay the mortgage, taxes, etc while living in the home and that if the final judgment orders former husband to continue paying temporary support until the sale which includes funds for payment of property expenses, he is in fact paying the mortgage and property expenses and may be entitled to either credit and/or setoffs upon sale of the home.
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2008/October/October%2003,%202008/2D07-342.pdf (October 3, 2008).

Third District Court of Appeal

Ponce v. Ponce, __ So. 2d __, 2008 WL 4568038 (Fla. 3d DCA 2008). TRIAL COURT MUST CONSIDER RELEVANT ECONOMIC FACTORS
In this reversal of the trial court's awards of alimony, child support, and retroactive support as not having been based on competent, substantial evidence and reversal of its plan for equitable distribution and retroactive support for failing to credit former husband for sums to which he was entitled, the appellate court stated that, pursuant to s. 61.08(2), Florida Statutes, a trial court is required to set forth factual findings regarding "all relevant economic factors" including probable and potential earnings, actual and imputed income, and any adjustments to income. Concluding that the trial court had made no findings to support its determination that former husband's income was substantially higher than what he had established through testimony and tax returns and that the record lacked competent, substantial evidence, the appellate court reversed and remanded with instructions to the trial court to recalculate the awards and adjust its determination of equitable distribution and retroactive support to properly reflect credits due to former husband. http://www.3dca.flcourts.org/Opinions/3D06-1759.pdf (October 15, 2008).

Aguilar v. Montero, __ So. 2d __, 2008 WL 4568071 (Fla. 3d DCA 2008). RIGHT TO PRE-DISSOLUTION SUPPORT CANNOT BE WAIVED

Issue was whether a waiver of temporary support in a prenuptial agreement may be enforced. Citing Florida case law holding that the right to pre-dissolution support cannot be waived, the appellate court reversed the trial court's denial of former wife's claim for support for the period from the date of filing of the petition for dissolution and the date of the final judgment of dissolution. http://www.3dca.flcourts.org/Opinions/3D07-1068.pdf (October 15, 2008).

Toiberman v. Tisera, __ So. 2d __, 2008 WL 4489176 (Fla. 3d DCA 2008). NO ARITRATION IN CHILD CUSTODY ETC PROCEEDINGS

Question as to whether an agreement in which former husband and wife chose to arbitrate all issues contravenes s. 44.104, Florida Statutes, which specifically forbids arbitration of disputes involving child custody, visitation, or child support. Finding that the plain language of s. 44.104(14), Florida Statutes, prohibits binding arbitration of issues concerning child custody, visitation, or child support, the appellate court vacated the portions of the order pertaining to those issues. With regard to whether the issue of alimony could be determined through arbitration, the appellate court held that the legislature intended the term, dispute, to refer to the entire legal action between the parties, as opposed to individual issues within that action and intended to exclude *any* proceedings involving issues of child custody, visitation, or child support from arbitration. The appellate court noted that fundamental error, such as occurred in this case, may be raised for the first time on appeal. Accordingly, the entire order was vacated. http://www.3dca.flcourts.org/Opinions/3D07-1160.pdf (October 8, 2008).

Baptiste v. Baptiste, __ So. 2d __, 2008 WL 4489206 (Fla. 3d DCA 2008). REQUIREMENTS FOR AWARD OF LUMP SUM ALIMONY

Appeal by former husband to a final judgment of dissolution, following entry of default against him, which awarded former wife all of former husband's interest in a jointly owned home as lump sum alimony. The order omitted the evidentiary proceedings and statutory findings of fact required to support the award. Holding that a trial court is required to consider evidence and make findings of fact in order to support an award of lump sum alimony, the appellate court reversed and remanded for the trial court to conduct appropriate fact-finding as well as rule on former husband's motion to vacate the default. The appellate court noted that in Florida, public policy prefers adjudication on the merits over entry of a default; although the filing of the notice of appeal deprived the trial court of jurisdiction to hear former husband's motion to vacate, the default, the trial court would be able to take it up on remand. http://www.3dca.flcourts.org/Opinions/3D07-3238.pdf (October 8, 2008).

Lopez v. Lopez, __ So. 2d __, 2008 WL 4499182 (Fla. 3d DCA 2008). TRIAL COURT HAS BROAD DISCRETION WITH CHILD SUPPORT

In an appeal by a former husband to the monthly child support obligation set in a supplement to the final judgment of dissolution, the appellate court noted that a trial court is afforded broad discretion in determining a party's child support obligation and its findings will not be overturned absent an abuse of discretion. In setting a monthly child support obligation, a trial

court may consider adjustments as necessary to achieve an equitable result. In this case, where the trial court's consideration of factors led it to set an amount which it believed would achieve an equitable result, and there was no showing that the trial court's findings or considerations were unsupported by the evidence, the appellate court could not conclude the trial court had abused its discretion.
http://www.3dca.flcourts.org/Opinions/3D07-2050.pdf (October 8, 2008).

Cardella-Navarro v. Navarro, __So. 2d __, 2008 WL 4414219 (Fla. 3d DCA 2008). ABUSE OF DISCRETION RE ASSETS/LIABILITIES
Appellate court held trial court had exceeded its discretion when it determined credits and/or setoffs upon sale of the marital home and directed proceeds of the sale to former husband. The appellate court also held that the trial court had erred in assigning former wife business liabilities incurred by former husband's business. Reiterating that the standard of review for a trial court's apportioning of assets and liabilities in a dissolution proceeding is abuse of discretion, the appellate court relied on previous holdings that a spouse is not entitled to either credit or setoffs upon sale of the marital home in absence of language specifically providing for them in a settlement agreement or final judgment. Where there is no such language, s. 61.077, Florida Statutes, allows the trial court to consider certain factors in determining the issue of credit or setoffs; however, here the appellate court found the trial court's decision was outside contemplation of the statute. The appellate court also found that the trial court erred in awarding one-half of the business debt to former wife where the record showed former husband controlled the business, former wife was not involved in the business, and that most of the business debt arose after the separation. Having found that former husband mishandled corporate finances; it was inequitable for the trial court to have assigned business debt to former wife.
http://www.3dca.flcourts.org/Opinions/3D07-1997.pdf (October 1, 2008).

Ramos v. Lopez, __So. 2d __, 2008 WL 4427135 (Fla. 3d DCA 2008). PARTIES IN FINANCIAL EQUIPOISE PAY OWN FEES
Appeal by former husband to a final judgment of dissolution which placed the spouses in a position of financial equipoise, but required former husband to pay former wife's attorney fees, costs, and suit money. Appellate court relied on Gaudette v. Gaudette, 890 So. 2d 1161 (Fla. 5th DCA 2004), for its holding that a former husband should not be ordered to pay former wife's fees where the parties were left in a relatively equal financial positions and Bible v. Bible, for its ruling that a trial court does not abuse its discretion in ordering each party to pay its own fees after a near equal distribution of property.
http://www.3dca.flcourts.org/Opinions/3D07-2159.pdf (October 1, 2008).

Miller v. Miller, __So. 2d __, 2008 WL 4414529 (Fla. 3d DCA 2008). REQUIREMENTS FOR MODIFICATION OF CUSTODY
Former wife, named the primary residential parent in the final judgment of dissolution, appealed an order which denied her motion to relocate with the couple's three year old son from Key West to Atlanta and also changed the primary residential parent from her to former

husband. Holding that the desire to relocate in and of itself is not a substantial change in circumstances sufficient to warrant a change in custody, the appellate court reversed the custody determination because former husband neither plead nor proved substantial, material change in circumstances and that the child's best interests justified a change in custody. The trial court's finding of both a substantial change in circumstances *and* the best interests of the child is crucial to modification of custody. The appellate court noted that in accordance with s. 61.13001(7), Florida Statutes, no presumption shall arise for or against relocation when the move proposed by the primary residential parent will materially affect the current time-sharing schedule with the non-relocating parent. The shift of the burden of proof regarding relocation contained in s. 61.13001(8), FS, was also noted by the appellate court.
http://www.3dca.flcourts.org/Opinions/3D07-3173.pdf (October 1, 2008).

Fourth District Court of Appeal

Lord v. Lord, __ So. 2d __, 2008 WL 4647386 (Fla. 4th DCA 2008). RIGHT TO PRE-DISSOLUTION SUPPORT CANNOT BE WAIVED

Another appeal in which Florida's long-standing policy prohibiting a spouse from waiving pre-dissolution rights was challenged this time by former wife arguing that an antenuptial agreement should have prevented the trial court from having awarded temporary attorney's fees to former husband. Fourth DCA, agreeing with the Third DCA on this point, affirmed. In this case, former wife was 82 years of age with a net worth of $3.9 million and a net monthly income of $20,000, while former husband was 77 with a net worth of $100,000 and a net monthly income of $3,670. In addition to disallowing the waiver, the trial court reasoned that former husband had need for payment of the fees and former wife had the ability to pay.
http://www.4dca.org/opinions/Oct%202008/10-22-08/4D08-1448.op.pdf (October 22, 2008).

Hitchcock v. Hitchcock, __ So. 2d __, 2008 WL 4642989 (Fla. 4th DCA 2008). TRIAL COURT ABUSED DISCRETION IN EQUITABLE DISTRIBUTION

In an appeal by former husband to a final judgment of dissolution on several grounds, appellate court reversed as to the plan for equitable distribution and fees and costs. Former wife had claimed special equity in the marital home and other properties acquired during the marriage because a substantial portion of the couple's assets derived from gifts and inheritances she had acquired from her family before and during the 21 year marriage. Although the trial court rejected former wife's claim for special equity in any of the properties, finding that her funds had been co-mingled and could not be traced to the purchase of properties and also that former husband had been responsible for managing and investing the funds and had worked to generate income from the properties, it went on to award former wife approximately 72% of the marital assets while awarding former husband the remaining approximate 28%. The appellate court held that the trial court had abused its discretion and accordingly, reversed and remanded for the trial court to redistribute the marital assets and liabilities.
http://www.4dca.org/opinions/Oct%202008/10-22-08/4D06-4743.op.pdf (October 22, 2008).

Fifth District Court of Appeal

Harrison v. Gattozi, __ So. 2d ___, 2008 WL 4442432 (Fla. 5th DCA 2008). CUSTODY CHANGES REQUIRE COMPETENT, SUBSTANTIAL EVIDENCE

Appellate court affirmed trial court's granting of supplemental petition to modify final judgment of dissolution, changing primary residential custody from former wife to former husband because there was competent, substantial evidence on which the decision could be based.
http://www.5dca.org/Opinions/Opin2008/092908/5D07-3064.op.pdf (October 3, 2008).

Cogen v. Cogen, ___So. 2d ___, 2008 WL 4442481 (Fla. 5th DCA 2008). REHABILITATIVE ALIMONY REQUIRES REHABILITATIVE PLAN

Appellate court held trial court committed error when it awarded rehabilitative alimony to former wife who had failed to present evidence of a rehabilitative plan. The trial court was instructed on remand to recalculate child support based on incomes of former husband and former wife as previously determined by the general magistrate.
http://www.5dca.org/Opinions/Opin2008/092908/5D07-3526.op.pdf (October. 2, 2008).

Domestic Violence Case Law

Florida Supreme Court

Inquiry Concerning A Judge No. 07-540, Re: George W. Maxwell, III, --- So.2d ----, 2008 WL 4379602 (Fla. 2008). JUDGE RECEIVES A PUBLIC REPRIMAND

A judge contacted the Sheriff's Office and sought the release of a former colleague's sister to the Pretrial Release Program in a domestic violence case, despite the fact that the law prohibited such a release because she was already on probation for a controlled substance offense. The judge also accepted an exparte communication from an attorney without input from the prosecutor or any other interested party and relied on this exparte communication in ordering the defendant's release, even though the judge may not have had the complete picture of the exact details of the crime or the defendant's prior record. Because of these facts, the court approved the JQC's recommendation that the judge receive a public reprimand.
http://www.floridasupremecourt.org/decisions/2008/sc08-1285.pdf (September 29, 2008).

In Re: Amendments to the Florida Family Law Rules, ---So.2. ----, 2008 WL 4587198 (Fla. 2008). CHANGES TO RULES AND FORMS

Several rule changes were suggested in the Family Law Rules Committee's regular cycle report and adopted by the Court. Rule 12.610, which applies to injunctions for repeat, dating, and sexual violence, was amended to require personal service of the petition by a law enforcement agency. Pursuant to the new rule, the clerk of the court will furnish a copy of the petition or the temporary injunction (if one has been entered), and notice of hearing for service to the appropriate law enforcement agency. Form 12.900(h) was also developed 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.
http://www.floridasupremecourt.org/decisions/2008/sc08-92.pdf (October 16, 2008).

In Re: Amendments To The Florida Family Law Rules, --- So.2d ----, 2008 WL 4587208 (Fla. 2008)
CHANGES TO RULES AND FORMS TO COMPLY WITH LEGISLATION
Several amendments to the Florida Family Law Rules of Procedure and Forms were proposed by the Florida Bar's Family Law Rules Committee to conform to recent legislation. The relevant legislation, chapter 2008-61, Laws of Florida, amended various sections of Chapter 61, Florida Statutes, and related statutes, to remove the references to "custody," "primary residential parent," "secondary residential parent," and "visitation." The statutes now require the court to create or approve a "parenting plan" which establishes how divorced parents will share the responsibilities of childrearing and decision-making with regard to the child and sets forth a time-sharing schedule. All of the suggested changes were approved by the court.
http://www.floridasupremecourt.org/decisions/2008/sc08-1660.pdf (October 16, 2008).

First District Court of Appeal

No new opinions for this reporting period.

Second District Court of Appeal

Ambrefe v. Ambrefe, --- So.2d ----, 2008 WL 4569950 (Fla. 2d DCA 2008) NO EVIDENCE OF IMMINENT DANGER
The court issued a domestic violence injunction, even though the court did not find any evidence of imminent danger. The appellate court found that the trial court abused its discretion in entering the injunction when the requisite evidence was lacking.
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2008/October/October%2015,%202008/2D08-433.pdf (October 15, 2008).

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.