

OSCA/OCI'S FAMILY COURT CASE LAW UPDATE
October 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.....	4
Fourth District Court of Appeal.....	5
Fifth District Court of Appeal.....	5
Dependency Case Law	5
Florida Supreme Court.....	5
First District Court of Appeal	5
Second District Court of Appeal.....	6
Third District Court of Appeal.....	7
Fourth District Court of Appeal.....	8
Fifth District Court of Appeal.....	8
Dissolution Case Law	9
Florida Supreme Court.....	9
First District Court of Appeal	9
Second District Court of Appeal.....	11
Third District Court of Appeal.....	12
Fourth District Court of Appeal.....	14
Fifth District Court of Appeal.....	16
Domestic Violence Case Law	16
Florida Supreme Court.....	16
First District Court of Appeal	16
Second District Court of Appeal.....	16
Third District Court of Appeal.....	16
Fourth District Court of Appeal.....	16
Fifth District Court of Appeal.....	17

Delinquency Case Law

Florida Supreme Court

In Re: Amendments To The Florida Rules Of Civil Procedure - Management Of Cases Involving Complex Litigation, __ So.3d __, 2009 WL 3296237 (Fla. 2009) **FORMS AMENDED** The Court amended several forms due to comments filed after publication. The final versions of the following forms are now available: Florida Rule of Civil Procedure 1.201 (Complex Litigation); Florida Rule of Civil Procedure 1.440 (Setting Action for Trial); Form for Use with Rules of Civil Procedure 1.997 (Civil Cover Sheet); Form for Use with Rules of Civil Procedure 1.998 (Final Disposition Form); Florida Family Law Rule of Procedure 12.100 (Pleadings and Motions); Florida Family Law Rule of Procedure 12.201 (Complex Litigation); and Florida Supreme Court Approved Family Law Form 12.928 (Family Court Cover Sheet). The Court also noted that their intent was to ensure that form 12.928 is filed in all cases under the Florida Family Law Rules of Procedure and, or the Florida Rules of Juvenile Procedure. To this purpose, it amended Florida Family Law Rule of Procedure 12.015 (Family Law Forms) to identify form 12.928 as a Florida Family Law Rules of Procedure Form and rule 12.100 to require a party opening or reopening a case under the family law rules to file form 12.928 with the clerk of the circuit court. Since there is currently no juvenile rule requiring use of this form, the Court requested that the Juvenile Court Rules Committee propose amendments to the juvenile rules to require use of form 12.928 in all cases filed under those rules as quickly as possible using the fast-track rule amendment process. <http://www.floridasupremecourt.org/decisions/2009/sc08-1141a.pdf> (October 15, 2009).

First District Court of Appeal

T.F. v. State, __ So.3d __, 2009 WL 3430192 (Fla. 1st DCA 2009). **DENIAL OF MOTION TO WITHDRAW GUILTY PLEA WAS REVERSED AND REMANDED.** The juvenile challenged the trial court's denial of his motion to withdraw his guilty plea. The State had acknowledged that the record on appeal provided no indication that the juvenile was given an opportunity to consult with defense counsel after the trial court stated that it would not accept the juvenile's nolo contendere plea and would only accept a guilty plea as a matter of convenience, to which defense counsel replied, "Yes, your Honor. We'll enter a plea of guilty to convenience." The First District Court of Appeal reversed and remanded for further proceedings citing D.V.L. v. State, 693 So.2d 693, 694 (Fla. 2d DCA 1997)("When the record fails to reflect a determination by the trial court that the juvenile has entered a plea voluntarily ... remand is appropriate."); Richardson v. State, 432 So.2d 750, 751 (Fla. 2d DCA 1983)("When a defendant moves to withdraw his plea of guilty, the court should be liberal in exercising its discretion to permit the withdrawal, especially where it is shown that the plea was based on a failure of communication..."); and Sanders v. State, 662 So.2d 1372, 1374 (Fla. 1st DCA 1995)(noting that, on remand, the trial court was free to permit the appellant to withdraw her plea or conduct an evidentiary hearing to develop the facts surrounding the entry of the plea). <http://opinions.1dca.org/written/opinions2009/10-27-2009/09-2617.pdf> (October 27, 2009).

Second District Court of Appeal

N.P. v. State, __ So.3d __, 2009 WL 3320187 (Fla. 2d DCA 2009). **DISPOSITION ORDER REVERSED AND REMANDED BECAUSE THE TRIAL COURT FAILED TO ADEQUATELY COMMUNICATE WHY THE RESTRICTIVENESS LEVEL IT SELECTED WAS THE MOST APPROPRIATE FOR THE JUVENILE.**

The juvenile appealed his disposition in two separate cases. The Florida Department of Juvenile Justice (DJJ) had recommended probation for both cases. Instead, the trial court entered disposition orders in both cases committing the juvenile to a moderate-risk residential facility followed by aftercare until his nineteenth birthday. The juvenile argued that the trial court failed to provide sufficient reasons for the departure and failed to explain why a moderate-risk program was the most appropriate placement. The Second District Court of Appeal found that E.A.R. v. State, 4 So.3d 614 (Fla.2009) explained the requirements necessary for a trial court to deviate from the DJJ's recommended disposition. In the instant case, even though the trial court supported its decision for deviating from the DJJ's recommendation, the trial court did not explain why a moderate-risk facility was the most appropriate restrictiveness level vis-à-vis the needs of the juvenile. Case law uniformly holds that if a trial court chooses to depart from DJJ's recommended disposition it must provide an explanation for why the restrictiveness level selected by the court better suits the needs of the child than the restrictiveness level recommended by DJJ. Accordingly, the disposition order was reversed and remanded. The Second District noted that this decision was not about the legality of the disposition or the appropriateness of the discretion exercised by the trial court but instead only about the trial court's failure to adequately communicate why the restrictiveness level it selected was the most appropriate for the juvenile. On remand, the trial court must logically and persuasively explain why, in light of these differing characteristics [of various restrictiveness levels], one level is better suited to serving both the rehabilitative needs of the juvenile-in the least restrictive setting-and maintaining the ability of the State to protect the public from further acts of delinquency. If it cannot do so, the trial court must impose the probation recommended by the DJJ.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/October/October%2016,%202009/2D08-4290.pdf (October 16, 2009).

G.M.H. v. State, __ So.3d __, 2009 WL 3233144 (Fla. 2d DCA 2009). **RESTITUTION ORDER REVERSED AND REMANDED FOR A NEW RESTITUTION HEARING AT WHICH THE STATE MAY PRESENT ADMISSIBLE EVIDENCE OF THE LOSS SUSTAINED BY THE VICTIM.** The juvenile challenged his restitution order in the amount of \$1062 arguing that there was insufficient evidence to support the award. The juvenile had stolen a dirt bike which was purchased "used" by the victim for \$1350. The dirt bike was recovered with numerous damages. The victim made some repairs. Six months later, the victim traded the damaged dirt bike for another used dirt bike rather than repair the remaining damage. No documentation of the book value was presented. At the restitution hearing, the juvenile's mother submitted a list of prices for all the needed repairs based on her internet research which was conducted before any repairs had been undertaken. She wanted \$1062 in restitution. The trial court overruled the juvenile's hearsay objection to the damages evidence. The court set the restitution amount at \$1062, reasoning that the victim would have incurred all of the repair/replacement expenses had he

not traded the dirt bike. The State conceded that the restitution award must be reversed because the trial court should not have admitted the hearsay evidence. The Second District Court of Appeal noted that generally, restitution is calculated based on the fair market value of the property at the time of the offense offset by the salvage value of the property returned. The Second District reversed and remanded for a new restitution hearing at which the State may present admissible evidence of the amount of loss sustained by the victim.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/October/October%2009,%202009/2D08-3847.pdf (October 9, 2009).

A.M.E. v. State, __ So.3d __, 2009 WL 3233010 (Fla. 2d DCA 2009). **CASE REVERSED AND REMANDED BECAUSE THE JUVENILE’S WAIVER OF COUNSEL FAILED TO COMPLY WITH FLORIDA RULE OF JUVENILE PROCEDURE 8.165.** The juvenile challenged her adjudication and commitment to a moderate- risk facility until her nineteenth birthday. The juvenile appeared at a hearing with her mother. The juvenile appeared without counsel. At this hearing, the juvenile waived her right to counsel, signed a written waiver of counsel, and entered a guilty plea. The juvenile's mother also signed the written waiver. When the juvenile later returned to court for her disposition hearing, the trial court did not renew the offer of counsel before adjudicating her delinquent and ordering her placement. The Second District Court of Appeal found that the inquiry conducted by the trial court at the initial hearing and the waiver form failed to meet the waiver of counsel requirements of Florida Rule of Juvenile Procedure 8.165. Further, the trial court failed to renew the offer of counsel before proceeding with the disposition hearing as required by rule 8.165(b)(5). The State noted that the juvenile had turned nineteen. Therefore, the jurisdiction of the juvenile court had terminated and the juvenile had fulfilled the requirements of the disposition order, i.e., commitment until her nineteenth birthday. The Second District recognized that any action beyond vacating the original order may raise new issues regarding jurisdiction or other matters. Nevertheless, the Second District reversed and remanded for further proceedings as determined necessary and appropriate.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/October/October%2009,%202009/2D08-4697.pdf (October 9, 2009).

Third District Court of Appeal

W.J. v. State, __ So.3d __, 2009 WL 3271372 (Fla. 3d DCA 2009). **APPELLATE COURT AFFIRMED ADJUDICATION FOR RESISTING AN OFFICER WITHOUT VIOLENCE BASED ON THEIR FINDING THAT POLICE OFFICER WAS ENGAGED IN THE LAWFUL EXECUTION OF A LEGAL DUTY WHEN ARRESTING THE JUVENILE.** The trial court found that the juvenile committed the offense of resisting an officer without violence, withheld adjudication, and placed the juvenile on probation. The juvenile argued that there was neither reasonable suspicion for an investigatory stop, nor probable cause. Therefore, the officer was not engaged in the lawful execution of a legal duty under s. 843.02, F.S. (2008), and the charge must be dismissed. The arresting officer had previously encountered the juvenile on the playground of a public housing project. The officer warned the juvenile to leave the property and warned him that he would arrest him for trespass if he returned. Two days later, the juvenile was observed by the officer at the playground with a group shooting dice and placing bets. The officer did not observe the juvenile

actually gambling. The officer was with other police officers in unmarked vehicles. The police officers emerged from their unmarked vehicles and identified themselves as police officers. The juvenile and another boy ran away. The officer caught the juvenile and charged him with resisting an officer without violence and with trespass. The Third District Court of Appeal found that there was probable cause. The officer had previously ordered the juvenile to leave the housing project and warned that he would be arrested for trespass if he returned. Thus, there was probable cause to arrest the juvenile for trespass. At trial, the juvenile successfully obtained a judgment of dismissal on the trespass charge, because the State failed to establish that the officer had the authority to warn the juvenile to stay off the property. However, the fact that the State did not prevail at trial did not defeat the fact that probable cause for the arrest existed. Therefore, the officer was engaged in the lawful execution of a legal duty. Judgment affirmed.

<http://www.3dca.flcourts.org/Opinions/3D08-3110.pdf> (October 14, 2009).

Fourth District Court of Appeal

No new opinions for this reporting period.

Fifth District Court of Appeal

No new opinions for this reporting period.

Dependency Case Law

Florida Supreme Court

In re: Amendments to Rules of Juvenile Procedure, ___ So. 3d ____, 2009 WL 3132829, 34 Fla.L.Weekly S555 (Fla.2009) [RULES AND FORMS ADOPTED/AMENDED](#).

The Supreme Court adopted new rule 8.292 (appointment and discharge of surrogate parent), new form 8.958 (order appointing surrogate parent), and new form 8.961(a)(order authorizing access to child's medical and educational records). In addition, the Court adopted amendments to rule 8.305 (shelter hearing, petition, and order) and form 8.961 (shelter order).

<http://www.floridasupremecourt.org/decisions/2009/sc09-1266.pdf> (October 1, 2009).

First District Court of Appeal

J.A.H. v. Department of Children and Families, ___ So. 3d ____, 2009 WL 3278715, 34 Fla.L.Weekly D2130 (Fla. 1st DCA 2009). [ORDER OF DIRECT CRIMINAL CONTEMPT REVERSED](#).

The father successfully sought reversal of his conviction for direct criminal contempt. The trial court had found the father in contempt of court after he refused to relinquish his cell phone. The court wanted the phone in order to ascertain whether the father had sent a text message to a third party to the effect that the father's estranged wife was at the courthouse. On appeal, the court found that the trial court's order of contempt violated Florida Rule of Criminal Procedure 3.830 because the trial court failed to follow three of the six steps necessary for an adjudication of contempt. In particular, a recital of the facts underlying the adjudication of guilt was essential whereas the trial court's order merely noted the father's "statements, demeanor and behavior" along with audio and video footage, thereby failing to satisfy Rule 3.830. The trial court had also noted differing reasons for the contempt and failed to give the father notice of the contempt charge or the opportunity to explain his behavior prior to sentencing. Nor was the father given the opportunity to explain himself or present evidence of mitigating circumstances. Therefore the court reversed the trial court's judgment of contempt. <http://opinions.1dca.org/written/opinions2009/10-14-2009/09-1818.pdf> (October 14, 2009).

Second District Court of Appeal

A.B. v. Department of Children and Family Services and Guardian ad Litem Program, ___ So. 3d ___, 2009 WL 3346754 (Fla. 2d DCA 2009). **CONCESSION OF ERROR.**

Based on the concession by the Department that the order adjudicating the child dependent based on prospective abuse or neglect should be reversed due to insufficient evidence, the court reversed and remanded the case for the circuit court to determine the appropriateness of the placement of the child with the father.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/October/October%2028,%202009/2D08-6148.pdf (October 28, 2009).

R.F. and E.F. v. Department of Children and Family Services and Guardian ad Litem Program, ___ So. 3d ___, 2009 WL 3320186, 34 Fla.L.Weekly D2138 (Fla. 2d DCA 2009). **TERMINATION OF PARENTAL RIGHTS REVERSED.**

The court reversed an order terminating the parental rights of both the mother and the father. The Department sought termination of parental rights of both parents based on sections 39.806(1)(c) and (e), Florida Statutes (2007). In terminating the parents' rights, the trial court found that both parents' continued involvement with drugs threatened the well-being and safety of the children pursuant to section 39.806(1)(c), Florida Statutes. After reviewing the applicable standards for terminating parental rights, the appellate court noted that although drug addiction is an important factor in assessing the threat of prospective harm to the children, a parents' substance abuse, standing alone, does not establish prospective neglect. In addition, witnesses had testified that the parents did not place the children in an environment that negatively affected their physical, mental, or emotional well-being. Furthermore, the court held that there was no clear and convincing evidence of a nexus between the parents' drug use and any existing abuse, neglect, or specific harm to the children. Therefore the trial court erred in terminating parental rights under section 39.806(1)(c), Florida Statutes. The court then turned its analysis to section 39.806(1)(e), Florida Statutes and held that the trial court did not distinguish factual findings among the children, as well as between the father and the mother, and therefore the trial court erred when it terminated parental rights as to one of the children

who was only nine (9) months old and therefore twelve (12) months had not passed since that child's removal from the father. In addition, the Department did not demonstrate by clear and convincing evidence that the circumstances causing the case plan's creation were not significantly remedied such that the children's well-being and safety were endangered if reunified with the parents. Finally, the court held that the Department failed to prove that the parents' acts harmed the children and evidence of future harm was speculative at best. The court therefore reversed the judgment terminating the parental rights of both parents and remanding the case for further proceedings.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/October/October%2016,%202009/2D08-4350.pdf (October 16, 2009).

R.C. v. Department of Children and Family Services and Guardian ad Litem Program, ___ So. 3d ____, 2009 WL3233143, 34 Fla.L.Weekly 2071 (Fla. 2d DCA 2009). **CONCESSION OF ERROR.**

Based on the concession by the Department and Guardian ad Litem that the order adjudicating the children dependent should be reversed due to insufficient evidence, the court reversed and remanded with instructions that the children be returned to the father.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/October/October%2009,%202009/2D07-5263.pdf (October 9, 2009).

J.S. v. Department of Children and Family Services and Guardian ad Litem Program, ___ So. 3d ____, 2009 WL 3151342, 34 Fla.L.Weekly D2022 (Fla. 2d DCA 2009). **GUARDIANSHIP REVERSED.**

The court reversed an order placing the mother's children in a permanent guardianship and ordered that the mother's case plan be reinstated. The Department had filed a petition for dependency based on neglect by both the mother and the father due to deprivation of food, clothing, shelter, or medical treatment. The mother consented to dependency and completed a case plan, resulting in termination of the Department's supervision. After supervision was reactivated, the children were placed with the maternal grandparents and a new case plan was later initiated. Prior to the case plan completion date, the Department filed a motion to place the children in a permanent guardianship and to terminate protective services. In granting the motion, and placing the children with the grandparents in a permanent guardianship, the trial court found in part that the parents had not worked their case plan and had not resolved the issues of domestic violence, stable housing, or financial stability. The court found that the mother was unemployed, lacked stable housing, and was noncompliant with domestic violence and couples counseling. On appeal, the court noted that the trial court failed to comply with the specificity requirement of section 39.622(2)(a), Florida Statutes (2008). Moreover, the Department failed to present sufficient evidence to support the guardianship. The court reversed the order and ordered on remand that the mother be given additional time to complete the case plan.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/October/October%2002,%202009/2D09-404.pdf (October 2, 2009).

Third District Court of Appeal

Y.F. v. Department of Children and Family Services, ___ So. 3d ____, 2009 WL 3272561, 35 Fla.L.Weekly D2123 (Fla. 3d DCA 2009). [CITATION OPINION](#).

By citation to A.W. v. Department of Children and Family Services, 969 So. 2d 496, 497 (Fla. 1st DCA 2007) and M.M. v. Department of Children and Family Services, 867 So. 2d 573, 574 (Fla. 3rd DCA 2004), the district court of appeal affirmed the trial court.

<http://www.3dca.flcourts.org/Opinions/3D09-1097.pdf> (October 14, 2009).

Fourth District Court of Appeal

L.M. v. Department of Children and Families, ___ So. 3d ____, 2009 WL 3271344, 34 Fla.L.Weekly D2094 (Fla. 4th DCA 2009). [TERMINATION OF SUPERVISION REVERSED](#).

The court reversed two orders, a permanency review order denying the mother's request for reunification and an order terminating Department supervision. The facts underlying the case involved the children's father writing to the court expressing concern that the mother was abusing prescription drugs. The court reopened the dependency case and put the children with the father. Both parents were put on a new case plan. A year later, the Department moved to terminate supervision and after a hearing, the court found the father, but not the mother, to have substantially complied with the case plan. The trial court terminated supervision, kept the children with the father, and ordered that the mother's visitation be supervised. On appeal, the court reversed for a thorough determination of whether the mother substantially complied with the case plan and noted the standard for the trial to apply if both parents have substantially complied. The court also ordered the trial court to consider and address all six factors contained in section 39.621(10), Florida Statutes.

<http://www.4dca.org/opinions/Oct%202009/10-14-09/4D09-1350.op.pdf> (October 14, 2009).

Fifth District Court of Appeal

L.M. v. Department of Children and Families, ___ So. 3d ____, 2009 WL3316944, 34 Fla.L.Weekly D2135 (Fla. 5th DCA 2009). [DEPENDENCY REMANDED](#).

The court reversed an order that, *inter alia*, denied the mother's motion for reunification and placed the child with the father. The Department had alleged in its shelter petition that the mother abused alcohol, used illegal drugs, permitted a sexual predator to live in her home with the child present, and that the child had witnessed acts of domestic violence against the mother by her paramour. The court granted the petition and temporarily placed the child with the father. The mother entered substance abuse treatment. After denying the Department's allegations, the mother moved for reunification and to accept a case plan. After a hearing, the court denied reunification with the mother, found it was in the child's best interests to remain with the father, and deferred further custody/visitation issues to a pending family law action. The trial court denied a motion for rehearing and indicated it had granted the father sole custody pursuant to section 39.521(3)(b)1, Florida Statutes (2008). Reaffirmed dependency. On appeal, the court reviewed section 39.521(3)(b)1 but noted that the award of sole custody

of the child to the father was inconsistent with the trial court's simultaneous decision to accept a reunification case plan for the mother. The court found that the trial court had both accepted and rejected the case plan and remanded the case for the trial court to determine whether or not it will accept the plan.

<http://www.5dca.org/Opinions/Opin2009/101209/5D09-1283.op.pdf> (October 15, 2009).

Dissolution Case Law

Florida Supreme Court

In Re: Amendments To The Florida Rules Of Civil Procedure - Management Of Cases Involving Complex Litigation, __So.3d __, 2009 WL 3296237 (Fla. 2009) **FORMS AMENDED** The Court amended several forms due to comments filed after publication. The final versions of the following forms are now available: Florida Rule of Civil Procedure 1.201 (Complex Litigation); Florida Rule of Civil Procedure 1.440 (Setting Action for Trial); Form for Use with Rules of Civil Procedure 1.997 (Civil Cover Sheet); Form for Use with Rules of Civil Procedure 1.998 (Final Disposition Form); Florida Family Law Rule of Procedure 12.100 (Pleadings and Motions); Florida Family Law Rule of Procedure 12.201 (Complex Litigation); and Florida Supreme Court Approved Family Law Form 12.928 (Family Court Cover Sheet). The Court also noted that their intent was to ensure that form 12.928 is filed in all cases under the Florida Family Law Rules of Procedure and, or the Florida Rules of Juvenile Procedure. To this purpose, it amended Florida Family Law Rule of Procedure 12.015 (Family Law Forms) to identify form 12.928 as a Florida Family Law Rules of Procedure Form and rule 12.100 to require a party opening or reopening a case under the family law rules to file form 12.928 with the clerk of the circuit court. Since there is currently no juvenile rule requiring use of this form, the Court requested that the Juvenile Court Rules Committee propose amendments to the juvenile rules to require use of form 12.928 in all cases filed under those rules as quickly as possible using the fast-track rule amendment process. <http://www.floridasupremecourt.org/decisions/2009/sc08-1141a.pdf> (October 15, 2009).

First District Court of Appeal

Steedman v. Chenoweth, __So.3rd __, 2009 WL 3491040, (Fla. 1st DCA 2009).

ASSETS BELONGING TO ONE SPOUSE MAY NOT BE DISSIPATED BY THE OTHER; TRIAL COURT MUST DETERMINE EXTENT TO WHICH ONE SPOUSE GETS CREDIT FOR OTHER'S DISSIPATION.

Former wife appealed the trial court's award to former husband of a share in the gold and silver which it had determined was former wife's non-marital property. The appellate court found that the trial court had erred in failing to give former wife credit for the portion of the gold and silver which former husband had liquidated and dissipated in violation of prior court orders. Reiterating that assets belonging to one spouse cannot be dissipated by the other, especially in violation of court order, the appellate court remanded to the trial court for its determination of the extent to which former wife should get credit for former husband's disposition of the assets in question.

<http://opinions.1dca.org/written/opinions2009/10-30-2009/08-3235.pdf> (October 30, 2009).

Brown v. Cowell, __So.3rd __, 2009 WL 3349659, (Fla. 1st DCA 2009).

EQUITABLE CHANCERY IS THE BASIS FOR JURISDICTION IN PETITION FOR ANNULMENT.

The appellate court cited Wright v. Wright, 778 So.2d 352,354 (Fla. 2nd DCA 2001), for its language that a circuit court's jurisdiction over a petition for annulment arises from its "equitable chancery" jurisdiction and is not based upon either the citizenship or the residency of the respondent.

<http://opinions.1dca.org/written/opinions2009/10-20-2009/09-0082.pdf> (October 20, 2009).

Hall v. Maal, __So.3rd __, 2009 WL 3349543, (Fla. 1st DCA 2009)

A MARRIAGE WHICH IS SOLEMNIZED WITHOUT A LICENSE IS NOT INVALID PER SE; CHILD SUPPORT OBLIGATIONS ARE NOT SUBJECT TO RETROACTIVE MODIFICATION.

Appeal by former wife in a case in which a marriage license was obtained a year after a religious marriage ceremony but the marriage was never solemnized after the license was obtained; the couple held themselves out as married. The appellate court held that the trial court had erred in its conclusion that no valid marital relationship existed. Comparing an unlicensed marriage to an unrecorded deed, the appellate court held that lack of a marriage license does not indicate a marriage did not take place, but rather that evidence of the marriage is lacking. Noting the absence of any statutory provision which expressly invalidates unlicensed marriages, the appellate court declined to hold that a marriage which is solemnized without a license is invalid per se. The appellate court reasoned that if former wife had entered into the marriage in good faith and in substantial compliance with chapter 741, Florida Statutes, that the marriage between the parties might be valid; accordingly, it remanded to the trial court for its determination of whether a marital relationship existed. In concluding that the trial court had not abused its discretion regarding former husband's request for reimbursement of child support paid per the parties' stipulated agreement and prior to any modification, the appellate court held that child support obligations are vested rights of the payee and vested obligations of the payor and are not subject to retroactive modification.

<http://opinions.1dca.org/written/opinions2009/10-20-2009/08-4776.pdf> (October 20, 2009).

Medlin v. Medlin, __So.3rd __, 2009 WL 3278676, (Fla. 1st DCA 2009).

FLORIDA TRIAL COURT MUST COMPLY WITH STATUTORY OBLIGATION TO COMMUNICATE WITH OUT OF STATE TRIAL COURT.

Former wife sought a writ of prohibition to prevent the trial court from further exercising its jurisdiction over a petition for dissolution due to her having previously filed a petition, signed by former husband as well, for dissolution of marriage in the state of Washington. The appellate court granted her petition and stayed the dissolution action in the Florida trial court until that court complied with its statutory obligation to communicate with the court in Washington State.

<http://opinions.1dca.org/written/opinions2009/10-14-2009/09-3896.pdf> (October 14, 2009).

Second District Court of Appeal

London v. London, __So.3rd __, 2009 WL 3320189, (Fla. 2d DCA 2009).

TRIAL COURT MUST COMPLY WITH SECTION 61.519, FLORIDA STATUTES, IN SIMULTANEOUS PROCEEDINGS.

Former husband appealed an order dismissing his petition to modify a foreign child custody determination for lack of jurisdiction. Appellate court stated its review was de novo. Former wife had petitioned for dissolution in French Saint Martin where the former couple had lived with their daughter prior to former husband filing his petition for dissolution in Florida where each party moved after French Saint Martin. After reviewing the various statutory provisions regarding simultaneous proceedings, the appellate court reversed dismissal of former husband's petition and remanded for the trial court to comply with the requirements of section 61.519, Florida Statutes.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/October/October%2016,%202009/2D08-3129.pdf (October 16, 2009).

Mobley v. Mobley, __So.3rd __, 2009 WL 323651, (Fla. 2d DCA 2009).

IT IS ERROR FOR TRIAL COURT TO OFFSET SPOUSE'S DEPLETED ACCOUNT AGAINST THE OTHER SPOUSE'S ACCOUNT WITHOUT A FINDING OF MISCONDUCT; A 10 YEAR MARRIAGE FALLS WITHIN THE GRAY AREA; NO PRESUMPTION EXISTS FOR OR AGAINST ALIMONY

Former wife appealed a final judgment of dissolution of marriage arguing that the trial court erred in its equitable distribution and in its denial of alimony to her. Finding that the final judgment was erroneous on its face, the appellate court reversed and remanded. The appellate court held that the trial court had erred by offsetting former wife's depleted retirement funds against former husband's pension and deferred compensation fund, in absence of a finding that former wife had committed any misconduct, which resulted in an unequal distribution in favor of the former husband. Noting that a marriage which endures 10 years falls within a gray area in which there is no presumption for or against alimony, the appellate court held that the trial court erred in stating that former wife was not entitled to alimony after a 10 year marriage. The appellate court also found that the trial court's statement that former husband's expenses in caring for the children would diminish his ability to pay support to former wife was faulty reasoning because alimony paid or received is considered in the party's net income when determining child support.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/October/October%2009,%202009/2D07-6012.pdf (October 9, 2009).

deGutierrez v. Gutierrez, __So.3rd __, 2009 WL 3232759, (Fla. 2d DCA 2009).

TEMPORARY ALIMONY WITHIN BROAD DISCRETION OF TRIAL COURT; COMPETENT, SUBSTANTIAL EVIDENCE MUST EXIST TO SUPPORT RULING; A SHORT-TERM MARRIAGE, STANDING ALONE, DOES NOT JUSTIFY DENIAL OF TEMPORARY ALIMONY; TEMPORARY RELIEF SHOULD BE RETROACTIVE TO DATE OF FILING OF PETITION.

Former wife appealed a non-final order denying her temporary support; appellate court held that although awards of temporary alimony are within the trial court's broad discretion, that the record must contain competent, substantial evidence to support the trial court's ruling. In

considering temporary support, the trial court must take into account the parties' standard of living along with the needs of the spouse requesting support and the corresponding ability of the other spouse to pay. The appellate court also referred to one of its earlier rulings that a short-term marriage, standing alone, does not justify denial of temporary relief. The appellate court instructed the trial court on remand that the award for temporary relief should be retroactive to the date former wife filed her petition.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/October/October%2009,%202009/2D08-6229.pdf (October 9, 2009).

Dye v. Dye, __ So.3rd __, 2009 WL 3151344, (Fla. 2d DCA 2009).

WHERE THERE IS NO CONTRACTUAL PROVISION FOR PAYMENT OF UNUSED SICK OR LEAVE TIME, IT IS NOT A MARITAL ASSET; WHERE THERE IS A CONTRACT PAYOUT PROVISION, THE CASH VALUE OF THE UNUSED LEAVE IS A MARITAL ASSET SUBJECT TO DISTRIBUTION.

Former husband appealed final judgment of dissolution of a long-term (26 years) marriage arguing that the trial court had abused its discretion in its equitable distribution and in its award of permanent alimony to former wife. The gist of the appeal was the valuation of former husband's unused sick leave of over 1000 hours and his unused vacation time of nearly 1000 hours. The appellate court held that where there is no contractual provision for payment of the cash value of unused time, it is not a marital asset; however, where there is a contract payout provision, the cash value of unused leave is a marital asset subject to distribution. The appellate court concluded that although the trial court's method of valuation was not error per se, that it had erred in its calculation. Concluding that it was in the best interests of the parties to utilize the method of present valuation set forth in former husband's employment contract and to equitably distribute the assets during the dissolution instead of waiting until former husband's termination, the appellate court reversed and remanded.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2009/October/October%2002,%202009/2D08-5056.pdf (October 2, 2009).

Third District Court of Appeal

LoCascio v. Sharpe, __ So.3rd __, 2009 WL 3448111, (Fla. 3d DCA 2009).

SECTION 732.802, FLORIDA STATUTES, "SLAYER STATUTE", PRECLUDES SPOUSE FROM INHERITING.

In a case in which former wife was murdered by former husband and his brother during dissolution proceedings, the appellate court reiterated that under section 732.802, Florida Statutes, (the "slayer statute"), former husband was precluded from inheriting any property from former wife. In addition, any rights of survivorship that former husband held as joint tenant with former wife at the date of her death were extinguished; however, what terminated was the right of survivorship, not the killer's interest in the property.

<http://www.3dca.flcourts.org/Opinions/3D09-118&08-1711.pdf> (October 28, 2009).

Colarusso v. Colarusso, __ So.3rd __, 2009 WL 3365264, (Fla. 3d DCA 2009).

MOTION TO RECUSE OR DISQUALIFY IS LEGALLY SUFFICIENT WHEN IT ALLEGES FACTS THAT WOULD LEAD A REASONABLY PRUDENT PERSON TO FEAR HE OR SHE WOULD NOT RECEIVE A FAIR AND IMPARTIAL TRIAL.

Former husband sought a writ of prohibition preventing the trial judge from conducting further proceedings in former husband's dissolution of marriage case. Appellate court reiterated that a motion to recuse or disqualify a trial judge is legally sufficient when the facts it alleges would lead a reasonably prudent person to fear he or she would not receive a fair and impartial trial. The appellate court held that, "the judge's decidedly negative commentary concerning his personal opinion of former husband's behavior," was sufficient to create that fear in a reasonably prudent person; and accordingly, granted the former husband's petition, concluding a writ was unnecessary.

<http://www.3dca.flcourts.org/Opinions/3D09-1633.pdf> (October 21, 2009).

Gulbrandsen v. Gulbrandsen, __So.3rd __, 2009 WL 3273209, (Fla. 3d DCA 2009).

INTEREST IN A PATENT APPLICATION A MARITAL ASSET; SPOUSE MUST ESTABLISH NEED FOR ALIMONY.

In what the appellate court termed a case of first impression in this dissolution of a long-term (23 years) marriage, former husband appealed the equitable distribution of his 50% interest in a pending patent application for an invention; he also appealed the awards to former wife of both permanent periodic and lump sum alimony. The appellate court found support in the law and record for the trial court's conclusion that former husband's interest in the patent application was a marital asset subject to equitable distribution; former husband had invested marital funds as well as his time into the design and marketing of the invention and the patent application for patent. The appellate court found that the trial court had erred in awarding permanent periodic alimony to former wife because she did not establish present need; however, it held that the trial court should award a nominal amount of alimony to retain jurisdiction. The appellate court also found the award to former wife of former husband's one-half interest in a condominium to be in its words, "grossly inequitable" in light of the equitable distribution former wife had already received from the pending patent application.

<http://www.3dca.flcourts.org/Opinions/3D07-3043.pdf> (October 14, 2009).

Arrabal v. Hage, __So.3rd __, 2009 WL 3271343, (Fla. 3d DCA 2009).

PARTIES MAY WAIVE SUBSTANTIAL CHANGE IN CIRCUMSTANCES REQUIREMENT FOR MODIFICATION.

Former wife appealed trial court's order on her exceptions to the magistrate's report regarding modification of primary custodial residence of the child; appellate court affirmed. Pursuant to an agreement entered into between the parties, the child was to live with former wife until sixth grade at which time the living arrangements would be reevaluated; within the agreement was a provision expressly waiving the substantial change in circumstances ordinarily required for modification. Based on the agreement and the testimony of the guardian ad litem that the child (an 11 year old boy) had expressed a preference to bond with his father, the magistrate granted former husband's motion for modification; the trial court denied former wife's exceptions and adopted the magistrate's report. Although former wife argued that the parties could not waive the substantial change in circumstances requirement for modification, the

appellate court held that the parties may contract to modify a custody arrangements and that the trial court had correctly concluded that the parties had freely contracted to such a waiver in this case. Former wife had also argued that she was prevented from a full opportunity to be heard re the testimony of the guardian ad litem; however, the appellate court pointed out that because former wife and her attorney were present at the hearing when the guardian testified via phone, that she was not prevented from a full and fair hearing at any point.

<http://www.3dca.flcourts.org/Opinions/3D08-2925.pdf> (October 14, 2009).

Berlow s. Berlow, __ So.3rd __, 2009 WL 3272375, (Fla. 3d DCA 2009).

TRIAL COURT NEEDS TO ELECT EITHER CIVIL OR CRIMINAL CONTEMPT AND PROCEED ACCORDINGLY.

Former husband appealed a non-final order finding him in contempt for having failed to comply with an order to provide former wife with an “irrevocable term life policy” in the amount of one million dollars naming her as beneficiary as required in their post-dissolution agreement; appellate court reversed and remanded. Former husband’s continuing failure to obtain the policy led to former wife’s motions for contempt. When former husband attempted to name former wife as beneficiary on an existing life insurance policy of \$500,000; former wife again moved for contempt. This time, former husband was found in contempt and ordered to pay a fine along with furnishing the required policy to former wife; however, the contempt order did not contain a purge provision. Former husband paid the fine and appealed the non-final order, arguing that the last order of contempt should not have been sustained as either a valid civil or criminal contempt order; the order did not state whether the trial court was holding former husband in civil or criminal contempt. After reviewing the differences between a civil and criminal order for contempt, the appellate court concluded that the order appeared to be for indirect criminal contempt as it lacked a purge provision, but that the proceedings failed to comply with the required rules. The trial court was instructed on remand to elect whether the contempt was civil or criminal and proceed accordingly.

<http://www.3dca.flcourts.org/Opinions/3D09-0690.pdf> (October 14, 2009).

Fourth District Court of Appeal

Rafanello v. Bode, __ So.3rd __, 2009 WL 3446414, (Fla. 4th DCA 2009).

TRIAL COURT MUST CONSIDER MARITAL FUNDS USED TO PAY DOWN MORTGAGE ON MARITAL HOME, BUT THERE IS NO HARD AND FAST RULE THAT NON-DEED SPOUSE GETS 50% OF DIFFERENCE IN VALUE OF HOME AT TIME OF MARRIAGE AND DISSOLUTION BECAUSE SOME MARITAL FUNDS WERE USED TO PAY DOWN MORTGAGE.

Former wife appealed final judgment of dissolution of marriage. The appellate court limited its consideration to the trial court’s equitable distribution of the value of the marital home which it found to be the only erroneous portion of the distribution. Reiterating that a trial court’s equitable distribution of marital assets is reviewable for abuse of discretion and that the trial court’s findings regarding credibility of the witnesses are entitled to a presumption of correctness, the appellate court concluded that the trial court had erred in failing to consider the marital funds used to pay down the mortgage on the marital home. The appellate court stopped short of finding former wife entitled to one-half of the marital home, holding that

equity will not allow a hard and fast rule that the non-deed spouse is entitled to one-half of the difference between the value of the property at the beginning of the marriage and at dissolution because some marital funds were used to reduce the principal of the mortgage. <http://www.4dca.org/opinions/Oct%202009/10-28-09/4D08-2480.op.pdf> (October 28, 2009).

Lippman v. Lippman, __So.3rd __, 2009 WL 3446485, (Fla. 4th DCA 2009).

SHAREHOLDERS' AGREEMENT CONTAINED AN ARBITRATION CLAUSE; MSA DID NOT.

Former wife appealed dismissal of her petition for relief from judgment and modification of child support and visitation after trial court determined that the parties had agreed to arbitrate all matters associated with their marital settlement agreement (MSA). The appellate court concluded that although the parties had entered into a shareholders' agreement which contained an arbitration clause, the MSA itself did not contain one. Former wife argued that the trial court erred in referring her petition to an arbitrator and further that matters of child support and visitation may not be subject to arbitration in Florida. The appellate court agreed with her on the first point, but declined to address the second. Accordingly, it reversed and remanded.

<http://www.4dca.org/opinions/Oct%202009/10-28-09/4D08-5126.op.pdf> (October 28, 2009).

Resnick v. Resnick, __So.3rd __, 2009 WL 3364854, (Fla. 4th DCA 2009).

CONTEMPT REQUIRES PRIOR ORDER REQUIRING SUPPORT WHICH WAS NOT PAID.

Former wife appealed an order denying her motion to hold former husband in contempt for failure to pay child support. Appellate court found that the trial court had not abused its discretion and affirmed the denial. In order for the trial court to find former husband in contempt, former wife must first have proved that there was a prior order requiring support which former husband failed to pay; finding that former wife had failed to prove this first issue, the appellate court concluded that the trial court had not abused its discretion in denying her motion for contempt.

<http://www.4dca.org/opinions/Oct%202009/10-21-09/4D08-2080.op.pdf> (October 21, 2009).

Ross v. Ross, __So.3rd __, 2009 WL 89201, (Fla. 4th DCA 2009).

CUT-OFF DATE FOR DETERMINING MARITAL ASSETS IS DATE OF FILING OF PETITION FOR DISSOLUTION; LIFE INSURANCE PROCEEDS RECEIVED AFTER THAT DATE ARE NON-MARITAL; CASH SURRENDER VALUE OF POLICY IS A MARITAL ASSET.

Former husband appealed trial court's treatment of life insurance proceeds he received after the date of filing of the petition for dissolution. Appellate court held that as of the date of filing of the petition, the term policy was not a marital asset; and accordingly, reversed. The policies were purchased by the business former husband and his brother partnered in; each brother was the other's beneficiary. Former husband received the proceeds when his brother was killed a few months after the petition was filed. The appellate court concluded that the cut-off date for determining marital assets is the date of filing of the petition for dissolution; therefore, proceeds triggered by an event occurring after the filing of a petition are not marital assets. The general rule is that only the cash surrender value of a policy constitutes a marital asset; life insurance policies without a cash surrender value are not treated as marital assets because a term policy has no value until the contingency of the death of the insured occurs.

<http://www.4dca.org/opinions/Oct%202009/10-07-09/4D08-1871.op.pdf> (October 7, 2009).

Fifth District Court of Appeal

No new opinions for this reporting period.

Domestic Violence Case Law

Florida Supreme Court

In Re: Amendments To The Florida Rules Of Civil Procedure - Management Of Cases Involving Complex Litigation, _So.3d _, 2009 WL 3296237 (Fla. 2009) **FORMS AMENDED** The Court amended several forms due to comments filed after publication. The final versions of the following forms are now available: Florida Rule of Civil Procedure 1.201 (Complex Litigation); Florida Rule of Civil Procedure 1.440 (Setting Action for Trial); Form for Use with Rules of Civil Procedure 1.997 (Civil Cover Sheet); Form for Use with Rules of Civil Procedure 1.998 (Final Disposition Form); Florida Family Law Rule of Procedure 12.100 (Pleadings and Motions); Florida Family Law Rule of Procedure 12.201 (Complex Litigation); and Florida Supreme Court Approved Family Law Form 12.928 (Family Court Cover Sheet). The Court also noted that their intent was to ensure that form 12.928 is filed in all cases under the Florida Family Law Rules of Procedure and, or the Florida Rules of Juvenile Procedure. To this purpose, it amended Florida Family Law Rule of Procedure 12.015 (Family Law Forms) to identify form 12.928 as a Florida Family Law Rules of Procedure Form and rule 12.100 to require a party opening or reopening a case under the family law rules to file form 12.928 with the clerk of the circuit court. Since there is currently no juvenile rule requiring use of this form, the Court requested that the Juvenile Court Rules Committee propose amendments to the juvenile rules to require use of form 12.928 in all cases filed under those rules as quickly as possible using the fast-track rule amendment process. <http://www.floridasupremecourt.org/decisions/2009/sc08-1141a.pdf> (October 15, 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

Brown V. State, _So.3d _, 2009 WL 3446388 (Fla. 4th DCA 2009) **SENTENCE AFFIRMED**.

The defendant was charged by information with domestic aggravated battery and domestic aggravated assault with a deadly weapon. Neither count made any statutory or factual references regarding the defendant's commission of the aggravated battery in the presence of a child. The issue in this appeal was whether the trial court erred in applying the 1.5 multiplier for the presence of a child under sixteen when sentencing the defendant for domestic aggravated battery, where the information failed to set forth the facts or statutory authority for such sentence enhancement. The defendant argued that because the state failed to plead the sentencing enhancement in the criminal information, his due process rights were violated when the trial judge utilized the enhancement during sentencing. The court noted, however, that not every fact with a bearing on sentencing must be alleged in the charging document. Instead, the charged facts must only make the defendant aware of the heaviest punishment he may face. The court also noted that the presence of a child under the age of sixteen was not an element of the offense, and thus did not need to be alleged in the information, and affirmed the lower court's ruling.. <http://www.4dca.org/opinions/Oct%202009/10-28-09/4D07-4121.op.pdf> (October 28, 2009).

Fifth District Court of Appeal

No new opinions for this reporting period.